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Cover Photograph: Laws, cases, and judicial decisions involving native peoples of the Pacific Northwest and Canada are the focus of articles by Hamar Foster and Kent McNeil in this issue. (Photograph by Edward S. Curtis, 1914, Special Collections Division, University of Washington Libraries)



A soldier's wife at Monterey, 1791, ascribed to José Cardero (Courtesy of the Museo de America, Madrid, and Iris Engstrand, University of San Diego)

THE LEGAL SYSTEM OF SPANISH CALIFORNIA: A PRELIMINARY STUDY

DAVID J. LANGUM

The tentative character of Spain's settlement in Alta California resulted in a legal system that was itself only provisionally formed.* The Spanish seized California in 1769, primarily as a defensive measure to preserve their hold on territory they had long claimed but then perceived to be under threat of actual occupation by Russia and Britain. Throughout the following fifty-three years of Spanish control, California was essentially a military frontier and was governed as such. The military commander of Spanish California also served as its political governor.

The military forts (*presidios*) and the church's missions were both far more important in California than the civilian settlements (*pueblos*), the third member of the Spanish triad of frontier governance. Indeed, the establishment of civilian settlements was in large part to support the military, by growing crops and providing places of residence for retired soldiers. The historian Hubert Howe Bancroft found the European population for the *pueblos* Los Angeles and San Jose, as of 1820, to be

David J. Langum is professor of law at the Cumberland School of Law at Samford University. This article was originally delivered as a paper at the symposium "The Spanish Beginnings in California, 1542-1822," July 15-19, 1991, at the University of California, Santa Barbara.

*I have called this study "preliminary" primarily because it relies too heavily upon secondary authority, especially the writing of Hubert Howe Bancroft. This must be explained. Almost all the originals of the Spanish California judicial records were destroyed in the 1906 San Francisco fire. However, Bancroft had previously made voluminous extracts of many of these records, synopses of some of which were presented in his *History of California*. This paper relies heavily upon those printed synopses.

650 and 240, respectively, and that of the civilian *villa* of Branciforte only 75.¹ The majority of Spaniards were soldiers, living with their families in the presidios. A few civilians, small squads of soldiers with their families, and the Franciscan padres lived at the missions. A very few Spaniards lived on ranches. Adding it all up, the total was small. Bancroft found the Spanish and mixed-blood Indian population for California to be only 3,270 in 1820, fifty-one years after the founding.² Most had some immediate relationship to the military.

California was not only thinly populated but extremely isolated geographically, and homogeneous in its Catholic faith and Hispanic cultural presuppositions. Before 1800 it had virtually no foreign trade, and after the turn of the century such foreign trade as it did have was illicit. There was almost no private enterprise in Spanish California; consumer goods were purchased at the military commissary and crops were sold to the military, both at fixed prices.

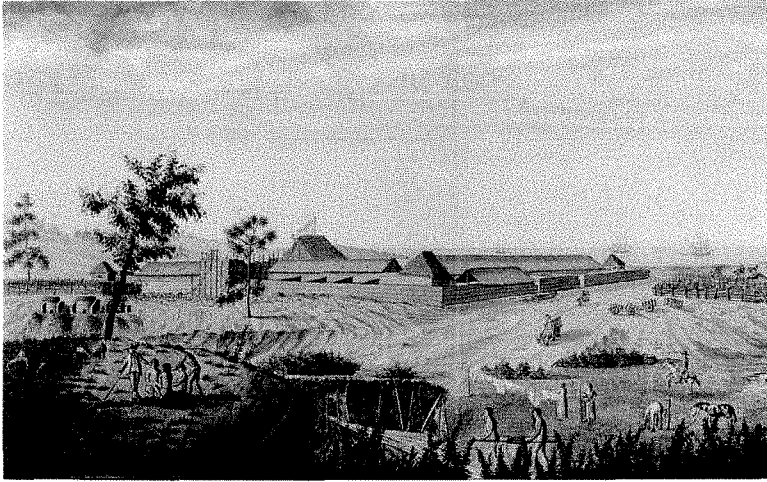
The extracts themselves are much more detailed and are available at the Bancroft Library. In addition, some few Spanish judicial records are in vol. 1 of the Monterey Archives, maintained by the Monterey Country Historical Society, Salinas. The overwhelming bulk of this sixteen-volume archive dates from the Mexican period. Also, scattered Spanish records are in the local Hispanic records known as the Los Angeles Archives, Los Angeles County Museum of Natural History. A guide to those thousands of documents, prepared by William Mason of that museum, would be most helpful in identifying which of them are judicial documents of the Spanish period. A few other judicial records are in the archives of smaller jurisdictions, such as San Jose and Branciforte. The originals of the San Jose records are divided between the Santa Clara County Recorder's Office, the San Jose City Clerk's Office, and the San Jose Historical Museum. Transcripts are in the Bancroft Library. Originals of Branciforte records for 1796-1803 are in the Latin American Collection of the University of Texas Library (William B. Stephens Collection). See Henry Putney Beers, *Spanish & Mexican Records of the American Southwest* (Tucson, 1979), 269-81. A full study of the Spanish-period legal system requires the use of these primary sources.

Since I am now working in a different field and will be unable for the indefinite future to return to the study of Hispanic legal history, I offer this only for what it purports to be: a preliminary study. On the other hand, this is the *only* such study of the Spanish California legal system that exists. In gray areas, where I have indicated doubts in the notes, the sources may offer a resolution. Some scholar may pick up these pieces and work them into a completed whole.

Far more judicial records survive for the Mexican period of California than for its Spanish era. The examples given and the conclusions reached in my book on the Mexican legal system, *Law and Community on the Mexican California Frontier*, were based entirely on my examination of the original Mexican records.

¹Hubert H. Bancroft, *History of California*, 7 vols. (San Francisco, 1874-90; reprint, Santa Barbara, 1963-70), 2:349, 377, 390 [hereafter cited as Bancroft, *History*].

²Bancroft, *History*, supra note 1 at 2:392.



A view of the Presidio of Monterey, 1791, by José Cardero (Bancroft Library)

This backwater of the Spanish empire, lacking all signs of noisy, capitalist rambunctiousness, required little by way of a legal system. The legal system of Spanish Alta California was as rudimentary as its colonization.

FORMAL LAW AND PUBLIC LAW

This is not to say there were no laws applicable to California. There were laws in abundance. In addition to current royal orders and commands of the viceroy in Mexico, there was the *Recopilación de leyes de los reynos de las Indias* of 1680. The framers of the *Recopilación* extracted more than four hundred thousand royal orders into a codification of sixty-four hundred laws of general application arranged into nine books.³ A revision, the *Novísima recopilación*, appeared in 1805. There were many other less distinguished compilations and legal digests. In 1792 a detailed set of commercial ordinances for business deal-

³A general history of Spanish colonial law, especially relating to Mexico, is in Jacinto Pallares, *Curso completo de derecho mexicano* (Mexico City, 1904). More recent studies include Guillermo Floris Margadant S., *Introducción a la historia del derecho mexicano* (Mexico City, 1971), English edition: *An Introduction to the History of Mexican Law* (Dobbs Ferry, N.Y., 1983), and John T. Vance, *The Background of Hispanic-American Law: Legal Sources and Juridical Literature of Spain* (Washington, D.C., 1937; reprint, Westport, Conn., 1979).

ings, the *Ordenanzas de Bilbao*, was applied to Mexico, including California.⁴

Theoretically, all of these were applicable to Alta California. Formal Spanish law was used in the foundation of pueblos, land-grant procedures, and the resolution of disputes between missions and pueblos. Laws were occasionally cited in disputes between the military government and the missionaries.⁵ But these laws hardly touched the lives of the general California populace. Since there was almost no private commerce, there were no commercial disputes on which to use the commercial ordinances. The California population had no need of the procedural law and the specialized tribunals and judgeships detailed in the *Recopilación*, and even less need of the substantive law, which creates and defines rights and duties. Lacking significant private property, the inhabitants had little need for such law.

On the eve of the Mexican revolution there were some profound changes in Spanish law, specifically through the liberal constitution of 1812 and the judicial law of October 9, 1812. This latter document, particularly, provided guidance for the civil courts and gave detailed instructions for the conduct of conciliation procedures that were required before actual litigation. There is good reason to believe that these late reforms had little impact in most of the Spanish borderlands and probably none in Alta California,⁶ although they would greatly influ-

⁴Frederick F. Barker and Joseph M. Cormack, "The Mercantile Act: A Study in Mexican Legal Approach," *Southern California Law Review* 6 (November 1932), 6-7, and Helen L. Clagett, "The Sources of the Commercial Law of Mexico," *Tulane Law Review* 18 (March 1944), 438-40, both contain information on the promulgation and effect of the Ordinances of Bilbao.

⁵Iris H. W. Engstrand, "The Legal Heritage of Spanish California," *Southern California Quarterly* 75 (Fall/Winter 1993), 205-36. On August 15, 1779, Junípero Serra, the president of the California missions, wrote to the guardian of his religious college in Mexico, asking for a set of the *Recopilación* and pointing out that the governor had a copy and "he is outmatching us with his quotations. Although I remember quite an amount from the time I read these laws, I have also forgotten a great deal—especially the quotations. And so I would appreciate it if they came, and we can let him know he is not dealing with ignorant men." Apparently they arrived, as subsequent correspondence, dated November 1 and 2, 1782, between various missionaries, the governor, and Serra refer to specific provisions within the *Recopilación*. Antonine Tibesar, ed., *Writings of Junípero Serra*, 4 vols. (Washington, D.C., 1955-66), 3:353 and 4:397-400.

⁶David J. Langum, "The Introduction of Conciliation into Modern Spanish Law and its Practice in the Spanish-American Borderlands," in *Studies in Roman Law and Legal History in Honour of Ramon D'Abadal i de Vinyals on the Occasion of the Centenary*, ed. Manuel J. Peláez (Barcelona, 1989), 337-41.

ence the law of independent Mexico and its practice in Alta California.⁷

In addition to the large body of formal Spanish law, there was a great deal of provincial law, almost all of it public law. Numerous laws concerned land and its use and inheritance. Decrees and orders governed and varied the amount of duties charged on the importation and exportation of goods—all carried, however, on government ships. Laws regulated livestock branding and slaughter as well as prices for goods. The governors issued numerous orders creating law of a public nature. For example, on December 2, 1817, the governor forbade card games on Catholic feast days. In December 1815 a different governor issued detailed regulations for the sale of liquor at the presidios: only one person to be the designated sales agent; no credit; no enforcement of debt for liquor; nothing to be taken in pawn; limits on amounts and to whom liquor could be sold.⁸

Local pueblos enacted their own regulations. For example, Los Angeles had a problem with disturbances from joyriding long before the invention of the automobile. On June 21, 1809, it adopted an ordinance outlawing horseback riding through the town after 8:00 P.M. unless a person could prove the legitimacy of his errand.⁹

Spanish California had a plethora of such regulatory laws. As Bancroft put it, somewhat condescendingly, "If the three great principles underlying ethics, namely, law, government, and religion, are proper criteria of progress, the Hispano-Californians were the most civilized of peoples. . . . [A]s for laws, there was no end to them. Men were made to eat and sleep by law, to work, dress, play, and pray by law, to live and die by law."¹⁰

These public laws were either required by a royal decree (a new one or a standing order contained in the *Recopilación*), or an order imposed by the governor. The local ordinances were enacted by the *cabildo*, more commonly known in California as the *ayuntamiento*, a locally elected town council. This body was presided over by the town's *alcalde*, the same official most immediately involved with civil litigation, who also played a lesser role in criminal litigation.

⁷See generally chs. 2, 4, and 5 of David J. Langum, *Law and Community on the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846* (Norman, 1987) [hereafter cited as Langum, *Law and Community*].

⁸The 1815 and 1817 order are both in Bancroft, *History*, supra note 1 at 2:425-26.

⁹*Ibid.* at 2:191.

¹⁰Hubert Howe Bancroft, *California Pastoral* (San Francisco, 1888), 537-38 [hereafter cited as Bancroft, *California Pastoral*].

ALCALDE SYSTEM

The *alcalde* originated with the Arabic official known as the *cadi* and was introduced into Spain during its medieval occupation. As the institution developed in Spain, the *alcalde*, or, more specifically, the *alcalde ordinario*, became an elected municipal official. The office, in its judicial aspects, was somewhat analogous to the English justice of the peace. But the *alcalde* had additional executive and legislative duties.

In his executive role, the *alcalde* was much like the Anglo-American mayor. He also presided over the *ayuntamiento*, which was composed of himself and usually two *regidores*, or city councilmen. Thus he had an important legislative function, although here he could be outvoted. The *alcalde* in Spain and in its colonies was almost always a respected community figure, often an elder.

The *alcalde's* judicial role was paternalistic and benevolently dictatorial. In local disputes his word was the law itself, not confined by any legalistic standards. No one expected him to know anything about the intricacies of formal Spanish law. He could resolve local conflicts as he thought fit, constrained only by the cultural and religious mores of the local village from which he was elected and in which he sat. *Alcalde* justice has been well described as "a formalistic administration of law . . . based on ethical or practical judgements rather than a fixed, 'rational' set of rules."¹¹

The *alcalde* system was popular in Spain and later in its kingdoms and colonies, including Mexico and California. It offered a locally controlled system of justice with easy access for the town's inhabitants. The lack of legal technicalities ensured that any peasant could feel comfortable presenting his viewpoint of any dispute to the *alcalde*. For most small-town residents, a talk with their *alcalde* was the only contact with the legal system they would ever have.¹²

When California was first settled in 1769, there was no need for *alcaldes* or *regidores* because almost every Hispanic in California was a soldier. The need for civil institutions grew with

¹¹Douglas Hay, "Property, Authority and the Criminal Law," in *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England*, ed. Douglas Hay (New York, 1975), 40. Hay is paraphrasing Max Weber's characterization of "khadi justice" and its comparability to that of the English justice of the peace. On the Arabic *cadis'* extraordinary powers, see also Clifford Stevens Walton, *The Civil Law in Spain and Spanish-America* (Washington, D.C., 1900), 61-62.

¹²Local Spanish colonial institutions are described well in C.H. Haring, *The Spanish Empire in America* (New York, 1947; reprint, New York, 1963), 147-65 [hereafter cited as Haring, *Spanish Empire*].



A soldier at Monterey, 1791, ascribed to José Cardero (Courtesy of the Museo de America, Madrid, and Iris Engstrand, University of San Diego)

the expansion of the civilian population, and in 1779 Governor Felipe de Neve drafted detailed provisions for civilian governance. Two years later, the king approved this *reglamento*. It provided for an *alcalde* in each civilian pueblo (as well as in the Indian mission settlements), to function in their normal judicial and executive capacities. Additionally, there would be two *regidores* who, with the *alcalde*, would form the town council, or *ayuntamiento*. The governor would appoint these three officials for the first two years. Thereafter, the inhabitants of each pueblo could annually elect their own *alcaldes* and *regidores*, subject to confirmation by the governor.¹³

Problems developed with the pueblo *alcaldes* almost immediately, probably related to the poor quality of settlers, of whose indolence and dissipation the government often complained. Another problem was simple illiteracy. In 1781 the *alcalde* of San Jose was unable to write. However, that was not unusual in California. In 1785 only fourteen of the fifty members of the Monterey presidio could write, and in the following year only seven of thirty soldiers at the San Francisco presidio were literate.¹⁴ Irregularities and slow progress in San Jose caused the governor to suspend the elections and temporarily reinstitute an appointment process in 1785, and Los Angeles was not permitted an *alcalde* until 1788.¹⁵

When the *alcalde* system was resumed and elections were held, it was with a new feature. Officials known as *comisionados* were appointed by the governor for the pueblos of Los Angeles and San Jose, and later for the *villa* of Branciforte. The *comisionados* were usually the corporals of the military guard stationed at the civilian settlements. They represented the governor in those settlements and reported to the commander of the nearest presidio—Monterey in the cases of Branciforte and San Jose, and Santa Barbara in the case of Los Angeles. One of the duties of the *comisionados* was to oversee the civilian *alcaldes* and *regidores*, and ensure that those civilian officials performed their duties promptly.¹⁶

The *comisionados* continued their role for the duration of the Spanish regime. Although they were military men, they constituted the political representatives of the governor, who was also, it will be recalled, the military commander. The

¹³These provisions are contained in title 14, section 18, of the Neve regulations, which are reprinted in translation as an appendix of Richard P. Powell, *Compromises of Conflicting Claims: A Century of California Law, 1760 to 1860* (Dobbs Ferry, N.Y., 1977), 235-50.

¹⁴Bancroft, *History*, supra note 1 at 1:642.

¹⁵Ibid. at 1:478, 461.

¹⁶Ibid. at 1:461, 478, 601-02, 661.

comisionados were empowered to annul some acts of the town councils and *alcaldes*, but they had affirmative duties as well, such as allocating lands for farming, conferring land titles, collecting taxes, and exhorting those neglecting their crops.¹⁷

The subjugation of the *alcaldes* and *regidores* to the representatives of the governors was a success, at least from the viewpoint of the governors. One governor attributed the restoration of prosperity at San Jose to the appointment of *comisionados*.¹⁸ The military continued to exercise close control over the municipal officials. Occasionally an elected *alcalde* or *regidor* was not confirmed and a new election was ordered,¹⁹ and even a *comisionado* could be removed if not sufficiently energetic.²⁰ Some *comisionados* found themselves in a different sort of trouble, probably by being too active. Disaffected inhabitants of San Jose burned down the house of an unpopular *comisionado* in 1800, and troops had to be sent in by the governor to restore order.²¹

It has been suggested that the *comisionado* could annul the judicial decisions of the *alcaldes*, as well as control their legislative and executive acts.²² But it seems more likely that the extent of the judicial activity of the *comisionados* was to make sure the *alcaldes* were really working, that they were hearing and deciding disputes presented to them, and that the *comisionados* did not act to second-guess their decisions. Their relationship would seem to be more analogous to that of *prefect* to *juez de paz* in centralist Mexico.²³ One strong piece of evidence for this is a letter from Governor Borica to the *comisionado* of San Jose on April 30, 1798, ordering him not to meddle in the administration of justice.²⁴ Perhaps the *comisionado* filled the usual function of the *alcalde*, not in review but in the original

¹⁷Ibid. at 1:716; *ibid.* at 2:378; Theodore Grivas, "Alcalde Rule: The Nature of Local Government in Spanish and Mexican California," *California Historical Society Quarterly* 40 (March 1961), 12-13, also in Theodore Grivas, *Military Governments in California, 1846-1850* (Glendale, Calif., 1963), 153-54 [hereafter cited as Grivas, *Military Governments*]; Francis F. Guest, "Municipal Government in Spanish California," *California Historical Society Quarterly* 46 (December 1967), 313-19 [hereafter cited as Guest, "Municipal Government"].

¹⁸Bancroft, *History*, *supra* note 1 at 1:483 (Governor Pedro Fages in 1791).

¹⁹Ibid. at 2:191 (San Jose *regidor* disapproved and new election ordered in 1801).

²⁰Ibid. at 1:661 (Governor Borica to Santa Barbara commander: if Los Angeles *comisionado* not active enough, he should be removed).

²¹Ibid. at 1:718.

²²By Grivas, *Military Governments*, *supra* note 17 at 153. I admit to stating this view myself, Langum, *Law and Community*, *supra* note 8 at 32, but now have doubts.

²³Langum, *Law and Community*, *supra* note 7 at 36-37.

²⁴Bancroft, *History*, *supra* note 1 at 1:722.

instance, when a particular *alcalde* was absent or had been suspended, as they sometimes were because of incompetence. The exact nature of the *comisionado*'s judicial authority, particularly in relation to the *alcalde*, remains a gray area that needs further investigation.²⁵

On the whole, the local California magistrates, the *alcaldes*, functioned in practice in much the same manner as has been described for the neighboring province of New Mexico:

In legal proceedings, little attention was paid to any code of laws since, in fact, the magistrates had no law books or written statutes to guide them. Many were perhaps unaware that such existed. . . . By and large, judgment of the *alcaldes*, when it was not corrupted by personal interest or sheer malicious obstinacy, conformed to the prevailing customs of the country.²⁶

CRIMINAL LITIGATION

The Spanish criminal law employed the *fuero* system. If a criminal defendant were a military man, he was entitled to be tried by a military court; if a priest, by a church court; and if a civilian, by a civilian court.²⁷ As for the military and civilian *fueros*, in California there was no real difference. The man who would make the determination of guilt or innocence and set the punishment, excepting only the most petty and the most

²⁵Guest, "Municipal Government," *supra* note 17 at 317, 320-21, presents evidence that the *comisionados* did themselves play an active role in at least some criminal proceedings. But there is still doubt. Most of these examples are taken from San Jose (and found in the San Jose Archives), a pueblo so in disfavor with the governors that its *alcaldes* were from time to time simply suspended. Further, some of these examples may involve retired military personnel. They were still regarded as belonging to the army and could be called into service for emergency duty. Thus, they were still in the military *fuero* and, like the *comisionado* but unlike the *alcalde*, were entitled to be tried by a military officer. Last, some of the "judicial" duties suggested by Guest's evidence may simply be the preliminary taking of witness statements. Today, we might think that would be a strange thing for a tax collector to do, but we must remember that California was a frontier, whose culture, even in settled areas, did not have fixed ideas about the separation of governmental powers. All this said, it is not clear exactly what the judicial role of the *comisionados* was. My statement in the text is simply a judgment subject to further research and refinement.

²⁶Marc Simmons, *Spanish Government in New Mexico* (Albuquerque, 1968; reprint, Albuquerque, 1990), 176 [hereafter cited as Simmons, *Spanish Government*].

²⁷See Lyle N. McAlister, *The "Fuero Militar" in New Spain 1764-1800* (Gainesville, 1957).

severe, was the same. For a military defendant the governor would act as commander, and for the civilian, as political governor. Although there is room for doubt as to the authority of the subordinate officials—*alcalde*, *comisionado*, and presidio commander—there is no question that the ultimate authority within California over criminal and civil cases was vested in the governor.

Punishment for petty offenses was summary. The corporal of a mission guard could punish insubordination, for example, with flogging or placement in the stocks, and an *alcalde* or a *comisionado* could doubtless order the stocks or minor flogging for a petty offense such as public drunkenness. The priests at the missions asserted a paternal power over their Indian charges, including the responsibility of discipline. There was nearly constant friction between the governors and the missionaries as to how far the padres' power of punishment extended. Governor Borica suggested a pragmatic and well-defined solution in 1796. The limit he set was twenty-five lashes; if more punishment were deserved, the matter belonged to the royal jurisdiction and not to the missions.²⁸

More serious criminal matters were initiated in ways that varied with the location of the crime, its severity, and the *fuero* of the defendant. A suspect would be jailed pending investigation, determination of guilt, and punishment. Ordinarily there was no bail. Were a crime committed at a mission, either by an Indian or a mission soldier, the corporal of the guard would proceed with an investigation, take written statements, and forward them and the accused under guard to the commander of the nearest presidio.²⁹ If a crime occurred within a pueblo or villa, or the surrounding lands over which the *alcalde* had jurisdiction, the town *alcalde* initiated proceedings by ordering an arrest. He then prepared a *sumaria* (sometimes called an *expediente*), which included a statement of the charges, witnesses' statements, and a statement of the defendant. All of that was forwarded to the governor for decision.³⁰ Some minor matters were apparently tried by the commander of the local fort or presidio, who also tried serious crimes, with appeal to the governor when the culprit was a member of the military.³¹

In difficult cases, or in cases of great severity of the alleged crime, the governor ordered a military officer to prepare an

²⁸Bancroft, *History*, supra note 1 at 1:593.

²⁹Bancroft, *California Pastoral*, supra note 10 at 299.

³⁰This was the procedure followed in New Mexico. Simmons, *Spanish Government*, supra note 26 at 177.

³¹Guest, "Municipal Government," supra note 17 at 317, 320-21.

investigation. Thus, for example, in 1806 Corporal Cota investigated an alleged case of incest between a father and daughter at San Fernando,³² and in 1812 Lieutenant Estudillo was ordered to conduct an investigation into Padre Quintana's death.³³ Such investigations would result in the forwarding of a bundle of documents, including affidavits and depositions, to the governor.

After the *sumaria* or *expediente* was complete, a prosecutor, or *fiscal*, was appointed and the defendant was permitted to designate a defense counsel. The governors usually appointed army officers as prosecutors. The defendants also chose officers, and were apparently free to name anyone in California as their defenders. In 1815 Lieutenant Guerra was compelled to travel from San Diego to Monterey—many hundreds of miles—to defend a soldier who had been charged with insulting his sergeant.³⁴ Neither prosecutor nor defense counsel had formal training; there were no lawyers in Spanish California, although some few would appear during the Mexican period.

The job of the prosecutor and defender was to argue the contrary inferences in the depositions that could lead to innocence or guilt and to urge those factors in the case that would lessen or increase culpability for purposes of sentence. The state of forensic science was so primitive and the legal system so rudimentary that criminal charges were usually not pursued unless proof of guilt were relatively manifest. The dark side of the infancy of scientific investigation was that Spanish law permitted torture to compel a confession of a defendant of whom there was grave suspicion but insufficient evidence. The confession could be repudiated later and then could not be considered. Thus in 1804 the California governor proposed the torture of a woman who had refused to confess a murder of which she was strongly suspected.³⁵

Usually there was no oral testimony. That is a particularity of English common law, while the tendency of continental civil-law jurisdictions is to determine cases by formal statements and written submissions. The deliberations by the Spanish governors were by no means rubber-stamp endorsements of prosecutorial recommendations. The Spanish governors were

³²Bancroft, *History*, supra note 1 at 2:192.

³³Ibid. at 2:387.

³⁴Ibid. at 2:424; another example is in ibid. at 2:192.

³⁵Ibid. at 2:191. However, there is no evidence that women as a class were treated disfavorably by the legal system. See Rosalind Z. Rock, "Pido y Suplico: Women and the Law in Spanish New Mexico, 1697-1763," *New Mexico Historical Review* 65 (April 1990), 146-59.

Spanish natives, reasonably well-educated career officers, sent from Spain to the New World. Generally speaking they were excellent bureaucrats.³⁶

The governors' proceedings actually resulted in some acquittals. In 1792 a mission Indian at San Carlos named Estanislao was unhappy with his wife. He beat her severely and left her in the woods. Estanislao admitted this to his mistress. After the body of the dead wife was found, Sergeant Vargas was ordered to conduct an investigation and Estanislao repeated his admission. However, the testimony and the record evidently conflicted over the force and manner of the blows the dead woman suffered. The defendant was acquitted and released on the supposition that his spouse might have been killed by a bear.³⁷ In another example, in 1814 an artilleryman was acquitted of a charge that he had poisoned another soldier.³⁸

After the governor had found guilt and pronounced sentence, the case was forwarded to Mexico for final review, at that point usually only as to the sentence. Here the status of the defendant, civilian or military, made some difference. If civilian, the defendant's fate was decided by the *audiencia*, the highest colonial court, composed of judges trained in the law. If military, the matter went to the viceroy for a decision in his capacity as commander-in-chief, although he might be aided by a judge

³⁶See Donald A. Nuttall, "The Gobernantes of Spanish Upper California: A Profile," *California Historical Society Quarterly* 51 (Fall 1972), 253-80. The governors had a copy of the *Recopilación* available to them.

In 1776 a specific legal dispute between Governor Fernando de Rivera y Moncada and the San Diego missionaries concerned the right of an Indian who had led an uprising and murdered one of the priests to claim asylum in a church, a right recognized by Spanish law, subject to many exceptions and conditions, and exercised in California (examples in Bancroft, *History*, supra note 1 at 1:598, 2:191, 2:424). Governor Rivera, in his letters and diary, appears to have been quite knowledgeable about the then current Spanish law regarding asylum. Compare Antonio Xavier Perez y Lopez, *Teatro de la legislación universal de España é Indias* (Madrid, 1797), 16:397-434 [*inmunidad de las iglesias*] with Rivera's writings on this incident: (1) Statements by Rivera, Rafael y Gil, and Hermenegildo Sal on affairs at San Diego, March 26 and 27, 1776, *Fondo Franciscano. Misiones de Californias*, Lancaster-Jones Papers, vol. 2, 137-39ff., Museo Nacional, Mexico, D.F., microfilm at the Bancroft Library; (2) letter, Rivera y Moncada to Fuster, May 13, 1776, *Documentos relativos a las misiones de California, 1768-1802*, #0069, Museo Nacional, Mexico, D.F., microfilm at the Bancroft Library; and (3) entry for March 26, 1776, *Diario del Capitan Comandante Fernando de Rivera y Moncada con un apendice documental*, ed. Ernest J. Burrus, 2 vols. (Madrid, 1967), 1:243-45. For a study of asylum in neighboring New Mexico, see Elizabeth Howard Fast, "The Right of Asylum in New Mexico in the Seventeenth and Eighteenth Centuries," *Hispanic American Historical Review* 8 (1928), 357-91.

³⁷Bancroft, *History*, supra note 1 at 1:687-88.

³⁸*Ibid.* at 2:424.

specializing in military law, the *auditor de guerra*. From 1776 to 1793, when California was attached to a separate administrative unit, the *Provincias Internas*, the *commandante-general*, rather than the viceroy, would make the review. In criminal cases there was no further appeal to Spain.³⁹

The missionary fathers were sometimes accused of brutality in the treatment of their Indian charges. Usually these accusations were false, but in 1786 Tomás de la Peña Saravia, the priest in charge of Mission Santa Clara, was formally charged with having struck and killed two Indians in his charge. The confused manner in which the case was resolved perhaps reflects its unusual nature. The California governor, Pedro Fages, initiated the case in much the same manner as any other, appointing a military officer to undertake an investigation and take testimony. In a departure from the norm, however, the governor himself conducted an additional inquiry of several witnesses. These two hearings were held in April and May 1786. Peña had not been incarcerated, but apparently it took a week or so for the president of the missions, Father Fermín de Lasuén, to learn what had transpired. The governor had not informed him of the investigations.

An alarmed Lasuén summoned an ecclesiastical court to conduct a third inquiry, in late May 1786. In his report he not only declared the innocence of Fr. Peña, but strongly criticized the governor for conducting proceedings against a cleric, when the trial should have been held only by an ecclesiastical court for a defendant of the religious *fuero*. Both the governor and the missionary president communicated the results of their investigations to the commandant general of the *Provincias Internas*, and there matters sat for about four years. The evidence was contradictory. Ultimately, the commandant general determined that, although Peña was innocent, it would be prudent to remove him from California. He passed his recommendation to the viceroy.

The viceroy ordered a *fourth* hearing to be held, and appointed two neutral parties to hear the witnesses. One was the commander of the San Diego presidio—a long distance from Santa Clara—and the second was a priest, but a Dominican missionary from Baja California and not of the same order as the Alta California missionaries, who were Franciscans. This fourth hearing was held in Santa Clara in July 1793, and Peña was completely exonerated. In 1795, nine years from the original accusation, the viceroy (California no longer being in the *Provincias Internas*), declared Peña innocent. It was a long-

³⁹Haring, *Spanish Empire*, supra note 12 at 115, 120-21.

drawn-out affair, unusual both for its nature and for the procedures adopted to deal with the accusation.⁴⁰

In the usual run of cases, it is not clear which were required to be referred to Mexico and which could be considered final by the governor's decision. The range of cases that were referred to Mexico suggests that capital punishment and imprisonment in excess of around two years is a reasonable measuring point. A number of cases involving Indians were also sent to Mexico for review, including six cases of murder among the natives of Santa Barbara in the 1790s in which the sentences ranged from four to eight years' work in a California military presidio and substantial lashings; four Indians convicted of planning an uprising who received sentences varying from two to six years of forced labor in a presidio followed by exile; and Indians who murdered a priest and received sentences of two hundred lashes plus forced labor in chains ranging from two to ten years.⁴¹

The capital cases are quite interesting. These were invariably referred to Mexico. Ignacio Rochin, a soldier at Santa Barbara, murdered a man by the name of Alvarez. Apparently the case involved a love triangle, since the wife of the victim was Rochin's accomplice. The final sentences came from the *audiencia*, probably because of the civilian status of the codefendant. She was condemned to work as a servant, while Rochin himself was sentenced to death and was shot at Santa Barbara on January 10, 1794. It was California's first execution.⁴²

More poignant is the case of José Antonio Rosas, a native of Los Angeles, and at eighteen years of age a private in the guard at Mission San Buenaventura. In June 1800 he was in charge of some animals when two Indian girls observed him sodomizing a mule. The commander of the Santa Barbara presidio, whose district included the mission, instituted criminal proceedings. As usual, a military officer was appointed as prosecutor. A retired officer was selected as defender.

Young Rosas confessed, but pleaded that the devil had tempted him. The prosecutor demanded the death penalty and

⁴⁰Information on the Peña incident, admittedly from the priestly perspective, may be found in Francis F. Guest, *Fernán Francisco de Lasuén, A Biography* (Washington, D.C., 1973), 159-72, and the many letters and documents in *Writings of Fernán Francisco de Lasuén*, ed. and trans. Finbar Kenneally, 2 vols. (Washington, D.C., 1965), 1:109-37. However, the more neutral Bancroft thought that Peña was "hot-tempered and occasionally harsh," yet innocent of the charges to which the Indian witnesses had falsely testified. Bancroft, *History*, supra note 1 at 1:722-23.

⁴¹Bancroft, *History*, supra note 1 at 1:638, 1:460, 2:387-89. These cases appear to have been determined by the viceroy, not the *audiencia*.

⁴²Ibid. at 1:638, 669.

the defense counsel pleaded eloquently for mercy. In July 1800 the case went to the viceroy. After consultation with the *auditor de guerra* the viceroy sentenced Rosas to be hanged and his body burned, together with that of the mule. The sentence was carried out on February 11, 1801, at Santa Barbara in the presence of the entire garrison, excepting that, since California had no hangman, the youth was shot.⁴³ It was the sordid beginning of a long California tradition of hysterical overreaction to irregular sexual practices that harm nobody, a tradition only recently ameliorated.

A wide variety of crimes were committed in Spanish California and accordingly there was a wide range of sentences. We will consider first only Spaniards and those Indians well integrated into Hispanic society, the *gente de razón*, or people of reason, as they were pleased to call themselves, and then the other Indian defendants.

As examples of petty crime, in 1788 a San Jose settler was put in the stocks for hitting the corporal of the pueblo's guard. In 1808 another settler in San Jose was sentenced to fasting and having his head and feet placed in the stocks, alternately, for two hours each day for a month. His offense was that he got drunk and threatened everyone around him. In 1818 two soldiers, probably also at San Jose, were each given fifty lashes in public for stealing \$2.50.⁴⁴ Punishment for petty crimes such as threats, simple assault, or public drunkenness was summary, and resulted in some combination of the stocks and flogging.

Rising in importance of crime, a carpenter was exiled from Santa Barbara to San Jose for eight years for aggravated assault and wounding; two soldiers were sentenced to a year's prison labor in a presidio for breaking open a trunk; and another soldier received five years of imprisonment for receiving stolen goods. In 1805 Ignacio Montes de Oca was given ten years of presidio imprisonment for murder, and in 1799 a wife-murderer in Santa Barbara faced eight years' hard labor in chains.⁴⁵

Prison sentences were usually served at the San Diego presidio, though sometimes in Santa Barbara. A census of January 1803 showed twenty-seven prisoners at San Diego, four for murder but most for stealing horses.⁴⁶ A large number of these would have been Indians. Some prisoners were sent to Mexico for confinement, a practice that, as the presidios disintegrated,

⁴³Ibid. at 1:639-40.

⁴⁴Ibid. at 1:480, 2:192, 425.

⁴⁵Ibid. at 1:639 (first three cases), 2:191 (de Oca), and 1:638 (wife murderer).

⁴⁶Ibid. at 2:191.

would become almost routine for serious offenders in Mexican California.⁴⁷

The criminal law was used to serve other miscellaneous public purposes. In 1784 some San Jose settlers were jailed and put in irons for refusing to help build a house for the town council.⁴⁸ San Jose was always troubling to the government, and not just because of the civilian settlers. In 1798, after many urgings and threats, the corporal of the San Jose guard was ordered to arrest those of his command who had not complied with the church's requirement of confession and communion at Easter. They were to be kept in chains until they confessed to a priest and took communion.⁴⁹

Sampling the evidence preserved by Bancroft, it appears that the majority of crimes in Spanish California were morals offenses.⁵⁰ Some of these were serious. In 1799 a soldier received ten years of public labor in Mexico for incest, and in 1805 a soldier was sentenced to public works for violating his stepdaughter.⁵¹ In 1818 a settler of Branciforte was tried for fornication with not just one but three stepdaughters. The actual sentences are not available, but, perhaps reflecting the ranges of culpability involved, the prosecutor in this last case made an interesting demand for punishment: for the stepfather, four years of hard labor in shackles followed by banishment; for the oldest stepdaughter, fifty lashes from an Indian woman together with one month's confinement; for the second girl, fifty lashes from her mother, to be administered in the girl's room; for the youngest, twenty-five lashes; and for the mother, a personal reprimand from the governor.⁵²

Most of the morals charges were for such conduct as would be of interest only to a government determined to assert strong social controls and meddle with the private affairs of its citizens. In 1799 the San Diego authorities found a soldier named Ruiz in bed with his corporal's wife. He was put in irons and the woman sent to Los Angeles. In 1806 two men of Los Angeles were tried for criminal conversation, or fornication with married women.⁵³ The futility of all this is shown in the case of Sebastian Alvitre.

⁴⁷An example in 1807 of remanding a prisoner to Mexico for imprisonment for murder is in *ibid.* at 2:192; in 1799 of a soldier sentenced to ten years at San Blas in Mexico for incest, in *ibid.* at 1:638.

⁴⁸*Ibid.* at 1:480.

⁴⁹*Ibid.* at 1:598.

⁵⁰See explanation *supra* note 1.

⁵¹Bancroft, *History*, *supra* note 1 at 1:638, 2:191.

⁵²*Ibid.* at 2:425.

⁵³*Ibid.* at 1:640; 2:191.

Alvitre went to California with the Portolá party in 1769 as a soldier and was one of the area's first pioneers. He was also one of the founding settlers of San Jose. Once retired from the military he proved unmanageable, and became well known for his excesses with Indian women and the wives of his neighbors. He was punished by spending several years as a convict at the presidio and then, ironically, was sent to Los Angeles for reform. There the temptations he had faced in San Jose confronted him again, and his conduct remained irrepressible, to the consternation of the authorities, as much in the southland as in the north.⁵⁴ The same story of sexual energy and fruitless exile was duplicated in others, including one man who was exiled twice.⁵⁵

The authorities were vexed by how to punish the women involved in these heinous offenses. When the commander of the Santa Barbara presidio asked the advice of Governor Borica on how to handle adultresses, the latter advised warnings and threats of exposure to husbands. If those did not work, he wrote, then he should use seclusions in respectable homes with hard work.⁵⁶

Cutting hair was deemed appropriate, perhaps as a shaming device. In 1809 the authorities at Branciforte threatened a married woman with exposure, hair-cutting, and imprisonment if a soldier were found at her house again.⁵⁷ In 1818 a carpenter at the San Gabriel Mission impregnated a widow living in nearby Los Angeles. Governor Sola demanded that the scandal "must be corrected for her reform and as a public example." He ordered the *comisionado* to take her to the mission, cut her hair short, shave one eyebrow, and exhibit her to members of the public as they came to mass. She was then to serve some respectable family in Santa Barbara for six months, and to lead a religious life. As for the man, he was to be kept in prison for a month, pay child support by deduction from his wages, and if possible be persuaded to marry the widow.⁵⁸

⁵⁴Ibid. at 1:312, 350, 460-61, 477, 640.

⁵⁵Ibid. at 1:640 (examples of Ávila and Navarro; the latter was exiled from Los Angeles to San Jose, and then re-banished to San Francisco).

⁵⁶Ibid. at 1:640.

⁵⁷Ibid. at 2:192.

⁵⁸Ibid. at 2:425.

OFFICERS AND INDIANS

Of interest is how two particular groups were treated within the criminal-justice system: military officers and Indians. As might be expected, officers received somewhat more lenient treatment than the general population. Lieutenant Diego Gonzalez was the presidio commander at Monterey until 1785, when he was sent to command the San Francisco presidio. At Monterey he had been arrested for insubordination, gambling, and smuggling—the last probably involving no more than low-level, personal trade with the supply ships. His irregular conduct continued in San Francisco, notwithstanding warnings and at least one re-arrest. In 1787 he was sent to frontier duty outside California.⁵⁹

Second Lieutenant José Ramon Lasso de la Vega, who was the San Francisco presidio's quartermaster, was also in trouble. In 1787 the serious shortages in supplies could no longer be ignored. Lasso had offered repeated excuses—stealing by soldiers and convicts, melting of sugar during transportation, even forgetfulness—but these could no longer save him. He was arrested, suspended from office, and made to live on a subsistence allowance, while the balance of his salary was applied to the deficits in his accounts. After four years, most of the debt was repaid. He was then dismissed from the service, but the king granted him retirement at half pay, and Lasso became the schoolmaster at San Jose.⁶⁰

The missionaries summarily punished Indians for insubordination and petty offenses. In more serious matters, the royal justice system treated the Indians quite fairly. They were afforded the same procedures as the Spaniards, and, as with the Hispanics, were entitled to choose their own defense counsel.⁶¹ Indians received sentences for serious crimes that were the equivalent of, or, if anything, less than, those given Spaniards. These included, for murder: four Indians who murdered another, four years in the presidio and fifty to one hundred lashes (1796); an Indian punishing his wife who "overdid" it, four years at public works (1797); an Indian murderess, six years, with a request from the padre that she be permitted to serve her time at the mission (1803); an Indian murderer in San Fran-

⁵⁹Ibid. at 1:467, 470.

⁶⁰Ibid. at 1:471.

⁶¹Two examples are in *ibid.* at 2:424. At times the prosecutors took into consideration the special beliefs of the Indians (e.g., the taboo to discuss deceased friends and relatives) as a matter of leniency in sentencing. An example is in *ibid.* at 2:191.

cisco, eight years in chains in San Diego (1804); three mission Indian murderers at San Diego, six and eight years in the presidio (1807); a mission Indian at San Diego who flogged a non-mission Indian to death for infidelity, with a request from the prosecutor for five months and fifty lashes (1811).⁶²

The range of sentences imposed on Indians for lesser offenses seems about the same as those given the Spanish, as illustrated by a case in 1811 in which seven Indians who robbed a presidio warehouse received eighty lashes and imprisonment in a presidio ranging from two months to five years.⁶³

Petty offenses that were more serious than simply insubordination of the missionaries were also more or less comparable. Indians assaulting other Indians received two months of presidio work in 1797, and in the same year the governor sentenced some Indians to ten to thirty lashes for petty theft.⁶⁴ In 1788 fifteen natives from the San Jose area were sent to work at the presidio for horse stealing, and in 1795 an Indian received twenty-five lashes and three months of work in shackles for stealing clothes.⁶⁵ The missionaries criticized sentences of presidio work for Indians who stole the abundant cattle and horses, alleging that the sole motive was to obtain cheap labor, that the Indians were ill treated at the presidios, and that they returned to the missions as even greater disciplinary problems. The padres felt they should have exclusive jurisdiction over this sort of offense.⁶⁶

A recent and detailed study of the criminal punishment of Indians in San Diego during the Spanish period is highly critical of the imposition of laws derived from Hispanic cultural and religious values upon a people, the California Indians, whose culture did not share those values.⁶⁷ Nonetheless, it concludes that "the Spanish authorities applied colonial laws . . . to the San Diego Indians on more or less the same basis as they did to lower-class Spanish citizens." Not only was there rough equality in the amount of punishment imposed, but "once

⁶²Ibid. at 1:638 (1796 and 1797), 2:191 (1803 and 1804), 2:192 (1807), and 2:424 (1811). See also examples, *supra* note 41 and accompanying text.

⁶³Bancroft, *History*, *supra* note 1 at 2:424.

⁶⁴Ibid. at 1:639 (both incidents).

⁶⁵Ibid. at 1:480, 639.

⁶⁶Ibid. at 1:405-6, 594. The correspondence of Junípero Serra (see *supra* note 5) has much on this topic.

⁶⁷Richard L. Carrico, "Spanish Crime and Punishment: The Native American Experience in Colonial San Diego, 1769-1830," *Western Legal History* 3 (1990), 31. This article also presents a topical list of criminal actions in San Diego involving Indians, taken from the Bancroft extracts but including more than those published in the *History of California*.

sentenced, Indian prisoners served their sentences in the same cramped and dank cells under military guard at the presidio and toiled on work details beside Spanish convicts.⁶⁸

Indians were also protected by the criminal law; the legal system punished Spaniards who invaded their interests. In 1784 two young boys drowned an Indian, apparently for no greater motive than to amuse themselves. Because of their ages they were given only twenty-five lashes each, but these were to be administered in the presence of the natives.⁶⁹

Most of the Spanish crimes committed against the Indians were sex offenses. Obviously, innumerable incidents of soldiers' seducing Indian women with trinkets and, in a large number of cases, simply raping them, were left unpunished. The missionaries constantly complained of this conduct, which was primarily why they attempted to obtain married men with families as mission guards. However, some Hispanics were punished for abuse of Indian women, particularly in the later part of the Spanish period, after the rawest of the frontier period had passed. In 1799 a Spaniard or Mexican received thirty lashes for abusing Indian women, and in 1809 a sentence of stocks, chains, and sweeping duty was given a soldier for fornicating with an Indian woman.⁷⁰ In 1818 a San Diego Indian accused a civilian Hispanic settler of raping his wife. The final sentence is unavailable, but proceedings went sufficiently far for a prosecutor to be appointed and the defendant to choose his defender.⁷¹ Thus the Spanish legal system treated Indians not equally, but, for the times, not grossly inequitably.

CIVIL LITIGATION

The colonial Spanish system for the determination of civil suits, involving damages, breaches of contract, and the like, was quite simple. To be sure, specialty courts dealt with particularized and narrow legal disputes. But for ordinary civil litigation the legal system of New Spain (i.e., Mexico, of which California was a part) provided that the town *alcalde* served as the court of first instance, with appeals to the governor, or in minor cases to the *ayuntamiento*. Further appeal was possible to the *audiencia*, the highest colonial court. In an extremely important civil suit, involving large amounts of money, further ap-

⁶⁸Ibid.

⁶⁹Bancroft, *History*, supra note 1 at 1:480.

⁷⁰Ibid. at 1:640, 2:192.

⁷¹Ibid. at 2:425.

peal was permitted to the Council of the Indies in Spain.⁷² The civil law was in force, not the English common law, and there were therefore no juries.

This was undoubtedly the process in most of such civil litigation as existed in Spanish California. But there is evidence of some civil disputes—mostly on the matter of inheritance—decided by the commander of the presidio closest to the civilian pueblo in which the dispute arose, with occasional appeal to the governor.⁷³ A close study of these cases might suggest why an extraordinary procedure was employed, involving the presidio commander.⁷⁴

It is doubtful that any civil dispute arising in Spanish California was ever carried as far as the *audiencia*. Certainly the overwhelming majority of the simple squabbles of bucolic California were settled locally. There were unquestionably appeals to the governor. In Mexican California, before the establishment of a formal appellate court in 1842, there was a well-documented tradition of appealing lower-court decisions of *alcalde* and *juez de paz* to the governor.⁷⁵ This probably had its roots in the actual practice of the earlier Spanish period.

The legal procedures described here may seem crude and primitive—as, by certain standards, they were. But a legal system can not be judged in a vacuum. It must be measured by the society it serves. If Spanish California had possessed a significant amount of private property or a vigorous mercantile trade, its legal system would have been woefully inadequate. But that was not the case. The region was thinly populated, and much of that population was under direct military control. Alta California had relatively little private property. There were few land grants in Spanish California, as distinguished from Mexican California, and those twenty or so grants conveyed mere rights of usage, not absolute ownership.

Except for the Indians, this small population held the same religion and a common culture. Such a homogeneous people can resolve many disputes by common consensus and require

⁷²Haring, *Spanish Empire*, supra note 12 at 120-23, 156-57.

⁷³Guest, "Municipal Government," supra note 17 at 317, 319-320.

⁷⁴Another way to find these particular cases, aside from consulting the references given by Guest to the San Jose Archives, would be to check the indexes of the Documentary Relations of the Southwest, Arizona State Museum, Tucson, under the names of the various presidio commanders. This might turn up examples of cases involving the presidio commanders in a judicial capacity more easily than going through the unindexed pueblo archives.

⁷⁵Langum, *Law and Community*, supra note 7 at 117-18.

less law and legal mechanisms than does a more heterogeneous society.⁷⁶ Access to the *alcalde* or *comisionado*, with appeal to the governor, was sufficient. Spanish California's legal system, although by modern standards far from ideal, adequately served its contemporary inhabitants.

⁷⁶See generally Bruce L. Benson, *The Enterprise of Law: Justice Without the State* (San Francisco, 1990); Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass., 1991); Langum, *Law and Community*, *supra* note 7.



Some unscrupulous Californians attempted to use the Alien Land Law to cheat *nikkei* out of their homes and other property. (Collection of Dr. Midori Nishi, Courtesy of the Japanese American National Museum)

CALIFORNIA'S ALIEN LAND LAWS

BRUCE A. CASTLEMAN

In 1942 President Franklin D. Roosevelt ordered the incarceration of all West Coast *nikkei*, or people of Japanese descent. Immigrant aliens and native citizens alike were rounded up and herded into relocation camps in one of the most disgraceful chapters in American history. The history of camps like Manzanar is well known, well documented, and often retold. It will not soon be forgotten. The internment saga, however, overshadows another chapter of public shame and discrimination. During the first half of this century, a large part of California's populace, including its elected officials, waged a campaign to drive the *nikkei* out of the state's agriculture.

In 1913 the California legislature passed the first of a series of laws designed to achieve this end. Governor Hiram Johnson intended that the Alien Land Law would put the "Japanese question" to rest. Instead, the act became part of a pattern of racial discrimination that eventually resulted in the incarceration without charge or trial of United States citizens and resident aliens of Japanese descent.

During the century's early decades, California's laws against immigrant Japanese landholders were a source of friction with Japan and of embarrassment to the federal government. Now seldom remembered, the alien land laws have become little more than a paragraph or a footnote in the history of the *nikkei*. A study of legislative history, of court cases, and of public reaction, however, shows that this version of a "Jim Crow" law had a much greater effect than such obscurity indi-

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cates. California's Alien Land Laws were principally aimed at Japanese immigrants, the first of whom, from the time of their arrival, were victimized by a well-entrenched pattern of prejudice against immigrants from China.

The Japanese began settling in California in the 1890s, but in numbers too small to arouse public outcry. Although Congress had passed laws against Chinese immigration to the United States, labor unions were still fearful of foreign competition in the Pacific Coast states. In 1897 the California assembly considered a resolution decrying the influx of cheap foreign labor. Because the resolution dealt with an issue beyond the authority of state governments, it was referred to the assembly Federal Relations Committee. There it was tabled and the legislature adjourned.¹

The annexation of Hawaii in 1898 suddenly placed a large number of Japanese immigrants under United States jurisdiction. By 1900 Japanese immigration to California had increased by more than ten times that of 1890.² In 1899 the assembly passed a resolution complaining of the increased Japanese immigration and the importation of Japanese females for lewd purposes, and urged the California congressional delegation to solve the problem with legislation. However, the senate tabled the resolution.³ The next two sessions of the California legislature included resolutions against Asian immigration⁴ and a school-segregation law,⁵ neither of which singled out Japanese from other Asians.

After 1905 racial hatred in the state tended to be aimed specifically at the Japanese. In March 1905 of that year, both houses of the legislature unanimously passed a resolution expressing apprehension over the "growing and threatened invasion of our State by Japanese immigrants." It listed ten specific complaints, and directed California's congressional delegation to take immediate action.⁶ The fear evident in the resolution

¹California Legislature, *Journal of the Assembly*, 32nd Session, 1897 (Sacramento, 1897), 137-38 [hereafter referred to as *Assembly Journal* for the given year].

²Frank F. Chuman, *The Bamboo People: The Law and Japanese-Americans* (Del Mar, Calif., 1976), 11 [hereafter cited as Chuman, *Bamboo People*].

³Assembly Concurrent Resolution No. 8, *Assembly Journal* 1899, supra note 1 at 87, 511, 624.

⁴California Legislature, *Journal of the Senate*, 34th Session, 1901 (Sacramento, 1901), 387 [hereafter referred to as *Senate Journal* for the given year].

⁵*Statutes of California and Amendments to the Codes Passed at the Thirty-Fifth Session of the Legislature*, 1903 (Sacramento, 1903), 86 [hereafter referred to as *California Statutes* for the given year].

⁶*Assembly Journal* 1905, supra note 1 at 1522, and *Senate Journal* 1905, supra note 4 at 1164.

was expressed at a time when Japan was winning the Russo-Japanese War and destroying the comfortable myth of white invincibility.⁷

Following the San Francisco fire and earthquake of 1906, that city's school board established segregated schools for Japanese and other Asians. Tokyo protested vigorously, and there was a popular clamor in Japan for war with the United States.⁸ President Theodore Roosevelt forced state and municipal officials to rescind the segregation plan in exchange for negotiated agreements with Japan voluntarily limiting the number of passports issued to emigrants bound for the United States.⁹ After Roosevelt's heavy-handed intervention, the California legislature turned its attention to anti-Japanese legislation, frequently considering such measures during sessions over the next several decades.

Shortly after the legislature convened in 1907, the first California Alien Land Bill (A.B.404) was introduced in the assembly on January 23.¹⁰ The senate passed a resolution on January 29 protesting Roosevelt's intervention in the San Francisco school-segregation issue, claiming it to be a local matter beyond the purview of the federal government.¹¹ Two days later, Governor James N. Gillett received a telegram from the congressional delegation requesting the deferral of all anti-Japanese matters in view of the delicate immigration negotiations between Secretary of State Elihu Root and Ambassador Suizo Aoki. The governor put the request to the assembly, which immediately voted to comply on January 31, 1907.¹²

The moratorium was short-lived, however, and the assembly worked on the bill throughout the month of February. The bill that finally passed limited the period of land ownership of aliens who did not declare their intention to naturalize to five years and set a maximum lease period of five years for aliens.

⁷At that point, the Japanese Army had captured Port Arthur, Manchuria, and was advancing on Mukden. The decisive naval victory at Tsushima did not occur until May 1905.

⁸Edward S. Miller, *War Plan ORANGE: The U.S. Strategy to Defeat Japan, 1897-1945* (Annapolis, 1991), 22-23 [hereafter cited as Miller, *War Plan ORANGE*]. Roosevelt directed the navy to develop the first formal plan for war with Japan in response to this crisis.

⁹Thomas A. Bailey, *Theodore Roosevelt and the Japanese-American Crisis: An Account of the International Complications Arising from the Race Problem on the Pacific Coast* (Gloucester, Mass., 1964), 1-44.

¹⁰*Assembly Journal 1907*, supra note 1 at 177.

¹¹*Senate Journal 1907*, supra note 4 at 305-06.

¹²*Assembly Journal 1907*, supra note 1 at 361.

The bill passed the assembly on February 28.¹³ On March 8, the senate passed a bill calling for a statewide ballot measure to ascertain the will of the voters on immigration.¹⁴ Roosevelt again intervened, to complain that the California legislature was undermining the negotiations with Japan, and the governor had the bill (S.B.930) tabled by the assembly.¹⁵ The assembly's Alien Land Bill languished in the senate's committee for the rest of the session.

In 1909 the California legislature actively considered a number of anti-Japanese bills before capitulating to Roosevelt's intervention. On January 8, the first day for introducing bills, five discriminatory measures appeared, including a school-segregation bill, a bill to prohibit aliens from serving as directors of corporations in the state, a municipal-segregation bill that would allow city governments to establish and enforce racially segregated ghettos, and an alien land bill that was simultaneously introduced in the senate and the assembly.¹⁶

On January 15 the United States ambassador to Japan, Thomas J. O'Brien, cabled the State Department that Foreign Minister Juntaro Komura had expressed concern over the bills before the California legislature.¹⁷ Roosevelt swiftly interposed with Gillett, a fellow Republican, who then applied severe pressure and killed the measures.¹⁸

The original version of the 1909 Alien Land Bill was based on an Illinois law giving alien landowners five years to become citizens, otherwise the title would escheat to the state. At the governor's behest, the committee substituted an Oklahoma law prohibiting any and all aliens from owning land, but that measure fell prey to lobbying efforts on behalf of European investors and banking interests as well as the 1915 Panama-Pacific International Exposition Committee, which feared revenue loss from Japanese nonparticipation.¹⁹

Later in the 1909 session, on March 4, the senate passed a resolution calling for stricter exclusion of Asiatics from immi-

¹³Ibid. at 435, 1082, 1204. The vote was 48-1, the sole no vote coming from Grove L. Johnson of Sacramento, who himself authored several anti-Japanese bills, and was the father of the future governor Hiram W. Johnson.

¹⁴*Senate Journal* 1907, *supra* note 4 at 1144, 1593, 1621, 1622.

¹⁵*Assembly Journal* 1907, *supra* note 1 at 361, 1787, 1855.

¹⁶*Senate Journal* 1909, *supra* note 4 at 61, and *Assembly Journal* 1909, *supra* note 1 at 72, 74, 78.

¹⁷Raymond A. Esthus, *Theodore Roosevelt and Japan* (Seattle, 1966), 287.

¹⁸*Assembly Journal* 1909, *supra* note 1 at 415, 419-20, 430-32, 515-16. The full text of Governor Gillett's message to the legislature is on 477-79.

¹⁹Franklin Hichborn, *The Story of the Session of the California Legislature of 1909* (San Francisco, 1909), 201-06.

gration.²⁰ Reflecting the rising fear of a naval war with Japan, two days earlier the assembly had passed a resolution calling on the federal government to maintain a Pacific fleet equal in size to any other nation's Pacific-based naval force.²¹

The 1910 election brought a Progressive Republican, Hiram W. Johnson, to the Governor's Mansion at the time when President William H. Taft was conducting delicate treaty negotiations with Japan. Taft summoned Johnson to Washington to discuss California's anti-Japanese stance. The president explained to the governor-elect the facts of political life: if violence occurred against the Japanese in California before the treaty under negotiation was signed, San Francisco would move from first place to last among the cities contending to host the 1915 Panama-Pacific International Exposition.²² Johnson's inaugural address contained no mention whatsoever of anti-Oriental issues, even though support for Asiatic exclusion had been a plank in each party's platform during the election campaign.²³ Immediately after taking office, Johnson wrote the United States secretary of state, Philander C. Knox, that he would do everything he could to prevent anti-Oriental legislation in 1911.²⁴

The governor's efforts were successful. No such legislation passed both houses, although many discriminatory bills were introduced.²⁵ The historian Roger Daniels has provided a list of twenty anti-Oriental bills, four resolutions, and one constitutional amendment that were introduced during the 1911 legislative session.²⁶ These actions by the legislature reflect its determination to exclude the *nikkei* from public life. Nevertheless, Japanese observers were pleased with the outcome of the 1911 legislature, although they worried that the governor might not be able to repeat his performance in 1913, when the legislature convened again. In 1911 voters in California

²⁰Assembly Joint Resolution No. 7, *Assembly Journal* 1909, supra note at 1143.

²¹Senate Joint Resolution No. 6, *Senate Journal* 1909, supra note 4 at 1251.

²²Chuman, *The Bamboo People*, supra note 2 at 44.

²³Hichborn, *The Story of the Session of the California Legislature of 1911* (San Francisco, 1911), xxiv-xxv. The full text of the inaugural address appears on i-xvi.

²⁴Spencer C. Olin, Jr., *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911-1917* (Berkeley, 1968), 84 [hereafter cited as Olin, *California's Prodigal Sons*].

²⁵*Assembly Journal* 1911, supra note 1 at 101, 111, 125, 151, 170, 185, 575, 581, 659, 667, 1677, 2429, and *Senate Journal* 1911, supra note 4 at 95, 98, 100, 124, 426, 454, 753, 781, 2364.

²⁶Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (Berkeley and Los Angeles, 1962), 132n.20 [hereafter cited as Daniels, *Politics of Prejudice*].

acquired the ballot initiative allowing them to pass their own laws on election day; they harbored strong feelings against Japanese immigrants.²⁷

Five alien land bills were introduced on the assembly floor in 1913. A.B.10, introduced on January 13, would have prohibited land ownership by all aliens. Three competing bills were introduced the next day. A.B.113 would have prohibited land ownership by aliens and alien-owned corporations; A.B.183 would have prohibited ownership by aliens ineligible for citizenship and by corporations owned by ineligible aliens; and A.B.194 would have prohibited land ownership by aliens who had not formally declared their intention to seek naturalization. These four bills were withdrawn on April 4, when the assembly Judiciary Committee's substitute bill, A.B.2064, was introduced.²⁸

The substitute bill provided for aliens to be able to acquire property for up to one year, and to lease property for up to five years. Corporations controlled by aliens ineligible for citizenship were classed as aliens for the purposes of the bill. Corporations controlled by aliens eligible for naturalization were unrestricted by this proposal. A.B.2064 also "grandfathered" from all its restrictions any land previously owned by an alien as long as title remained within the immediate family. This bill did not discriminate between classes of *individual* aliens. Several attempts to amend the bill on the floor were unsuccessful, including one to apply the bill only to aliens ineligible for citizenship. The senate then buried the bill in committee until a different bill was passed.²⁹

Parallel efforts were afoot in the Senate from the beginning of the 1913 session. S.B.5 and S.B.27 were introduced on January 13. They were identical to A.B.194 and A.B.113, respectively. A modified proposal was offered by S.B.416, which would have *allowed* United States citizens and "aliens who had declared their intentions to become such" to own real property in fee simple (as distinct from other proposals to *prohibit* ownership by certain groups). The Senate Judiciary Committee began work on a substitute bill.³⁰

Reaction in Japan was swift and outspoken. The Japanese

²⁷Teruko Okada Kachi, *The Treaty of 1911 and the Immigration and Alien Land Law Issues Between the United States and Japan* (New York, 1978), 218.

²⁸*Assembly Journal 1913*, supra note 1 at 81, 95, 101, 102, 1183; see also Franklin Hichborn, *Story of the Session of the California Legislature of 1913* (San Francisco, 1913), 221-25 [hereafter cited as Hichborn, *Legislature of 1913*].

²⁹*Senate Journal 1913*, supra note 4 at 3063, and Hichborn, *Legislature of 1913*, supra note 28 at 237-41.

³⁰*Senate Journal 1913*, supra note 4 at 87, 90, 167, and Hichborn, *Legislature of 1913*, supra note 28 at 221-23.

press protested vigorously. The *Asahi Shimbun* complained of "a deep sense of humiliation" and declared that American "equality is a hollow sham." The editors called for the Imperial government to threaten retaliation against the United States.³¹ Another Japanese newspaper demanded even stronger measures. The *Mainichi Shimbun* vehemently proclaimed that the United States was deliberately provoking Japan and that warships should immediately be stationed off the California coast.³² Tokyo filed a formal diplomatic protest in Washington. President Woodrow Wilson and his cabinet discussed the serious possibility of war.³³

At this point, the Wilson administration intervened. Although the Democrats of that time were staunch champions of state rights, Governor Johnson was surprised that his victorious opponents in the 1912 national election had been silent for so long.³⁴ On April 18, Secretary of State William Jennings Bryan telegraphed the governor and informed him that Washington greatly preferred the senate committee's bill to A.B.2064.³⁵ The senate draft applied to all aliens, whether European or Asian, individual or corporation.³⁶ The president, he urged, "very respectfully, but most earnestly, advises against the use of the words 'ineligible to citizenship.'"³⁷

Another lobbying campaign on behalf of European banking interests arose to protest the new threat to their investments in California's land and minerals. The senate committee drafted a new bill that protected European corporate interests but denied land ownership to individual aliens of any origin, as well as to corporations controlled by aliens ineligible for citizenship.³⁸

In late April, President Wilson protested that the proposed laws violated United States treaty obligations and were inimical to the national interest.³⁹ When another war scare arose in

³¹"California Anti-Alien Land Bill," *Literary Digest* 46 (16), 787. The *Literary Digest* was published in New York.

³²James B. Kessler and Kan Ori, *Anti-Japanese Land Law Controversy in California: A Case Study of Intranational and International Communication as Affected by the Dynamics of American Federalism* (Tokyo, 1971), 45 [hereafter cited as Kessler and Ori, *Anti-Japanese Land Law Controversy*].

³³August Heckscher, *Woodrow Wilson: A Biography* (New York, 1991), 301.

³⁴Spencer C. Olin, Jr., "European Immigrant and Oriental Alien: Acceptance and Rejection by the California Legislature of 1913," *Pacific Historical Review* 35 (August 1968), 312.

³⁵Quoted in Hichborn, *Legislature of 1913*, supra note 28 at 243 n.215.

³⁶*Senate Journal*, 1913, supra note 4 at 1309-12.

³⁷Quoted in Hichborn, *Legislature of 1913*, supra note 28 at 243 n.215.

³⁸*Senate Journal*, 1913, supra note 4 at 1666-70.

³⁹Wilson to Johnson (telegram), April 22, 1913, quoted in Hichborn, *Legislature of 1913*, supra note 28 at 246.

Washington and Tokyo,⁴⁰ the secretary of state was dispatched in a belated attempt to establish control and pressure the Progressive Republican-dominated state government into framing a law that would not embarrass the United States. Bryan arrived in Sacramento on April 28, 1913. He advanced the president's position, but Johnson pointed out that similar laws already existed in Washington and Arizona. The governor went on to proclaim piously that California gave no offense to Japan by use of the words "ineligible to citizenship," since any offense that arose therefrom was the responsibility of the United States government, in whose domain immigration laws exclusively lay.⁴¹

Bryan returned to Washington empty-handed, and commenced a round of delicate negotiations with Ambassador Suteimi Chinda. They were able to defuse the situation.⁴² A later commentator observed that Bryan's trip to California probably hastened the inevitable passage of the state's Alien Land Act, but it was an effective gambit in mollification of the Japanese government and Japanese popular opinion.⁴³

Francis J. Heney's initial draft of the measure that would finally become law was circulated even before Bryan's arrival in Sacramento.⁴⁴ The Heney draft prohibited ineligible aliens from owning or leasing agricultural land.⁴⁵ As finally worked out by the state attorney general, Ulysses S. Webb, the substitute bill prohibited ineligible aliens from owning land except as allowed by treaty obligations. S.B.5 was amended to delete the original text completely and substitute the Webb-Heney bill. After approving an amendment from the floor allowing ineligible aliens to lease agricultural lands for up to three years, the senate passed the Alien Land Law by a vote of thirty-five to two on May 2, 1913.⁴⁶ The assembly passed it the next day, by a vote of seventy-two to three.⁴⁷

⁴⁰Miller, *War Plan ORANGE*, supra note 28 at 23.

⁴¹Hichborn, *Legislature of 1913*, supra note 28 at 252-59.

⁴²William Jennings Bryan and Mary Baird Bryan, *The Memoirs of William Jennings Bryan* (1925; reprint, New York, 1971), 366-367. Japanese popular attention soon switched to a domestic political scandal that quickly brought down the government. See Mikiso Hane, *Modern Japan: A Historical Survey*, 2d. ed. (Boulder, Colo., 1992), 194, 201.

⁴³Thomas A. Bailey, "California, Japan, and the Alien Land Legislation of 1913," *Pacific Historical Review* 1 (January 1932), 58.

⁴⁴Heney was a leading Progressive and close confidant of Governor Johnson at the time. See Dan and Inez Morris, *Who Was Who in American Politics* (New York, 1974).

⁴⁵Hichborn, *Legislature of 1913*, supra note 28 at 261 n.239.

⁴⁶*Senate Journal 1913*, supra note 4 at 2324.

⁴⁷*Assembly Journal 1913*, supra note 1 at 2494.

In the end, the provisions of the California Alien Land Act of 1913 were as follows:⁴⁸ (1) Aliens eligible for citizenship had the same property rights as United States citizens. (2) Aliens ineligible for citizenship were prohibited from acquiring more land (except as guaranteed by any treaties between the United States and an alien's country of citizenship), and such aliens could lease agricultural land for up to three years. This provision shows that the act was aimed at Japanese immigrants, since the United States-Japanese treaty of 1911 guaranteed their right to own residential or commercial property, but did not address agricultural property.⁴⁹ (3) Corporations controlled by ineligible aliens faced the same restrictions as individual ineligible aliens. (4) Titles to lands that were acquired in violation of the act escheated automatically to the state of California.

Anti-Japanese agitators attempted to strengthen the Alien Land Law during the next session. When the legislature convened in 1915, Assemblyman R. Shartel, of Modoc County, introduced A.B.612, which would have amended the law to prohibit all leases of agricultural land by aliens ineligible for citizenship. The bill was reported out of committee one day before adjournment, and was thus defeated by parliamentary means.⁵⁰

In letters to Theodore Roosevelt and the Republican state central committee chairman, Meyer Lissner, Governor Johnson claimed credit for preventing passage of the stricter law.⁵¹ Since the 1910 Census showed only one Japanese as living in Shartel's district, he was probably not facing voter pressure on the issue, and so carried the banner until influential supporters abandoned him in the face of Johnson's opposition.⁵²

Johnson must have been aware from the outset of the gaps in the 1913 law. His record as governor since 1911 shows an extensive record of legislative reform, which drove the Southern Pacific Railroad and other influential "machine" organizations from California's politics. Johnson achieved his reforms through carefully crafted legislation, which makes it unlikely that he was unaware of the effects the law would actually have. Several lawmakers expressed their dissatisfaction with the

⁴⁸*California Statutes 1913*, supra note 5 at 206-08.

⁴⁹United States Department of State, *Papers Relating to the Foreign Relations of the United States, 1911* (Washington, 1919), 315-19.

⁵⁰*Assembly Journal 1915*, supra note 1 at 281, 2445.

⁵¹Olin, *California's Prodigal Sons*, supra note 24 at 88.

⁵²Jean Pajus, *The Real Japanese California* (Berkeley, 1937), 73 [hereafter cited as Pajus, *Real Japanese California*].

holes in the Alien Land Law on the assembly floor at the time it was passed.⁵³

Why a powerful and competent politician like Johnson would have accepted an alien land law lacking teeth is unclear. His principal motive may have been the ultimate exclusion of Japanese from immigration, a cause he unceasingly championed.⁵⁴ He believed that Roosevelt's advocacy in 1905 of naturalization rights for Japanese aliens had played a role in the defeat in 1912 of the Progressive party's presidential ticket, on which he had run with Theodore Roosevelt.⁵⁵

Another possibility is that Johnson preferred all along to quash the alien land bills, but engineered a weak law as a political sop to agitators. Early in the 1913 session, the governor held a meeting to come up with a plan to prevent the passage of such bills. Mindful of both the diplomatic imbroglio with Japan and the massive support of Californians for an alien land bill aimed at Japanese immigrants, he maneuvered behind the scenes. Deciding that his constituents were determined to prohibit Asians from owning land, he got on the bandwagon and allowed the bills to go forward.⁵⁶ The author of the Alien Land Law, Attorney General Ulysses S. Webb, addressed the San Francisco Commonwealth Club on August 13, 1913: "The fundamental basis of all legislation upon this subject, State and Federal, has been, and is, race undesirability," he declared. "It seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land."⁵⁷

Besides his commitment to exclusion, the recently defeated Progressive "Bull Moose" vice-presidential candidate took pleasure in using his position in the Governor's Mansion to embarrass Woodrow Wilson greatly in the first days of his presidency.⁵⁸ Although Johnson enjoyed publicly humiliating his political antagonist, his private letters to a confidant, Chester

⁵³*Assembly Journal 1913*, supra note 1 at 2495.

⁵⁴As a United States senator, Johnson sponsored the 1924 law prohibiting Japanese immigration to any part of the United States.

⁵⁵Roger Daniels, *Asian America: Chinese and Japanese in the United States since 1850* (Seattle, 1988), 138.

⁵⁶Kessler and Ori, *Anti-Japanese Land Law Controversy*, supra note 32 at 11. The authors make a compelling case for this theory, citing letters from the papers of Johnson and those of Chester Rowell, a prominent Progressive and the publisher of the *Fresno Republican*.

⁵⁷Yamato Ichihashi, *Japanese in the United States* (1932; reprint, New York, 1969), 272-75 [hereafter cited as Ichihashi, *Japanese in the United States*].

⁵⁸Johnson to Roosevelt, June 21, 1913, quoted in Daniels, *Politics of Prejudice*, supra note 26 at appendix B.

Rowell, indicate that he was willing to cooperate with Wilson on the Japanese issue. Johnson's sudden reversal surprised Rowell. The governor's principal concern was that if he did not support an alien land bill, the Democrats would use it against him in the 1916 gubernatorial election.⁵⁹ He may have engineered the last-minute floor amendment in order to quiet the war scare raging in Tokyo on account of his bill. Moreover, he probably shied away from active enforcement of the law from fear of provoking another such scare with Japan.

The first escheat action under the Alien Land Law arose in 1916. It concerned a small piece of residential property in Santa Barbara, and the defendant was Chinese rather than Japanese. On July 30, 1915, Gin Fook Bin acquired part of an undivided half-interest in a residence on a seventy-two-hundred-square-foot lot. One Eugene Fung also had part of the half-interest, but he died two weeks later. Fung was apparently a United States citizen. Sophie McDuffie and M.B. McDuffie held a mortgage secured by a trust deed from Gin and Fung. After Fung's death, Gin defaulted, and a legal fracas followed. The state joined in on February 7, 1916, filing suit for an escheat of the entire half-interest in the property. Attorney General Webb's complaint claimed title for the state as of July 30, 1915, because Gin Fook Bin was an ineligible alien and there was no treaty with China allowing him to acquire any American property. Following a bench trial on April 24, 1917, the judge ordered an escheat of the half interest to the state. Gin Fook Bin lost everything connected with the property when the judgment was finally entered in July 1918.⁶⁰

While the *Gin Fook Bin* case was awaiting trial, Attorney General Webb filed his first escheat case against a Japanese alien. The real estate in question was an urban residence in Riverside, and the issei head of the family was a restaurant owner who had no agricultural interest at all.⁶¹

On December 14, 1915, Jukichi Harada purchased a residence in "one of the city's best residential districts," between Third and Fourth avenues on Lemon Street.⁶² Although the 1911 Treaty of Commerce and Navigation allowed Japanese citizens to acquire American residential and commercial property,

⁵⁹James B. Kessler, "The Political Factors in California's Anti-Alien Land Legislation, 1912-1913" (Ph.D. diss., Stanford University, 1958), 10. Kessler also cites an oral interview with Hichborn, who covered the Capitol and the Governor's Mansion for the *Sacramento Bee*, in support of his contention.

⁶⁰*People v. Gin Fook Bin, et al.*, Santa Barbara County Super. Ct. case on file with the Santa Barbara County clerk, Santa Barbara.

⁶¹*Daily Enterprise*, November 12, 1974.

⁶²*Riverside Enterprise*, October 7, 1916.

Harada placed the title to the property in the names of his citizen children.⁶³ After the residents had "taken every means to oust the Haradas from the community,"⁶⁴ they sought the help of their state government in driving the family out. The Haradas demurred and argued that Jukichi had never had an interest in the property because the title had been directly conveyed to the co-defendants, citizen children Mine, Sumi, and Yoshizo, who at that point were severed from the action. Superior Court Judge Hugh M. Craig overruled the demurrer.⁶⁵

After each of three amendments to the complaint was answered with a demurrer that Craig overruled, the case finally came to trial on May 28, 1918. Attorney General Webb came down to Riverside to try the case himself, assisted by state Senator Miguel Estudillo (R-Riverside). Judge Craig ruled that the Alien Land Law was constitutional, opining that the treaty right to own a house did not necessarily include the land upon which the dwelling sat. The judge also held that the California Constitution gave all citizens the right to own any land in the state, and that, since minor children often held title to real property, Jukichi Harada's payment of the fee simple could not be construed as an attempt to evade the Alien Land Law, to acquire the land for any unlawful purpose, or to defraud the people of California. The final document in the case file is Webb's motion of January 18, 1919, petitioning for a new trial, claiming that Craig had abused judicial discretion by issuing a decision contrary to law and because irregularities had denied the plaintiffs a fair trial. The retrial never took place.

In 1974 Sumi Harada recalled that "fifteen residents signed a petition to have us removed beyond the tracks."⁶⁶ The local press reported that concerted attempts had been made to buy the property from the hapless Haradas.⁶⁷

Craig's opinion noted that the affair first came to the attorney general's attention when he received a letter from a Mr. Noble, asking whether "Jap children" could own land. Since Noble was the real-estate agent who handled the sale to the Haradas,⁶⁸ presumably his inquiry was sent only after he had received his commission. Because Webb replied to Noble that the citizen children could in fact own California land, his later decision to pursue the case himself probably stemmed from

⁶³*People v. Harada, et al.*, Riverside County Super. Ct. Case 7751 [hereafter cited as *People v. Harada*].

⁶⁴*Riverside Enterprise*, October 7, 1916.

⁶⁵*People v. Harada*, *supra* note 63.

⁶⁶*Daily Enterprise*, November 12, 1974.

⁶⁷*Riverside Enterprise*, October 7, 1916.

⁶⁸*People v. Harada*, *supra* note 63.

political considerations, which would also explain why a state senator joined the action. The absence of subsequent newspaper articles in the *Riverside Enterprise* is perplexing in view of the initially high profile of the case. Even the trial itself went unreported, the clamor apparently subsiding after the initial legal maneuvers two years earlier.

TIGHTENING LAWS HAVE LOOSE ENFORCEMENT

Enforcement of the Alien Land Law, in each of its increasingly stringent forms, was fairly lax. With few exceptions, no land title escheated to the state of California.⁶⁹ Three avenues of evasion were common: Placing title in the names of the growing number of citizen nisei (native-born) children, like the Haradas of Riverside; payment to a citizen middleman who held nominal title to the land; and payment to a land-owning corporation in which the Japanese held no stock, or the stock was held in trust for them by their attorneys.⁷⁰

The leasehold option was widely used before it, too, was outlawed in 1920. The *nikkei* were not driven off the land, much less out of California. When the 1916 *Harada* case was filed, 1,321 *nikkei* farmers were cultivating one hundred and fifty-eight thousand acres in Los Angeles County.⁷¹ Some of the farmers, however, were selling their land. According to the Japanese Agricultural Association, the amount of Japanese-owned farmland in California decreased from thirty-two thousand to twenty-nine thousand acres between 1913 and 1918.⁷²

The 1913 act actually did little to halt farming by Japanese aliens. Leasehold acreage increased sharply between 1914 and 1920, although Japanese immigrants tended to concentrate on

⁶⁹Carey McWilliams, *Prejudice: Japanese-Americans: Symbol of Racial Intolerance* (Boston, 1944), 65 [hereafter cited as McWilliams, *Prejudice*]. Chuman states that nine "reported" cases arose between 1916 and 1920. Reported cases are those for which the District Court of Appeals or California Supreme Court opinion was published. Chuman does not list the nine cases, but opines that many more unreported cases must have existed. *Bamboo People*, supra note 2 at 117-18. In a careful review of *California Reports*, vols. 164-88, and *California Appellate Reports*, vols. 20-53, the author found no Alien Land Law escheat cases. These volumes contain the published opinions of the California Supreme Court and the various district courts of appeal, respectively, in all reported cases between 1913 and 1921.

⁷⁰Robert Higgs, "Landless by Law," *Journal of Economic History* 38 (March 1978), 216-20 [hereafter cited as Higgs, "Landless by Law"].

⁷¹William M. Mason and John A. McKinstry, *The Japanese of Los Angeles* (Los Angeles, 1969), 30.

⁷²Japanese Agricultural Association, *The Japanese Farmers in California* (San Francisco, 1918), 10.

crops not requiring long-term investments such as fruits or vines.⁷³ Some Japanese farmers transferred their land titles in trust to lawyers or corporations, and then worked as "managers" or "tenants" of their land. Titles were also transferred to nisei children of the immigrants, who then acted as both guardian and employee. Small Euro-American farmers resented the Japanese, but large landowners welcomed them because they were good tenants. Such influential people could lean on local officials and ensure that their interests were protected.⁷⁴ As racist pressure groups such as the Native Sons of the Golden West became increasingly angry, Japanese land tenancy grew.⁷⁵ In his book on the issei, Yuji Ichioka claims that the main effect of the law was to stigmatize the Japanese as the victims of discrimination as well as to channel their agricultural efforts, and points out that in 1918 about thirty-eight thousand people of Japanese descent in California were engaged in farming. This was about 58 percent of the total.⁷⁶

No major court cases arose in California from the 1913 Alien Land Law, although several came up after the law was strengthened in 1920.⁷⁷ The 1913 act raises obvious Fourteenth Amendment questions. However, the absence of any United States or California Supreme Court decisions suggests that the act was not so damaging that anyone was willing to undertake the costs of litigation.

California's agriculture enjoyed a boom throughout the First World War. After the war's end, the economy slowed at the same time veterans were returning from France to look for work, making fertile conditions for agitation against a racial minority.⁷⁸ A number of anti-Japanese bills were introduced in the California senate in April 1919. They were withdrawn at the behest of United States Secretary of State Robert Lansing for the peace negotiations then in progress at Versailles, in

⁷³Ronald Takaki, *Strangers from a Different Shore: A History of Asian-Americans* (Boston, 1989), 204 [hereafter cited as Takaki, *Strangers from a Different Shore*].

⁷⁴Gary Y. Okihiro and David Drummond, "The Concentration Camps and Japanese Economic Losses in California Agriculture, 1900-1942," in *Japanese-Americans: From Relocation to Redress*, ed. Roger Daniels, Sandra C. Taylor, and Harry H.L. Kitano (Salt Lake City, 1986), 170.

⁷⁵Yuji Ichioka, *The Issei: The World of the First Generation Japanese Immigrants, 1885-1924* (New York, 1985), 155 [hereafter cited as Ichioka, *The Issei*].

⁷⁶*Ibid.* at 156.

⁷⁷Japanese Government, Foreign Ministry, Consul General of San Francisco, *Documental History of Law Cases Affecting Japanese in the United States, 1916-1924*, 2 vols. (1925; reprint, New York, 1978).

⁷⁸Pajus, *Real Japanese California*, *supra* note 52 at 91.

which Japan participated as a victorious belligerent in the First World War.⁷⁹ Instead, a resolution was passed calling for the state Board of Control to investigate who was leasing farmland to Orientals, and whether equal or better results from farms could be obtained from citizens or eligible aliens.⁸⁰ The final report focused on people of Japanese descent and made no distinction between citizen and alien. Much was made of the high birthrate of Japanese aliens, but no mention was made of the relative youthfulness of that recently immigrated segment of society.⁸¹ In the letter transmitting the report to United States Secretary of State Bainbridge Colby, Governor William D. Stephens complained that the *nikkei* "were crushing competitors to our white rural populations."⁸²

After the Treaty of Versailles was signed, the California legislature passed a resolution requesting a special session in 1920 to consider additional legislation concerning Oriental ownership and control of agricultural lands. Its text describes the tone of events that would soon follow:

Whereas The menace of ownership and control of agricultural lands in California by Asiatics is growing so rapidly that it is now recognized by thinking men as the greatest danger confronting the white race of this state . . . it will soon reach such proportions that it will be beyond control . . . the people . . . are demanding necessary action to safeguard our interests and preserve this fair land for the children of the white race . . . the evil which now exists can be to a great extent checked by proper legislation.⁸³

Stephens, a Progressive Republican, declined to call the special session, a ruse to prevent United States Senator James D.

⁷⁹McWilliams, *Prejudice*, supra note 69 at 57.

⁸⁰Senate Concurrent Resolution No. 19, *Senate Journal* 1919, supra note 4 at 1314, 1380, 1465, 1524, and *Assembly Journal* 1919, supra note 1 at 2094.

⁸¹Other observers, however, recognized the reason for the high per-capita birthrate. For example, see Ralph Burnright, "The Japanese in Rural Los Angeles County," *Studies in Sociology* 4 (June 1920), 12.

⁸²State Board of Control, *California and the Oriental: Japanese, Chinese, and Hindus* (1920; reprint, New York, 1978), 9. This document covered a host of topics, from living standards to language schools and citizenship rights. It actually has little bearing on the Alien Land Law, instead urging exclusion of the supposedly non-assimilable Japanese immigrants. Opponents of exclusion, and of the Alien Land Law, published a number of rebuttals to *California and the Oriental*. Notable among these were K.K. Kawakami, *The Real Japanese Question* (New York, 1921), and T. Iyenaga and Kenoske Sato, *Japan and the California Problem* (New York, 1921).

⁸³*California Statutes* 1921, supra note 5 at lxxxvi.

Phelan, a Democrat, from claiming credit for a strengthened alien land law in his 1920 reelection campaign.⁸⁴ As in the 1910 gubernatorial campaign and many other California elections of the period, both Democrats and Progressive Republicans maneuvered to be the champion of Japanese exclusion in the eyes of the Euro-American electorate. Phelan vied for this position from the time he took his seat in Washington. He argued that Californians' anti-Japanese attitudes arose from the need for cultural self-preservation, not from racial prejudice. California's racial question was a great deal more serious than the South's, he claimed, because the "Japanese were a masterful people, of great industry and ingenuity."⁸⁵

He believed that the Japanese intended to drive the white man from California's soil, and that there was no hope of accommodation because the Japanese were not assimilable. Because California was such an attractive place, Japanese immigrants could be expected to continue arriving at Angel Island as long as it was open to them. The Root-Takahira agreements were circumvented by sending to Japan for picture brides, resulting in a high birthrate in a group whose low standard of living, according to Phelan, the white man would never accept. Because of the threat to white culture there, he said, California had a right to speak with authority for the United States on the Japanese immigration question. Phelan pointed out that Japan did not allow foreigners to own any land at all, and that Tokyo, like the United States, excluded Chinese immigration. The senator claimed that because Governor Stephens and the California legislature had surrendered to fear of Japan, they had not passed a stronger alien land law.

Phelan repeatedly urged the prohibition of Japanese immigration to the United States. He also argued that the Japanese should expand into areas where they belonged, such as, he suggested, Manchuria and the Philippines.⁸⁶ Stephens's gambit was apparently successful, for Phelan was not reelected. Instead, the Progressive Republicans pushed onto the 1920 ballot an initiative measure to strengthen the 1913 Webb-Heney Act.

The 1920 initiative prohibited ineligible aliens from leasing land except by treaty. Thus, in effect, Japanese farmers could no longer lease land in California. They were also prohibited from owning stock in any company that owned or leased agricultural land. The 1913 act addressed only companies in which ineligible aliens owned a *majority* of the common stock. Guardians

⁸⁴Ichihashi, *Japanese in the United States*, supra note 57 at 278.

⁸⁵James D. Phelan, "The Japanese Evil in California," *North American Review* 210 (September 1919), 323.

⁸⁶Ibid. at 323-28.

for nisei children holding land title were now required to be United States citizens. If a transaction conveyed land title to an eligible owner, and it could be shown that an ineligible alien had actually paid for it, the land would escheat to the state of California.⁸⁷

The campaign in favor of the initiative was intense as various groups appealed to the racism among California's voters, with the aim of driving the Japanese out of farming in the state.⁸⁸ The American Legion produced a film called *Shadows of the West*, which accused Japanese growers of fixing vegetable prices. It appealed to a baser prurience in its portrayal of a group of Japanese men abducting two Euro-American women, who were rescued at the last moment by a group of legionnaires.⁸⁹ The 1920 voters' information booklet argued that Orientals should be prevented from controlling agricultural lands, and that California should not give rights to Japanese that Japan denied to Americans.⁹⁰ Assorted groups pressed not only for the rigorous exclusion of Orientals, but for a constitutional amendment denying citizenship to native-born children of ineligible aliens.⁹¹ The initiative Alien Land Act carried by a vote of 668,483 to 222,086.⁹²

The 1920 initiative Alien Land Law plugged many of the loopholes Hiram Johnson had left in the Webb-Heney Act. The *nikkei* and large Euro-American landowners recognized that it constituted a serious threat to their interests. Legal challenges on several points were quick in forthcoming.

The first was whether the phrase "ineligible to citizenship" applied to Japanese immigrants.⁹³ A test case on behalf of one Takao Ozawa had already been filed in the Territory of Hawaii and denied by United States district and appellate courts. Ozawa's backing originally came from Japanese consuls in Honolulu in response to the California Alien Land Law of 1913.⁹⁴ First filed in 1916, the case moved slowly until in 1922 it finally reached the United States Supreme Court, which de-

⁸⁷California Statutes 1921, supra note 5 at lxxxvii-xc.

⁸⁸Ichihashi, *Japanese in the United States*, supra note 57 at 227.

⁸⁹McWilliams, *Prejudice*, supra note 69 at 60.

⁹⁰Dudley O. McGovney, "The Anti-Japanese Land Laws of California and Ten Other States," *California Law Review* 7 (35), 14.

⁹¹Daniels, *Politics of Prejudice*, supra note 26 at 145.

⁹²California Secretary of State, *Statement of Vote at General Election held in the State of California on November 2, 1920* (Sacramento, 1920), 35. The initiative carried in each of the state's fifty-eight counties by a sizable majority.

⁹³For a detailed history of eligibility for naturalization, see Milton R. Konvitz, *The Alien and the Asiatic in American Land Law* (Ithaca, N.Y., 1946), 79-80.

⁹⁴Ichioaka, *The Issei*, supra note 75 at 214.

cided that Ozawa was ineligible for naturalization, based on his race.⁹⁵

A direct assault on the constitutionality of the 1920 initiative Alien Land Law was similarly unsuccessful. The Supreme Court rejected a Los Angeles County Euro-American landowner's claim that the restrictions on the conduct of agricultural business violated the Fourteenth Amendment rights of citizens who might want to lease or sell their land to Japanese. W.L. Porterfield had sued Attorney General Webb, seeking a ruling that his employment arrangement with H. Mizuno was legal. Mizuno farmed eighty acres of Porterfield's land.⁹⁶ The Supreme Court also upheld the prohibition against ownership of even a single share of stock in a land corporation.⁹⁷

The initiative act was unclear about the legality of "cropping contracts," in which the farmer worked the land for a percentage of the crop. The farmer had no legal interest or responsibility for the land, as he would have had under a normal sharecropping lease. Many cropping contracts were entered after 1920 as a means for Japanese to stay in agriculture.⁹⁸ The legality of cropping contracts came up before the United States Supreme Court in 1923, which held them to be prohibited by the 1920 law.⁹⁹

The Supreme Court decision was by then moot, because a new alien land law had already been passed in 1923. The legislature retained all the provisions of the 1920 law, and added a prohibition against cropping contracts.¹⁰⁰ In 1927 the legislature again strengthened the Alien Land Law. By unanimous vote, it added the statutory presumption that if an ineligible alien paid for land and the title were conveyed to a citizen minor, a gift was not intended. In such a case, the title would automatically escheat to the state. Another section of the law shifted the burden of establishing proof of citizenship or eligibility for citizenship to the defendants in any Alien Land Law action.¹⁰¹ Still another section added a *prima facie* presumption that a defendant who was a member of a race ineligible for citi-

⁹⁵*Ozawa v. United States*, 260 U.S. 189 (1922).

⁹⁶*Porterfield v. Webb*, 263 U.S. 225 (1923).

⁹⁷*Frick and Satow v. Webb*, 263 U.S. 326 (1923).

⁹⁸Higgs, "Landless by Law," *supra* note 70 at 216.

⁹⁹*Webb v. O'Brien*, 263 U.S. 313 (1923). J.J. O'Brien owned much land in Santa Clara County, and apparently preferred to hire Japanese to work on his lands.

¹⁰⁰*California Statutes* 1921, *supra* note 5 at 1020-25.

¹⁰¹*California Statutes* 1927, *supra* note 5 at 880-81, sec. 9a. This section was declared unconstitutional by the United States Supreme Court. The case was *Morrison v. California*, 291 U.S. 82 (1934).

zenship was not a citizen until he or she proved otherwise.¹⁰² In other words, persons of Asian descent had to prove their United States citizenship in court if they were the defendants in any Alien Land Law proceedings.

The legislature added the statutory presumption because Japanese farmers had won a case against the Alien Land Law. The California Supreme Court struck the provision of the 1920 initiative act requiring the guardians of landowning nisei to be United States citizens. Hayao Yano had given his Butte County land to his four-year-old daughter, Tetsubumi, a citizen, and had then established guardianship. A trial court declared his action illegal. The California Supreme Court reversed the lower court on the equal-protection grounds of the Fourteenth Amendment, because incompetence was the only basis in state law to deny guardianship to a parent, and because citizen Tetsubumi Yano could not be denied the right to receive gifts or own land.¹⁰³

Escheat actions were civil proceedings concerning eligibility to hold title to real property. The 1920 Alien Land Law added criminal penalties where none had existed under the 1913 law. Section 10 of the initiative law established a maximum sentence of a five-thousand-dollar fine and a two-year prison term for conspirators in violation of that law. District attorneys in several counties brought criminal charges against Asian-Americans and Euro-Americans who tried to get around the 1920 Alien Land Law. The most significant of these cases occurred in Sonoma County. A tenant farmer near Petaluma, S. Ikada, offered to buy a thirty-one-acre farm from its owners, Bartolomeu and Mary Souza. The Souzas declined, since selling to Ikada would be in violation of the Alien Land Law. However, they must have been interested in selling, because their attorney, W. A. Cockrill, found a solution for them.¹⁰⁴

Cockrill proposed to hold the title in trust for the Ikada family, and the land was sold on that basis on August 26, 1921, for a price of \$2,250. Ikada's wife and children lived on the farm with him; four of the children were American-born. It is unclear why the title was not put in their names. When questioned, the Souzas adamantly maintained that they had been told by Cockrill and Ikada that this would be a sale to the chil-

¹⁰²*California Statutes 1927*, supra note 5 at 880-81, sec. 9b. The constitutionality of this section was also upheld.

¹⁰³*People v. Estate of Yano*, 188 Cal. 645 (1922).

¹⁰⁴*People v. Cockrill, et al.*, 62 Cal. App. 23 (1923) [hereafter cited as *People v. Cockrill*].

dren.¹⁰⁵ The *Yano* decision had not yet been handed down when Ikada bought the land.

The Sonoma County grand jury indicted Cockrill and Ikada on conspiracy charges. Ikada was jailed, and the California Supreme Court denied his petition for a writ of habeas corpus, in which he claimed that Section 10 was invalid.¹⁰⁶ Cockrill and Ikada were convicted of the felony conspiracy charges, even though they maintained all along that their intent was to put title in the nisei children's names. They lost their appeal to the Third District Court of Appeals.¹⁰⁷ The California Supreme Court refused to hear the case, from which they appealed to the United States Supreme Court. The case was heard in Washington in May 1925. The federal justices denied that prohibition of the transaction was unconstitutional because of the 1911 Treaty of Commerce and Navigation. They also held that denial of land ownership to aliens by states of the Union was a reasonable exercise of sovereignty, and that the Fourteenth Amendment did "not require absolute uniformity of treatment."¹⁰⁸ Apparently Ikada either sold the land or transferred title to his nisei children while the criminal case was continuing, because the attorney general's biennial reports contain no record of an escheat action against him.

A GROWING CAUSE FOR ALARM

Enforcement of the new Alien Land Law may have been spotty, but it was certainly no paper tiger. Enough escheat actions and conspiracy charges were brought to make people wary, and some Euro-Americans attempted to use the law to prevent activities that were clearly allowed under the 1911 treaty.

J.W. Johnson of Sutter County leased some farmland to a Japanese tenant, I. Murayama. In January 1917 he executed two separate three-year lease agreements for the property. The first was to Murayama and ran until 1920. The second started immediately upon expiration of the first, and ran until 1923. The named lessee in the second agreement was another issei, C. Suwa, but he was only a cover for Murayama. Johnson seems

¹⁰⁵*Ibid.* at 25.

¹⁰⁶*In Re Y. Akado*, 188 Cal. 739 (1922). Ikada was also known as Y. Akado and also as Y. Akada. Misspellings of Japanese names were common throughout these early court cases, and the name used when the conspiracy case went to the United States Supreme Court is used here.

¹⁰⁷*People v. Cockrill*, *supra* note 104.

¹⁰⁸*Cockrill v. California*, 268 U.S. 258 (1925).

to have fallen out with Murayama, as he refused to deliver the second lease to Suwa, claiming that to do so would be to violate the Alien Land Law. Suwa sued Johnson, demanding delivery of the lease, and won.

Johnson appealed, but the Third District Court of Appeals upheld Superior Court Judge K.S. Mahon. The appellate court decision added a key ruling: only the state could undertake an escheat proceeding or enforce the Alien Land Law. The constitutionality of this particular ruling was never tested before the California Supreme Court, and the Third District decision was accepted throughout the state.¹⁰⁹

A single Alien Land Law escheat action was filed in San Bernardino County before the Second World War. The defendant was an immigrant from India, which, as a British dominion, had its own domestic government but did not conduct foreign relations. The case file contains no evidence to show that British diplomatic officials took action to assist Indr Singh, who purchased some land in the Claremont Orange Tract on June 4, 1917.

Nine years later, on May 26, 1926, District Attorney George Johnson filed a complaint to declare an escheat of Singh's property. Johnson based his cause of action on the absence of a treaty with the United Kingdom allowing Asian Indians to acquire United States land.

Singh demurred, claiming that the facts as stated did not support an escheat. Judge Charles L. Allison sustained the demurrer on October 26, and denied Johnson leave to amend his complaint. The district attorney insisted on his complaint as written, but Allison stood his ground on the demurrer. Johnson appealed to the California Supreme Court, and on April 16, 1927, the justices not only reversed Allison on the demurrer, but declared an escheat of Singh's property then and there. They also awarded costs to the state, so that Singh, who lost his land, was handed a bill for the cost of having it taken from him. On the day the Supreme Court handed down its decision, Attorney General Webb filed a stipulation that the escheat action would be dismissed if Singh sold the land to an eligible owner, which he did three days later.¹¹⁰

On the complaint filed against Singh, Webb's signature appears beside that of Johnson. Because of the *Suwa* decision, the state of California needed to join the *Singh* case in order for it

¹⁰⁹*C. Suwa v. J.W. Johnson*, 54 Cal. App. 119 (1921). In August 1933 the California Supreme Court reaffirmed in another case that only the state could bring an escheat action. *Hart v. Nagasawa*, 218 Cal. 685 (1933), dealt with a share interest in property that was purchased in 1900.

¹¹⁰*People v. Indr Singh*, San Bernardino County Super. Ct. Case 24564.

to go forward. In 1914 Webb had stated that he believed that high-caste Hindus were Caucasians and therefore eligible for naturalization.¹¹¹ He later found that he was wrong in that belief. The United States District Court in Oregon granted a certificate of naturalization to Mr. Bhagat Singh Thind, over the objections of the naturalization examiner. The United States Attorney appealed. The Ninth Circuit Court of Appeals sent a certificate to the United States Supreme Court, requesting a ruling on whether a high-caste Hindu of Asian Indian blood and birth were a "white person" under immigration law. The Supreme Court's opinion was in the negative, because the framers of the 1790 law were common folk who used the term "white person" in a common, unscientific manner.¹¹² The *Thind* decision was handed down in February 1923, after which Webb and the anti-Asian groups had yet another group of targets. Webb soon received a complaint from an American Legion post in Gridley, alleging that Hindus were violating the Alien Land Law in Butte County. Webb asked District Attorney William E. Roth to investigate the matter and report the facts to him, but Roth appears not to have replied to Webb's letter.¹¹³

Other district attorneys, including Franklin Swart of San Mateo County, were also less than cooperative. Andrew J. Clunie, a lawyer with a private practice in Menlo Park, complained to Deputy Attorney General Frank M. English that one of his neighbors was entering into cropping contracts with Japanese tenants. Clunie asked English to take action, since his complaints to Swart had been to no avail. English requested that Swart investigate the matter and furnish him with the information so that he could answer Clunie.¹¹⁴

Swart replied that Clunie had become an annoyance as he grew older, and that the real issue was Clunie's ongoing water-rights litigation with the neighbor in question, one Eli Enten. Swart said that he had looked into the matter briefly after the initial complaint, but that he was satisfied that Enten and all the other surrounding owners were complying with the law. He went on to add that if Clunie would give him the required evidence, he would initiate an escheat action and contact the state. As it was, the workload in San Mateo County was grow-

¹¹¹Webb to Richard Belcher, a lawyer in Marysville, September 22, 1914. California State Archives, B1419/1265.

¹¹²*United States v. Bhagat Singh Thind*, 261 U.S. 206 (1923).

¹¹³Webb to Roth, July 15, 1924. California State Archives, B1419/1290. Asian Indian immigrants were commonly labeled "Hindus" without regard to their actual religion. A large number of them in the Pacific Coast region were Sikhs, a minority group whose cultural center is Amritsar, in the Punjab. See Takaki, *Strangers From a Different Shore*, supra note 73.

¹¹⁴English to Swart, March 6, 1924. California State Archives, B1419/1293.

ing heavier by the day, and the district attorney did not have time to bother with such matters.¹¹⁵

California's attorney general was unequipped to investigate Alien Land Law violations. American Legion Post 189 of Delhi, in Merced County, wrote Webb requesting state assistance to investigate and put an end to a growing Japanese presence in the area.¹¹⁶ Webb immediately requested the same of the county's district attorney, C.H. McCray. McCray replied that he would make inquiries, but apparently never followed up with a letter to the attorney general.¹¹⁷ Replying to the distressed legionnaires, Webb stated that his office had no investigators for Alien Land Law matters. He also lacked the funds to hire any investigators, and responsibility to enforce the law therefore lay with each county's district attorney and grand jury.¹¹⁸

Webb himself was anxious to enforce the Alien Land Law, but lacked the resources to do so alone. A county had nothing tangible to gain from doing the legwork so that the state could then co-sign the complaint and take title to the victim's land. Webb was forced to rely upon the willingness of each district attorney to devote time and resources to his crusade of persecution, and the results thus varied from one county to the next. He tried to bring the uncooperative district attorneys into line, summoning all of them to a conference and giving public notice that the Alien Land Law would be rigidly enforced after the next harvest.¹¹⁹ In the cover letter of his 1925 biennial report to the governor, he stated that "the earnest, intelligent and persistent enforcement of this law [by the district attorneys] is assured."¹²⁰ The fact that Webb felt compelled to comment at all on the issue indicates that their unanimous cooperation was anything but assured.

The *nikkei* farmers did not know what to expect. One of them wrote anonymously to Webb himself, asking the attorney general whether he meant business, or whether the Alien Land Law was a hollow showpiece. Would it be enforced in Los

¹¹⁵Swart to English, March 8, 1924. California State Archives, B1419/1293.

¹¹⁶Paul Dougherty to Webb, March 21, 1923. California State Archives, B1419/1290.

¹¹⁷McCray to Webb, March 27, 1923. California State Archives, B1419/1290. No additional letter from McCray is in the file.

¹¹⁸Webb to Dougherty, March 24, 1923. California State Archives, B1419/1290.

¹¹⁹Valentine S. McClatchy, "California's Threatened Hegira of Japanese: Results Following Alien Land Law Enforcement," reprint from *The Overland Monthly* (March 1924), in *Japanese Pamphlets*, vol. 3, California State Library.

¹²⁰Webb to Governor William Richardson, February 1, 1925, in *Biennial Report of the Attorney General of the State of California, 1922-1924* (Sacramento, 1925), 6.

Angeles County? The farmer asked Webb to publish his answer in the newspaper, and to do it soon, so that he would know in time whether to lease some more land and plant another crop.¹²¹

Cases also arose in which individual Californians attempted to use the Alien Land Law for their own gain by cheating the *nikkei*. In 1923 A.F. Schmuck agreed to sell some property in Los Angeles to the Takeuchi family, with the deed to be in the name of the nisei daughter, Haruko. The sale price was \$14,350, and the Takeuchis agreed to make a down payment of four thousand dollars. After taking a deposit of five hundred dollars and \$105 in prepaid property taxes, Schmuck backed out of the deal without refunding the money. Takeuchi sued to get back the money, and the case dragged on for six years.

Los Angeles attorney J. Marion Wright represented the Takeuchis and took the case all the way to the California Supreme Court.¹²² The justices ruled that Takeuchi and Schmuck were co-conspirators in a plan to violate the Alien Land Law. They took no notice of the intent for Haruko Takeuchi to hold title, so the 1922 decision in favor of Tetsu-bumi Yano was of no help to the Takeuchis. The court held that, as co-conspirators, neither Takeuchi nor Schmuck had any legal remedy against the other. The court decision noted that Schmuck was not bound legally to return the \$605, but added that for him to keep it was patently unfair and that a member of the white race should know better.¹²³

In June 1920 T. Saiki bought a house in Los Angeles from Luke Hammock. The Saiki family moved into the house. For an unrecorded reason, Hammock had a change of heart. He tried to refund the Saikis' money and back out of the deal, but they refused. The title was to be in the name of a nisei son, Mori Saiki, but Hammock refused to give them the deed to the property. The Saikis, also represented by Wright, sued Hammock, and in November 1925 Los Angeles Superior Court Judge Albert L. Stephens ordered Hammock to grant the deed. Hammock appealed, but the California Supreme Court unani-

¹²¹Anonymous undated letter to Webb, received February 5, 1924. California State Archives, B1419/1293. The letter was typed on blue construction paper, and closed with the typed inscription "A poor farmer with worry."

¹²²Jacob Marion Wright was a lifelong resident of Los Angeles who graduated from the University of Southern California law school and was admitted to the bar in July 1912. State Bar Association of California Membership Records, and *Los Angeles Times*, July 10, 1970. See also Janice Marion Wright La Moree, "J. Marion Wright: Los Angeles' Patient Crusader 1890-1970," *Southern California Quarterly* 62 (Spring 1990), 41-64 [hereafter cited as La Moree, "J. Marion Wright"].

¹²³*Haruko Takeuchi v. A.F. Schmuck*, 206 Cal. 783 (1929).



California's alien land laws were aimed at driving Japanese immigrants out of the state's agriculture. (Shikuma Collection, Courtesy of the Japanese American National Museum)

mously upheld Stephens, and the Saikis finally got a deed some nine years after buying and occupying their house.

In their published opinion, the Supreme Court justices ruled that the issei father, T. Saiki, was precluded from owning residential property.¹²⁴ How the justices justified that opinion's seeming conflict with the 1911 Treaty of Commerce and Navigation is not recorded. Since the name of the Saikis' citizen son, Mori, was on the deed, the point was moot to the case at hand.

Attorney General Webb also used the Alien Land Law in attempts to close off commercial opportunities to the *nikkei* in non-agricultural endeavors. Ramon D. Sepulveda owned a half-acre property in Los Angeles County named Fish Camp. In September 1918 he leased Fish Camp to Tojuero Togami, who intended to operate a health resort and sanitarium there. District Attorney Asa Keyes and Webb filed an escheat action against Sepulveda and Togami, complaining that the lease was a violation of the Alien Land Law.

Wright joined Sepulveda's attorneys for the defense. They demurred, arguing that the 1911 Treaty of Commerce and Navigation allowed Togami to engage in commercial pursuits. Superior Court Judge Leslie R. Hewitt sustained the demurrer,

¹²⁴*Mori Saiki v. Luke Hammock*, 207 Cal. 90 (1929), 92.

from which Webb and Keyes appealed. The California Supreme Court unanimously upheld the judge.¹²⁵

Webb was not the only elected state official trying to restrain attempts by the *nikkei* to expand their activities. Secretary of State Frank C. Jordan refused to file articles of incorporation for a medical group to build and run a hospital in Los Angeles. Dr. K. Tashiro requested incorporation of the Japanese Hospital of Los Angeles. He retained Wright, who applied in court for a writ of mandate, ordering Jordan to incorporate the hospital. As secretary of state, Jordan was represented by Attorney General Webb. They claimed that acquisition of land for a hospital was a violation of the Alien Land Law, and that the refusal to allow the incorporation was therefore justified. In May 1927 the California Supreme Court published its unanimous decision ordering Jordan to incorporate the hospital.¹²⁶ Undaunted, the state appealed to the United States Supreme Court, which ruled in favor of Tashiro.¹²⁷ Located at First and Fickett Streets, the Japanese Hospital opened on December 1, 1929.¹²⁸

Escheat actions were strictly civil procedures, and no prison terms or criminal fines could therefore result from pre-1920 cases such as *Gin Fook Bin* or *Indr Singh*. During the 1920s, however, some district attorneys began to file criminal counts charging felony conspiracy to violate the Alien Land Law.

One of the first such cases arose in Sutter County, where K. Osaki, an issei, farmed several parcels of land, although Hawaiian-born K. Yoshioka's name appeared on the rental agreements. The landowner, apparently a Euro-American, was never charged as a co-conspirator, even though under cross-examination he admitted to knowing that Osaki was a Japanese alien. Osaki's attorneys argued that the prima facie presumption of alienage based on his Japanese race was unconstitutional. Their efforts were to no avail. In March 1930 the California Supreme Court upheld Osaki's conviction and affirmed that Section 9b of the Alien Land Law was indeed constitutional.¹²⁹ Osaki appealed to the United States Supreme Court, which upheld the state court's decision.¹³⁰ The landowner remained unscathed.

¹²⁵*State of California v. Tojuero Togami, et al.*, 195 Cal. 522 (1925).

¹²⁶*K. Tashiro, M.D., et al., v. Frank C. Jordan, Secretary of State, et al.*, 201 Cal. 236 (1927).

¹²⁷*Jordan v. Tashiro*, 278 U.S. 123 (1927).

¹²⁸La Moree, "J. Marion Wright," supra note 122 at 52, 53, and 63 n.11. Wright was the only non-Japanese invited to the ceremony.

¹²⁹*People v. Osaki*, 209 Cal. 169 (1930).

¹³⁰The Supreme Court did not publish an opinion in the *Osaki* case. The court mentioned its earlier action on page 89 of *Morrison v. California*, 291 U.S. 82 (1934).

George Morrison of San Diego County was not so lucky. Morrison was charged with conspiracy in two separate cases, in each of which the *nikkei* farm operator was a co-defendant. Morrison, H. Doi, and H. Ozaki were convicted by Superior Court Judge A.C. Finney of all the charges brought against them. Their attorney, J. Marion Wright, appealed both cases.

Wright challenged the convictions in the case involving Ozaki with another claim that the prima facie presumption of Section 9b was unconstitutional. The Fourth District Court of Appeal upheld the conviction,¹³¹ and the California Supreme Court upheld the appeal. Wright then appealed to the United States Supreme Court, which granted certiorari on February 11, 1933. Nine days later, the Supreme Court dismissed the appeal for want of a substantial federal question.¹³² In other words, Section 9b had been ruled de facto as being constitutional.

Wright's appeal in the case involving Doi attacked Section 9a, which placed the burden of proof of defendant citizenship upon *all* defendants. The Fourth District Court of Appeals and the California Supreme Court upheld the convictions and Section 9a.¹³³ This case, too, was appealed to the United States Supreme Court. In January 1934 the federal justices reversed the convictions of Morrison and Doi. The Court Opinion stated that in the case of Morrison, the statutory presumption that he knew that Doi was an ineligible alien was purely arbitrary. The Court declared Section 9a to be unconstitutional, but took care to reiterate that Section 9b still stood.¹³⁴ The threat of conviction to Euro-American landowners was eliminated. The threat to the *nikkei* remained.

They took the threat seriously. A Sacramento case highlighted their fear of criminal prosecution. On February 17, 1930, Taro Shiba sold some property to James Y. Chikuda, for four thousand dollars. During the following May, Shiba discovered that an issei, Genkichi Akahoshi, was actually occupying the premises, and suspected that Chikuda's ownership was a cover for Akahoshi to evade the Alien Land Law.¹³⁵

Shiba sued Chikuda, asking for rescission of the sale because it was illegal under the Alien Land Law. Superior Court Judge Malcolm Glenn found for Chikuda, and the California Supreme Court affirmed his judgment. The court noted that at the time of purchase Shiba was unaware of the circumstances, and that

¹³¹*People v. Morrison*, 125 Cal. App. 282 (1932).

¹³²*Morrison v. California*, 288 U.S. 591 (1932), per curiam decision no. 662.

¹³³*People v. Morrison*, 218 Cal. 287 (1933).

¹³⁴*Morrison v. California*, 291 U.S. 82 (1934).

¹³⁵*Shiba v. Chikuda*, 214 Cal. 786 (1932).

he had been fairly paid for the land. The justices reaffirmed that title eligibility issues relating to the Alien Land Law were the exclusive concern of the state of California, and only its attorney general could bring an escheat action against Chikuda.¹³⁶ Attorney General Webb's biennial reports from 1930 through 1938 contain no record of an escheat action against the Chikuda property.

Some people actually spent some time in jail after being charged with conspiracy to violate the Alien Land Law. One such story unfolded in San Diego County. In July 1926 Pierre Delpy sold eighty acres of farmland, near Vista, to Shoichi Nakamura, a United States citizen. Nakamura's name was on the deed, but he received the purchase money from five issei, who were members of four separate families. These five settled with their respective families on various parts of the property. The events of the next eleven years must certainly have caused Nakamura to regret ever having become involved with this land.

In November 1928 all six *nikkei* were charged with conspiracy, jailed, and then released on bail. They were later acquitted of all the criminal charges.¹³⁷ The state also filed an action to escheat title to the eighty acres of land.¹³⁸

The state's argument centered on the payment of the money by the five issei. Judge Charles C. Haines denied the escheat, but the state appealed. On August 5, 1932, the Fourth District Court of Appeals reversed Haines. Instead of adjudging an escheat, as had been done in the earlier *Singh* case, the appellate justices remanded the case back to the lower court for a new trial.¹³⁹

The new trial never took place. In 1931 Nakamura had given Delpy, the original owner, a promissory note for the balance due on the land, and in 1934 he conveyed twenty acres to each family's citizen children. In 1935 Nakamura defaulted on his note to Delpy. The latter regained title to the land, and then filed an unlawful detainer action to evict the four families. Superior Court Judge Arthur L. Mundo found for the families, whose defense included a claim that the whole arrangement was necessary to circumvent the Alien Land Law. Pierre Delpy's heir, Emile, won on appeal to the Fourth District.¹⁴⁰

¹³⁶*Ibid.* Note that the opinion in this California Supreme Court case was handed down two years before the United States Supreme Court struck down sec. 9a in *Morrison v. California*.

¹³⁷*People v. Nakamura, et al.*, San Diego County Super. Ct. 52820.

¹³⁸*People v. Nakamura, et al.*, San Diego County Super. Ct. 58439.

¹³⁹*People v. Nakamura, et al.*, 125 Cal. App. 269 (1932).

¹⁴⁰*Delpy v. Ono, et al.*, 22 Cal. App. 2d 301 (1937).

The appellate decision came down at the same time the *nikkei* lost a suit in superior court for quiet titles in the children's names. The Delpy family thus retained ownership of the land.¹⁴¹

The figures given by scholars of Japanese immigration differ, but the trends from year to year are important, and all sources show a reduced acreage of California farmland under Japanese ownership.¹⁴² Robert Higgs points out that a majority of Japanese employed in California were in farming as late as 1940. This is consistent with Ichioka's 1918 statistic showing 58 percent of the state's Japanese population as being engaged in agriculture. In 1920 one of every 6.4 Japanese was a farm operator, but by 1940 the ratio had risen to one of every 5.4. Over those twenty years, the number of adult Japanese aliens declined from thirty-two thousand to twenty-one thousand, because of mortality and exclusion by the 1924 Immigration Act.¹⁴³ Over the same period the number of other alien farmers in the state declined from approximately five thousand to thirty-nine hundred, a much lower attrition rate than that of the overall Japanese population of California. None of these authors discusses migration to other places within the United States or back to Japan, which would have resulted from the destruction of the economic foundation of Japanese immigrant society. The statistics clearly show that the *nikkei* were not driven from farming in California.

The California attorney general's failure to enforce the Alien Land Law before World War Two was later explained as "a reflection of the National [*sic*] policy to refrain from acts which might be regarded as unfriendly to the Japanese race and the Japanese empire."¹⁴⁴ Concern over foreign relations with Japan may have helped the *nikkei*, but some other people had no such shield to protect them.

A large number of Asian Indian farmers from the Punjab region had settled in Imperial County. Like Indr Singh in San Bernardino County, their interests came under attack after the 1923 *Thind* decision. The Punjabis resorted to the same circumventions as did the *nikkei*, and added another. Many married Mexican women, and then took land title in their wives' names. An anthropologist concludes that the Punjabis were

¹⁴¹T. Miyada, *et al.*, v. Shoichi Nakamura, San Diego County Super. Ct. 88707.

¹⁴²See Ichioka, *The Issei*, *supra* note 75 at 234; Masakazu Iwata, "The Japanese Immigrant in California Agriculture," *Agricultural History* 36 (January 1962), 31.

¹⁴³Higgs, "Landless by Law," *supra* note 70 at 221-23.

¹⁴⁴*Proceedings, California Land Title Association* (38th Annual Conference, 1944), 97, cited in *Oyama v. California*, 332 U.S. 633, 662 n.17.

more successful than the *nikkei* in circumventing the Alien Land Law. The Punjabis had no consular support and were too few in number to establish the type of closed community that was typical of the *nikkei*. Karen Leonard attributes their success in part to a cultural tendency toward litigiousness that they brought with them from British India, in part to their Mexican wives, and in part to their better credit standing with local banks stemming from more extensive community contacts. Leonard also notes, however, that a number of Punjabis turned to non-agricultural livelihoods because of the Alien Land Law.¹⁴⁵

The last prewar Alien Land Law escheat case was filed against Chuey Suey Wah Quin, a Chinese woman who lived in San Diego. In 1911 she had married Thomas A. Quin, a native United States citizen, in Canton, China. As a citizen's wife, Chuey Suey Wah Quin was excepted from the provisions of the Chinese Exclusion Act. On March 31, 1931, she bought several pieces of municipal and mining property from her husband.¹⁴⁶

In August 1933, California's attorney general and San Diego County's district attorney filed a suit claiming that all the Quinn property had escheated to the state as of the moment of transfer. Quin's reply denied that any Alien Land Law violation had occurred. In October 1933, the Quins quickly transferred title to their daughter, Helen Kong, a college student in Los Angeles. Indr Singh had been allowed to transfer his title to an eligible holder, but Webb tried to deny that option to Chuey Suey Wah Quin, claiming it was too late for that once the escheat action had been filed. On March 19, 1935, Judge C.N. Anderson denied the escheat and decided that Helen Kong was the lawful owner.¹⁴⁷ Because of an error in the property description, the case was retried on November 7, 1935. With the state's stipulation, Anderson also found that Chuey Suey Wah Quin had been the lawful owner before Helen Kong. This obviously had to be so if the transfer to Kong was valid, but it is nonetheless interesting to find a document from the state's attorney general agreeing that an alien ineligible for citizenship could hold title to real property without a treaty to back her up.

No additional changes were made to California's Alien Land Law until the United States had entered the Second World War.

¹⁴⁵Karen Leonard, "Punjabi Farmers and California's Alien Land Law," *Agricultural History* 59 (October 1985), 549-62.

¹⁴⁶*People v. Chuey Suey Wah Quin, et al.*, San Diego County Super. Ct. 75327 (1933) [hereafter cited as *People v. Chuey Suey Wah Quin*]. The municipal land was in the downtown area, and the mining claims were in the vicinity of Lake Henshaw. The reason for the sale is not evident from the case file, but the couple were apparently still married.

¹⁴⁷*Ibid.*

A proposal in 1935 to prohibit all Japanese participation in California's agriculture was stifled in the legislature, as was an attempt in 1937 to outlaw gifts of land to citizen *nisei* children.¹⁴⁸

THE WAR INCREASES RACIST FERVOR

The state government renewed and intensified its anti-*nikkei* activity following the attack on Pearl Harbor. On February 2, 1942, Attorney General Earl Warren chaired a conference of district attorneys and sheriffs that considered the alien "threat" in California. Claiming that there were "innumerable" violations, Warren declared that by enforcing the Alien Land Law, California could assist the federal government's anti-sabotage program. The conference passed a resolution asking that alien Japanese be evacuated from the state's coastal areas. Warren forwarded the resolution to the United States attorney general, Francis Biddle.¹⁴⁹ Soon afterward, President Franklin D. Roosevelt ordered West Coast people of Japanese descent into concentration camps, and Warren initiated twenty escheat cases against land titles held by Japanese aliens and Japanese-American citizens.¹⁵⁰

Reminiscent of the 1907-1913 sessions, the 1943 legislature took up a host of anti-Japanese bills, many of which singled out the Japanese by name, instead of using the earlier euphemisms. One bill clarified procedures for state disposal of escheated property. Another required California's courts to decide on the compensation paid to alien guardians by their citizen children, and provided for injunctions against violators (alien or citizen), barring them from all agricultural pursuits.¹⁵¹

Other officials joined the clamor. On March 18, 1943, the California County Supervisors Association passed a resolution calling for strengthening the Alien Land Law. The supervisors also recommended that Japanese language schools be prohibited in the state, and that American-born *nikkei* be stripped of their United States citizenship.¹⁵²

Protesting Japanese aggression on the Asian mainland, the United States abrogated the 1911 Treaty of Commerce and

¹⁴⁸Pajus, *Real Japanese America*, supra note 52 at 166.

¹⁴⁹*Los Angeles Times*, February 3, 1942. See also G. Edward White, *Earl Warren: A Public Life* (Oxford, 1982), 70 n.99.

¹⁵⁰Chuman, *Bamboo People*, supra note 2 at 201.

¹⁵¹*California Statutes 1943*, supra note 5 at 2917, 2999.

¹⁵²California County Supervisors Association, Resolution dated March 5, 1943, California State Archives.

Navigation, which had obliged the United States to allow Japanese aliens to purchase residential and commercial land. On July 26, 1939, the United States Senate voted unanimously for abrogation and gave Japan the required notice that the treaty would expire six months later.¹⁵³

As with most Alien Land Law issues after 1920, the question of Japanese ownership or leasing of land in California was decided in the courts. A corporation owned by Japanese resident aliens had leased a theater in Stockton since 1930, and exercised its option for an additional ten-year leasehold in 1940. Just as large numbers of internees were being released from the relocation camps in October 1944, Emil Palermo, the original owner's successor, brought legal action to terminate the lease. Palermo argued that abrogation of the 1911 Treaty of Commerce and Navigation made it illegal for the alien-owned corporation to lease the theater. Judge M.G. Woodward of the San Joaquin County Superior Court agreed with him, and also granted him an unlawful detainer against the company. The Third District Court of Appeals reversed Woodward, pointing out that the Alien Land Law allowed ineligible aliens to acquire property in accordance with any "treaty now existing" between the United States and the country of the alien's citizenship. The court interpreted the phrase "now existing" to mean at the time the act became law. The appellate decision was handed down in September 1946, and upheld by the California Supreme Court in 1948.¹⁵⁴ In 1947, however, the question was still active in some people's minds, such as when Assemblyman Albert C. Wollenberg requested an executive opinion on the matter. The attorney general responded by citing the *Palermo* case.¹⁵⁵

Both the 1913 and 1920 Alien Land Laws contained the phrase "treaty now existing" concerning the right of ineligible aliens to acquire property, and the meaning is quite clear to any reader. Obviously, some attorneys and their clients tried to use the legal system to profit from the rampant prejudice against the *nikkei*.

As the Japanese were being released from the camps in 1945, California continued to enforce the Alien Land Law. By that time, Earl Warren was governor. S.B.139 placed the burden of proof in escheat cases squarely on the defendant, and also provided that one-half of the proceeds from the sale of escheated

¹⁵³Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932-1945* (Oxford, 1979), 195.

¹⁵⁴*Palermo v. Stockton Theatres*, 32 Cal. 2d 53 (1948), 172 P.2d 103 (1946).

¹⁵⁵Warren L. Hanna, ed., *Opinions of the Attorney General of California*, vol. 10 (San Francisco, 1948).

property would go to the county in which the land lay. Another bill, S.B.415, reaffirmed that no statute of limitations applied to any escheat proceeding. Most importantly, two hundred thousand dollars was appropriated for the state's attorney general, Robert M. Kenny, to enforce the Alien Land Law.¹⁵⁶

Eighty escheat cases were ultimately filed, resulting in the outright escheat of several pieces of real property. A number of other cases were settled by the defendants' paying civil fines in order to quiet the title to the land. Between the two types of cases, the state recovered \$475,595.¹⁵⁷ In essence, this last procedure amounted to buying land from the state that the buyer already owned. A less charitable term would be extortion.

Payment of the fines began with one of the earliest wartime escheat cases. On June 15, 1942, shortly after the *nikkei* internment began, Attorney General Warren filed an escheat action against the Winafred Orchards in Sacramento. This concern was owned in part by Lafayette J. Smallpage, the attorney for the Ishida family, who owned the remainder of the interest. After an "independent appraisal," Smallpage bought the Ishidas' interest for \$16,500, and on June 25, 1942, paid the state twenty-five thousand dollars to settle the escheat action.¹⁵⁸

In his biennial report covering 1943 and 1944, Attorney General Kenny informed the legislature that he had recovered one hundred thousand dollars from the State Farming Company of

¹⁵⁶*California Statutes 1945*, supra note 5 at 2164, 2177, 2739.

¹⁵⁷California Department of Justice, *Biennial Report of Department of Justice, 1946-1948* (Sacramento, 1949), 64. Different sources have published disparate statistics on Alien Land Law escheats. Bill Hosokawa wrote that seven pieces of property were escheated outright, valued at \$57,064, and that twelve other titles were quieted through payment of \$213,915 in civil fines. See *idem*, *Nisei: The Quiet Americans* (New York, 1969), 447-48 [hereafter cited as Hosokawa, *Nisei: The Quiet Americans*]. Hosokawa later wrote that some two hundred escheat suits were filed between 1944 and 1948. Robert A. Wilson and Bill Hosokawa, *East to America: A History of the Japanese in the United States* (New York, 1980), 257. Frank Chuman's 1976 work gives still different figures, quoting from *Oyama v. California*, 332 U.S. 633 at 661, which cited data compiled from California attorney general biennial reports from 1916 to 1946. Chuman, apparently relying on the published case of *People v. Ikeda*, 177 P.2d 948 (1947), states that some Monterey County farmland belonging to Yeizo Ikeda was escheated. The report does not reflect that the First District Court of Appeals granted a rehearing and then reversed the escheat on March 1, 1948. See Chuman, *Bamboo People*, supra note 2 at 201-02.

¹⁵⁸*Smallpage v. Winafred Orchards*, 154 Cal. App. 2d 676 (1957). Some years later, Smallpage sold the whole concern for \$82,000. The Ishidas apparently felt that Smallpage had taken unfair advantage of them, because they sued him, trying to get some of the \$25,000 that the state paid him under a 1953 law providing for remuneration of Alien Land Law escheat defendants. The Ishidas lost, in large part because the court found that they had been paid fair market value for their interest in Winafred Orchards.

Fresno. This was "an unusual case in which indisputable evidence was made available, and the facts were not contested."¹⁵⁹ Although not specifically stated in the report, the roundness of the dollar figure suggests that the case ended with a settlement to pay civil fines in return for quiet title, and not a fraction based on an exact property-value assessment.

Fumiko Mitsuuchi of Los Angeles did the same thing to keep her seventy-one-acre ranch at Sawtelle and National boulevards. She had originally purchased it in 1938 at a foreclosure sale for \$88,562.50. Reacting to a tip from an outbid prospective buyer, the title company investigated the possibility that Mitsuuchi's purchase was a subterfuge to evade the Alien Land Law. After it was satisfied, the title company completed the escrow. While Mitsuuchi was interned in a camp, the state of California brought an escheat action against her property. At the trial, Mitsuuchi offered seventy-five thousand dollars to the state in return for quiet title. By 1946 the property was worth several times what she had paid for it; thus it was well worth the money to protect her land from being taken away by the state.¹⁶⁰

The legislature's offer of half the proceedings from Alien Land Law escheat actions had the desired effect on some county governments. They now had an incentive to help the state attorney general attack *nikkei* landholdings. Earl Redwine, the Riverside County counsel, was not content with trying to take Joe A. Kitagawa's land. On April 24, 1946, Redwine petitioned for an escheat and for all the "substantial" sums of money that had accrued over the years.

Kitagawa, an issei, had bought 37.68 acres of farmland on October 9, 1923, with title in the names of his citizen son and daughter, Yeiji and Kikuye. He bought another 17.63 acres on August 11, 1930, deeding that land to his younger son,

¹⁵⁹California Department of Justice, *Biennial Report of the Attorney General, 1943-1945*, California State Library, Sacramento, 28.

¹⁶⁰*Mitsuuchi v. Security-First National Bank*, 103 Cal. App. 2d 214 (1951). The court opinion recapitulated the history of Mitsuuchi's involvement with the property. This particular case was not the escheat action. The bank held her mortgage, and had been a co-defendant in the escheat case. By the terms of the mortgage, Mitsuuchi was liable to the bank for the bank's legal costs in the title defense. Represented by J. Marion Wright, she sued the bank to make it pay its own legal costs, but lost. Here again arises a discrepancy between sources. The published court opinion records judicial notice that the value of the land had increased severalfold since the original purchase, so evidence must have been introduced on that point. Hosokawa stated that civil fines in escheat cases were settled at one-half the assessed value of the property [*Nisei: The Quiet Americans*, supra note 157 at 447-48], but that is obviously not true in the *Mitsuuchi* case.

Yeichi.¹⁶¹ Kitagawa was meticulous about filing the annual Alien Land Law reports required for each of the properties. These show a cumulative "issues and profits" of \$128,870 over the twelve-year period preceding 1942.¹⁶²

Kitagawa hired J. Marion Wright, the Los Angeles lawyer who had represented many *nikkei* interests before the war. Wright demurred on the grounds that the Alien Land Law said nothing about escheatment of funds, and also claimed that the law unconstitutionally deprived Americans of Japanese descent of their property without due process of law. The judge sustained Wright's demurrer, but gave Redwine leave to amend his complaint. In February 1947, the county counsel petitioned for an escheat of the property only, but Wright again demurred on the earlier constitutional grounds. The judge did not rule on this demurrer, and action on the *Kitagawa* case stopped, awaiting the outcome of a test case in which *nikkei* interests were represented by the American Civil Liberties Union.¹⁶³

The November 1946 ballot contained an initiative, Proposition 15, to establish the validity of the legislature's various amendments to the 1920 Alien Land Law. Since that initiative contained no specific provision for the legislature to amend the act, amendments should have been valid only if enacted by the initiative. Proposition 15 lost—the first time that voters in California had rejected an anti-Oriental measure.¹⁶⁴ This vote occurred while a test case was on its way to the United States

¹⁶¹*People v. Kitagawa, et al.*, Riverside County Super. Ct. 40796, on file with the Riverside county recorder.

¹⁶²Alien Land Law Reports nos. 1946, 2328, 2517, 2902, 2904, 3011, 3211, 3706, 3707, 4140, 4219, 4556, 4873, 5126, and 5308, California State Archives. In some years Kitagawa filed one report for both properties; he sold the smaller property in 1937.

Alien Land Law reports were required by sec. 5 of the 1920 initiative. Non-submission was later claimed by some district attorneys to prove non-ownership by a *nisei* minor. In other counties compliance was not an issue. Bob Hatamiya, a *nisei* grower, told the author that his father was always careful about legal matters, and that he was therefore astonished to hear that no reports by his father are on file in the California State Archives. The Hatamiya properties were near Gridley, in Butte County, and Marysville, in Yuba County. Telephone interview, September 17, 1992. The staff of the California State Archives expressed confidence that they hold every Alien Land Law report filed with California's secretary of state.

¹⁶³The test case was *Oyama v. California*, 332 U.S. 633 [1948] [hereafter cited as *Oyama v. California*].

¹⁶⁴Takaki, *Strangers from a Different Shore*, supra note 73 at 412-13. The tally was Yes—797,067 to No—1,143,780. Proposition 15 did get a majority yes vote in twenty-six of the fifty-eight counties, including very large majorities in Fresno, Placer, San Diego, Sacramento, and Stanislaus counties. California Secretary of State, *Statement of Vote of General Election held in the State of California on November 5, 1946* [Sacramento, 1946], 37.

Supreme Court, in which *nikkei* interests were represented by the American Civil Liberties Union and the Japanese American Citizens' League. Action on other Alien Land Law cases was halted while this case went forward.

The case in question originated in San Diego and involved two small parcels of farmland. In 1934, Kajiro Oyama, a Chula Vista farmer, paid for approximately seven acres of farmland, but title was directly conveyed to his six-year-old son, Fred, a native citizen of the United States. By December 1941 the Oyamas were no longer tilling Fred's land, instead renting it to a tenant farmer named John Kurfurst. After they were evacuated and interned, Kurfurst transmitted his rent via the War Relocation Authority.¹⁶⁵ At some point in the war, the Oyamas were released and settled in Payson, Utah.¹⁶⁶ There they resided during the vigorous efforts by Governor Warren and Attorney General Kenny to enforce the Alien Land Law.

On August 28, 1944, the People of the State of California and the County of San Diego petitioned in court to take from sixteen-year-old Fred Oyama his title to the land. This was the seventh such suit in the County of San Diego's campaign to enforce the Alien Land Law.¹⁶⁷ The state claimed that since co-defendant Kajiro Oyama failed to prove that the gift was not a circumvention of the law, the title had actually escheated to the state upon purchase instead of passing to Fred. The Oyamas were represented, at no cost to themselves, by A.L. Wirin, of the Los Angeles law firm A.L. Wirin, J.Y. Maeno, and J.B. Tietz. The firm was active in American Civil Liberties Union causes and represented the civil-rights interests of California *nikkei* in many cases at the time. Wirin attacked the constitutionality of the law, but Deputy County Counsel Duane J. Carnes prevailed before Superior Court Judge Joe L. Shell.¹⁶⁸ As in the 1920s, the California Supreme Court upheld the constitutionality of the Alien Land Law on October 31, 1946.¹⁶⁹

¹⁶⁵*Oyama v. California*, supra note 163.

¹⁶⁶*People v. Oyama*, San Diego Super. Ct. 121200, on file with the county recorder [hereafter cited as *People v. Oyama* file]. The land is now bounded by J and K streets, Woodlawn Street, and the San Diego Trolley tracks.

¹⁶⁷*San Diego Union*, August 29, 1944. Ultimately, twelve suits were brought in San Diego County. As the Japanese community in that county was small, this represents a disproportionate share of the eighty cases filed throughout California.

¹⁶⁸*People v. Oyama* file, supra note 166. Carnes is identified in the complaint as a deputy district attorney, though the *San Diego Union* (supra note 167) states that he was a deputy county counsel. The latter official normally represents the county only in civil matters.

¹⁶⁹*People v. Oyama*, 29 C.2d 164 (1946). Justice Roger B. Traynor qualified his concurrence with a statement that the U.S. Supreme Court decisions of earlier years were controlling until reexamined by that court.

Oyama appealed to the United States Supreme Court, where Dean Acheson joined Wirin in arguing his case. In a major civil-rights decision, the high court reversed the escheat by a vote of six to three on January 19, 1948. The Court held that the law *as applied* deprived Fred Oyama of equal protection under the law as guaranteed by the Fourteenth Amendment. Because his father was a Japanese citizen, the law presumed that a gift was not intended when the land was deeded to Fred. Since no such presumption would be applied under California law when land was deeded to the minor children of other aliens, Fred had not been treated equally. The reversal was based only on that narrow ground.

The Court majority declined to address the more general question of the Alien Land Law's constitutionality in terms of racial discrimination. Four of the six majority justices signed concurring opinions passionately declaring that California's law was intended purely to be an implement of racial discrimination and was therefore unconstitutional.¹⁷⁰ Apparently, two of six justices who voted reversal on the narrow grounds refused to find the Alien Land Law itself unconstitutional during deliberations.¹⁷¹ Had Justices William O. Douglas, Frank Murphy, Wiley Rutledge, or Hugo Black persuaded Chief Justice Fred Vinson or Justice Felix Frankfurter, the issue would have been settled then and there.

Because titles to many *nikkei* properties were by then held by nisei citizens, the Supreme Court decision gutted the Alien Land Law and rendered it virtually unenforceable. A few months later, the California Supreme Court heard the *Palermo* case on appeal from the Third District Court of Appeals. The published opinion noted that it had been suggested that this case be used to declare the Alien Land Law unconstitutional. The justices declined the opportunity, stating that the constitutionality issue was not relevant to the case before them. Since *Palermo* could be decided on statutory grounds, they considered it improper to expand the limits of their opinion to include a constitutionality ruling.¹⁷²

The status of the Alien Land Law was at that point murky. The voters had repudiated the legislature's post-1920 changes to it, and the United States Supreme Court had truncated it with the *Oyama* decision. California's attorney general

¹⁷⁰*Oyama v. California*, supra note 163.

¹⁷¹Douglas, Murphy, Rutledge, and Black signed the concurring opinions. Vinson and Frankfurter joined in overturning the escheat of the Oyama land, but apparently could not be persuaded during deliberations to find the California Alien Land Law unconstitutional.

¹⁷²*Palermo v. Stockton Theatres*, 32 C.2d 53, at 65.

dropped all pending escheat actions, but two of the twelve San Diego County cases had already resulted in escheats to the state of California.

Masao Tanida lost several properties in Vista, close to what is now a major freeway, State Highway 78. The Tanida family was then in an internment camp in Poston, Arizona. Unlike most Alien Land Law proceedings involving *nikkei*, the *Tanida* case went quickly. It was filed on September 2, 1944, and Judge Joe L. Shell adjudged an escheat on November 30 of that year. Tanida was represented by a San Diego attorney, Sherman Lacey, but no appeal was made concerning the decision.¹⁷³

The other property was a two acre parcel near Third and H streets in Chula Vista. The farm was operated by Shigeru and Yuki Masumoto, with title held by their daughter, Hisako Masumoto Ikemi. Shigeru Masumoto had listed himself as the owner when he filled out an application for utility service, an act that was to cause his undoing. Judge Franklin J. West adjudged an escheat on June 4, 1945.¹⁷⁴ The remaining cases were dismissed after the *Oyama* decision.¹⁷⁵

One of the other active San Diego County escheat cases offers a great deal of insight into the effects of the internment on the *nikkei*. In July 1936, Mather Masako Hirose (née Yasukochi) bought 171 acres of farmland near the San Luis Rey Mission in the northern part of the county. The purchase price of twenty-one thousand dollars was provided by two of her cousins, the Yoshimura brothers, who were issei aliens.¹⁷⁶

When Hirose and the Yoshimuras were interned in 1942, they hired Thomas P. Gonzalez to manage the property and to

¹⁷³*People v. Tanida, et al.*, San Diego County Super. Ct. 121323 [1944].

¹⁷⁴*People v. Masumoto, et al.*, San Diego County Super. Ct. 122527 [1945]. Although no brothers were listed as co-defendants or as title holders to the land, which was bought in 1937, a brother named Fred suddenly showed up with a Bronze Star Medal, an honorable discharge from the army, and a statement that he had run the operation before the war. The issei parents were his employees, he claimed. A new trial was set for April 1946, but Shigeru Masumoto suddenly consented to an order denying the new trial. A large number of the escheat cases pending at the time of the *Oyama* decision had been delayed because the Soldiers' and Sailors' Civil Relief Act so required if a defendant were unable to be present because of the demands of active military service.

¹⁷⁵The other cases were all filed in the autumn of 1944: *People v. K. Iguchi*, San Diego County Super Ct. 120062; *People v. K. Iguchi*, 120064; *People v. I. Iguchi*, 120065; *People v. K. Iguchi*, 120066; *People v. Federal Land Bank of Berkeley*, 31 Cal. 2d 87 [1948], 120450; *People v. Shinohara*, 122451; *People v. Yasukochi*, 125783; *People v. Nippon Co.*, 123965; and *People v. Saito*, 120683.

¹⁷⁶*Gonzalez v. Hirose*, 33 Cal.2d 213 [1948] [hereafter cited as *Gonzalez v. Hirose*].

make mortgage and other payments from the proceeds. About a year later, Gonzalez offered to buy the property for twenty-five thousand dollars. Hirose rejected the offer as too low. By October 1944 Hirose was in default to the Federal Land Bank of Berkeley, which held her mortgage.¹⁷⁷

Deputy County Counsel Carnes filed an escheat action against Hirose in November 1944. A few weeks later, Gonzalez bought his employer's mortgage from the bank, and immediately initiated foreclosure. Hirose returned to San Diego in early 1945. The foreclosure and escheat actions were tried together as one case. The trial commenced on May 5, 1945.¹⁷⁸

Superior Court Judge Arthur L. Mundo judged an escheat as of the moment of sale in 1936. Including Gonzalez, the defendants appealed, and the case was pending before the California Supreme Court when the United States Supreme Court handed down the *Oyama* decision. The state court reversed the escheat, leaving open the foreclosure issue between Gonzalez and Hirose.¹⁷⁹ The California Supreme Court ruled unanimously for Hirose, stating that to allow Gonzalez to keep the property would be "unconscionable" under the circumstances. Hirose was to pay Gonzalez the amount due under the promissory note in a "reasonable time."¹⁸⁰

The campaign against the Alien Land Law by the Japanese-American Citizens' League and the American Civil Liberties Union was at a standstill. Sei Fujii, publisher of the Los Angeles bilingual newspaper *Kashu Mainichi*,¹⁸¹ bought a small piece of land and took title in his own name. Represented by his long-standing friend and University of Southern California Law School classmate J. Marion Wright, the resident alien sued the state in a direct test of constitutionality.¹⁸² Judge William C. Curtis of the Los Angeles County Superior Court adjudged an escheat, and Fujii appealed to the California Supreme Court. Justices Edmonds and Traynor reversed the earlier stance they had taken against Fred Oyama. In a four-to-three decision handed down on April 17, 1952, the court ruled that the Alien

¹⁷⁷*Ibid.*

¹⁷⁸*Ibid.* The case report does not indicate where Gonzalez acquired the funds to buy Hirose's mortgage, only that he had managed her property for a year while she was in an internment camp, at which point she found herself in default and her employee flush with cash.

¹⁷⁹*People v. Federal Land Bank of Berkeley, et al.*, 31 Cal. 2d 87 (1948).

¹⁸⁰*Gonzalez v. Hirose*, *supra* note 176 at 217.

¹⁸¹Chuman, *Bamboo People*, *supra* note 2 at 218.

¹⁸²La Moree, "J. Marion Wright," *supra* note 122 at 59. Fujii paid \$200 for the property, which was in East Los Angeles.

Land Law was racially discriminatory and violated the Fourteenth Amendment, and was therefore unconstitutional.¹⁸³

After Fujii lost in superior court in 1948, a prominent Japanese-American leader tested the Alien Land Law from yet another angle. Mike Masaoka and two of his brothers bought a residence for their widowed issei mother, Haruye Masaoka. They funded the purchase with the money from the death benefit paid by the army when another brother was killed during the war. Represented by James Purcell,¹⁸⁴ and assisted by Wirin and the American Civil Liberties Union, they sued the state of California in 1950 to determine whether an escheat had occurred. They argued that their act, which would be considered laudable for most citizens, made the Masaoka brothers felons. This was true solely because of their race, and they were therefore denied equal protection under the law, a violation of their Fourteenth Amendment rights.¹⁸⁵

This case differed significantly from *Fujii* in that Judge Thurman Clarke, also a superior court judge in Los Angeles, ruled that the California Alien Land Law *as applied* was unconstitutional, but the state had appealed. In the interim between the *Fujii* and *Masaoka* decisions, Congress overrode President Harry S. Truman's veto and passed the Immigration and Nationality Act of 1952. Commonly known as the Walter-McCaran Act, the new law made Japanese immigrants eligible for naturalization by removing the racial restrictions on eligibility to United States citizenship that had underpinned California's Alien Land Laws.¹⁸⁶

¹⁸³*Fujii v. California*, 38 C.2d 718 (1952). Shortly after the *Oyama* case, the Supreme Court ruled in *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) and 30 C.2d 719 (1947), that racial restrictions in the federal immigration laws did not automatically provide restrictions in state legislation with a cloak of constitutionality. The Court Opinion discussed the differences between the right to fish and the right to own land. The right to own land resides with the sovereign states. Nevertheless, that ruling, coupled with the Oregon Supreme Court's opinion invalidating that state's Alien Land Law, caused several of the California justices to reverse their earlier position in *People v. Oyama*.

¹⁸⁴Purcell practiced law in San Francisco. He was so outraged by the internment that he took the *Mitsuye Endo* habeas corpus case all the way to the United States Supreme Court free of charge. For a detailed treatment of *Endo* and other internment cases, see Peter Irons, *Justice at War: The Story of the Japanese-American Internment Cases* (Oxford, 1983).

¹⁸⁵Mike Masaoka and Bill Hosokawa, *They Call Me Moses Masaoka: An American Saga* (New York, 1987), 212-15.

¹⁸⁶Chuman, *Bamboo People*, *supra* note 2 at 220-21, 310. The bill also prescribed conditions under which naturalized Americans could be stripped of their citizenship. Truman's veto stemmed from his fear of creating a group of second-class citizens who could be denaturalized and deported for political

The California Supreme Court found for Masaoka as it had for Fujii. The three justices who voted against Masaoka had voted against Fujii. They contended that the United States Supreme Court's 1923 ruling in *Porterfield v. Webb*, finding the Alien Land Law to be constitutional, was binding on all other courts in the country.¹⁸⁷ Humanitarian issues aside, they felt that the California Supreme Court could only have found for the state and allowed the cases to go the United States Supreme Court.

The role of the state attorney general in the *Fujii* and *Masaoka* cases requires explanation. The attorney general had abandoned the role of plaintiff in Alien Land Law cases after the *Oyama* decision. The Third District Court of Appeals had decided, in *Palermo v. Stockton Theatres*, that the abrogation of the 1911 Treaty of Commerce and Navigation did not negate an issei's right to purchase residential or commercial property, but that that decision was binding only within that district's boundaries. Before *Palermo* went to the California Supreme Court, the state attorney general published an opinion concurring with the Third District's *Palermo* decision. Why, then, would the state even bother to defend itself against Fujii and the Masaokas?

Because the California legislature took no action to repeal the Alien Land Law, the United State Supreme Court's *Porterfield* decision was the supreme law of the land, and only the judicial process could reverse it. That required an adversary proceeding to present squarely the basic questions that the justices managed to avoid in *Oyama* and *Palermo*. Whatever sympathies the deputy attorneys general may have had, their role in working the cases remained as Fujii and Masaoka's adversaries. In a letter to A.L. Wirin concerning the ongoing case *Takahashi v. Fish and Game Commission*, a deputy attorney general wrote, "The writer takes this opportunity to congratulate you on the *Oyama* case."¹⁸⁸ Not to defend itself would have been a sidestep of the issue by the state.

After it was no longer an operative issue, the California legislature finally acted in 1955. It placed Proposition 13, an initiative to repeal the Alien Land Law, on the general-election bal-

reasons. Rodolfo Acuña, *Occupied America: A History of Chicanos*, 2d ed. (New York, 1981), 159.

¹⁸⁷*Haruye Masaoka v. California*, 39 C.2d 883 (1952), and *Fujii v. California*, 38 C.2d 718 (1952).

¹⁸⁸California Department of Justice, Attorney General Fred N. Howser to A.L. Wirin, by Deputy Attorney General Ralph W. Scott, Letter serial 917 of January 26, 1948, in Attorney General Letter Books, California State Archives F3632:263.

lot of November 6, 1956. The voters handily repealed the Alien Land Law.¹⁸⁹

Proposition 13 also appropriated money for settlement with the victims of earlier escheat cases,¹⁹⁰ but it was preceded by two acts of the California legislature that established redress for Alien Land Law victims. The first bill was slow in coming. The 1949 legislature was the first regular session after the *Oyama* decision, but it did not pass a redress bill. Three full years after that decision, the 1951 legislature finally passed A.B.2611, which provided remuneration for *United States citizens* whose constitutional rights had been violated.¹⁹¹ The process was evidently slow, because in April 1952 the legislature passed a resolution urging expeditious payment of redress.¹⁹² The 1953 legislature was much quicker to pass another bill after the *Fujii* case, providing for redress of all Alien Land Law defendants.¹⁹³

A dark chapter in California's history ended with the *Fujii* case and the voters' repeal of their Alien Land Law. Scholars differ over its effect on the *nikkei*, but none has accorded it more than passing importance in comparison with exclusion from immigration in 1924 and incarceration during World War Two. The nature of the application of the law changed after the Pearl Harbor attack, and the impact of the Alien Land Law must therefore be separately assessed for each of the two periods.

CONCLUSION

In the earliest years of this century, Euro-American Californians saw themselves as the front line in a cultural war between the Orient and the Occident. The prize was California (the battle for Hawaii had already been lost). The Japanese victory over Russia heightened Californians' hysteria and fear of the "Yellow Peril." The major purpose of the Alien Land Law was exactly what Attorney General Webb said it was: to deter Japanese people from immigrating to the United States, and to California in particular. The Alien Land Law was meant to keep the *nikkei* on the bottom rungs of California's society,

¹⁸⁹*California Statutes 1957*, supra note 5 at cxxxvii.

¹⁹⁰*California Statutes 1955*, supra note at 767-68, 2831.

¹⁹¹*California Statutes 1951*, supra note 5 at 4035-36.

¹⁹²*California Statutes 1953*, supra note 5 at 35. This resolution also declared that the evacuation and internment had been an injustice.

¹⁹³*California Statutes 1953*, supra note 5 at 3601-02.

thereby making emigration to the state undesirable to the Japanese.

When Jukichi Harada moved into a good Riverside neighborhood, Webb tried to push his family out. When Japanese physicians tried to open a hospital in Los Angeles, Webb and Secretary of State Frank C. Jordan went all the way to the United States Supreme Court to deter them. The *nikkei* wanted to own their own farms, and some succeeded only because Webb could not prevent their children from holding title. *Nikkei* farm workers could work on a wage basis, but not on an incentive basis with a cropping contract. Even though the Alien Land Law was held to be constitutional during the prewar years, those who had the money to buy and were willing to run the risk were generally successful in acquiring farmland in California. How much more they might have achieved without the impediment of the Alien Land Law, how many of them were deterred from buying property whose value soared, we shall never know.

The Alien Land Law did affect Chinese and Asian Indians, but Gin Fook Bin and Indr Singh were incidental targets. The *Chuey Suey Wah Quin* case was an isolated instance of persecution, at least with respect to the Alien Land Law. Californians could have used the law during the 1930s to persecute the *nikkei* vigorously. They apparently refrained from doing so out of deference to Washington's solicitude for Tokyo's delicate pride. This solicitude stemmed from a foreign-policy concern, which was to avoid a military confrontation in Asia. In essence, Japan itself shielded its emigrants' way of life from outright destruction, notwithstanding the Alien Land Law and other statutes designed to exclude the *nikkei* from productive life in California.

After Pearl Harbor, Governor Earl Warren used the Alien Land Law as a weapon of racial persecution. He was somewhat successful, although most people of Japanese descent who owned land were able to hold on to it. Some, like Gladys Ishida of Sacramento, were frightened into selling. Others, like Masako Hirose of Escondido, were driven into default while they were incarcerated and unable to manage their own affairs. Since most of them (including Hirose) managed to keep their land, they did not suffer the losses on agricultural property that were experienced during the 1942 panic sales of chattels such as automobiles and business inventories.

Not until after 1950 did Euro-American Californians make serious efforts to redress the wrongs perpetrated by the Alien Land Law. The first redress bill was passed by the 1951 legislature, which was the first session to meet after the outbreak of the Korean War. Other measures followed in each successive

legislature. California's attitude toward the *nikkei* had changed, just as the United States' attitude toward Japan changed as it was rapidly rehabilitated into a cold war ally.¹⁹⁴ From the first failed bill in 1907 to repeal in 1955, the history of California's Alien Land Law and the *nikkei* clearly paralleled the relations between the United States and Japan, as our diplomatic antagonist became first a belligerent enemy in 1941, and then a close ally ten years later.

¹⁹⁴Many works advance this concept of United States-Japanese relations. See, for example, Michael L. Schaller, *The American Occupation of Japan: The Origins of the Cold War in Asia* (Oxford, 1985), Akira Iriye, *Across the Pacific: An Inner History of American-East Asian Relations* (New York, 1967), and Edwin O. Reischauer, *The United States and Japan*, 3d ed. (New York, 1965).

CANADIAN INDIANS, TIME, AND THE LAW

HAMAR FOSTER

In 1987 Charles F. Wilkinson published *American Indians, Time, and the Law*.¹ The book is a thoughtful analysis of the effect of time upon the evolution of legal doctrine, especially during the years since the United States Supreme Court's decision in *Williams v. Lee* marked the beginning of an exceptionally active period of federal Indian law litigation.² The issues Wilkinson raises, and the conclusions he draws about the legal history of Native Americans and the courts in the United States, provide a useful template for describing and comparing the Canadian record in these matters.³ Such comparisons are especially important in the 1990s. The work of the Waitangi Tribunal in New Zealand, and the High Court of Australia's recent decision in *Mabo v. Queensland*, are significant indications of a growing determination to address unfinished business in what used to be Great Britain's major Pacific colonies.⁴

Hamar Foster is professor of law at the University of Victoria, British Columbia. This paper was first presented at the Interim Meeting of the Research Committee on Comparative Judicial Studies, August 1-4, 1993, in Santa Fe.

¹Charles F. Wilkinson, *American Indians, Time, and the Law. Native Societies in a Modern Constitutional Democracy* (New Haven and London, 1987) [hereafter cited as Wilkinson, *American Indians*].

²*Williams v. Lee*, 358 U.S. 217 (1959).

³For an American legal specialist's view of our respective histories, see Ralph W. Johnson, "Fragile Gains: Two Centuries of Canadian and United States Policy Towards Indians," *Washington Law Review* 66 (1991), 643 [hereafter cited as Johnson, "Fragile Gains"].

⁴*Mabo v. Queensland* [no. 2] (1992), 175 C.L.R. 1, recognizing the existence, for the first time, of aboriginal title in Australia. A useful description of the history and role of the Waitangi Tribunal is Evelyn Stokes, "The Treaty of Waitangi and the Waitangi Tribunal: Maori Claims in New Zealand," in *Indigenous Land-Rights in Commonwealth Countries: Dispossession: Negotiation and*

Nowhere is that determination more evident than in Canada, where in the past twenty years aboriginal rights have been the subject of continuing negotiations, protracted litigation, and even constitutional amendment. And nowhere is the American experience a more relevant point of comparison.

In common with others who have surveyed the more than two centuries of experience that have shaped the history of the relationship between the United States and its Native American tribes, Wilkinson begins by setting out the different periods into which that history may be divided.⁵ American Indian policy in the nineteenth century, for example, may be described as moving through at least two stages after the War of 1812, which really marked the end of the period in which the North American tribes were valued as military allies by the colonizing powers. At first the federal government was concerned with extinguishing Indian title and removing the tribes to reservations west of the Mississippi, where they could and did pursue their separate ways of life. However, as American Indian power waned and non-aboriginal designs on their lands and resources increased, the notion that the tribes were separate and apart began to be supplanted by a different ideology. Congress ceased making Indian treaties in 1871, by which time most original Indian title had been extinguished, and the passage of the Dawes Allotment Act in 1887 signalled that the assault on tribal sovereignty had begun in earnest.⁶ As Wilkinson puts it, "Allotment and the other assimilationist programs that complemented it devastated the Indian land base, weakened Indian culture, sapped the vitality of tribal legislative and judicial processes, and opened most reservations for settlement by non-Indians."⁷

In the twentieth century the pattern changed even more dramatically. American Indian policy suffered increasingly

Community Action, ed. Garth Cant, John Overton, and Eric Pawson (Christchurch, 1993), 66-80.

⁵These are even more clearly set out in ch. 2 of *Federal Indian Law: Cases and Materials*, ed. David H. Getches and Charles F. Wilkinson (St. Paul, 1986) [hereafter cited as Getches and Wilkinson, *Federal Indian Law*].

⁶See 25 U.S.C.A. §71 and §331. Original Indian title (aboriginal title in Canadian law) in federal Indian law means the title that existed before recognition by Congress by means of a treaty or other instrument: *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955). For one view of how successful the "quieting" of Indian title has been in the United States, see Ward Churchill, "The Earth is Our Mother: Struggles for American Indian Land and Liberation in the Contemporary United States," in *The State of Native America. Genocide: Colonization: and Resistance*, ed. M. Annette Jaimes (Boston, 1992), 139-88.

⁷Wilkinson, *American Indians*, supra note 1 at 19.

sharp swings, shifting back and forth between promoting tribal termination and tribal sovereignty three times within sixty years. The allotment era (1871-1928) gave way before the reformist zeal associated with the Indian Reorganization Act of 1934, which was itself eclipsed by the termination policies that dominated the postwar years, only to be replaced in yet another about-face by a return to a policy of self-determination in the 1960s.⁸ A constant, however, has been the tension between the conflicting forces of assimilation and what Wilkinson calls "modified" separatism.⁹

According to Wilkinson, this tension is reflected in a bifurcated jurisprudence in federal Indian law, because two streams of divergent judicial opinions took shape in the years between 1823 and 1903. On the one hand, there is what he calls the *Worcester-Crow Dog-Talton* line of opinions, which derives from the Marshall Court jurisprudence of the 1820s and 1830s and calls for "largely autonomous tribal governments subject to an overriding federal authority but essentially free of state control." The tribes are seen in these cases as possessing inherent powers that pre-date the Constitution and that are subject only to express congressional limits.¹⁰ On the other hand, there is the *Kagama-McBratney-Lone Wolf* line, from the 1880s through the early 1900s. In these opinions the tribes are "conceptualized as lost societies without power, as minions of the federal government." The judges in such cases emphasize apparently unlimited federal legislative authority, even where treaties are concerned, and contemplate a significant role for the states to "fill the void" created by tribal decline.¹¹ This duality has presented courts with a unique judicial dilemma, writes Wilkinson, because the two approaches are irreconcil-

⁸See Getches and Wilkinson, *Federal Indian Law*, supra note 5 at 111-60. They close their discussion by citing examples that raise the question of whether American Indian policy "is headed for yet another assimilationist cycle."

⁹Wilkinson, *American Indians*, supra note 1 at 13.

¹⁰*Ibid.*, 23-31, and see *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), holding that the laws of Georgia did not extend to Cherokee lands; *Ex Parte Crow Dog*, 109 U.S. 556 (1883), holding that federal criminal law had not been applied by Congress to Sioux lands; and *Talton v. Mayes*, 163 U.S. 376 (1896), holding that the powers of self-government of the Cherokee Nation predated the United States Constitution and that their legislation was not subject to the Fifth Amendment.

¹¹*Ibid.*, and see *United States v. Kagama*, 118 U.S. 375 (1886), holding that the Major Crimes Act, which limited tribal criminal jurisdiction, was validly enacted by Congress; *United States v. McBratney*, 104 U.S. 621 (1882), holding that, even in the absence of a congressional grant of authority, state courts had jurisdiction over the murder of a non-Indian by a non-Indian committed within Indian country; and *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), holding that Congress could unilaterally abrogate Indian treaty rights.

able. One is based upon legal pragmatism and the modern realities of liberal egalitarianism and relative power; the other upon the promise of modified separatism and autonomy contained in the original Marshall Court decisions.¹²

The crucial issue in most American cases has been "how an old treaty, statute, or court decision should be applied in times bearing little resemblance to the era in which the words of the law were originally written."¹³ In the decisions rendered over the past twenty-five years or so, this has really amounted to a question of the "continued vitality" of *Worcester v. Georgia*, even if the result might mean "seating a nearly 'foreign' government in rural Minnesota, South Dakota, or, for that matter, downtown Tacoma, Washington." More specifically, "How should the passage of time be treated—as an eroding or cementing force? How should tribalism be conceptualized? To what extent should territoriality operate to set Indian reservations off as islands apart from states and local governments? How should courts deal with the civil rights of non-Indians in Indian country when tribes seek to exert power over them?"¹⁴ Wilkinson concludes that in answering each of these questions, the United States Supreme Court has arrived at "a substantial reaffirmation of the measured separatism . . . of *Worcester v. Georgia*," recognizing Native American tribes as "permanent, separate sovereigns, a third level of government in this constitutional democracy."¹⁵ In doing so, the Court has been both "principled and courageous," because it has "cut directly against the normal inclinations of Anglo-American judicial decision-making by enforcing laws of another age in the face of compelling, pragmatic arguments that tribalism is anachronistic."¹⁶

There are those, certainly, who would take issue with Wilkinson's assessment of how effectively the judiciary has

¹²Cf. Fred L. Ragsdale, Jr., "The Deception of Geography," in *American Indian Policy in the Twentieth Century*, ed. Vine Deloria, Jr. (Norman, 1985), 63-82 [hereafter cited as Deloria, *American Indian Policy*], and "There Dragons Be" (Paper presented at the Transboundary Conference on the Legal History of the West and North-West of North America at the University of Victoria in February 1991). Admittedly, some of the seeds of the *Kagama* line of cases can be found in the Marshall decisions.

¹³Wilkinson, *American Indians*, supra note 1 at 4.

¹⁴Ibid. at 30-31.

¹⁵Ibid. See also Wilkinson, "Indian Tribes and the American Constitution," in *Indians in American History*, ed. Frederick E. Hoxie (Arlington Heights, 1988), 117-34.

¹⁶Wilkinson, *American Indians*, supra note 1 at 5. A notable example of this affirmation of tribal sovereignty is *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), holding that, except where the remedy of habeas corpus is available, judicial review of the actions of tribal governments pursuant to the provisions of the Indian Civil Rights Act, 1968, is confined to tribal courts.

guarded tribal sovereignty, especially in light of such recent opinions as *Duro v. Reina*.¹⁷ But for comparative purposes, it is enough to note some of the issues Wilkinson raises and the history of federal Indian law that he relates. How similar is it to the history of the relationship between Canada's First Nations and the law of the people who colonized them?¹⁸ More specifically:

1. Has the legal history of the relationship between Canada and its First Nations been characterized by the same sort of policy shifts that have occurred in the United States?
2. Has Canada anything comparable to the foundation cases represented by the Marshall "trilogy" of opinions, or to the two lines of jurisprudence described by Wilkinson? How has tribalism been conceptualized in Canada, and to what extent have Indian reserves been jurisdictionally set apart?
3. Whether or not there is such a jurisprudence, has there been the same tension in Canada between assimilationist and separatist principles?
4. How has the passage of time been treated in Canadian Indian law?

A fifth question, consideration of which will permeate my attempts to answer the first four, is the extent to which the 1982 amendments to Canada's Constitution have the potential to transform the impact of Canadian law upon the First Nations. The answer is that they have already done so, to a remarkable degree. What follows, however, is primarily an account of Canadian law before these changes.

POLICY SHIFTS

Obviously, the history of the relationship between Canada and the First Nations within it can be analyzed, as can any

¹⁷*Duro v. Reina*, 495 U.S. 676 (1990), significantly limits the criminal jurisdiction of tribal courts in a way that signals a retreat from the *Worcester* style of reasoning—to such a point that Congress legislatively reversed it: see Ralph W. Johnson, "Justice Rehnquist and the Indian Cases," *Sixth Annual Western Regional Indian Law Symposium* (Washington, 1992), D-1, D15n.

¹⁸In Canada the terms "First Nation," "Aboriginal," and "Native" are replacing the term "Indian." There is no hard-and-fast rule about this, however, since preferences vary, and some people remain content to be referred to as "Indian." "Eskimo," on the other hand, is no longer acceptable as a synonym for "Inuit."

process involving change over long stretches of time, into periods with defining characteristics. One of the two most recent attempts at such a history does this in a compelling and defensible way. In common with many other scholars, J.R. Miller emphasizes that aboriginal peoples were active agents, "not the passive victims . . . found in so many older accounts of Canadian history," and that the relationship between two peoples of different cultural backgrounds is best understood in terms of the reasons each had for interacting with the other.¹⁹ He then describes three historical eras of cooperation (mainly the cod fishery, the fur trade, and military alliances), coercion (reserves, the Northwest Rebellion, residential schools, and so on), and confrontation (political organization and aboriginal rights in the twentieth century).²⁰ In a country as large and diverse as Canada, these periods overlap. Thus in the north and far west the cooperative relationship fostered by the fur trade lasted well into the nineteenth century—much longer than in central Canada and the east. Indeed, in the far north, where significant government initiatives did not really exist until the twentieth century, these patterns remained in place until the Second World War and after.²¹ But overall, the Indian history of Canada—as opposed to the history of federal Indian policy—has phases not unlike those in the United States.

One important point of contrast, however, lies in the treaty process. The American scholar Felix Cohen could write in 1947 that despite what "every American schoolboy is taught . . . the historical fact is that practically all of the real estate acquired by the United States since 1776 was purchased . . . from its original Indian owners."²² In Canada, the same treaty process

¹⁹J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto, 1989), ix [hereafter cited as Miller, *Indian-White Relations*].

²⁰The other recent survey is Olive Patricia Dickason's very useful *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto, 1992) [hereafter cited as Dickason, *Canada's First Nations*].

²¹And although opinions may differ, it seems reasonable to suggest that some First Nations were more actively engaged in political action than others. The Iroquois of central Canada and the northern coastal tribes of British Columbia, for example, were among the first to put sovereignty and land-claims issues on the public agenda.

²²Quoted in Nell Jessup Newton, "At the Whim of the Sovereign: Aboriginal Title Reconsidered," *Hastings Law Journal* 31 (1979-80), 1215 [hereafter cited as Newton, "Aboriginal Title Reconsidered"]. The notable exception at that time was Alaska, and Newton contrasts Cohen's view with Justice Reed's statement in *Tee-Hit-Ton Indians v. United States* (see supra note 6 at 289-90) that every American schoolboy knew that the tribes were "deprived of their ancestral ranges by force and that, even when the Indians ceded millions of

that Cohen is referring to existed, and found its roots in the same source: the historical practice of the British Crown and its colonial proprietors, most notably exemplified in the Royal Proclamation of 1763. But treaties for the cession of land were actually made only in Ontario, in the prairie provinces of Alberta, Manitoba, and Saskatchewan, and in parts of British Columbia and the Northwest Territories. When this process ended with Treaty 11 between the Crown and the Dene peoples of the Northwest Territories in 1921, no agreements for the purchase and sale of traditional tribal territories had been made in Quebec, the maritime provinces, Newfoundland, or Yukon, or in most of British Columbia and the Northwest Territories.²³ This means that, unlike the situation in the United States, vast tracts of land in Canada may still be subject to unextinguished aboriginal title.

The reasons for this omission vary from region to region and include the history of contact in each of them, the period when settlement or resource-extraction pressures developed, and the landholding practices of each First Nation. But the judiciary's peculiar interpretation of Canada's federal system and the absence of a clearly articulated legal obligation to enter into land-cession treaties were also important, perhaps even of paramount importance. This is not to say that there were not cases—notably *St. Catherine's Milling*, discussed below—that acknowledged the idea of Indian title.²⁴ There were even statutes that did so. The first Dominion Land Act, for example, provided that it did not apply to territory "the Indian title to which [has] not been extinguished."²⁵ Forty years later, the statutes transferring federal lands to Ontario and Quebec also

acres by treaty . . . it was not a sale but the conquerors' will that deprived them of their land." There was a singular lack of such wars in Canada, for a variety of reasons.

²³Adhesion to existing treaties continued, ending with the adhesion of the Algonkian peoples of northern Ontario to Treaty 9 in 1929-30. The land-claims process begun in the 1970s may be regarded as a revival of the treaty process. In British Columbia legislation passed in May 1993 created the British Columbia Treaty Commission, established to oversee the making of perhaps as many as forty treaties in that province over the next several years.

²⁴*St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, which established the interpretation of s.91(24) of the Constitution Act, 1867, referred to in the preceding sentence (see note 54 *infra*). See also *Ontario Mining Company v. Seybold* (1902), 3 C.N.L.C. 203 (P.C.) and *Attorney-General of Quebec v. Attorney-General of Canada*, [1921] 1 A.C. 401 (P.C.), applying the *St. Catherine's Milling* principle to Indian reserves.

²⁵Dominion Land Act, 35 Vict., c.23 (1872), s.42. For discussion, see *Native Rights in Canada*, ed. Peter A. Cumming and Neil H. Mickenberg (Toronto, 1972), 164-66.

referred to the need to extinguish title.²⁶ But there were no such provisions affecting provinces, or parts of provinces, which entered confederation already enjoying the underlying title to the lands within their borders.

The stock response of governments to the argument that aboriginal title still existed in provinces where no treaties had been signed was that, assuming—which they doubted—such title had ever existed, it had long since been “superseded by law” or extinguished by implication. Some doubt was cast upon these arguments in 1973 by *Calder v. Attorney-General of British Columbia*, a decision of the Supreme Court of Canada that was the first real aboriginal title case that that court had ever heard; but it was a split decision, so the arguments retained considerable vigor both in law and, more significantly, among provincial politicians and federal policy-makers.²⁷ Their attitudes have been slow to change, but recent judicial decisions have prompted a different view to gain strength, the practical implications of which remain unclear.²⁸

In this area—the impact of law upon the First Nations—another contrast with the American experience may be discerned. While it is true that Canadian Indian policy has been shaped by objectives similar to American ones (protection, civilization, and then assimilation, as one scholar has put it), the sharp-angled turns in direction that began with the Dawes Allotment Act and that were especially prominent in the years between 1928 and 1961 find no real analogue in Canada.²⁹

²⁶Ontario Boundaries Extension Act, S.C. 1912, c. 40, s.2, and Quebec Boundaries Extension Act, S.C. 1912, c.45, s.2. For discussion, see Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon, 1990), 52ff.

²⁷*Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) 145. It was the first “real” aboriginal title case because no First Nations were involved in *St. Catherine's Milling*, and the issue of aboriginal title arose only indirectly. This was also true of the leading nineteenth-century cases in New Zealand and the United States.

²⁸The claim that Indian title could be extinguished by statutes that mentioned neither title nor extinguishment was seriously weakened by the Supreme Court of Canada's decision in *Regina v. Sparrow* (1990), 56 C.C.C. (3d) 263 (S.C.C.). Although the trial judge in *Delgamuukw et al. v. The Queen* (1991), 79 D.L.R. (4th) 185 appeared to breathe the new life into this approach, on June 25, 1993, the British Columbia Court of Appeal reaffirmed that courts should be slow to find such extinguishment, and held that it had not taken place in British Columbia; see *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470. For a commentary on the trial judge's decision on this point, see Hamar Foster, “It Goes Without Saying: The Doctrine of Extinguishment by Implication in *Delgamuukw*,” in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, ed. Frank Cassidy (Lantzville, 1992), 133-60.

²⁹See John L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy,” in *As Long as the Sun Shines and Water*

There were no removals on the scale that took place in the United States.³⁰ There was no statute comparable to the Indian Reorganization Act of 1934, no senior bureaucrat who might be described as sharing the vision of John Collier.³¹ And there was no termination era—at least, not one that ever proceeded beyond the proposal stage.³² Instead, and until quite recently, there was a fairly consistent and largely unsuccessful government policy of assimilation. This was to be accomplished slowly, by keeping Indians separate and apart for extended periods of time if necessary; but it was uncomplicated by notions of tribal sovereignty. Another way of putting this for Americans might be that it was a policy of gradual “termination” of Indian status based upon the unspoken assumption that there were no *sovereign* entities to terminate; instead, termination would be achieved through such things as education, intermarriage, individualized landholding, enfranchisement (the relinquishment of Indian status), and experiments in municipal-style government. A brief examination of the history of the Indian Act may help to make this clearer.³³

The federal Indian Act was first enacted in 1876.³⁴ Technically, it consolidated the pre-confederation laws of the provinces of Upper and Lower Canada and was undertaken to facilitate their application throughout the recently formed Dominion—including, albeit selectively, the new provinces and the immense and recently acquired Hudson’s Bay territo-

Flows: A Reader in Canadian Native Studies, ed. A.L. Getty and Antoine S. Lussier [Vancouver, 1983], 39-55 [hereafter cited as Tobias, “Outline History”]. In the United States the years referred to saw, among other things, the Indian Reorganization Act, then the termination statutes and Public Law 280 (transferring civil and criminal jurisdiction over reservation lands to five states and offering it to the rest), then a return to a policy of self-determination.

³⁰In British Columbia, for example, Governor James Douglas specifically rejected American Indian policy on removal. He did so partly because of its evil effects, partly because many of the colony’s aboriginal peoples knew about the removals in the United States territories contiguous to British Columbia and greatly feared that such would be their fate.

³¹The best-known holder of the equivalent office in Canada was Duncan Campbell Scott, as to whom see text accompanying note 63, *infra*, and E. Brian Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver, 1986) [hereafter cited as Titley, *Narrow Vision*].

³²See text accompanying notes 56-59, *infra*.

³³Some of the following material first appeared in Hamar Foster, “Lands and Monies under the Indian Act: Selected Provisions in Historical Perspective,” published as Appendix A to *The Report of the Commission of Inquiry Concerning Certain Matters Associated with the Westbank Indian Band* (Ottawa, 1988).

³⁴34 S.C. 1876, c.18.

ries.³⁵ Philosophically, it reflected the view that Indians should be protected from corrupt influences while, at the same time, they were gradually weaned from their religious, socio-economic, governmental, and cultural practices. It contained, among other things, provisions respecting the enfranchisement of Indians and provisions for the individualization of landholding on reserves. As the years went by, these and other assimilative features of the act proliferated. For example, in 1880 it was amended to provide that, in bands in which Ottawa had introduced the three-year elective system for choosing chiefs, customary "life" chiefs were deprived of their authority unless they had also won election. (The 1876 act had permitted such chiefs to retain their authority until death or resignation, notwithstanding the adoption of the electoral regime.) Four years after that, the Indian Advancement Act, which was subsequently incorporated into the Indian Act proper, extended the option of an elective system to band councillors as well.³⁶

The pace of such amendments accelerated after the passage of the Indian Advancement Act, and during the years between 1884 and the Second World War three trends stand out. The first, especially in the early years, involved attempts to repress by law certain aspects of Indian culture that were seen to inhibit advancement: for example, the criminalization of the potlatch and the Tamanawas dance in 1884, and of the sun dance in 1885.³⁷ The potlatch law is an especially good example of how the Indian Act was used to attempt to supplant aboriginal laws and customs, and to replace customary sanctions with bureaucratic enforcement. Because the original law was vague and carried too harsh a penalty, the British Columbia Supreme

³⁵*Commons Debates* 1876: 342. The provinces that joined confederation (originally composed of Ontario, Quebec, Nova Scotia, and New Brunswick) after 1867 were Manitoba (1870), British Columbia (1871), and Prince Edward Island (1873). The Hudson's Bay territories, originally granted to the company by Charles II in 1670, were transferred to the new Dominion of Canada in 1870, at which time the province of Manitoba was created. In 1905 two more provinces, Alberta and Saskatchewan, were carved out, but the remainder is federal territory even today. Newfoundland joined in 1949.

³⁶36 S.C. 1884, c.28, incorporated as Part 2 of the Indian Act of 1906. For an aboriginal account of the resistance to implementation of this statute at Akwesasne, a Mohawk reserve that straddles the border between Canada and the United States, see Grand Chief Michael Mitchell, "An Unbroken Assertion of Sovereignty," in *Drumbeat: Anger and Renewal in Indian Country*, ed. Boyce Richardson (Toronto, 1989), 116ff.

³⁷See, for example, Douglas Cole and Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver, 1990), and "A Worse Than Useless Custom: The Potlatch Law and Indian Resistance," *Western Legal History* 5 (1992), 187, and Tina Loo, "Dan Cramer's Potlatch: Law as Coercion, Symbol, and Rhetoric in British Columbia, 1884-1951," *Canadian Historical Review* 73 (1992), 125.

Court more or less refused to enforce it. The government's response was to tighten the language and reduce the offence from an indictable to a summary conviction offence—a change that seems benign until one notices that summary offences were triable by justices of the peace. As Duncan Campbell Scott, the deputy superintendent of Indian Affairs, well knew, Indian agents were justices of the peace. Accordingly, potlatch prosecutions could be tried by the agents who initiated them, rather than by the regular courts.³⁸

The second trend was a gradual but steady increase in the discretionary powers vested in the superintendent general of Indian Affairs, especially over Indian funds and reserve lands, in order “to overcome the increasing reluctance of band councils to do what the Department [of Indian Affairs] deemed desirable.”³⁹

The third trend, which is closely related to the second, may be described as a steady erosion of reserves. This was achieved by creating inducements to Indians to surrender their lands, by dispensing with band consent in certain circumstances for the sale, lease, or other development of land, and even by outright legislative expropriation, overriding the surrender provisions of the Indian Act. Thus the government increased the amount of money that it could disburse to band members on the surrender of land (from 10 percent to 50 percent of the proceeds of the sale); dispensed with the consent of the band to an individual member's enfranchisement—which involved taking the enfranchised Indian's land out of the reserve; and amended the Indian Act in 1911 to permit the removal of reserves near large urban centers without complying with statutory surrender (consent) requirements.⁴⁰

Perhaps the most striking example of all occurred in 1919-21, when Ottawa and the Government of British Columbia passed legislation to give force to the report of a major commission investigating the size and location of Indian reserves in that province. British Columbia was arguably Canada's foremost proponent of the assimilationist ideology, and had never recognized Indian title. Before confederation with Canada in 1871, the colonial government had set aside reserves by executive fiat, without going through any treaty process involving purchase and sale.⁴¹ After confederation, when the constitutional

³⁸S.C. 1895, c.35, s.6; S.C. 1918, c.26, s.7. Agents had been justices of the peace since 1881; S.C. 1881, c.17, s.12.

³⁹*The Historical Development of the Indian Act* (Ottawa, 1975), 105.

⁴⁰S.C. 1906, c.20, s.1; S.C. 1884, c.27, s.16; S.C. 1911, c.14, s.2.

⁴¹There is an interesting exception, however. Between 1850 and 1854 Governor James Douglas made fourteen treaties with the Coast Salish and Kwakwa

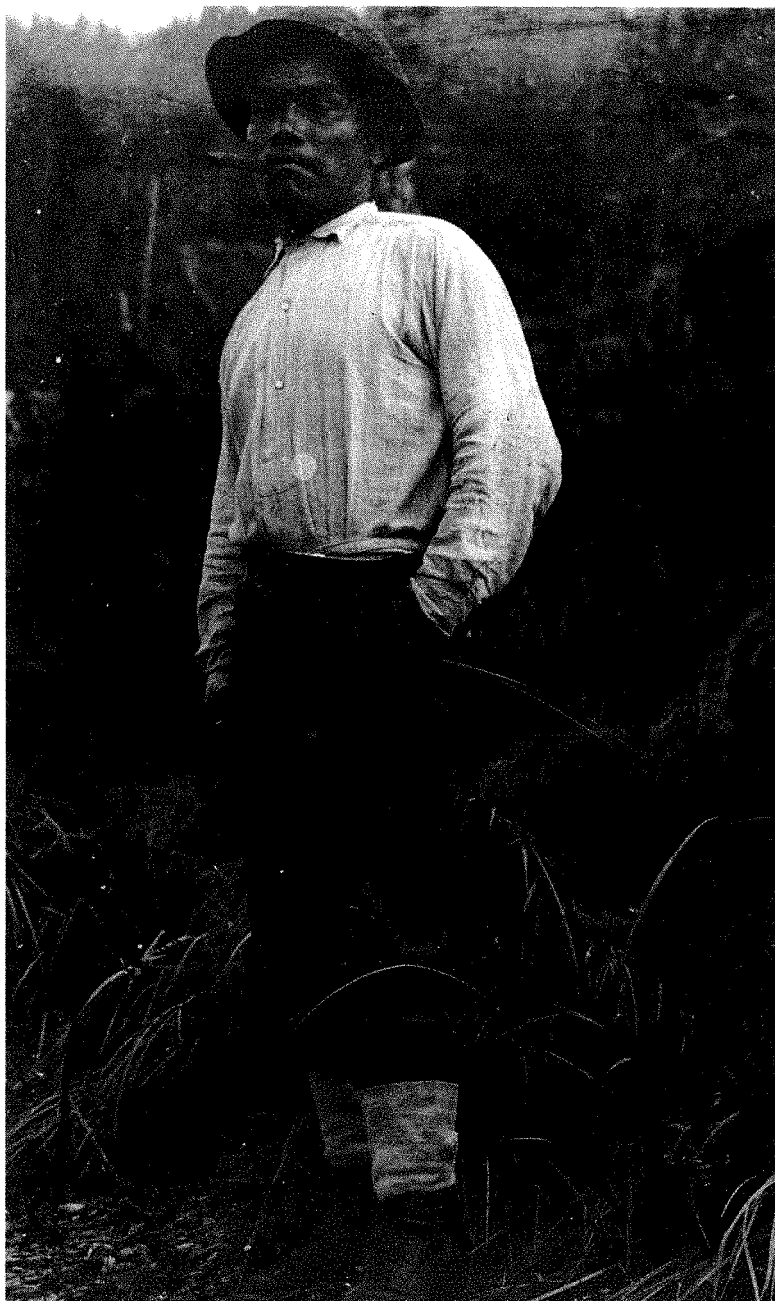
authority to make Indian treaties migrated to Ottawa, the province continued to maintain that there was no need to treat with the Indians for their lands.⁴² At first the Dominion balked, expressing concern about this apparent cloud on the title of the Crown in that province and appearing to insist that treaties be made.⁴³ Certainly when British Columbia's native peoples heard about the federal treaty-making process on the prairies they protested the local policy, and at a meeting with the province's premier they demanded agreements similar to those made east of the Rockies.⁴⁴ But political considerations induced Ottawa to compromise, which in the 1870s meant agreeing to the creation of a joint reserve commission that would allocate

ka'wakw peoples to cede relatively small portions of Vancouver Island. They were little more than land conveyances with aboriginal hunting and fishing guarantees attached, and by the 1860s a colonial policy of ignoring the question of Indian title was firmly established. Nonetheless, the treaties have played a significant role in the debate about land claims in British Columbia; see Wilson Duff, "The Fort Victoria Treaties," *British Columbia Studies* 3 (1969); Dennis Madill, *British Columbia Indian Treaties in Historical Perspective* (Ottawa, 1981); Hamar Foster, "The Saanichton Bay Marina Case: Imperial Law, Colonial History and Competing Theories of Aboriginal Title," *University of British Columbia Law Review* 23 (1989), 629; and Paul Tennant, *Aboriginal People and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver, 1990), chs. 2, 3.

⁴²The problem created by confederation was that authority over Indians and Indian lands became federal, but in most provinces (by 1930, all of them) the Crown provincial owned the underlying title to the land. In 1875 Ottawa rather prematurely acknowledged that British Columbia had a reversionary interest in its Indian reserves, a position it soon repudiated. And in 1888 the *St. Catherine's Milling* case (see *supra* note 24) established that the effect of a surrender of aboriginal title to the federal Crown was the perfection of the underlying title of the *provincial* Crown. In short, the Indian interest evaporated upon surrender and Ottawa not only got nothing but lost all authority it otherwise had to deal with the land; see *supra* note 24 and *Smith v. The Queen*, [1983] 1 S.C.R. 554.

⁴³See, for example, the advice given by the federal minister of justice to the governor general in council on January 19, 1875, discussed in Hamar Foster, "How Not to Draft Legislation: Indian Land Claims, Government Intransigence, and How Premier Walkem Nearly Sold the Farm in 1874," *The Advocate* 46 (1988), 411.

⁴⁴Premier Smith told a Tsimshian and Nisga'a delegation in February 1887 that there was no law requiring governments to treat with Indians for their lands. He even appeared to deny that treaties had been made on the prairies; see *British Columbia Sessional Papers*, 1887, 255-56. Later that year a commission visited the north coast to hear complaints about the land question, and to tell the chiefs that there was "no probability of [their] views as to the land being entertained." When told that the government would set apart land for reserves, the chiefs demanded to know who had given the land to the queen for her to set apart. "We took the Queen's flag and laws to honour them," said one chief. "We never thought when we did that that she was taking the land away from us." *British Columbia Sessional Papers*, 1888, 432-34.



An "Indian Rights Agitator," as designated in an archival file labeled "McKenna-McBride Commission," Hartley Bay, British Columbia, ca. 1916 (British Columbia Archives and Records Service)

reserves on the basis of executive grace rather than legal title.⁴⁵ The joint commission was slow to get under way, and really did only a year's work in the field before the province complained that it was costing too much; in 1878 it was reduced to one member, Gilbert Malcolm Sproat, who was paid by Ottawa. When the province complained that his reserve allotments were too generous, Sproat was replaced by someone more sympathetic to the settler view of Indian land entitlement.⁴⁶

Although by any reasonable standard most of the reserves were small, by the early twentieth century many non-Indian British Columbians had become increasingly unhappy with the amount of valuable land, especially agricultural land, that the reserves contained. The Indian population had declined drastically since confederation, increasing both the ratio of reserve land to that population and the pressure upon government to reduce the reserves. Another problem was that Ottawa and British Columbia both insisted that they owned the underlying title to (or reversionary interest in) the province's Indian reserves. This meant that each asserted an exclusive right to dispose of reserve land once it was surrendered, a legal uncertainty that quickly proved a serious impediment to the land development both governments had in mind.⁴⁷

In 1908 the province took action. It ceased cooperating with the reserve commission and refused to set aside any more land until some sort of agreement could be reached with Ottawa

⁴⁵See Department of the Interior memorandum, November 5, 1875, and Report of the Minister of Justice (Edward Blake), April 28, 1876, the latter expressing doubts about whether this course of action removed the legal difficulties involved in ignoring the Indian title. These documents are reproduced in the report of the Special Committee of the Senate and House of Commons that inquired into the claims of the Allied Tribes of British Columbia in 1927: *Proceedings: Reports and the Evidence* (Ottawa, 1927), 44-49 [hereafter cited as 1927 Special Committee report]. For the province's point of view, see the memorandum of George Anthony Walkem, premier and attorney-general, dated August 17, 1875. This is reproduced in *Papers Connected with the Indian Land Question: 1850-1875* (1875; reprint, Victoria, 1987), in the 1877 supplement.

⁴⁶See *British Columbia Sessional Papers, 1885*, 391-401, for the allotments made by the reserve commissions up to then, and Robin Fisher, "An Exercise in Futility: The Joint Commission on Indian Land in British Columbia, 1875-1880," Canadian Historical Association, *Historical Papers* (1975), 79-94.

⁴⁷The federal government took the position that, if an Indian band were to surrender a portion of its reserve for sale, Ottawa held the proceeds of such sale for the band in trust. The province, on the other hand, insisted that, at the moment the surrender was complete, the title of the provincial Crown was perfected and Ottawa had no legal authority to do anything with the surrendered land: see Order in Council 125/1907 (British Columbia), and Order in Council P. C. 2739 (1907) for the federal response. Compromises were proposed and discussed, but proved elusive.

about the reversionary interest and about reducing the size of reserves. The Liberal prime minister, Wilfrid Laurier, proposed that the dispute and the whole matter of Indian title in British Columbia be referred to the courts, but the provincial government, which could be sued only if it consented, would not comply. Laurier then appears to have resolved to force the question into court unilaterally.⁴⁸ However, he lost the federal election of 1911, not over Indian issues but because of his policy of free trade with the United States. His administration was replaced by a Conservative one that was more sympathetic to British Columbia's position, and the two governments agreed to create a new reserve commission, which came to be known by the names of the federal negotiator, J.A.J. McKenna, and of British Columbia's premier, Richard McBride. In return for the province's relinquishing its claim to an interest in the underlying title to Indian reserves, the commission was to make recommendations as to which reserves should be increased in size and—much more importantly—which should be reduced.

The province refused to allow this commission to hear or to investigate any claims based upon aboriginal title, and the federal government agreed, promising the Indians that no reserves would be reduced in size without band consent.⁴⁹ The two governments also agreed that this would be "the full and final adjustment and settlement of all differences between the said Governments respecting Indian lands and Indian affairs in the Province."⁵⁰ However, when it became clear that many bands (especially the Allied Tribes of British Columbia, formed in 1916 as a response to the McKenna-McBride Commission's report) were unhappy with the commission's work, this promise was put aside. The legislation implementing the report specifically provided that land could be cut off reserves without complying with the surrender requirements of the Indian Act, i.e., without band consent.⁵¹

⁴⁸The Indian Act was amended to permit a test case to be brought in federal court against a provincial grantee (or licensee), with the intention that the status of the aboriginal title to the land in question would have to be determined before a decision about the grantee's rights could be rendered; see the 1927 Special Committee report, *supra* note 45 at 11, 52.

⁴⁹This was an explicit provision of the McKenna-McBride agreement; see *British Columbia (A.-G.) v. Mount Currie Indian Band* (1991), 54 B.C.L.R. (2d) 156 (B.C.C.A.).

⁵⁰See Indian Affairs Settlement Act, S.B.C. 1919, c.32, s.2. A similar clause is in the equivalent federal statute.

⁵¹See the British Columbia Indian Lands Settlement Act, S.C. 1919-20, c.51, s.3, and *Commons Debates* 1920, 790-91, 794-95. Although more land was added to than removed from reserves, the so-called "cut-off" lands were much more valuable. Years of agitation finally resulted in the Indian Cut-Off Lands Disputes Act, S.B.C. 1982, c.50.

The Allied Tribes of British Columbia eventually obtained a hearing before a joint committee of the Senate and House of Commons in Ottawa in 1927, at which they lodged their complaints about the commission's report and about British Columbia's refusal to acknowledge their aboriginal title. Once again, the province refused to take part. Its views were nonetheless ably presented by Duncan Campbell Scott, and the committee concluded that the Indians' claim of aboriginal title had no merit. That same year, the Indian Act was amended to make it an offense, without formal federal consent, for anyone to raise funds from Indians for the purpose of prosecuting any further claims against the government.⁵²

After the Second World War, more public attention focused upon Indians because of the contrast between the principles for which that war had been fought and the striking absence of those principles in Canada's Indian policy. One result was three years of hearings before another joint committee of the Senate and House of Commons, which sat from 1946 to 1948; these led to the first major overhaul of the Indian Act since its inception. Among other things, the joint committee recommended that no decision affecting Indian welfare be made without band consent and that a claims commission, along the lines of the Indian Claims Commission set up in the United States in 1946, be established to inquire into treaty and other rights. Neither of these recommendations was adopted, but the restrictions on Indian culture (including the potlatch law) and the prohibition against funding claims against the government were dropped, together with many of the extraordinary powers to interfere with reserves that had crept into the old act over the years. Nonetheless, considerable authority remained with the federal government. As one commentator put it, the main difference between the 1951 revised Indian Act and what it replaced is that the new law reduced the minister's powers to supervisory status with a veto. In short, the changes did not repudiate the goal of assimilation, only the means previously adopted to achieve it. When it became clear that the new law was not much more likely to be successful than the old one, alternative means were sought.⁵³

One of these means—the gradual transfer to the provinces of responsibility for Indian services—had already been recommended by the joint committee. This was because reserve Indians had fallen through the cracks in the Canadian Constitution: the federal government's underfunded efforts in this area,

⁵²Section 149A of the Indian Act, enacted by S.C., 1926-27, c.32, s.6.

⁵³Tobias, "Outline History," *supra* note 29 at 52, 53.

inadequate as they may have been, were sufficient to enable the provinces to delay extending social services to those within the special legislative jurisdiction of the federal Parliament.⁵⁴ The committee hoped that greater provincial involvement would speed assimilation by treating Indians more as ordinary citizens, a hope (or fear) that seemed to be confirmed when a federal study in the 1960s reported that this transfer had to proceed cautiously. The provinces lacked not only administrative and professional expertise, but the perception "that Indians are not really complete provincial citizens because of their special . . . relation to the federal government easily gets transmuted into the argument that if they wish to receive the same government treatment as other provincial citizens, they will have to give up their special privileges under treaty or the Indian Act." According to this report, "Provincial officials and politicians display a much more assimilative and less protective philosophy to Indians than does the federal government. There is, for example, a fairly general antipathy to the reserve system. Indians, we were told on several occasions, cannot have it both ways and retain their special privileges while simultaneously obtaining the full benefits of provincial citizenship."⁵⁵

Despite this warning, the federal government then made the one move in its hundred-year history that can be compared to the abrupt policy shifts south of the border. In 1969 it produced its rather inaptly titled White Paper on Indian policy.⁵⁶ This trial balloon signalled the end of gradualism, proposing the dismantling of the Indian Affairs Branch within five years, the repeal of the Indian Act, the rejection of land claims and treaties as regressive, and the provision of services to Indians through regular provincial agencies. It brought an outraged reaction from nearly all aboriginal groups and organizations. The British Columbia Indians' Brown Paper, the Alberta Red Paper, and the Manitoba *Wahbung* all argued strongly against it.⁵⁷ As the Alberta chiefs put it in their Red Paper, they wanted the act reviewed, not repealed, and they wanted their special

⁵⁴Section 91(24) of the Constitution Act, 1867, provides that "Indians, and Lands reserved for the Indians" are within the exclusive legislative competence of the federal parliament. But see *infra* note 71.

⁵⁵H.B. Hawthorn, ed. *A Survey of the Contemporary Indians of Canada* (Ottawa, 1966, 1967), pt. 1, ch. 17.

⁵⁶*Statement of the Government of Canada on Indian Policy* (1969). A White Paper in Canada is simply a preliminary policy paper on any topic, and has no racial connotation: see Miller, *Indian-White Relations*, *supra* note 19 at 225n.

⁵⁷See Wayne Daugherty and Dennis Madill, *Indian Government under Indian Act Legislation 1868-1951* (Ottawa, 1980), 80.

status confirmed and entrenched. Prime Minister Pierre Trudeau had said that treaties between groups of Canadians were historical anomalies and that "no society can be built on historical might have beens." The Alberta chiefs responded: "The only way to maintain our culture is for us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights."⁵⁸ Of course, not all Indians have treaties, and not all agreed. But the proposed policy was withdrawn. Within four years a decision by the Supreme Court of Canada, coupled with a perceived need to develop the hydroelectric potential of James Bay, led to Canada's first comprehensive land-claims policy.⁵⁹

It seems reasonable to conclude, therefore, that until recently Canada's "Indian policy" has been more consistent than the United States'. It is true that Deputy Superintendent Scott, disappointed by the slowness of education and intermarriage as tools of assimilation, attempted to accelerate the process by inducing the government to introduce compulsory enfranchisement in 1920.⁶⁰ It is also true that the reduction of Indian reserves during the late nineteenth and early twentieth centuries was not unlike the program initiated by the Dawes Allotment Act in the United States, and that the application of provincial law to Indians contemplated by the 1951 Indian Act has something in common with Public Law 280.⁶¹ One should therefore

⁵⁸Trudeau's remarks are quoted in Thomas R. Berger, *Fragile Freedoms: Human Rights and Dissent in Canada* (Toronto, 1981), 243, and the Alberta chiefs' in Richard H. Bartlett, "The Indian Act of Canada," *Buffalo Law Review* 27 (1978), 581, 589.

⁵⁹The decision was *Calder v. Attorney-General of British Columbia* (1973), see *supra* note 27. A comprehensive claim is one based upon unextinguished aboriginal title, and in British Columbia these will now be facilitated by the new British Columbia Treaty Commission. The federal government also has a specific claims policy, which deals with alleged breaches of treaty and statutory provisions: see Canada, Department of Indian Affairs and Northern Development, *Outstanding Business: A Native Claims Policy: Specific Claims* (Ottawa, 1982). Since 1991 there has also been an Indian Claims Commission, established pursuant to the federal Inquiries Act for specific claims.

⁶⁰The amendment was repealed in 1922. Scott had proclaimed in 1914 that "the happiest future for the Indian race is absorption into the general population, and this is the object of the policy of our government. The great forces of intermarriage and education will finally overcome the lingering traces of native custom and tradition." Quoted in Titley, *Narrow Vision*, *supra* note 31 at 34.

⁶¹See *supra* note 29. Note, however, that the Indian Civil Rights Act of 1968 made provision for the "retrocession" to the federal government of jurisdiction that a state had assumed under PL-280. Note also that reserve land that was surrendered and sold in fee to non-Indians in Canada did not remain part of the reserve, so that the "crazy-quilt" mixture of lands in many United States reservations does not exist there. There are, however, non-Indian lessees of reserve land.

not draw too heavy a line between the tensions in United States policy and the single-mindedness of Canada's. As one writer recently pointed out,

Despite their striking differences, there are important similarities between the two countries. Both regimes authorize the exercise of Indian governmental authority and provide for extensive differential treatment on the basis of indigenous difference. The United States Congress is constitutionally authorized to pass laws specific to Indian people. Similarly . . . the Parliament of Canada has [a like] jurisdiction to pass laws governing "Indians, and Lands reserved for the Indians," [without] their consent. Moreover, the United States Supreme Court has held the federal government to be in a position of trust and responsibility in its dealing with the Indian nations . . . [and the] Supreme Court of Canada has imposed a similar duty on the federal Crown.⁶²

In short, in the last century both countries faced broadly similar situations, and have responded with broadly similar policies.

But structural similarities between the two, not to mention episodes of bureaucratic frustration, are to be expected. The fact remains that, for most of its history, Canada has pursued a program of assimilation that was not interrupted by the sort of policy reversals that have occurred in the United States. As Scott put it in 1920,

I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought continuously to protect a class of people who are able to stand alone. That is my whole point. Our objective is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic, and there is no Indian question, and no Indian Department.⁶³

Perhaps one reason for this singleness of purpose is that Canada has not had to contend with the legacy of tribal sovereignty that is enshrined—however precariously—in its neighbor's national legal consciousness.

⁶²Patrick Macklem, "Distributing Sovereignty . . . Indian Nations and Equality of Peoples," *Stanford Law Review* 45 (1993), 1311, 1323, footnotes omitted.

⁶³Quoted in Titley, *Narrow Vision*, supra note 31 at 50.

FOUNDATION CASES

The answer to the question of whether there is a Canadian equivalent of the Marshall Court decisions should not, therefore, come as a surprise. The Supreme Court of Canada, which was established in 1875, did not address the question of Indian title until its decision in *St. Catherine's Milling and Lumber Co. v. The Queen* in 1887. By an unfortunate coincidence, the trial judge heard the case at about the same time as federal troops, two of whom were his sons, were putting down the Northwest Rebellion.⁶⁴ Shortly thereafter, the Supreme Court more or less confirmed his and the Ontario Court of Appeal's rather emaciated view of the legal nature of that title.⁶⁵ An appeal was taken the following year to the Judicial Committee of the Privy Council, which held that the Indians' interest in their traditional lands was a "mere burden" on the Crown's proprietary estate. Indian title, wrote Lord Watson, is only a "personal and usufructuary right, dependent upon the good will of the Sovereign."⁶⁶ These somewhat anemic and ambiguous words (their lordships did not "consider it necessary" to elaborate further) have resonated through the years. Although they conferred more legal weight upon the notion of Indian title than the Supreme Court had been prepared to recognize, they had a chilling effect upon attempts to assert that title. The Supreme Court of Canada has now largely repudiated this characterization of the rights involved, but a trial judge reasserted it in March 1991 in what is probably the nation's most important land-claims case. As this essay was being completed, he was unanimously overruled.⁶⁷

The Marshall cases, including *Worcester v. Georgia*, were argued in *St. Catherine's*, but neither the Judicial Committee nor the Supreme Court of Canada considered the issues of

⁶⁴Donald B. Smith, "Aboriginal Rights a Century Ago," *The Beaver* 67 (1987), 4, 9-10. One son fought at the battle of Cut Knife Hill, the other did garrison duty at Battleford.

⁶⁵*St. Catherine's Milling and Lumber Co. v. The Queen* (1887), 13 S.C.R. 577. For an intriguing look at the background to the *St. Catherine's* case, see S. Barry Cottam, "Indian Title as a Celestial Institution: David Mills and the *St. Catherine's Milling Case*," in *Aboriginal Resource Use in Canada: Historical and Legal Aspects*, ed. Kerry Abel and Jean Friesen (Winnipeg, 1991), 247-65.

⁶⁶See *supra* note 24 at 54, 58.

⁶⁷See *supra* note 28, and the reasons of Macfarlane, J.A., at pp. 492-97 of the Court of Appeal's decision. While the court declined to describe the aboriginal interest as proprietary, the judges did hold that it was a unique, *sui generis* interest in land that was more than a merely personal right and that was capable of competing, or at least coexisting, with the proprietary interests of the Crown and its grantees.

tribal sovereignty or self-government. The Supreme Court still has not done so directly, although in its most important recent decision it was obliged to do so inferentially.⁶⁸ One reason for this silence would appear to be the assumption that Canada's Indians were British subjects, possessing no more sovereignty or right of self-government than anyone else.⁶⁹ On this view, the grant to Parliament of legislative authority over "Indians, and the Lands reserved for the Indians" in s.91(24) of the Constitution Act, 1867, is seen as a grant of authority over a racial group rather than over "domestic dependent nations" enjoying inherent, albeit limited, sovereignty.⁷⁰

The result has been a legal regime in which all powers of aboriginal self-government are regarded as deriving from the Indian Act (a federal statute), and in which the only protection against the application of provincial law to First Nations was their treaties—if they had them. Otherwise provincial laws applied to Indians, on or off reserve,⁷¹ and such laws could effectively abrogate even traditional rights so long as the legislature did not intend to single Indians out for differential treatment.⁷² In other words, the Supreme Court of Canada emphatically rejected the "enclave" theory that animates American law, whereby the reservation boundary—at least in theory—presents a relatively impermeable barrier to state legislation unless Congress decides otherwise.⁷³

⁶⁸See *Regina v. Sparrow*, supra note 28. Appeals to the Judicial Committee of the Privy Council were abolished in 1949.

⁶⁹See *Logan v. Styres* [1959], 20 D.L.R. (2d) 416 (Ont.).

⁷⁰See supra note 54, and contrast *Morton v. Mancari*, 417 U.S. 535 (1974) in the United States.

⁷¹There is, admittedly, some confusion about whether provincial law applied on reserve before 1951. Before the Supreme Court of Canada's decision in *Dick v. The Queen*, [1985] 2 S.C.R. 309, it appeared that s.88 of the Indian Act had been enacted in 1951 to make provincial laws apply on reserve, which they would not otherwise have done. In *Dick*, however, the Court ruled that provincial laws "of general application" have always applied to Indians *ex proprio vigore*, and that s.88 was needed only to give effect to laws that interfered with "Indianness" so much that, without s.88, they would be regarded as trenching upon federal jurisdiction. The section works by referentially incorporating such laws as federal law.

⁷²Unlike a provincial law that simply affects aboriginal rights, one that is directed specifically at Indians trenches upon federal legislative jurisdiction under s.91(24) of the Constitution Act, 1867, and is not referentially incorporated by s.88. It is therefore *ultra vires*. See, e.g., *Regina v. Sutherland*, [1980] 2 S.C.R. 451, and *Regina v. Moosehunter*, [1981] 1 S.C.R. 282.

⁷³As it did when it enacted the Major Crimes Act and Public Law 280. There are many other examples of this exercise of congressional authority; note also the exceptions and the principle contained in cases such as *United States v. McBratney* (supra note 11).

Although treaties could insulate First Nations against provincial law, they have not protected them from the sweep of federal law, which was held to prevail over treaty rights in case of conflict.⁷⁴ On the other hand, when considering whether federal legislative jurisdiction over Indians might also include the Inuit (Eskimos) of Quebec, Ottawa was less enthusiastic about an expansive interpretation of its authority. Although the Supreme Court held on a reference that the term "Indians" in s.91(24) of the Constitution Act of 1867 does include the Inuit, they continue to be excluded from the operation of the Indian Act.⁷⁵ Inuit might, in other words, be Indians for constitutional purposes, but the grant of jurisdiction in s.91(24) does not oblige Parliament "to legislate to the full limit of its authority."⁷⁶

Perhaps the most succinct, and certainly the most recent, judicial statement of the view that tribal sovereignty has not played a significant role in Canadian legal history is to be found in a decision that is otherwise the Supreme Court of Canada's most emphatic affirmation of aboriginal rights. In *Regina v. Sparrow*, the Court was faced for the first time with interpreting Part II of the Constitution Act, 1982, relating to the rights of First Nations.⁷⁷ In that year major changes to the country's constitutional structure were made, including s.35(1), which states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." In a decision that turned much of the pre-1982 law on its head, the court ruled that the food fishery of the Musqueam of

⁷⁴*Sikyea v. The Queen*, [1964] S.C.R. 642, affirming 46 W.W.R. 65 (N.W.T.C.A.), holding that the Migratory Birds Convention Act of 1917 overrode the hunting rights guaranteed in Treaty 11, which had been signed in 1921. See also *Regina v. George*, [1966] S.C.R. 267, confirming that s.88 of the Indian Act protects Indians only against provincial, not federal, statutes, and compare with *Lone Wolf v. Hitchcock*, *supra* note 11.

⁷⁵See *Reference re term "Indians,"* [1939] S.C.R. 104 (sub. nom. *Re Eskimos*). The issue arose with respect to the Inuit of northern Quebec (the Inuit of Yukon and the Northwest Territories are clearly a federal responsibility). Despite the lack of a governing statute, Inuit affairs are administered by Ottawa; see Jack Woodward, *Native Law* (Toronto, 1989), 52, and note that a similar question to that raised in *Re Eskimos* exists with respect to whether s. 91(24) includes the Métis people.

⁷⁶Peter Hogg, *Constitutional Law of Canada*, 3d. ed. (Toronto, 1992), 666 [hereafter cited as Hogg, *Constitutional Law*]. On divergent interpretations of s.91(24), see Bradford Morse, "Government Obligations, Aboriginal Peoples and Section 91(24)," in *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles*, ed. David C. Hawkes (Ottawa, 1989), 59-91.

⁷⁷See *Regina v. Sparrow*, *supra* note 28, and s.35(1) of the Constitution Act, 1982, which is Schedule B to the Canada Act, 1982 (U.K.).

British Columbia was protected by s. 35(1), and that it had not been extinguished by a century of intensive federal regulation. The Court also ruled that the aboriginal food fishery was protected by the Constitution, that federal regulators had to rank the fishery second only to conservation needs when allocating the resource, and that a strict justificatory test would be applied to any law that interfered with it. In the course of doing this, however, the Court stated that

while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown: see *Johnson v. M'Intosh*, 8 Wheaton 543 (1823) (USSC).⁷⁸

That American case law should be cited for this proposition is interesting, because the court that decided *Johnson* went on to develop the doctrines of inherent sovereignty, domestic dependent nationhood, and Indian title that animate *Worcester v. Georgia* and its progeny.⁷⁹ Even more interesting is the assertion that the proposition has never been doubted.

In fact, there was a time when Canadian courts were not at all sure that the tribes were not nations with their own title and laws.⁸⁰ In a series of mainly criminal cases beginning in 1818 and ending in 1838, the assize courts of York, Montreal, Quebec, and Trois Rivières all heard arguments that imperial law did not apply in Indian country. The charges were brought in Upper and Lower Canada pursuant to the Canada Jurisdic-

⁷⁸*Ibid.* at 283.

⁷⁹*Worcester v. Georgia*, *supra* note 10, which strengthens the doctrine of domestic dependent nation originally laid down in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and describes the United States' interest in unceded Indian lands as more of an exclusive right to purchase than a type of title. Admittedly, the latter view was considerably weakened by the almost *St. Catherine's Milling*-style approach of the United States Supreme Court in *Tee-Hit-Ton Indians v. United States*, *supra* note 6.

⁸⁰See Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases," *Manitoba Law Journal* 21 (1992), 343. It is also interesting to note that in *Regina v. Sioui* (1990), 56 C.C.C. (3d) 225 (S.C.C.), 246, 254, which was released a week before *Sparrow*, the justices stated that "the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations." And in a passage that invites comparison with the cases cited in note 74, *supra*, they wrote that "the very definition of a treaty . . . makes it impossible to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned."

tion Act, a British statute that authorized the courts of these two jurisdictions to try offences from the Indian Territories as if they had been committed within the colony.⁸¹ The gist of the arguments presented in this period is summarized in the following excerpt from the submissions in a case associated with the destruction of Lord Selkirk's settlement at Red River. Defense counsel told the court that

the British legislature could not, for a moment, entertain any right to make laws to bind any, but her own subjects, in the Indian Territory. Nor do I admit that they could even go that length, but, without admitting or denying their power over their Own subjects, it could extend no farther. . . . [Tribal] independence has been, and is, recognized by *Great Britain* herself. If I only refer to the numerous treaties made with the Indians by the British nation [and] look to the very act [the Canada Jurisdiction Act] upon which this indictment is founded . . . I deduce the same favourable confirmation of my position. It is an act for the punishment of crimes and offences in the Indian territories.⁸²

Although the jurisdiction of the imperial Parliament to pass the Canada Jurisdiction Act was upheld, the implicit result of cases such as this one was that, in the absence of an imperial statute authorizing the same, colonial law did not extend to the trial of Indians for acts committed in Indian country.⁸³ All in all, the ruling was not unlike those laid down in *Worcester v. Georgia* and *Ex Parte Crow Dog*.⁸⁴

The spirit of these early decisions was quickly forgotten, however. The decisions were not reported in the law reports, the statutes under which they were decided were repealed, and the Indian Territories were absorbed into the Dominion of Canada. Moreover, because the decisions were made in an age

⁸¹43 Geo. III (1803), c.138 (U.K.). For a brief history of this statute, see Hamar Foster, "Long Distance Justice: The Criminal Jurisdiction of Canadian Courts West of the Canadas, 1763-1859," *American Journal of Legal History* 34 (1990), 1.

⁸²W.S. Simpson, *Report at Large of the Trial of Charles De Reinhard* (Montreal, 1819), 252, emphasis in original.

⁸³See especially *The Queen v. Baptiste Cadien* (1838), the record of which is entirely archival, where the assize court at Trois Rivières appears to have reached this conclusion as a matter of statutory interpretation. A published account may be found in Hamar Foster, "Sins Against the Great Spirit: The Law, the Hudson's Bay Company, and the Mackenzie's River Murders, 1835-1839," *Criminal Justice History: An International Annual* 10 (1989), 23.

⁸⁴See supra note 10.

when there were no regular appeals in criminal cases, they remained simply rulings in the course of trials by jury.⁸⁵ As late as 1867, the year of confederation, a Quebec court took a somewhat similar approach when it upheld the validity of a Cree marriage in estate litigation; but, aside from a few more decisions dealing with the relevance of customary aboriginal law in a relatively small number of circumstances, the concepts of aboriginal title and tribal sovereignty were rarely even hinted at.⁸⁶ By 1908 the Ontario Court of Appeal could assert, without fear of contradiction, that to say that the Criminal Code did not apply to Indians was a proposition "so manifestly absurd as to require no refutation."⁸⁷ It is hardly surprising, therefore, that tribes in Canadian law have not been regarded as enjoying the sort of inherent sovereignty that is a commonplace of federal Indian law in the United States.⁸⁸

However, although there were no Canadian "foundation" cases like those in the United States, i.e., rulings of the highest court establishing principles of tribal sovereignty and title early in the nation's history, over the past twenty years there have

⁸⁵There were no appeals as of right in serious criminal cases in Canada until the late nineteenth century.

⁸⁶*Connolly v. Woolrich and Johnson et al.* (1867), 11 L.C. Jur. 197. See also *The Queen v. Nan-e-quis-a Ka* (1889), 1 N.W.T. Rep., pt. 2, and compare *Regina v. Bear's Shin Bone* (1899), 3 C.C.C. 329.

Readers interested in how aboriginal peoples have been treated by the Canadian justice system in general, and the extent to which that system has recognized their customary laws, may wish to refer to the following selections from the literature: Bradford Morse, "A Unique Court: S.107 Indian Act Justices of the Peace," (1982) C.L.A.B. 131, and "Indian and Inuit Family Law and the Canadian Legal System," *American Indian Law Review* 8 (1980), 199; Norman K. Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases," [1984] 4 C.N.L.R. 1; William B. Henderson, "Native Customs and the Law" (Ottawa, Research Branch Corporate Policy, Indian and Northern Affairs Canada, 1985); Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?," *Osgoode Hall Law Journal* 24 (1986), 605; Michael Jackson, "Locking Up Natives in Canada," *University of British Columbia Law Review* 23 (1989), 215; James Youngblood Henderson, "First Nations' Legal Inheritance" (Working Paper 91-5 in the University of Manitoba's Canadian Legal History Project, 1992); Rupert Ross, "Leaving Our White Eyes Behind: The Sentencing of Native Accused," [1989] 3 C.N.L.R. 1, and *Dancing with a Ghost: Exploring Indian Reality* (Markham, 1992); and *Report of the Aboriginal Justice Inquiry of Manitoba*, 2 vols. (Winnipeg, 1991).

⁸⁷*Regina v. Beboning* (1908), 17 O.L.R. 23, 25 [C.A.]. It must be remembered, of course, that in Canada jurisdiction over criminal law is federal.

⁸⁸See Felix Cohen, *Handbook of Federal Indian Law* (Albuquerque, 1942), 122: "Perhaps the most basic principle of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished."

been some remarkable developments. The *Sparrow* case, referred to above, is the last in a series of legal and political events that may well transform the impact of Canadian law upon First Nations. This series began soon after Ottawa released its White Paper in 1969. As we have seen, in that year the federal government announced a proposal to speed up the assimilative process of the previous century by embarking upon an American-style policy of termination with a vengeance. A version of Duncan Campbell Scott's program of fifty years earlier was to be enacted and put into effect, and then the "Indian problem" would disappear, or at least be defined out of existence.⁸⁹ The White Paper therefore represented a break with the past, but only with respect to the means adopted to realize government policy, which were now seen as perpetuating separateness and economic disadvantage rather than assimilation. The Paper's withdrawal without implementation marked a watershed in the legal history of Canada's First Nations: instead of a reversion to the status quo, over the past two decades there has been a transformation in how the government and the courts view aboriginal rights.

A selective chronology will help to make this point. In 1973 the Supreme Court of Canada's decision in the *Calder* case, which established that Indian title could exist in Canada even if it had not been recognized by treaty or statute, led Prime Minister Trudeau to remark that he guessed that Indians had more rights than he had realized.⁹⁰ This case, and the legal uncertainty that it caused over the development of the hydroelec-

⁸⁹See text accompanying note 63, *supra*. For an interesting analysis of the concept of the "Indian problem," see Noel Dyck, "Negotiating the Indian Problem," in *Out of the Background: Readings on Canadian Native History*, ed. Robin Fisher and Kenneth Coates (Toronto, 1988), 267-84.

⁹⁰The White Paper had asserted that "aboriginal claims to land . . . are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community" (quoted in *Regina v. Sparrow*, *supra* note 28 at 283-84).

Remarkably, as late as the trial and first appeal in *Sparrow*, lower-court judges still held that there could be no unrecognized Indian title. The reasoning was that the British Columbia Court of Appeal in *Calder v. Attorney-General of British Columbia* had ruled that, because the title of the Nisga'a had never been recognized by government, it never existed; and because the Supreme Court had divided 3-3 on the merits and dismissed the Nisga'a appeal 4-3 (the seventh judge ruled that the case was not properly before the courts because the Crown had not granted permission to sue), the British Columbia Court of Appeal ruling still bound trial judges in that province. However, as the provincial appeal justices pointed out in *Sparrow*, this reasoning completely ignored the fact that the six Supreme Court judges who addressed the merits in *Calder* had ruled that unrecognized title could exist: they had divided only on the question of whether the Nisga'a title had been extinguished; see [1986], 32 C.C.C. (3d) 65 (B.C.C.A.), 79-84.

tric potential of James Bay, led, as we have seen, to the first federal comprehensive land-claims policy and the James Bay settlement.⁹¹ In 1982 the Canadian Constitution was amended to provide for the recognition and affirmation of existing aboriginal rights, and the federal and provincial governments held a series of ultimately unsuccessful, but highly public and important, conferences with aboriginal leaders designed to provide for a constitutional right to self-government.⁹² In 1984 the first of several northern land-claims agreements was signed with the Inuvialuit of the western Arctic.⁹³

That same year, the Supreme Court ruled in *Guerin et al. v. R. and National Indian Brotherhood* that there was a legally enforceable fiduciary duty upon the Crown to deal with surrendered reserve lands in the best interests of the band.⁹⁴ In 1985 the British Columbia Court of Appeal issued an interim injunction blocking all logging on Meares Island in Clayoquot Sound, pending the resolution of the land claim of the Ahousaht and Tla-o-qui-aht peoples.⁹⁵ It was the first time that any court in that province had refused to allow resource extraction to pro-

⁹¹See text accompanying note 59, *supra*. The new policy required the surrender of all aboriginal rights and title in exchange for money and land, although the federal government did not concede that any such rights actually existed in law. It was explained in 1981 in *In All Fairness: A Native Claims Policy: Comprehensive Claims* (Ottawa, 1981). A task force reviewed the policy a few years later and issued a report entitled *Living Treaties, Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa, 1985). As a result, Ottawa broadened its approach to include self-government issues, and modified its insistence on extinguishment of aboriginal rights: see *Comprehensive Land Claims Policy* (Ottawa, 1986). For aboriginal criticism of the policy, as amended, see "A Critique of Federal Government Land Claims Policies," reproduced in *Aboriginal Self-Determination*, ed. Frank Cassidy (Lantzville, 1991), 232-46.

⁹²See ss.35, 35.1, 37, and 37.1 of the Constitution Act, 1982, as amended.

⁹³See, *inter alia*, Andrew R. Thompson, "Land Claims Settlements in Northern Canada: Third Party Rights and Obligations," *Saskatchewan Law Review* 55 (1991), 127. Other federal agreements that have been signed, or are being negotiated, in the north include ones with the Council of Yukon Indians, with the Dene of the Mackenzie River Delta, and with the Inuit of the eastern Arctic (Nunavut). Negotiations with the Dene and Métis of the Mackenzie River Valley broke down in 1990.

⁹⁴*Guerin et al. v. R. and National Indian Brotherhood*, [1984] 2 S.C.R. 335. Before *Guerin*, legal orthodoxy held that the minister's obligation under the Indian Act to ensure that reserves were held for the use and benefit of the bands for which they were set apart was a political obligation only, not a legally enforceable one.

⁹⁵*Macmillan Bloedel Limited v. Mullin et al; Martin et al. v. Regina in Right of British Columbia et al.* (1985), 61 B.C.L.R. 145 (B.C.C.A.). Litigation of this claim was commenced in the Supreme Court of British Columbia, and then adjourned by the parties after the plaintiffs put in their case in order to try to secure a negotiated settlement. It is still unclear whether the parties will return to court, but a preliminary resource-management agreement has been signed.

ceed because of possible Native claims. Then in 1990 the Supreme Court of Canada decided the *Sparrow* case, which held not only that the class of existing aboriginal rights might be a substantial one, but that extinguishment was not to be lightly implied. The Court also acknowledged that aboriginal rights were constitutionally protected, and ruled that such rights could be regulated only if strict criteria were met.⁹⁶ Perhaps even more noteworthy, the Court expanded the concept of fiduciary obligation developed in *Guerin*. The "honor of the Crown" is no longer confined to reserve lands and executive action; it now applies to all governmental interaction with aboriginal people, including legislation:

[T]he words "recognition and affirmation" [in s.35(1) of the Constitution Act, 1982] incorporate the fiduciary relationship . . . and so import some restraint on the exercise of sovereign power. . . . Federal legislative powers continue . . . with respect to Indians . . . [but they] must . . . now be read together with s.35(1). In other words, federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.⁹⁷

⁹⁶Johnson, in "Fragile Gains," supra note 3 at 693-95 and 714-15, has suggested that the *Sparrow* test is analogous to the American "strict scrutiny" approach to equal protection guarantees.

It might be useful to point out that, in contemplating the possibility that, exceptionally, extinguishment could occur in the absence of explicit legislation, Canadian law has followed United States law; see, for example, *United States v. Santa Fe Pacific Railway Co.*, 314 U.S. 339 (1941). Over the past ten years or so Canadian courts have also followed United States law in holding that Indian treaties and statutes are to be interpreted liberally, and their terms construed as they would have been understood by the Indians. The leading case is probably *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29.

⁹⁷*Regina v. Sparrow*, supra note 28 at 288. The Court went on to say that s.35(1) "sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are affected." It also confirmed, a fortiori, that s.35(1) protects aboriginal people from provincial legislative power, a conclusion that severely modifies the much broader view of provincial law that the Court had enunciated in *Dick v. The Queen*, supra note 71. See also the recent British Columbia Court of Appeal decisions in *Delgamuukw et al. v. The Queen*, supra note 28, and the hunting and fishing cases decided with it. In *The Queen v. William Alphonse* (1993), 80 B.C.L.R. (2d) 17, for example, the majority held that the British Columbia Wildlife Act applied to the defendant because it was referentially incorporated as federal law pursuant to s.88 of the Indian Act (see supra notes 71-72). However, the conviction was overturned because the relevant provisions of the Wildlife Act unjustifiably infringed on the defendant's aboriginal right to hunt, thereby violating s.35(1) of the Constitution Act, 1982.

In short, Parliament's plenary power over Indians and their lands has been subjected to the constitutional guarantees enacted in 1982. And although aboriginal and treaty rights may still be regulated by Parliament if the *Sparrow* criteria are met, it is unlikely that they can be extinguished, legislatively or otherwise.⁹⁸ This is clearly a much stronger protection for aboriginal rights than presently exists in the United States.⁹⁹

Nineteen-ninety, the year in which *Sparrow* was decided, also saw a deadly stand-off in Quebec between the Mohawk and the Canadian military at Kanesataké (Oka), and the defeat of the Meech Lake Accord.¹⁰⁰ The former alerted Canadians to what the future might hold if changes in legal doctrine did not lead quickly to concrete action on aboriginal rights; the latter put Canadians on notice that constitutional changes made without aboriginal participation and without addressing aboriginal interests were unlikely to be enacted into law.¹⁰¹ Two and a half years of constitutional negotiations ensued, designed to accommodate the aspirations of all the regions of the country. This was a tall order that was probably doomed from the outset, but the agreement reached at Charlottetown, Prince Edward Island, in the summer of 1992 was a remarkable victory for Canada's First Nations. They succeeded in securing a number of important provisions, including recognition of the First

⁹⁸For a more detailed discussion, see Brian Slattery, "First Nations and the Constitution: A Question of Trust," *Canadian Bar Review* 71 (1992), 273 [hereafter cited as Slattery, "First Nations and the Constitution"], and Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments," *Queen's Law Journal* 19 (1993), commenting on Slattery.

⁹⁹See, for example, Matthew P. Wells, "*Sparrow* and *Lone Wolf*: Honoring Tribal Rights in Canada and the United States," *Washington Law Review* 66 (1991), 1119, wherein the author proposes that Congress enact legislation reflecting the Canadian approach.

¹⁰⁰The bloodshed at Oka occurred in the context of a complicated dispute over title to land, and has some similarities with the events at Wounded Knee in the early 1970s. The Indians' title had been denied by the Judicial Committee of the Privy Council in *Corinthe et al. v. Ecclesiastics of the Seminary of St. Sulpice of Montreal*, [1912] A.C. 872, and nearly three-quarters of a century later both specific and comprehensive claims were disallowed. The town of Oka's decision to develop the land as a golf course precipitated a roadblock that led to a police assault and a sustained state of siege.

The Meech Lake Accord was an agreement to make constitutional changes reached by Ottawa and the provinces in 1987. It was designed to induce Quebec to ratify the Constitution Act of 1982, which had been enacted over that province's objections: see Peter Hogg, *Meech Lake Accord Annotated* (Toronto, 1988). Written before the failure of the accord to gain unanimous approval of the provincial legislatures, Hogg's is nonetheless an excellent account of its genesis and structure.

¹⁰¹Primarily because of the role played by Elijah Harper, a Cree legislator from northern Manitoba, who blocked the timely consideration of the accord by the Manitoba legislature.

Nations as a third level of government with an inherent right to govern themselves.¹⁰² However, Canadians rejected what was by then called the Charlottetown Accord in a national referendum held in October 1992, making further attempts at constitutional reform a political non-starter for the foreseeable future.¹⁰³ To make matters worse, a year earlier the British Columbia Supreme Court had ruled in the longest and probably most important land-claims case in Canadian history that the Gitksan and Wet'suwet'en peoples of northern British Columbia had no title, and that there were virtually no aboriginal rights in that province for s.35(1) to affirm.¹⁰⁴

However, these setbacks only served to emphasize how far the debate in Canada over aboriginal rights had come. Rebuffed at Charlottetown, First Nations are now negotiating with the government or considering simply asserting their sovereignty directly, letting the courts determine whether they already have an inherent right to self-government under s.35(1) of the existing Constitution.¹⁰⁵ In May 1993 the British Columbia Treaty Commission was established by statute to speed the ponderous comprehensive-claims process, an event that puts a legal imprimatur upon that province's recent rejection of its century-old policy of refusing even to talk about, much less acknowledge, aboriginal title.¹⁰⁶ On June 25, 1993, the British Columbia Court of Appeal partially reversed the trial court's ruling in the Gitksan-Wet'suwet'en case and handed down decisions in seven hunting- and fishing-rights cases.¹⁰⁷ The implications of these complex rulings are unclear, and they

¹⁰²*Final Text of the Consensus Report on the Constitution* (Charlottetown, 1992), 3, 19. The aboriginal government provisions of the Charlottetown Accord are discussed in much more detail by Kent McNeil in his article in this issue.

¹⁰³It seems likely that most non-aboriginal Canadians who voted against the accord did so not because they opposed the aboriginal-rights provisions, but because they opposed other provisions (primarily those dealing with the status of Quebec) or indeed the whole idea of a comprehensive accord of this sort. It should also be noted that many First Nations people also voted against it, probably because their leaders had not done a good job of explaining it and because there was a great deal of apprehension about what it might mean. A number even boycotted the vote, especially the Mohawk and some of the treaty bands on the prairies who saw incorporation into the Constitution as a denigration of their sovereignty; see, e.g., "Message to all Canadians from First Nations of Treaty 6 and 7," *Globe and Mail*, September 24, 1992.

¹⁰⁴See *Delgamuukw et al. v. The Queen*, supra note 28 (trial judgment).

¹⁰⁵The most comprehensive exploration of this argument is Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Right of Aboriginal Self-Government in Canada* (Montreal, 1990).

¹⁰⁶Treaty Commission Act, supra note 23, proclaimed into law May 26, 1993.

¹⁰⁷See supra notes 28 and 97, and note 132 infra.

certainly do not amount to a ringing endorsement of aboriginal title; but their affirmation of a legal and constitutional basis for aboriginal rights in British Columbia confirms that the trial judge's approach in *Delgamuukw* was an aberrant and transitory remnant of another age.

The transformation described above should not be allowed to obscure the fact that the conditions under which most of Canada's aboriginal peoples live remain bleak, even desperate.¹⁰⁸ Many of the legal and political developments of the past twenty years are, for many reserve Indians, simply words on paper. Nonetheless, they mark a virtual revolution in consciousness in Canada's legal and political systems, and among large segments of its non-aboriginal population. They also seem to be producing some tangible results. Moreover, although Canadian law has been influenced by developments in Australia, New Zealand, and elsewhere, it has contributed as much to the emerging transboundary approach to aboriginal rights as it has received from other jurisdictions.¹⁰⁹ It remains to be seen whether decisions such as *Sparrow* will have any impact in the United States.¹¹⁰

DIVERGENT FORCES

In Canada, as in the United States, a tension has existed between assimilationist (or at least integrationist) and separatist forces, but, as the foregoing suggests, until quite recently it had little basis in positive law. The overwhelming weight of jurisprudence ignored aboriginal title and sovereignty, and the Indian Act, although largely separatist in effect, was designed to be transitional. Such title as may have existed was said to do so only at the pleasure of the Crown, and all powers of self-government were a product of federal delegation, not inherent right.

However, the changes in the last twenty years could not have happened if the twin fires of sovereignty and title had not been kept alive amongst the First Nations themselves. They were not always described in these terms, nor were the fires often much more than embers. But they never went out. Examples

¹⁰⁸See, for example, the Statistics Canada survey released on June 29, 1993, and reported in the press.

¹⁰⁹For example, Canadian case law and scholarship played an important role in the Australian High Court's decision in *Mabo v. Queensland*, supra note 4. The court referred to recent Supreme Court of Canada decisions, and some of the judges were clearly influenced by Kent McNeil's *Common-Law Aboriginal Title* (New York, 1989).

¹¹⁰See supra note 99.

abound, from well before the many complaints that were made about the enfranchisement provisions of the Gradual Civilization Act of 1857 in the 1860s, to well after the Six Nations' appeal to the League of Nations in the 1920s.¹¹¹ Some aboriginal peoples, notably the Mohawk, have vigorously asserted their claims to a form of sovereignty virtually indistinguishable from national independence. Others—for example, the Inuit of the eastern Arctic—have emphasized again and again that they see their self-government as a way to join confederation, not to leave it, and that their homeland, Nunavut, will be a part of Canada. Many others have been comparatively silent, preoccupied with the daily struggle to survive on reserves that resemble nothing so much as Third World slums.

In British Columbia the demand was for treaties and self-government, but above all for resolution of what has been known since 1875 as the Indian Land Question.¹¹² Before 1927, successive aboriginal delegations went to Victoria, Ottawa, and London to protest the provincial government's refusal to acknowledge their title. Some of the men in these delegations had integrationist views; others simply wanted the outside world to leave them alone. But they all wanted to have their rights as Indians recognized and respected. Chief Johnny Chilli-hitza of the Okanagan, for example, told the parliamentary committee that sat in 1927 (to hear the petition of the Allied Tribes) that his forefathers had never relinquished their title, and that he had come to Ottawa to receive "power in my title and my rights." He added that Indians did not want to be enfranchised, but to remain as they were: "All the Indians want is to be just Indians, and not to be taken as white people."¹¹³

The Nisga'a Land Committee and the Allied Tribes of British Columbia were especially active, and members of government commissions and parliamentary committees sometimes felt that they had heard endless complaints about Indian title, reserve allotments, and fisheries regulations. Few of these politicians and officials could speak as eloquently about what was in their hearts as the Reverend Peter Kelly, a Haida and a Methodist minister. He was one of those testifying in 1927, and he spoke of the many attempts, beginning with the Nisga'a and

¹¹¹S.P.C. 1857, c.26. For a brief account of the Six Nations appeal, see Dickason, *Canada's First Nations*, supra note 20 at 355-59. For some of the legal battles this struggle has entailed, see *Logan v. Styres*, supra note 69, and *Isaac v. Davey*, [1977] 2 S.C.R. 897.

¹¹²1875 was the year in which the *Papers Connected with the Indian Land Question* were published; see supra note 45.

¹¹³See text accompanying note 52, supra, and the *Proceedings: Reports and the Evidence* of the committee, supra note 45 at 142.

Tsimshian delegation to Victoria in 1887, that British Columbia's Indians had made to assert aboriginal title. When questioned by a member of the committee about what would happen if this title were not recognized, he replied:

Then the position that we would have to take would be this: that we are simply dependent people. Then we would have to accept from you, just as an act of grace, whatever you saw fit to give us. Now that is putting it in plain language. The Indians have no voice in the affairs of this country. They have not a solitary way of bringing anything before the Parliament of this country, except as we have done last year by petition, and it is a mighty hard thing. If we press for that, we are called agitators, simply agitators, trouble makers, when we try to get what we consider to be our rights. It is a mighty hard thing, and as I have said, it has taken us between forty and fifty years to get where we are today. And, perhaps, if we are turned down now, if this Committee see fit to turn down what we are pressing for, it might be another century before a new generation will rise up and begin to press this claim. If this question is not settled, in a proper way and on a sound basis, it will not be settled properly. Now, that is the point we want to stress.¹¹⁴

The committee did turn them down, finding that the petitioners had not established any claim to the lands of British Columbia "based on aboriginal or any other title." The matter, wrote the committee members, "should now be regarded as finally closed." They added that the agitation that had been going on for so long in British Columbia also existed in other parts of Canada, often carried on by "designing white men." It was, they advised the government, to be "deplored, and . . . discountenanced."¹¹⁵

As we have seen, Parliament quickly obliged. Fund-raising to finance the further prosecution of claims such as the Allied Tribes' was made a federal offence.¹¹⁶ But when this prohibition was dropped after the Second World War, Peter Kelly's new

¹¹⁴Ibid. at 161. "Agitation" was the usual word that politicians used in connection with the Allied Tribes and their sympathizers; see, for example, *Commons Debates* 1920: vol. 1, 792, and the caption to the photograph on p. 81.

¹¹⁵Ibid. at xi.

¹¹⁶See *supra* note 52 and accompanying text.

generation did rise up, several decades ahead of schedule, and began to press for the settlement that had eluded him.

Resistance, however, was not confined to the issue of title. As Duncan Campbell Scott no doubt realized before he died, assimilation was not happening at anything like the pace he had anticipated, and the "Indian problem" was not disappearing. Critics may debate whether this failure was a product of too many concessions to aboriginal "separatism" or too few, but, whatever the explanation, Ottawa's reach had exceeded its grasp. One recent commentator has made this point by quoting from Shakespeare's *Henry IV*, part 1:

Owen Glendower: I can call spirits from the vasty deep.

Hotspur: Why, so can I, or so can any man; But will they come when you do call for them?¹¹⁷

He then makes a convincing case that historians may have spent too much time upon the motives behind federal Indian policy, and not enough upon how successful they were. Such initiatives, for example, as the residential school system, the pass system, and prohibitions upon traditional practices were not as effective as Ottawa had hoped.¹¹⁸ Federal agricultural policies, it seems, may have been even worse. Distorted by economic considerations unrelated to aboriginal interests, and influenced in part by non-aboriginal concerns about having to compete with Indian farmers, these policies were counterproductive, reenforcing the very separatism that they were supposedly designed to combat.¹¹⁹

Thus, whatever the intentions of bureaucrats like Scott, the Indian Act and its associated programs tended to promote separatism rather than operate as a temporary way station on the

¹¹⁷J.R. Miller, "Owen Glendower, Hotspur, and Canadian Indian Policy," in *Sweet Promises: A Reader on Indian-White Relations in Canada*, ed. J.R. Miller (Toronto, 1991), 323 [hereafter cited as Miller, *Sweet Promises*]. For a similar assessment of U.S. Indian policy, see Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York, 1988), ch. 6, and Vine Deloria, Jr., Introduction, in idem, *American Indian Policy*, supra note 12 at 5-6.

¹¹⁸The potlatch law, for example, was pretty much a failure, even after its judicial enforcement was placed in the hands of the Indian agents.

¹¹⁹Sarah Carter, "Two Acres and a Cow: 'Peasant' Farming for the Indians of the Northwest, 1889-1897," in Miller, *Sweet Promises*, supra note 117 at 353-77, and Helen Buckley, *From Wooden Ploughs to Welfare: Why Indian Policy Failed in the Prairie Provinces* (Montreal, 1992). Similar fears are probably responsible, at least in part, for the restrictions on Indian land preemptions that were imposed in British Columbia in the 1860s.

road to assimilation. And although the obvious social and economic deprivation that accompanied these failed policies led some aboriginal men and women to seek to assimilate, or at least to integrate, by abandoning their special status, it had the opposite effect on many more. So much so that when the member of the Dominion cabinet responsible for Indian Affairs spoke in Parliament during the debate on the 1951 Indian Act, he said:

We rather expected that the Indian would want to . . . be like one of us. Nothing can be further from the truth. The Indian has no desire to become as one of us, and all his representations have said: I hope you are not going to take away from me the right to be an Indian. . . . Except in rare cases, the Indian has every intention to retain his connection with his reserve and with his band, and while he wants some of the advantages of our society he wants them on such terms that he can retain his old connections.¹²⁰

If Chief Chillihitza had known this in 1927, and the Liberal administration of Prime Minister Louis St. Laurent had rediscovered it in 1951, one wonders how the Liberal administration of Prime Minister Pierre Trudeau could have forgotten it by 1969. The answer, probably, is that assimilation is a policy alternative that seems so attractive and reasonable to governments that it will never cease to be an option, whatever the historical record. Certainly when Trudeau's government published its White Paper that year, it unwittingly unleashed forces that over a century of legal repression had failed to quash. However inhospitable or neglectful Canadian law may have been to the ideas of aboriginal sovereignty and title, with a little help from federal policies that were replete with unintended consequences, these ideas had survived.

TIME'S ARROW

The passage of time has received a somewhat chequered treatment in Canadian law where the First Nations are concerned, and claims based on historical rights or ancient promises have often been received brusquely, almost contemptuously. Even when there was no intention to belittle, politi-

¹²⁰Commons Debates 1951: 1351, quoted in the reasons of Lambert, J.A., in the *Delgamuukw* appeal, *supra* note 28 at 683.

cians and judges have given offense. When the British Columbia Court of Appeal heard the *Calder* case, for example, one of the justices described the Nisga'a plaintiffs' ancestors as "a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property." Another said that the effect of colonial land legislation was that the Indians of British Columbia "became in law trespassers on and liable to actions of ejectment from lands in the Colony other than those set aside as reserves."¹²¹ Perhaps even more surprising, the trial judge in the Gitksan-Wet'suwet'en case wrote in 1991, quoting Thomas Hobbes, that their ancestors' lives had been "nasty, brutish and short."¹²²

Aside from the obvious racist or ethnocentric explanations for these statements, contributing to such offhand rejection of claims to sovereignty and title may be the notion that aboriginal peoples were British subjects, and were therefore not entitled to "special" treatment.¹²³ Demands for self-government were seen as lacking legal credibility. There is also the fact, emphasized throughout this essay, that the concept of title as a legally enforceable right never became firmly established in Canadian law as it did in the United States. As Douglas Sanders observed in 1973, leading counsel for the province in what was effectively Canada's first Indian title lawsuit "hardly appeared to take the case seriously."¹²⁴ The same was true of most of the rest of the legal community, who were aware of the dearth of Canadian law on the subject and who had not read the decisions from other parts of the former British Empire that ultimately proved influential.¹²⁵

Charles Wilkinson may thus be quite correct in regarding the state of federal Indian law in the United States as a question of the "continued vitality" of the *Worcester* line of cases, but in Canada there were no such cases, other than the ambiguously worded *St. Catherine's Milling*. There is also what many people have derisively called the "pizza" or "fast-foods" syndrome, a

¹²¹[1971], 13 D.L.R. (3d) 64, 66, 94. Hall, J., in the Supreme Court of Canada (supra note 27 at 217), called this a "proposition which reason itself repudiates."

¹²²*Delgamuukw et al. v. The Queen*, supra note 28 at 208.

¹²³See supra note 69 and accompanying text. Of course, these were subjects who, at various times in Canadian history, could not vote, preempt land, consume liquor, and so on.

¹²⁴Douglas Sanders, "The Nishga Case," *British Columbia Studies* 19 (1973), 3, 15, commenting on *Calder*.

¹²⁵See, for example, *Amodu Tijani v. Secretary, Southern Nigeria*, [1921] 2 A.C. 399 (J.C.P.C.), a ruling that counsel for the Allied Tribes put before the joint parliamentary committee in 1927, to no avail.

sentiment that goes to the heart of the question of time and the law.¹²⁶ At its most extreme, it amounts to the proposition that aboriginal peoples cannot have it both ways: if they want the benefits of centuries of non-aboriginal technology, including pizzas and other fast foods, they must forfeit all special or traditional rights; conversely, if they want the latter, they must forfeit the former.¹²⁷

In the courts this issue is usually discussed under the rubric of the "frozen-rights" theory. At its simplest, it means that an aboriginal right must be "truly" aboriginal to be legally recognized, and even then it will be recognized only in its aboriginal form. Thus a right to drive a car is not an aboriginal right, but a right to hunt and fish is, so long as the technology used existed in pre-contact times. In other words, spears and reef nets are acceptable, while rifles and seine boats are not. In 1985 the Supreme Court of Canada invoked the principle of liberal interpretation to reject the latter part of this theory, holding that treaty hunting rights should be construed flexibly, in a way that is "sensitive to . . . changes in normal hunting practices."¹²⁸ Rifles, therefore, could be used. Five years later, in *Sparrow*, the Court ruled that the "existing" aboriginal and treaty rights protected by the 1982 Constitution should also be "affirmed in a contemporary form rather than in their primeval simplicity and vigour."¹²⁹ Still unclear, however, is whether a practice amounts to an aboriginal right in the first place. For instance, while an aboriginal right to fish for food may be exercised with modern technology, does the extensive system of barter that existed in British Columbia amount to an aboriginal right to fish commercially, using fleets of seiners and selling the catch overseas? Does aboriginal title mean the dispossession of existing grantees or, alternatively, massive compensation for wrongful expropriation, especially after the passage of

¹²⁶See Don Monet and Skanu'u (Ardythe Wilson), *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case* (Gabriola Island, 1992), 66, 94, and vol. 1, no. 3, of Project North British Columbia's *Newsletter*, Fall 1989. (Project North is an ecumenical coalition for aboriginal justice.)

¹²⁷An especially nasty form of this argument that surfaced in the Gitksan-Wet'suwet'en trial was that a refusal to abide by government hunting, trapping, and fishing regulations meant prosecution, but compliance with such regulations was argued to be evidence of acquiescence in the extinguishment of title. Thus, if you disobeyed the law, you were charged under it; if you obeyed the law, you lost your aboriginal rights.

¹²⁸*Simon v. The Queen* (1985), 23 C.C.C. (3d) 238, 251, citing such earlier decisions as *Nowegijick*, *supra* note 96.

¹²⁹*Supra* note 28 at 276, quoting Brian Slattery, "Understanding Aboriginal Rights," *Canadian Bar Review* 66 (1987), 727, 782.

centuries?¹³⁰ Such questions, as Wilkinson points out, have caused sharp divisions of opinion in the United States.¹³¹ They do in Canada as well.¹³²

Drawing upon some of British Columbia's municipal history, a related aspect of the relationship between time and the law might be called the "deferred-subway" syndrome. Every few years, the City of Vancouver has considered building a subway, rejected the idea as too expensive, and then returned to it later—by which time the original estimate looked pretty good—only to reject the idea once again as even more expensive. This is not unlike the question of land claims. A common reaction among politicians and officials has been not only to deny that Indian title existed, but to maintain that, if it did, it was too late—and would be too expensive—to do anything about it. This, in essence, was the idea behind the White Paper in 1969. It was what Premier McBride had told Ottawa more than fifty years earlier when he refused to allow the McKenna-McBride Commission to consider the title issue as part of its mandate. It was also what British Columbia's lieutenant-governor, Joseph Trutch, had told Prime Minister John A. Macdonald another fifty years before that, in 1872, only a year since British Columbia had joined confederation. Ottawa had just discovered that virtually no treaties extinguishing Indian title had been

¹³⁰In *Mabo*, supra note 4, a narrow majority of the Australian High Court said no to dispossession and compensation. In Canada, grants in fee are safe, but in *Delgamuukw* [supra note 28 at 494-97 and 531-57], the British Columbia Court of Appeal appears to have ruled that aboriginal rights in land can coexist with conventional ones, and that compensation may be payable. On the other hand, by holding that the nature and content of an aboriginal right is determined by asking what the organized aboriginal society regarded as "an integral part of their distinctive culture," the court tied content to "traditional aboriginal enjoyment."

¹³¹See, for example, the remarkable *County of Oenida v. Oneida Indian Nation*, 105 S. Ct. 1245 (1985), discussed in Wilkinson, *American Indians*, supra note 1 at 41. In that case the Court invalidated a transaction that was 175 years old and held that the Oneida Nation had a right to sue for unlawful possession. The opinion was 5-4, and the dissent called it "an unprecedented departure from the wisdom of the common law." See also Fay G. Cohen, *Treaties on Trial: The Continuing Controversy over Northwest Indian Fishing Rights* (Seattle, 1986), dealing with the aftermath of the Boldt decision on commercial fishing and treaty rights in the Pacific Northwest states.

¹³²For example, the tension and anger surrounding the issue of whether there is an aboriginal right to a commercial fishery in Canada is extremely high. On the same day that the British Columbia Court of Appeal brought down its decision in *Delgamuukw*, the majority also ruled—citing the test referred to in note 130, supra, and rejecting any analogy with the treaties in the state of Washington—that there was no such right: see, inter alia, *The Queen v. Van der Peet* [1993], 80 B.C.L.R. (2d) 75, and *The Queen v. N.T.C. Smokehouse*, [1993], 80 B.C.L.R. (2d) 158.

made by the colonial government there. Concerned that Macdonald might opt for treaties, Trutch told him that

We have never bought out any Indian claims to lands. . . . If you now commence to buy out Indian title to the lands of B.C. you would go back of all that has been done here for 30 years past and would be equitably bound to compensate the tribes who inhabited the districts now settled.¹³³

In 1872 the price tag would, of course, have been much lower than it will be now.¹³⁴ Had British Columbia's Indian land question been settled even as late as the 1930s, probably no land would have changed hands: in 1927 the Allied Tribes appeared to be prepared to settle only for cash and benefits, although they did not name a figure.¹³⁵ This will not be what happens in British Columbia today.¹³⁶

Whether the passage of time should be regarded by the legal system as "an eroding or cementing force" has therefore not been a question that has been confronted as often in Canadian courts as it has in American ones.¹³⁷ Although both forces have been around since long before confederation, legally there was really little to cement; there were no competing lines of cases in Wilkinson's sense. The structure of the Canadian legal system was such that it was difficult for aboriginal peoples to take their claims to court, and this meant that the forces of erosion won by default. Small wonder: they were protected by the rule

¹³³Trutch to Macdonald, October 14, 1872, reproduced in the *Proceedings: Reports and the Evidence* of the 1927 joint parliamentary committee, supra note 45 at 6. Trutch of course was wrong about the colony's never having bought out claims, because Governor Douglas had made some treaties (see supra note 41). But Trutch had already explained these away as purely a means of "securing friendly relations" with the Indians. They were "certainly not [made] in acknowledgement of any general title of the Indians to the lands they occupy" (see the 1870 memorandum by Trutch reproduced in *Papers Connected with the Indian Land Question*, supra note 45 at p.11 of the Supplement).

¹³⁴When he appeared before the 1927 parliamentary committee, Duncan Campbell Scott calculated that in the 1860s Governor Douglas theoretically could have extinguished the Indian title to all of British Columbia for a little over \$250,000; see *Proceedings: Reports and the Evidence*, supra note 45 at 15.

¹³⁵*Ibid.* at 153.

¹³⁶Land transfers are part of the process that will be overseen by the new British Columbia Treaty Commission; see *Memorandum of Understanding Between Canada and British Columbia Respecting the Sharing of Pre-Treaty Costs, Settlement Costs, Implementation Costs and the Costs of Self-Government*, signed on June 21, 1993, which assumes that the province will be providing lands to settle claims.

¹³⁷Wilkinson, *American Indians*, supra note 1 at 30.

that one needed a fiat to sue the Crown; by the prohibition between 1927 and 1951 against raising funds to advance claims; by the faint commitment to the concept of Indian title in Canadian law even if First Nations could get a hearing; and by aboriginal people's lack of political power.¹³⁸ In this connection it is worth remembering that, technically, the Nisga'a lost the *Calder* case: the majority ruled that the province of British Columbia had not given them permission to sue.¹³⁹ But the cementing forces got their foot in the door in 1982, and today seem firmly seated at the counsel table, perhaps even on the bench.¹⁴⁰ In short, the effect of time upon what the law should be is now very much an issue.

CONCLUSION

Felix Cohen once wrote that "the Indian plays much the same role in American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith."¹⁴¹

This sober reminder emphasizes that this essay has omitted or only touched upon many matters, including the destructive, day-to-day experience of aboriginal peoples with the legal system; the extensive jurisprudence on hunting and fishing and other prosecutions; the overrepresentation of aboriginal peoples in Canadian prisons; the role of Indian agents on the reserves (both as managers and as justices of the peace); and band government under the Indian Act.¹⁴² All these are important to any assessment of how Cohen's remarks—and Wilkinson's analysis—might apply to Canada. But space is limited. As a consequence, the focus in this essay has been upon the two

¹³⁸There were minor exceptions, such as the jurisprudence on the Canada Jurisdiction Act and a few decisions by maverick trial judges such as Jack Sissons in the Northwest Territories; see *idem*, *Judge of the Far North: The Memoirs of Jack Sissons* (Toronto, 1968). In the United States, Congress statutorily waived sovereign immunity to suit on a case-by-case basis until the establishment of the Indian Claims Commission in 1946.

¹³⁹This requirement was not abolished in British Columbia until 1974; see the Crown Proceeding Act, R.S. 1979, c.86 (B.C.).

¹⁴⁰See, for example, the dissenting judgment of Lambert, J.A., in *Delgamuukw et al. v. The Queen*, *supra* note 28.

¹⁴¹Felix Cohen, "The Erosion of Indian Rights, 1950-53," *Yale Law Journal* 62 (1953), 348, 390.

¹⁴²See, however, the sources cited in note 86, *supra*. There are many more.

ideas that underlie all these phenomena: aboriginal title and sovereignty.

The conclusions reached may be simply stated, although doing so glosses over much complexity. The legal history of the relationship between Canada and its First Nations has not been characterized by the same sort of policy shifts that occurred in the United States. Although a very real tension did and does exist between assimilationist (or, more charitably, integrationist) and separatist forces, historically the former were so dominant in the Canadian legal imagination that it is difficult to find analogues for the *Worcester* line of cases, the Indian Reorganization Act, and the increasingly regular reaffirmations by successive United States presidents of the tribes' inherent sovereignty and government-to-government relationship with the United States.¹⁴³ As a result, Canadian law has had no vigorous concept of either aboriginal title or tribal sovereignty.

The idea of the former that, until 1973, dominated Canadian courtrooms (on those rare occasions when the subject was raised at all) was aptly put by the chief justice of British Columbia in 1971. After referring to imperial policy and to the law in New Zealand and the United States (including *Worcester*), all of which stood for the proposition that the common law requires aboriginal title to be purchased, the chief justice concluded:

Whatever may be the law in [the United States], it is clear from the authorities binding this court (although some of them contain occasional statements that seem to give support to counsel) that there is no such principle embodied in our law. In each case it must be shown that the aboriginal rights were ensured by prerogative or legislative Act, or that a course of dealing has been proved from which that can be inferred.¹⁴⁴

The concept of tribal sovereignty fared even worse. The judges of Her Majesty's courts, whose authority derived from the Crown, had no jurisdiction to rule that the sovereignty of the Crown had been in any way diminished. Moreover, aboriginal peoples were usually conceived to be British subjects, albeit

¹⁴³On the limits of Canada's ability to change in this regard, see Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination," *McGill Law Journal* 36 (1991), 382.

¹⁴⁴See *supra* note 121 at 67. Compare this language to that of Justice Reed in *Tee-Hit-Ton Indians v. United States*, *supra* note 6, which is regarded as a surprising decision—so long as one ignores the evidence that counsel for the United States led respecting the financial implications of a different result; see Newton, "Aboriginal Title Reconsidered," *supra* note 22.

ones with special privileges and under special disadvantages. As a consequence, all powers of self-government enjoyed by Indians on their reserves were regarded not as inherent powers subject to the overriding authority of Parliament, but as delegated powers, narrow in scope and subject to ministerial approval or veto, as well as to parliamentary review. And although provinces could not interfere with band government, provincial law—subject to exceptions—applied to Indians, on or off reserve.¹⁴⁵ Thus Indian reserves have been jurisdictionally set apart in Canada, as reservations are in the United States, but they are without inherent powers of self-government and they are more likely to be affected by provincial (state) law.¹⁴⁶ Even after the constitutional changes of 1982, this view of how sovereignty has been distributed in the Canadian federation remains—at least for now—legal orthodoxy.¹⁴⁷

There has therefore not been a tension between two divergent lines of high judicial authority in Canada, because there have not been two lines. There were few cases, and even those were debated only among judges either more committed or less committed to the established views of the day. To be sure, there are dissenting reasons in the Supreme Court of Canada's decision in *St. Catherine's Milling*, but they contain precious few references to supporting Canadian authority and they remain dissents.¹⁴⁸ Much the same may be said of the dissenters in *Calder*, who nearly a century after *St. Catherine's* had to contend with the same dearth of Canadian authority and whose minority opinion still has not been applied by the Supreme Court to rule that a particular First Nation actually has aboriginal title. Until quite recently, therefore, time's primary role has been to erode aboriginal rights, aided and abetted by ill-advised policies and not-so-benign neglect.

¹⁴⁵The exceptions are listed in Hogg, *Constitutional Law*, supra note 76 at 671ff.

¹⁴⁶Provincial traffic laws, for example, apply to an Indian driving a motor vehicle on a reserve, and so, generally, do provincial labor laws; see *Regina v. Francis*, [1988] 1 S.C.R. 1025, and *Four B Manufacturing v. United Garment Workers*, [1980], 1 S.C.R. 1031, the case that decisively rejected the American "enclave theory." The thorny question of whether provincial law may, by way of s.88 of the Indian Act, apply directly to reserve lands is more difficult, and was left open in *Derrickson v. Derrickson* (1986), 26 D.L.R.(4th) 176 (S.C.C.).

¹⁴⁷See text accompanying note 78, supra. In *Delgamuukw et al. v. The Queen* (supra note 28), the majority of the Court of Appeal held that sovereignty under the Canadian Constitution is exhausted by the powers allocated to the federal and provincial governments.

¹⁴⁸See supra note 65. There is, however, an intriguing reference to the judgment of Strong, J., in the British Columbia Court of Appeal's recent ruling in *Delgamuukw et al. v. The Queen*, supra note 28 at 534. There is no mention of its being a dissent.

But this is history. Since the enactment of s.35(1) of the Constitution Act, 1982, the Supreme Court of Canada has declared that a potentially sweeping fiduciary obligation is owed by the Crown to aboriginal peoples; that the intention to extinguish aboriginal rights before 1982 must have been clear and plain, not inferred from the existence of statutes or regulations that do not meet this test; and that aboriginal rights existing in 1982 cannot be derogated from unless a strict standard of scrutiny is met.¹⁴⁹ The federal government has engaged in a series of land-claims negotiations in Canada's north, and initiated a move, with substantial aboriginal participation, toward recognizing First Nations as a third order of government with inherent rights that are constitutionally protected from legislative interference.¹⁵⁰ Not only did all the provincial and territorial governments agree to this proposal, but some have taken initiatives of their own. Perhaps the most notable is British Columbia, which has reversed its 130-year-old policy of refusing to acknowledge aboriginal title, and is now engaged in tripartite land claims and self-government negotiations.

This may all seem too good to be true, and perhaps it is. Raised expectations have led, and will continue to lead, to dashed hopes. Conditions on many reserves and among many urban aboriginal peoples remain desperate. But a remarkable legal reversal has been made, kickstarted to a large degree by the courts. And although the Charlottetown Accord failed and the Constitution has not been amended to include an inherent right to self-government, the courts may yet find that it is already there.¹⁵¹

It would not do to make too much of the differences between the Canadian and American experiences. In one sense, it is remarkable how similar they have been, partly because the 49th parallel holds little meaning for aboriginal peoples, whose strategies of resistance and renewal have known no boundaries. But the two histories do raise interesting questions about the relationship between the law in the books and on the ground, and how time and changed circumstances play a role in aboriginal law quite unlike the one they play in other contexts. Even if Canada lacks the two lines of jurisprudence so ably charted by Wilkinson, the tough questions are the same. But another, rather more speculative, possibility is raised by comparing these two histories.

¹⁴⁹*Guerin et al. v. R. and National Indian Brotherhood*, supra note 94; *Regina v. Sparrow*, supra note 28.

¹⁵⁰See supra notes 102-04, and accompanying text.

¹⁵¹See Slattery, "First Nations and the Constitution," supra note 98.

Critics of the Hudson's Bay Company's legal monopoly over the fur trade used to say that the Hudson's Bay Company—allegedly standing for "Here Before Christ"—slumbered beside the frozen bay, waiting for the Indians to bring their furs to them. It was only competition from the more entrepreneurial Scots and their Canadian voyageurs that awoke the beast and stimulated it into beating its competitors at their own game. At this point it looks as though something similar has been happening to Canadian law. After years of unexamined assumptions, plodding uniformity, and administrative repression, it seems that the law in Canada now holds more potential for recognizing, affirming, and protecting aboriginal title and sovereignty than United States law does, whether or not Canadians amend their Constitution.¹⁵² Perhaps, like the Hudson's Bay Company's trading methods, aboriginal-rights law in Canada has, somehow, profited from its long sleep. On the other hand, the ultimate contours of this changed picture are too large for us to see, and may be redrawn in execution. Canada's First Nations will therefore be watching carefully to see whether all this is just another sweet promise; so, probably, will aboriginal peoples elsewhere.

¹⁵²Amend it, that is, to make the inherent right to self-government explicit. Section 35(1) of the Constitution Act, 1982, may have entrenched this right implicitly; but whether it did or not, it accorded aboriginal rights constitutional protection; see *supra* notes 96-99 and 151 and accompanying text.

THE DECOLONIZATION OF CANADA: MOVING TOWARD RECOGNITION OF ABORIGINAL GOVERNMENTS

KENT MCNEIL

For seven months in 1992, Canada engaged in a soul-searching examination of itself as a nation. The long process of constitutional renewal reached a climax on October 26 of that year, when Canadians voted in a referendum to decide whether the Constitution should be renewed on the basis of an agreement reached by the nation's leaders after extensive consultations and negotiations. That agreement of August 1992, known as the Charlottetown Accord, was designed to resolve a number of long-lasting problems with the present Constitution that have caused deep divisions in the country.

While it is impossible to give an adequate overview of these diverse problems here, the major issues can be briefly mentioned. For at least thirty years, the Province of Quebec has not been satisfied with its position in Canada, and has been demanding major changes to the Constitution as an alternative to outright separation from the rest of the country. (When the Constitution was last amended in a substantial way in 1982, Quebec refused to participate because certain of its key demands, such as recognition of its unique status within Canada, were not met.) The four western provinces, particularly Alberta and British Columbia, have felt that they have been dominated by central Canada, and are asking for more effective representation nationally so that their interests and concerns will be addressed in Ottawa. Many of the aboriginal peoples of Canada,

Kent McNeil is an associate professor of law at Osgoode Hall Law School, York University, Toronto. The author would like to thank Professor Peter Hogg for his very helpful comments on a draft of this article. Financial assistance from the Social Sciences and Humanities Research Council of Canada for the research and writing of this paper is also gratefully acknowledged.

who received some recognition of their special rights in the 1982 Constitution, have been pressing for more extensive constitutional powers. In particular, they want their inherent right of self-government to be explicitly acknowledged and protected in the Constitution.

The primary aims of this article are to analyze the proposals regarding aboriginal self-government in the Charlottetown Accord, and to assess the impact of the defeat of the accord on future relations between the aboriginal peoples and the Canadian state. However, for these matters to be properly understood they must be placed in the context of the historical background leading to the August agreement.

In Euro-Canadian legal culture, the Constitution of Canada has been conceptualized in a way that has excluded the aboriginal peoples from the structures of government.¹ This exclusion has its roots in the attitudes of the European colonizers to the First Nations (as the aboriginal peoples of Canada generally call themselves), going back to the period of contact.² The existence of aboriginal peoples was commonly regarded as legally irrelevant, at least insofar as claims to sovereignty were concerned.³ The aboriginal peoples were denied the status of nations, making it possible for the Europeans to assert that they had "discovered" America. This so-called discovery led to a scramble for colonies and the partitioning of North and South America, as first the pope and then European monarchs made grants of vast territories that were in the possession and control of the First Nations.⁴

¹See Bruce Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations," *McGill Law Journal* 36 (1991), 314-20 [hereafter cited as Ryder, "Demise and Rise"].

²The terms "First Nations" and "aboriginal peoples" are here used interchangeably to refer to the original inhabitants of North America.

³See Brian Slattery, "Aboriginal Sovereignty and Imperial Claims," *Osgoode Hall Law Journal* 29 (1991), 682-91 [hereafter cited as Slattery, "Aboriginal Sovereignty"]. Europeans distinguished between sovereignty and land rights, and so were logically able to deny the former to aboriginal peoples while according them limited rights to the lands they traditionally occupied: see generally idem, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of their Territories* (Saskatoon, 1979) [hereafter cited as Slattery, *Land Rights*]; Geoffrey S. Lester, "The Territorial Rights of the Inuit of the Canadian Northwest Territories: A Legal Argument" (D. Jur. thesis, York University, 1981) [hereafter cited as Lester, "Territorial Rights of the Inuit"]; Kent McNeil, *Common Law Aboriginal Title* (Oxford, 1989), esp. 108-10, 244-90 [hereafter cited as McNeil, *Common Law Aboriginal Title*].

⁴In Canada, the most important grant of this kind was the Royal Charter issued in 1670 by Charles II of England, creating the Hudson's Bay Company and purporting to grant it a vast territory referred to as Rupert's Land, ostensibly

This colonial legacy has exerted a powerful influence on constitutional thinking in Canada. Because of the colonial attitudes of judges and constitutional scholars, actions by the French and English, through their monarchs or elected representatives, have been given constitutional significance, while actions by the First Nations have not.⁵ For example, the Treaty of Paris, by which France ceded New France to Britain in 1763, is taken as the source of the British Crown's sovereignty over a large part of Canada.⁶ Treaties signed with the aboriginal peoples, however, have not been regarded as involving sovereign relations between nations, being classified for the most part as friendship agreements or land transactions.⁷ Unlike many aboriginal people,⁸ non-aboriginal judges and academics have generally viewed these treaties not as entailing peer relations between equal sovereigns, but as hierarchical relations between

including the whole of the Hudson watershed; for analysis, see Kenneth M. Narvey, "The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company," *Saskatchewan Law Review* 38 (1973-74), 123-233; Lester, "Territorial Rights of the Inuit," *supra* note 3 at 1204-1407; Slaterry, *Land Rights*, *supra* note 3 at 149-64; Kent McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" [hereafter cited as McNeil, "Aboriginal Nations"], in *Negotiating with A Sovereign Quebec*, ed. Daniel Drache and Roberto Perin (Toronto, 1992), 107-23.

⁵My own work has been affected by these attitudes as well; e.g., compare Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon, 1982), with my more recent evaluation of the effect of the Hudson's Bay Company grant in McNeil, "Aboriginal Nations," *supra* note 4.

⁶See *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46, at 53; *Re Labrador Boundary*, [1927] 2 D.L.R. 401 at 402-3; McNeil, *Common Law Aboriginal Title*, *supra* note 3 at 268.

⁷See *St. Catherine's Milling and Lumber Co.*, *supra* note 6 at 51-53. In *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404, the Supreme Court of Canada denied international status to Indian treaties, classifying them instead as *sui generis*. However, in *A.-G. of Quebec v. Sioui*, [1990] 1 S.C.R. 1025 at 1052-53, the Supreme Court did say that, until 1760 at least when the treaty in question was made with the Hurons of Lorette, Britain and France maintained relations with the Indian nations "very close to those maintained between sovereign nations." Nonetheless, the Supreme Court in *Sioui* did not question that the British Crown's sovereignty over that part of Canada was derived from the French, regardless of Indian treaties.

⁸See Delia Opekokew, *The First Nations: Indian Government and the Canadian Federation* (Saskatoon, 1980), 9-21 [hereafter cited as Opekokew, *First Nations*]; Darlene Johnston, "The Quest of the Six Nations Confederacy for Self-Determination," *University of Toronto Faculty Law Review* 44 (1986), 1-32 [hereafter cited as Johnston, "Quest of the Six Nations"]; Harold Cardinal, "Indian Nations and Constitutional Change" [hereafter cited as Cardinal, "Indian Nations"], in *Governments in Conflict? Provinces and Indian Nations in Canada*, ed. J. Anthony Long and Menno Boldt (Toronto, 1988), 84 [hereafter cited as Long and Boldt, *Governments in Conflict?*].

European monarchs and their subjects.⁹ The European assertion of sovereignty over the aboriginal peoples has simply been taken for granted.¹⁰

Numerous constitutional provisions nonetheless acknowledge that the aboriginal peoples have special status and rights within Canada.¹¹ The Royal Proclamation of 1763, issued by the British Crown after the Treaty of Paris, protected aboriginal lands from colonial governments and settlers, and provided a procedure by which aboriginal peoples could voluntarily surrender their lands to the Crown.¹² The Constitution Act of 1867, by assigning responsibility for "Indians, and Lands reserved for the Indians" to the Parliament of Canada, maintained the special status of the aboriginal peoples within Canada's federal structure.¹³ Imperial orders in council and

⁹For a refreshing exception, see Patrick Macklem, "First Nation Self-Government and the Borders of the Canadian Legal Imagination," *McGill Law Journal* 36 (1991), 425-45 [hereafter cited as Macklem, "First National Self-Government"], where the attitudes of Canadian judges to the treaties are analyzed and criticized.

¹⁰See *ibid.* at 414-16; Slattery, "Aboriginal Sovereignty," *supra* note 3, esp. 682-83; Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*," *Alberta Law Review* 29 (1991), 498-517. This is not to say that the European monarchs consistently treated aboriginal peoples as their subjects. In practice, those monarchs frequently acknowledged the independence of the First Nations, as Lamer J. observed in *Sioui*; see *supra* note 7. See also J.D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon, 1985). At the same time, however, France and Britain made sweeping claims to territory that were clearly incompatible with the sovereign independence of the First Nations. To date, the Supreme Court of Canada has not explained how these apparently contradictory policies are to be reconciled as a matter of law. For my views on this matter with respect to Rupert's Land, see McNeil, "Aboriginal Nations," *supra* note 4.

¹¹See Kenneth M. Lysyk, "The Unique Constitutional Position of the Canadian Indian," *Canadian Bar Review* 45 (1967), 513-53; Douglas Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" [hereafter cited as Sanders, "Aboriginal People"], in *Canada and the New Constitution: The Unfinished Agenda*, ed. Stanley M. Beck and Ivan Bernier (Montreal, 1983), 1:237-40.

¹²R.S.C. 1985, App. II, no. 1. For detailed discussion, see Slattery, *Land Rights*, *supra* note 3. Bruce Clark, in his book *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal and Kingston, 1990) [hereafter cited as Clark, *Native Liberty*] argues that the Royal Proclamation "affirmed both the aboriginal right of self-government and the corresponding constitutional incapacity of colonial governments to interfere with that right" (82-83).

¹³30 & 31 Vict., c.3 (U.K.), s.91(24). See discussion in Brian Slattery, "Understanding Aboriginal Rights," *Canadian Bar Review* 66 (1987), 775-81 [hereafter cited as Slattery, "Understanding Aboriginal Rights"]; Ryder, "Demise and Rise," *supra* note 1 at 315-16, 362-81; Macklem, "First Nation Self-Government," *supra* note 9 at 416-25.

statutes admitting new territories into Canada, and creating or enlarging provinces, also contain guarantees of aboriginal rights.¹⁴ However, none of these constitutional documents, as interpreted by the courts and applied by federal and provincial governments, has been regarded as maintaining a place within Canada's Constitution for First Nation governments.¹⁵

This denial of their right to govern themselves has never been accepted by many First Nations.¹⁶ For more than three hundred years the Haudenosaunee (Iroquois Confederacy) have maintained that their treaty relationship with the British Crown entitles them to continue to govern their own nations, free of interference by the Canadian government.¹⁷ In British Columbia the Nisga'a, Gitksan, and other First Nations have consistently asserted that their right of self-government has never been surrendered or taken away.¹⁸ The Mi'kmaq, Innu,

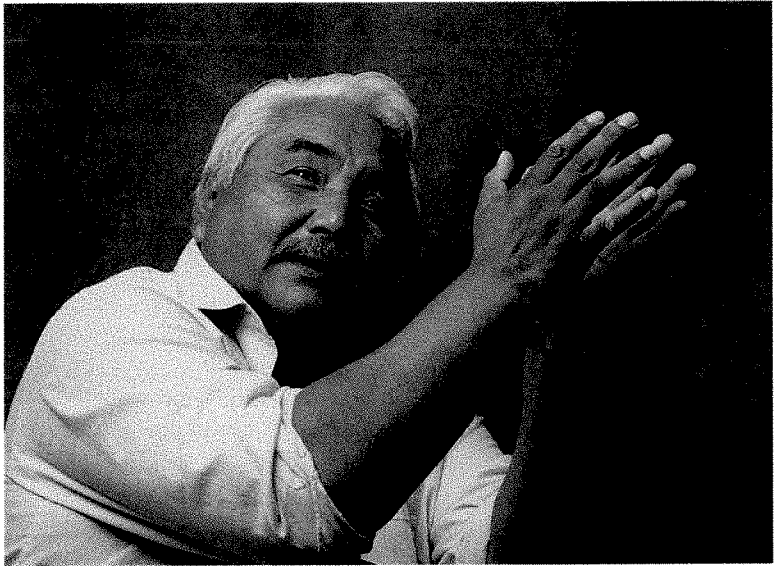
¹⁴See Rupert's Land and North-Western Territory Order, 1870, in R.S.C. 1985, App. II, no. 9, and analysis in Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon, 1982); Manitoba Act, S.C. 1870, c.3, ss. 31-32, in R.S.C. 1985, App. II, no. 8, *aff'd* by Constitution Act, 1871, 34 & 35 Vict., c.28 [U.K.], in R.S.C. 1985, App. II, no. 11, and discussed in Paul Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon, 1991); British Columbia Terms of Union, 1871, in R.S.C. 1985, App. II, no. 10, and *Jack v. The Queen*, [1980] 1 S.C.R. 294; Ontario Boundaries Extension Act, 1912, S.C. 1912, c.40; Quebec Boundaries Extension Act, 1912, S.C. 1912, c.45. In addition, the Natural Resources Transfer Agreements, being the Schedules to the *Constitution Act, 1930*, 20 & 21 Geo. V, c.26 [U.K.], in R.S.C. 1985, App. II, no. 25, protected some treaty rights of the aboriginal peoples of the prairie provinces from provincial legislation; see Kent McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon, 1983), 20-45.

¹⁵See, e.g., *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.); *A.-G. for Ontario v. Bear Island Foundation*, [1985] 1 C.N.L.R. 1 (Ont. S.C.) at 78, 80; *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.), esp. 452-54, *aff'd* on this issue (1993), 104 D.L.R. (4th) 470 (B.C.C.A.), at 519-20, 591-93.

¹⁶See generally Delia Opekokew, *The First Nations: Indian Government in the Community of Man* (Regina, 1982); Leroy Little Bear, Menno Boldt, and J. Anthony Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto, 1984) [hereafter cited as Little Bear, Boldt, and Long, *Pathways to Self-Determination*]; Boyce Richardson, ed., *Drumbeat: Anger and Renewal in Indian Country* (Toronto, 1989) [hereafter cited as Richardson, *Anger and Renewal*]; J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, rev. ed. (Toronto, 1991), 235 [hereafter cited as Miller, *Indian-White Relations*].

¹⁷See Paul Williams, "The Chain" (LL.M. thesis, York University, 1982); Johnston, "Quest of the Six Nations," *supra* note 8; Grand Chief Michael Mitchell, "Akwasasne: An Unbroken Assertion of Sovereignty," in Richardson, *Anger and Renewal*, *supra* note 16 at 107-36.

¹⁸See Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1889* (Vancouver, 1990), 11-14, 57, 97.



The Charlottetown Accord would have acknowledged that aboriginal peoples governed Canada before the arrival of Europeans, the position advocated by Roderick Robinson, chief of the Nisga'a Eagle Clan. (Photograph by David Neel, © 1994)

Cree, Dene, and many other aboriginal peoples make similar claims.

Unfortunately, these aboriginal voices were seldom heard—and when heard were generally not heeded—by the rest of Canada before the late 1960s. That changed abruptly in 1969, when Pierre Trudeau's Liberal government issued its White Paper on Indian Policy.¹⁹ Among other things, the White Paper proposed that the federal Indian Act be repealed, the Department of Indian Affairs be abolished, and general responsibility for Indians be transferred to the provinces.²⁰ While "lawful obligations" were to be respected, aboriginal land claims were said to be "so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians

¹⁹Canada, *Statement of the Government of Canada on Indian Policy*, 1969 (Ottawa, 1969) [hereafter cited as White Paper]. On the genesis of the White Paper, see Sally Weaver's excellent study, *Making Canadian Indian Policy: The Hidden Agenda, 1968-1970* (Toronto, 1981).

²⁰The term "Indians" is used here as in the White Paper. Although undefined in that document, it presumably referred to the aboriginal people over whom the federal government exercised control through the Indian Act, then R.S.C. 1952, c.149.

as members of the Canadian community."²¹ Control of reserve lands was to be transferred to the Indian peoples, but once that was done "the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended."²² In sum, while paying lip service to the importance of Indian cultures, the White Paper envisaged rapid assimilation of Indian peoples into "Canadian" society in the name of equality.²³

Aboriginal reaction to the White Paper was widespread and vocal, culminating a year later in "Citizens Plus,"²⁴ the Alberta Indian Association's so-called Red Paper, which became the official position of the National Indian Brotherhood.²⁵ The Red Paper rejected the federal government's assimilationist objectives, asserting that special status was essential for Indians to maintain their identity: "The only way to maintain our culture is for us to remain as Indians. To preserve our culture it is necessary to preserve our status, rights, lands and traditions. Our treaties are the bases of our rights."²⁶ Among other things, the Red Paper called for the treaties to be honored according to their intent and spirit, for the Indian Act to be reviewed rather than repealed, and for the Indian Affairs Department to be reformed rather than abolished. To deal with aboriginal land claims, treaty rights, and other matters, an Indian Claims Commission should be established in consultation with the Indians. The Red Paper also asked for a commitment from the federal government that tribes be free to choose their own arrangements for local government.

Ironically, the federal government's ill-conceived White Paper, which was eventually retracted in face of near unanimous Indian opposition,²⁷ probably provided some of the impe-

²¹White Paper, supra note 19 at 11.

²²Ibid.

²³While the government had purported to consult with Indians in formulating its new policy, the White Paper's "assumptions, arguments, and recommendations were the antithesis of what Indians had been saying"; Miller, *Indian-White Relations*, supra note 16 at 228.

²⁴A presentation by the Indian Chiefs of Alberta to the Rt. Hon. P.E. Trudeau, Prime Minister, and the Government of Canada, June 1970 [hereafter cited as "Citizens Plus"].

²⁵On reaction to the White Paper generally, see Weaver, *Canadian Indian Policy*, supra note 19 at 171-89; Miller, *Indian-White Relations*, supra note 16 at 230-32. See also Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton, 1969).

²⁶"Citizens Plus," supra note 24 at 5.

²⁷Jean Chrétien, then minister of Indian Affairs and Northern Development, retracted the White Paper in a speech at Queen's University on March 17, 1971, "The Unfinished Tapestry—Indian Policy in Canada"; see Weaver, *Canadian Indian Policy*, supra note 19 at 184-89.

tus for the strong assertion of aboriginal and treaty rights in the 1970s.²⁸ In the courts, important land-claims cases forced the federal government to reassess its policy toward aboriginal land rights,²⁹ and begin a new process of negotiating settlements.³⁰ On the political front, increased awareness and better organization made the aboriginal peoples more effective in getting their message across.³¹ As the decade progressed, the emphasis shifted from land rights to broader political claims to nationhood.³² For example, the Dene of the Northwest Territories, in their 1975 declaration, insisted on their right to be regarded as a distinct people and a nation by the Canadian government and the world community, and asserted their right to self-determination within Canada.³³

By the late 1970s, the gathering political momentum of the aboriginal peoples had begun to have an impact on discussions for renewal of the Canadian Constitution. In the turbulent years leading to patriation of the Constitution on April 17, 1982, aboriginal leaders succeeded in their efforts to have aboriginal issues placed on the constitutional agenda.³⁴ Explicit constitutional acknowledgment of their right to self-government became a key aboriginal demand. While this demand was

²⁸See Miller, *Indian-White Relations*, supra note 16 at 232.

²⁹*Esp. Calder v. A.-G.B.C.*, [1973] S.C.R. 313. See also *Re Paulette* [1973], 42 D.L.R. (3d) 8 [N.W.T.S.C.], rev. [1975] 63 D.L.R. (3d) 1 [N.W.T.C.A.], [1977] 2 S.C.R. 628; *Gros-Louis v. Société de Développement de la Baie James*, [1974] R.P. 38 [Que. S.C.], rev. [1975] C.A. 166 [Que. C.A.].

³⁰The new policy, which was announced on August 8, 1973, is described in Department of Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy* (Ottawa, 1981).

³¹See Miller, *Indian-White Relations*, supra note 16 at 232-37; J. Rick Ponting and Roger Gibbins, *Out of Irrelevance: A Socio-political Introduction to Indian Affairs in Canada* (Toronto, 1980), 197-279 [hereafter cited as Ponting and Gibbins, *Introduction to Indian Affairs*].

³²See Sanders, "Aboriginal People," supra note 11 at 263-67.

³³The "Dene Declaration," in *Dene Nation—The Colony Within*, ed. Mel Watkins (Toronto, 1977), 3-4.

³⁴See Simon McInnes, "The Inuit and the Constitutional Process: 1978-1981", in *As Long As the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, ed. Ian A.L. Getty and Antoine S. Lussier (Vancouver, 1983), 315-36; Douglas E. Sanders, "The Indian Lobby," in *And No One Cheered: Federalism, Democracy and the Constitution Act*, ed. Keith Banting and Richard Simeon (Toronto, 1983), 301-32; Norman K. Zlotkin, *Unfinished Business: Aboriginal Peoples and the 1983 Constitutional Conference* (Kingston, 1983), 15-35 [hereafter cited as Zlotkin, *Unfinished Business*]; R.E. Gaffney, G.P. Gould, and A.J. Semple, "Broken Promises: The Aboriginal Constitutional Conferences" [1984], 5-15 [hereafter cited as Gaffney, Gould and Semple, "Broken Promises"]; Miller, *Indian-White Relations*, supra note 16 at 238-40; Ponting and Gibbins, *Introduction to Indian Affairs*, supra note 31 at 213-16.

not met,³⁵ the Constitution Act of 1982³⁶ did provide a general guarantee of aboriginal and treaty rights in the following section:

35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.³⁷

In addition, section 25 was included in the act to shield the aboriginal, treaty, and other rights and freedoms of the aborigi-

³⁵Another unfulfilled aboriginal demand was for a provision requiring aboriginal consent to constitutional amendments affecting their rights: see Douglas Sanders, "The Rights of the Aboriginal Peoples of Canada," *Canadian Bar Review* 61 (1983), at 334-36 [hereafter cited as Sanders, "Rights of Aboriginal Peoples"]; Norman K. Zlotkin, "The 1983 and 1984 Constitutional Conferences: Only the Beginning," [1984] 3 C.N.L.R. 3-29 at 5 [hereafter cited as Zlotkin, "Constitutional Conferences"].

³⁶Schedule B to the Canada Act, 1982, c.11 [U.K.].

³⁷An extensive body of literature on s.35 has been produced since its enactment; see, e.g., Kenneth M. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (ss. 25, 35 and 37)," in *The Canadian Charter of Rights and Freedoms: Commentary*, ed. Walter S. Tarnopolsky and G  rald-A. Beaudoin (Toronto, 1982), 467-88; Kent McNeil, "The Constitutional Rights of the Aboriginal Peoples of Canada," *Supreme Court Law Review* 4 (1982), 255-65, and "The Constitution Act, 1982, Sections 25 and 35," [1988] 1 C.N.L.R. 1-13; Sanders, "Rights of Aboriginal Peoples," supra note 35, and "Pre-Existing Rights: The Aboriginal Peoples of Canada (Sections 25 and 35)," in *The Canadian Charter of Rights and Freedoms*, ed. G.-A. Beaudoin and E. Ratushney, 2d ed. (Toronto, 1989), 707-38; Brian Slaterry, "The Constitutional Guarantee of Aboriginal and Treaty Rights," *Queen's Law Journal* 8 (1983), 232-73, "The Hidden Constitution: Aboriginal Rights in Canada," *American Journal of Comparative Law* 32 (1984), 361-88, and "Understanding Aboriginal Rights," supra note 13; Zlotkin, *Unfinished Business*, supra note 34 at 37-46; Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto, 1984), esp. 1-8 [hereafter cited as Asch, *Home and Native Land*]; James O'Reilly, "La Loi constitutionnelle de 1982: Droits des autochtones," *Cahiers de Droit* 25 (1984), 125-44; Georges Emery, "R  flexions sur le sens et la port  e au Qu  bec des articles 25, 35, et 37 de la Loi constitutionnelle de 1982," *Cahiers de Droit* 25 (1984), 145-63; Justin Malbon, "Section 35, Canadian Constitution Act—The Aboriginal Right to Land" (LL.M. thesis, York University, 1987); William Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part II—Section 35: The Substantive Guarantee," *University of British Columbia Law Review* 22 (1988), 207-78; Noel Lyon, "An Essay on Constitutional Interpretation," *Osgoode Hall Law Journal* 26 (1988), 95-126, and "A Perspective on the Application of the *Criminal Code* to Aboriginal Peoples in Light of the Judgment of the Supreme Court of Canada in *R. v. Sparrow*," *University of British Columbia Law Review Special Edition* (1992), 306-13; Patrick Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" (1992), *University of British Columbia Law Review Special Edition* (1992), 280-305; Peter W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto, 1992), 687-93 [hereafter cited as Hogg, *Constitutional Law*].

nal peoples from abrogation or derogation by the Canadian Charter of Rights and Freedoms.³⁸

The general guarantee in section 35 was intended to be supplemented by "identification and definition" of the rights of the aboriginal peoples at a constitutional conference, to be held in accordance with section 37 within a year of the coming into force of the act. The conference, chaired by Prime Minister Trudeau, was held in March 1983, and was attended by the provincial premiers and representatives of four national aboriginal organizations.³⁹ Although little progress was made toward clarification of aboriginal and treaty rights, the concept of aboriginal self-government was taken seriously,⁴⁰ and agreement was reached to hold further constitutional conferences to continue the process.⁴¹ In addition, certain constitutional amendments were approved and subsequently implemented.⁴² A minor change to section 25 explicitly protected rights and freedoms arising from both past and future land-claims agreements from the charter.⁴³ Two new subsections were added to section 35:

35.(3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.

(4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

³⁸Unlike s.35, which is in Part II, entitled "Rights of the Aboriginal Peoples of Canada," s.25 is in Part I, the "Canadian Charter of Rights and Freedoms." On s.25, see works cited in note 37 supra; William F. Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act, 1982: Part I, the Interpretive Prism of Section 25" *University of British Columbia Law Review* 22 (1988), 21-59; Bruce H. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon, 1988).

³⁹These organizations were the Assembly of First Nations (representing most status Indians, i.e., Indians as defined by the Indian Act, R.S.C. 1985, c.1-5, particularly those living on reserves), the Native Council of Canada (representing mainly non-status Indians and some Métis), the Inuit Committee on National Issues (representing the Inuit), and the Métis National Council (representing the Métis Nation in the prairie provinces).

⁴⁰For a useful survey and analysis of aboriginal positions on self-government at the conference, see Asch, *Home and Native Land*, supra note 37 at 27-38.

⁴¹See Zlotkin, "Constitutional Conferences," supra note 35 at 6-11.

⁴²By the Constitutional Amendment Proclamation, 1983, SI/84-102.

⁴³As originally enacted, s.25 protected "any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement," which could have been interpreted as excluding past settlements.

A further provision, section 35.1, committed the Canadian and provincial governments to hold a constitutional conference with the aboriginal peoples before any amendments could be made to the main constitutional provisions directly affecting them.⁴⁴ In addition, a new section 37.1 required at least two more constitutional conferences to be held on aboriginal matters before April 17, 1987.⁴⁵ In fact, three more conferences were convened.

Four months before the second conference began in March 1984, the House of Commons Special Committee on Indian Self-Government released its report, popularly known as the Penner Report after its chairman, Keith Penner.⁴⁶ A principal recommendation of the report was that "the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada."⁴⁷ The Trudeau government's response to this recommendation was to propose a draft constitutional amendment on self-government at the 1984 conference,⁴⁸ providing in part that

the aboriginal peoples of Canada have the right to self-governing institutions that will meet the needs of their communities, subject to the nature, jurisdiction and powers of those institutions, and to the financing arrangements relating thereto, being identified and defined through negotiation with the government of Canada and the provincial governments.⁴⁹

The proposal did not satisfy the aboriginal delegates, partly because it made their self-governing institutions dependent

⁴⁴The provisions referred to are s.91(24) of the Constitution Act, 1867, and ss. 25, 35, and 35.1 of the 1982 Act.

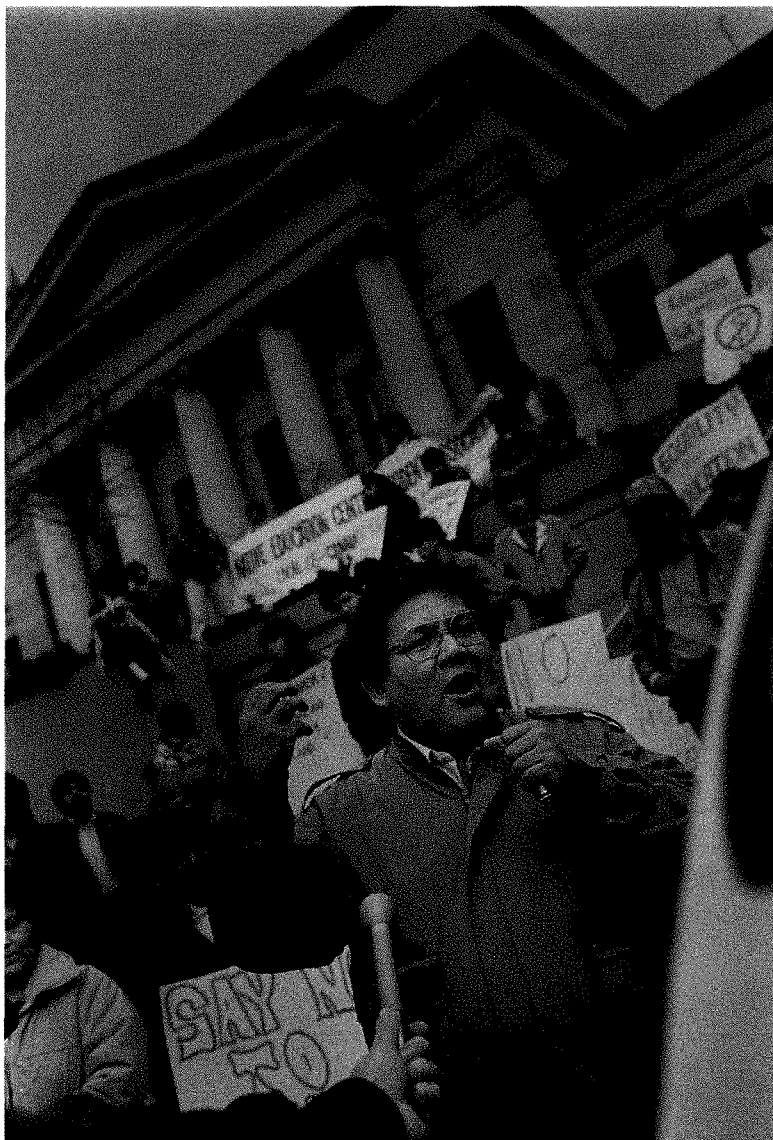
⁴⁵For further discussion of the 1983 conference, see Gaffney, Gould and Semple, "Broken Promises," supra note 34 at 35-46; Little Bear, Boldt, and Long, *Pathways to Self-Determination*, supra note 16 at 171-80; Bryan Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal, 1986), esp. 95-146 [hereafter cited as Schwartz, *First Principles*].

⁴⁶*Indian Self-Government in Canada: Report of the Special Committee* (Ottawa, 1983) [hereafter cited as Penner Report].

⁴⁷*Ibid.* at 44.

⁴⁸The federal government's official response to the Penner Report, released on March 5, 1984 (three days before the conference began), did not address the recommendation for constitutional entrenchment; see *Response of the Government to the Report of the Special Committee on Indian Self-Government* (Ottawa, 1984); Zlotkin, "Constitutional Conferences," supra note 35 at 12.

⁴⁹"Proposed 1984 Constitutional Accord on the Rights of the Aboriginal Peoples of Canada," March 8, 1984, reprinted in Zlotkin, "Constitutional Conferences," supra note 35 at 26.



First Nation leaders, such as Chief Joe Mathias of the Squamish, have been pressing for their inherent right of self-government. (Photograph by David Neel, © 1994)

on negotiated agreements, to be implemented by federal and provincial legislation that would not be entrenched in the Constitution.⁵⁰ Moreover, only three provinces—Ontario, Manitoba, and New Brunswick—backed the proposal.⁵¹ As a result, it was not adopted. The issue of self-government nonetheless dominated the discussions, and no agreement was reached on equality, aboriginal and treaty rights, and Métis lands and resources, the other main issues on the agenda.⁵²

The last two constitutional conferences on aboriginal issues, held in April 1985 and March 1987, and chaired by Prime Minister Brian Mulroney, failed to make substantial progress toward clarifying the constitutional rights of the aboriginal peoples. As in 1984, self-government was the dominant issue. At the 1985 conference, a federal proposal would have recognized and affirmed "[t]he rights of the aboriginal peoples of Canada to self-government, within the context of the Canadian federation, that are set out in agreements" to be negotiated with particular aboriginal peoples and approved by Acts of Parliament and of the legislatures of any provinces where those peoples reside.⁵³ A modified version of this proposal, which deleted a constitutional obligation committing the federal and provincial governments to negotiate these agreements,⁵⁴ was accepted by seven provinces, but rejected by two of the four aboriginal organizations.⁵⁵ At the 1987 conference, the four aboriginal organizations pressed for constitutional recognition of their inherent

⁵⁰See Zlotkin, "Constitutional Conferences," supra note 35 at 13-14.

⁵¹Ibid. See also Schwartz, *First Principles*, supra note 45 at 249-60.

⁵²See Zlotkin, "Constitutional Conferences," supra note 35 at 11-19; Gaffney, Gould and Semple, "Broken Promises," supra note 34 at 59-74; Schwartz, *First Principles*, supra note 45, esp. 147-60, 213-26.

⁵³Prime Minister of Canada, "Proposed 1985 Accord Relating to the Aboriginal Peoples of Canada," April 1, 1985, in Schwartz, *First Principles*, supra note 45 at 478-90.

⁵⁴"Proposed 1985 Accord Relating to the Aboriginal Peoples of Canada," April 3, 1985, in *ibid.* at 490-502.

⁵⁵See *ibid.* at 307-19. Alberta and British Columbia rejected the proposal, while Quebec, in keeping with its refusal to accept the 1982 Constitution, abstained (on Quebec's position regarding the constitutional conferences generally, see Eric Gourdeau, "Quebec and Aboriginal Peoples," in Long and Boldt, *Governments in Conflict!*, supra note 8 at 120-22). The Native Council of Canada and the Métis National Council accepted the proposal. The Inuit Committee on National Issues and the Assembly of First Nations both rejected it, objecting to the provincial "veto" over the constitutional protection of negotiated agreements and the deletion of the obligation to negotiate. In addition, the Assembly of First Nations wanted explicit constitutional acknowledgment of the Aboriginal peoples' inherent right to self-government; see Assembly of First Nations, "The Case for Indian Self-Government," April 2, 1985.

right of self-government, and produced a draft joint proposal to that effect.⁵⁶ However, the federal government, while favoring recognition of a general right of self-government, wanted it to be contingent on agreements to be negotiated with the federal and provincial governments rather than inherent.⁵⁷ Moreover, some of the provinces, especially Saskatchewan, Alberta, and British Columbia, continued to express concern over entrenching a broad, imprecise right.⁵⁸ Apparently viewing the differences as irreconcilable, Mulroney brought the conference to an end before the allotted time, without any plan to continue the discussions.⁵⁹ Aboriginal leaders were disillusioned by the whole process, and openly questioned the good faith of the first ministers, especially after the constitutional demands of Quebec appeared to be so readily accommodated only a few weeks later by the equally vague Meech Lake Accord.⁶⁰

After the discontinuation of the first ministers' conferences with no immediate prospect for further constitutional dialogue,⁶¹ the general recognition of aboriginal and treaty rights in section 35(1) of the Constitution Act of 1982 took on added significance. In the view of many aboriginal people, their inherent right to self-government is an existing aboriginal and treaty right already entrenched by that provision.⁶² A constitutional

⁵⁶Assembly of First Nations, Native Council of Canada, Métis National Council, and Inuit Committee on National Issues, "Joint Aboriginal Proposal for Self-Government," March 26-27, 1987 [hereafter cited as "Joint Aboriginal Proposal"].

⁵⁷See "Federal Draft, Schedule, Amendment to the Constitution of Canada," March 26-27, 1987; Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto, 1989), 251-52 [hereafter cited as Mandel, *Charter of Rights*].

⁵⁸See William Calder, "The Provinces and Indian Self-Government in the Constitutional Forum," in Long and Boldt, *Governments in Conflict?*, supra note 8 at 79.

⁵⁹See George Erasmus, "Twenty Years of Disappointed Hopes" [hereafter cited as Erasmus, "Disappointed Hopes"] in Richardson, *Anger and Renewal*, supra note 16 at 26.

⁶⁰*Ibid.* at 6-7, 26-27; Louis Bruyère, "Aboriginal Peoples and the Meech Lake Accord," *Canadian Human Rights Yearbook* 5 (1985), 49-79. See also Miller, *Indian-White Relations*, supra note 16 at 291-92; Mandel, *Charter of Rights*, supra note 57 at 252.

⁶¹For discussions of why the conferences failed to produce an agreement, see David C. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned?* (Kingston, 1989); Kathy L. Brock, "The Politics of Aboriginal Self-Government: A Canadian Paradox," *Canadian Public Administration* 34 (1991), 272-85 [hereafter cited as Brock, "Aboriginal Self-Government"].

⁶²See Penner Report, supra note 46 at 43-44; Cardinal, "Indian Nations," supra note 8 at 85-87; Gordon Peters, Statement to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development, Minutes of Proceedings and Evidence, March 3, 1987, 17: 5-7. For scholarly support for this

amendment acknowledging that right would simply make the recognition explicit instead of implicit.⁶³ This view is based on the fact that the aboriginal peoples were self-governing nations long before the Europeans arrived.⁶⁴ They have never give up their preexisting right to govern themselves and their territories, nor has that right ever been expressly extinguished.⁶⁵ However, with the failure of the first ministers' conferences to clarify section 35(1) rights through negotiated agreement and constitutional amendment, the task of defining aboriginal and treaty rights was temporarily left to the judiciary.

The issue of whether section 35(1) recognizes and affirms a right to self-government has not been directly addressed by Canadian courts. Cases involving the section have mostly involved aboriginal and treaty rights to hunt and fish, and the extent to which those rights are constitutionally protected against legislative infringements.⁶⁶ This is hardly surprising, as self-government is a highly charged political issue with which courts are inadequately equipped to deal. The aboriginal peoples, the federal and provincial governments, and no doubt the judges all realize that it is more appropriate to settle this complex matter by negotiation rather than litigation.

view, see Clark, *Native Liberty*, supra note 12; Brian Slattery, "First Nations and the Constitution: A Question of Trust," *Canadian Bar Review* 71 (1992), 279; John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government," *Osgoode Hall Law Journal* 30 (1992), 1; Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments," *Queen's Law Journal* 19 (1993), 95 [hereafter cited as McNeil, "Constitutional Space"].

⁶³The Joint Aboriginal Proposal presented at the 1987 conference confirmed this interpretation of s.35(1). It provided in part: "35[5][a] For greater certainty, the inherent right of self-government . . . of all the Indian, Inuit and Métis peoples of Canada is recognized and affirmed in subsection (1)" (supra note 56). See also Brock, "Aboriginal Self-Government," supra note 61 at 274.

⁶⁴See, e.g., "The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs to Chief Justice McEachern of the Supreme Court of British Columbia," [1988] 1 C.N.L.R. 17-72.

⁶⁵See Opekokew, *First Nations*, supra note 8, esp. 1; Assembly of First Nations, supra note 55; Erasmus, "Disappointed Hopes," supra n.59. Aboriginal peoples assert that the Royal Proclamation of 1763, s.91(24) of the Constitution Act, 1867, and the treaties all preserved their right to govern their own nations: see Ryder, "Demise and Rise," supra note 1 at 314-16. Even the Indian Act, R.S.C. 1985, c.I-5, while imposing a band council form of government, has acknowledged in a limited way the right of the aboriginal peoples to whom it applies to govern themselves.

⁶⁶The leading case is *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075. See also *R. v. Agawa* (1988), 53 D.L.R. (4th) 101 (Ont. C.A.); *R. v. Denny* (1990), 55 C.C.C. (3d) 322 [N.S.C.A.]; *R. v. Flett* (1989), 60 Man. R. 295 [Man. Q.B.], *leave to appeal denied* [1991] 1 C.N.L.R. 140 [Man. C.A.]; *R. v. Bombay*, [1993] 1 C.N.L.R. 92 [Ont. C.A.].

Impetus to reenter constitutional negotiations came with the failure of the 1987 Meech Lake Accord to be approved by all the provincial legislatures by the June 1990 deadline. That accord was designed to win Quebec's acceptance of the Constitution Act of 1982 by meeting that province's demands for constitutional renewal. But aboriginal peoples, who were excluded from the negotiations leading to the accord, had serious concerns about the impact it might have on their status and rights.⁶⁷ Elijah Harper, an aboriginal leader and member of the Manitoba legislature, played a key role in blocking the accord by using rules of legislative procedure to prevent a vote on it in his province.⁶⁸ With the defeat of the accord, Canada's political leaders were obliged to undertake a new round of constitutional discussions and to include the leaders of the four national aboriginal organizations as full participants in the talks.⁶⁹

Those talks, which started formally in March 1992, culminated in the agreement of all the participants at Charlottetown, Prince Edward Island, on August 28, 1992.⁷⁰ As we have seen, the Charlottetown Accord, officially known as the Consensus Report on the Constitution, was rejected by the Canadian electorate in a national referendum on October 26, 1992.⁷¹ The defeat of the accord and the almost complete lack of public reference to it by Canadian politicians subsequently make it unlikely that future constitutional reform will proceed along the same lines. However, the issues that sparked the accord have not disappeared, and are bound to surface again when the current constitutional fatigue and preoccupation with

⁶⁷See references in note 60, *supra*.

⁶⁸See Geoffrey York, *The Dispossessed: Life and Death in Native Canada* (London, 1990), 272-75; Miller, *Indian-White Relations*, *supra* note 16 at 299-303.

⁶⁹Apart from the Inuit Tapirisat of Canada, which replaced the Inuit Committee on National Issues, these are the same organizations that participated in the first ministers' conferences in the 1980s; see *supra* note 39.

⁷⁰Representatives of the federal government, the ten provinces, the two territories, and the four national aboriginal organizations participated in the talks. For background and analysis, see M.E. Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" [hereafter cited as Turpel, "Charlottetown Discord"], in *The Charlottetown Accord, the Referendum and the Future of Canada*, ed. K. McRoberts and P. Monahan (Toronto, 1993).

⁷¹Canadians were asked to reply yes or no to the following question: "Do you agree that the Canadian constitution should be renewed on the basis of the agreement reached on August 28, 1992?" Technically, the words "national referendum" are not an entirely accurate description, as the Province of Quebec and the rest of Canada held separate referendums. However, as the same question was asked on the same day, the results of these two referendums were national in scope.

economic issues begin to wane. The accord's provisions are then likely to serve as a starting point for any new constitutional discussions. It is therefore important for the provisions to be analyzed so that their potential impact and precedential value can be assessed.

One reason the accord was rejected was probably that not enough time was allowed between the agreement and the referendum for the accord's implications to be discussed and the consequences understood. Many Canadians appear to have felt uneasy about approving a weighty document they did not have adequate time to digest or comprehend.

The Charlottetown Accord is a complex document, covering such diverse matters as parliamentary reform, composition of the Supreme Court of Canada, social and economic union, and the creation of new provinces. These matters are in addition to the extensive provisions relating to the rights of the aboriginal peoples of Canada, including their right of self-government. While some parts of the accord are in legal terminology that is appropriate for constitutional amendment, much of it is in more general language intended to form the basis for the final legal text. A Draft Legal Text was prepared and was officially made public on October 13, 1992,⁷² but the referendum was on the accord itself.⁷³ I shall nonetheless use both the accord and the Draft Legal Text in analyzing the aboriginal self-government provisions.

ABORIGINAL SELF-GOVERNMENT PROVISIONS IN THE CHARLOTTETOWN ACCORD

THE CANADA CLAUSE

The accord would have added a new section 2 to the Constitution Act of 1867.⁷⁴ This section, known as the Canada Clause, would have provided that the Constitution of Canada "shall be interpreted in a manner consistent with [certain] fundamental characteristics," among which is the following:

(b) the Aboriginal peoples of Canada, being the first peoples to govern this land, have the right to promote their languages, cultures and traditions and to ensure

⁷²Quebec preempted the federal government by releasing the Legal Text three days early, on October 10, so that it would be available before a televised debate on the accord between Quebec's premier, Robert Bourassa, and Parti Québécois' leader, Jacques Parizeau, on October 12.

⁷³See *supra* note 71.

⁷⁴30 and 31 Vict., c.3 (U.K.).

the integrity of their societies, and their governments constitute one of three orders of government in Canada.⁷⁵

In addition, section 2 would have contained two non-derogation clauses:

(3) Nothing in this section derogates from the powers, rights or privileges of the Parliament or the Government of Canada, or of the legislatures or governments of the provinces, or of the legislative bodies or governments of the Aboriginal peoples of Canada, including any powers, rights or privileges relating to language.

(4) For greater certainty, nothing in this section abrogates or derogates from the aboriginal and treaty rights of the Aboriginal peoples of Canada.⁷⁶

The main significance of this section for the aboriginal peoples is that it would have acknowledged for the first time in the Constitution that they governed Canada before the arrival of the Europeans, and that they still have the right to govern themselves, at least insofar as their languages, cultures, and traditions and the integrity of their societies are concerned. Moreover, by stating that "their governments constitute one of three orders of government in Canada," the section apparently would have placed their governments on a par with the federal and provincial governments. However, the legal value of the section to the aboriginal peoples might have been more symbolic than real, as it would have been a statement of "fundamental characteristics" that would have applied in interpreting the rest of the Constitution, rather than a substantive recognition of rights and powers of aboriginal governments.⁷⁷ This assessment is reinforced by the non-derogation clause, which, in addition to protecting aboriginal and treaty rights, would have preserved the powers, rights, and privileges of the three

⁷⁵Draft Legal Text [hereafter cited as Legal Text], 1.

⁷⁶*Ibid.* at 2.

⁷⁷As an interpretive provision applicable to the Constitution generally, the Canada Clause may nonetheless have encouraged the courts to reassess the common judicial refusal to acknowledge the legitimacy of aboriginal governments after European colonization. For example, s.91(24) of the Constitution Act, 1867, could have been re-interpreted as maintaining a nation-to-nation relationship between aboriginal nations and the Canadian government, rather than giving Parliament the authority to destroy aboriginal forms of government, as was done through the enactment of the Indian Act, S.C. 1876, c.18: see Macklem, "First Nation Self-Government," *supra* note 9 at 416-25.

orders of government. The problem with this is that the federal and provincial governments already have their powers set out in sections 91 to 101 of the Constitution Act of 1867, and the courts have interpreted those sections as exhaustively distributing legislative and executive jurisdiction in Canada.⁷⁸ In contrast, the powers of aboriginal governments are not explicitly set out anywhere in the existing Constitution. For those powers to exist in the context of the Canadian Constitution, and for federal and provincial governments to be obliged to make space for those powers to be exercised, the aboriginal peoples would have had to rely on more substantive provisions in the Charlottetown Accord.

THE INHERENT RIGHT OF SELF-GOVERNMENT

The Charlottetown Accord would have added a new section 35.1 to the Constitution Act of 1982. In the language of the Legal Text it would have provided in part:

35.1 (1) The Aboriginal peoples of Canada have the inherent right of self-government within Canada.

(2) The right referred to in subsection (1) shall be interpreted in a manner consistent with the recognition of the governments of the Aboriginal peoples of Canada as constituting one of three orders of government in Canada.⁷⁹

Section 35.3 would have delayed the enforceability of section 35.1 in the courts for a period of five years after it came into force. This was to allow time for self-government agreements to be worked out under section 35.2, to which we will return. Once the five-year period was up, the courts would have had an obligation under section 35.1(4) to see whether adequate attempts had been made to reach a negotiated settlement before making decisions regarding the inherent right of self-government. Also, section 35.1(5) would have provided that the inherent right of self-government would not create any new rights to land or derogate from existing aboriginal or treaty rights to land. The first part of this provision was apparently included to allay provincial fears that the inherent right would lead to enlarged land claims.

⁷⁸See *Bank of Toronto v. Lambe* [1887], 12 App. Cas. 575 at 587; *Union Colliery Co. v. Bryden*, [1899] A.C. 326 at 353-54; *A.-G. for Ontario v. A.-G. for Canada*, [1912] A.C. 571 at 581, 583-54; *A.-G. for Canada v. A.-G. for Ontario*, [1937] A.C. 326 at 353-54; *Murphy v. C.P.R.*, [1958] S.C.R. 626 at 643; *Jones v. A.-G. for New Brunswick*, [1975] 2 S.C.R. 182 at 195.

⁷⁹Legal Text, *supra* note 75 at 37.

Acknowledgment of the inherent right of self-government in section 35.1(1) was a major step toward the decolonization of the Canadian Constitution. The term "inherent" means that the right is not derived from the Constitution or from a delegation of powers from the provincial or federal governments. The aboriginal peoples have this right because, as the Canada Clause discussed above states, they were "the first peoples to govern this land." By describing the right as inherent, the Constitution would have implicitly acknowledged that the right had survived European colonization of Canada, and had continued up to the present as the source of the authority of the aboriginal peoples to govern themselves. The right could not, however, have been used to justify the secession of aboriginal peoples from the rest of the country, as section 35.1(1) says that they have this right "within Canada." In other words, they would have had a constitutional right to govern themselves within the Canadian context, but would not have had the right to separate and form independent states. This restriction, which was insisted on by the provincial and federal governments, was controversial among the aboriginal peoples, some of whom thought that it would undermine the nation-to-nation relationship they have with Canada.⁸⁰

Section 35.1(2), as we have seen, would have provided that the inherent right of self-government "shall be interpreted in a manner consistent with the recognition of the governments of the aboriginal peoples of Canada as constituting one of three orders of government in Canada." While this provision had the potential to place aboriginal governments on a par with the federal and provincial governments, this status was weakened by another provision:

35.4 (2) No aboriginal law or any other exercise of the inherent right of self-government under section 35.1 may be inconsistent with federal or provincial laws that are essential to the preservation of peace, order and good government in Canada.⁸¹

⁸⁰On this relationship, see "A Message to All Canadians from First Nations of Treaty 6 and 7," *Globe and Mail*, September 24, 1992. That message, while not referring directly to the "within Canada" qualification, expresses a concern that the aboriginal provisions as a whole would undermine the nation-to-nation treaty relationship these First Nations have with the Crown: "The Treaty First Nations are concerned that the 'Aboriginal' part of the package attempts to change the very nature of our sacred treaties. Treaty 6 and 7 are agreements between nations and as such are international instruments. Our inherent right to First Nations Government is already recognized by the treaties." See also Turpel, "Charlottetown Discord," *supra* note 70.

⁸¹Legal Text, *supra* note 75 at 41.

This provision would have made both federal and provincial laws that are essential to the preservation of peace, order, and good government paramount over aboriginal laws and governments. While the term "essential" might have been used to qualify this paramountcy, the words "peace, order and good government" are very broad. In the context of the Canadian Constitution, the same words appear in section 91 of the Constitution Act of 1867, where they are used to describe the general residual jurisdiction of the Parliament of Canada.⁸² In that context, they have been relied upon to justify federal intrusions into provincial areas of jurisdiction in emergencies and in matters of overriding national concern.⁸³ Moreover, according to the Legal Text, the "peace, order and good government" provision in section 35.4(2) would have encompassed both federal and provincial laws,⁸⁴ placing aboriginal laws and governments in a position inferior to that of the other two orders of government. The implications of this for aboriginal governments would have depended on how narrowly or broadly the courts interpreted the words "essential to the preservation of peace, order and good government in Canada." These vague words undoubtedly would have given the courts a great deal of leeway in determining the scope of federal and provincial paramountcy.

In addition, section 35.4(1) would have provided as follows:

35.4(1) Except as otherwise provided by the Constitution of Canada, the laws of Canada and the laws of the provinces and territories continue to apply to the Aboriginal peoples of Canada, subject nevertheless to being displaced by laws enacted by legislative bodies of the Aboriginal peoples according to their authority.⁸⁵

⁸²The relevant part of section 91 reads: "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces" (30 & 31 Vict., c.3 [U.K.], s.91).

⁸³See Hogg, *Constitutional Law*, supra note 37 at 375-95.

⁸⁴Note that the inclusion of provincial laws in this context was not as clear in the Charlottetown Accord as in the Legal Text; see Consensus Report on the Constitution, 23 [hereafter cited as Consensus Report].

⁸⁵Legal Text, supra note 75 at 41. Note that the Charlottetown Accord did not include laws of the territories in this context, and referred to laws passed by "governments of Aboriginal peoples" rather than "legislative bodies of the Aboriginal peoples": Consensus Report, supra note 84 at 22.

This provision was obviously intended to prevent a legal vacuum when aboriginal peoples lacked laws governing all matters within the jurisdiction of their own governments.⁸⁶ Until such time as they exercised their jurisdiction and made their own laws, federal, provincial, and territorial laws that formerly applied to them would have continued to apply. However, as it appeared in the Legal Text, the provision was problematic because it apparently assumed that legislative bodies of the aboriginal peoples are the only valid sources of aboriginal law. Customary law, which has continued to govern juridic relations in many aboriginal communities,⁸⁷ apparently would not have been available to displace federal, provincial, and territorial laws. As a result, the aboriginal peoples would have been obliged to codify their customary laws in order for them to be accorded the same validity as, for example, the common law, which, like custom, lacks a legislative base. This problem would have been avoided if the section had been worded more generally so that federal, provincial, and territorial laws could have been displaced by "laws of the aboriginal peoples within the jurisdiction of their governments."

The extent of the jurisdiction of aboriginal governments was not clearly set out in the Charlottetown Accord. However, the accord did provide some guidance on this matter, as contained in the following provision of the Legal Text:

35.1(3) The exercise of the right referred to in subsection (1) [the inherent right of self-government] includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,

(a) to safeguard and develop their languages, cultures, economies, identities, institutions, and traditions, and

(b) to develop, maintain and strengthen their relationship with their lands, waters and environment, so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies.⁸⁸

⁸⁶For a discussion of this matter in the context of s.35(1) of the Constitution Act, 1982, see McNeil, "Constitutional Space," *supra* note 62.

⁸⁷See, e.g., "The Address of the Gitksan and Wet'suwet'en Hereditary Chiefs," *supra* note 64.

⁸⁸Legal Text, *supra* note 75 at 37-38. The text of the accord is substantially the same in this respect: Consensus Report, *supra* note 84 at 20.

The term "includes" suggests that the jurisdiction of aboriginal governments might not have been limited to the subjects referred to in (a) and (b). But even if the courts adopted a restrictive interpretation of this term, words like "cultures, economies, identities, institutions, and traditions" are very general, allowing for a broad application of the right of self-government.⁸⁹ However, the words "duly constituted legislative bodies of the Aboriginal peoples" in section 35.1(3) might have presented problems, as traditional aboriginal governments do not necessarily have a legislative branch in the sense understood in political systems based on European models.⁹⁰

The intention of the framers of the Charlottetown Accord was nonetheless to have questions of jurisdiction settled by negotiation if possible, rather than by judicial determination of the scope of the right of self-government. As already mentioned, in any proceedings involving that right, judges would have been obliged, under section 35.1(4), to inquire into the efforts that had been made to reach a negotiated settlement, and could order the parties to take steps to achieve a resolution. Moreover, section 35.2(1) contained a specific commitment to negotiate:

35.2 (1) The government of Canada, the provincial and territorial governments and the Aboriginal peoples of Canada, including the Indian, Inuit and Métis peoples of Canada, in the various regions and communities of Canada shall negotiate in good faith the implementation of the right of self-government, including issues of

- (a) jurisdiction,
- (b) lands and resources, and
- (c) economic and fiscal arrangements,

with the objective of concluding agreements elaborating relationships between governments of Aboriginal peoples and the government of Canada and provincial or territorial governments.⁹¹

⁸⁹Under sec. 35.1(4), courts would have been explicitly required to take subsection [3] into account in determining the scope of the right of self-government.

⁹⁰See generally Menno Boldt and J. Anthony Long, "Tribal Traditions and Euro-Western Political Ideologies: The Dilemma of Canada's Native Indians," in *Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, ed. Menno Boldt and J. Anthony Long (Toronto, 1985), 333-46 [hereafter cited as Boldt and Long, *Quest for Justice*]; Russell Lawrence Barsh, "The Nature and Spirit of North American Political Systems," *American Indian Quarterly* 10 (1986), 181-98.

⁹¹Legal Text, *supra* note 75 at 39.

Jurisdiction would thus have been a negotiable issue, to be determined if possible by agreement between the governments of the aboriginal peoples and the other governments in Canada. Jurisdiction could therefore vary from one aboriginal government to another, depending on the outcome of negotiations.⁹² Agreements regarding jurisdiction might or might not have been constitutionally protected, depending on whether the agreement was part of a treaty or land-claims agreement, or contained a declaration that the rights of the aboriginal peoples set out in the agreement were treaty rights, in which cases the rights would have been regarded as treaty rights under section 35(1) of the Constitution Act of 1982.⁹³

The commitment to negotiate in section 35.2(1) would not have affected the validity or enforceability of the right of self-government referred to in section 35.1(1). Subject to the five-year delay contained in section 35.3, that right could have been enforced in the courts. It was not contingent on the commitment to negotiate.⁹⁴

A major issue left unresolved by the Charlottetown Accord was how aboriginal governments would be financed. In the Legal Text, section 35.2(1) provided that economic and fiscal arrangements would be the subject of negotiations together with jurisdiction, lands, and resources, but no provision was made for financing in cases in which no agreement was reached. The Charlottetown Accord itself provided that "[m]atters relating to financing of governments of aboriginal peoples should be dealt with in a political accord."⁹⁵ In other words, financing arrangements would have to be negotiated, and might not be part of the Constitution.

The Charlottetown Accord did, however, provide some guidelines for the political accord, which are worth quoting in their entirety:

The accord would commit the governments of aboriginal peoples to:

⁹²This is implicit in section 35.2(5) of *ibid.*, which provides: "The parties to negotiations referred to in subsection (1) shall have regard to the different circumstances of the various Aboriginal peoples of Canada."

⁹³See text accompanying notes 37, 43-44, *supra*.

⁹⁴Section 35.2(7), Legal Text, *supra* note 75 at 40, stated: "Nothing in this section abrogates or derogates from the rights referred to in section 35 or 35.1, or from the enforceability thereof, and nothing in subsection 35.1(3) or in this section makes those rights contingent on the commitment to negotiate under this section."

⁹⁵Consensus Report, *supra* note 84 at 23.

promoting equal opportunities for the well-being of all Aboriginal peoples;
furthering economic, social and cultural development and employment opportunities to reduce disparities in opportunities among Aboriginal peoples and between Aboriginal peoples and other Canadians; and
providing essential public services at levels reasonably comparable to those available to other Canadians in the vicinity.

It would also commit federal and provincial governments to the principle of providing the governments of Aboriginal peoples with fiscal or other resources, such as land, to assist those governments to govern their own affairs and to meet the commitments listed above, taking into account the levels of services provided to other Canadians in the vicinity and the fiscal capacity of governments of Aboriginal peoples to raise revenues from their own sources.

The issues of financing and its possible inclusion in the Constitution should be on the agenda of the First Ministers' Conference on Aboriginal Constitutional matters referred to in Item 53.⁹⁶

The lack of definite arrangements for financing their governments was a major concern for many aboriginal peoples.⁹⁷ At present, most aboriginal communities are at the bottom of the economic scale in Canada. They rely heavily on financing from the other orders of government, particularly the federal government. There was a strong fear that they would have been left without sufficient resources to finance their governments if the Charlottetown Accord had been approved with inadequate financial arrangements. The commitment of the federal and provincial governments to the principle of providing them with fiscal or other resources, referred to in the accord, was not legally enforceable. The aboriginal peoples were being asked to

⁹⁶Ibid. at 23-24. Item 53 provides in part that the "Constitution should be amended to provide for four future First Ministers' Conferences on Aboriginal constitutional matters beginning no later than 1996, and following every two years thereafter"; *ibid.* at 24.

⁹⁷This was one reason the chiefs of the Assembly of First Nations did not vote to approve the Charlottetown Accord at a special session on the Constitution held on the Squamish Indian Reserve in North Vancouver on October 14-16, 1992; see Robert Matas, "Native leaders back away from endorsing deal," and "Aboriginals divided on accord, too," *Globe and Mail*, October 17 and 19, 1992; Michael Smyth, "Native talks explode," *Victoria Times-Colonist*, October 17, 1992.

have faith and trust the other orders of government to agree to acceptable financial arrangements. In light of past experience, the reluctance of some aboriginal peoples to do so is certainly understandable.⁹⁸

The Charlottetown Accord deals with a number of other important aboriginal matters, such as treaty rights and the status of the Métis Nation, which cannot be dealt with here. However, an issue that should be briefly mentioned is the application of the Canadian Charter of Rights and Freedoms to aboriginal governments.⁹⁹ The charter provides constitutional protection for certain fundamental freedoms, such as freedom of religion, thought, speech, assembly, and association. It also guarantees democratic rights associated with representative government, mobility rights of Canadians, legal rights pertaining to due process, equality rights to prevent discrimination, and language and education rights relating to French and English. Some aboriginal people think that the charter is culturally specific, as it is rooted in the individualistic, liberal-democratic traditions of Western Europe.¹⁰⁰ If so, it would probably be inappropriate for the charter to apply to aboriginal governments. Others, however, believe that the charter is necessary to protect individual aboriginal persons from their own governments. Some aboriginal women, in particular, are concerned that their rights to gender equality under the charter will be endangered if aboriginal governments are not subject to the charter's terms.¹⁰¹ A compromise was reached in the Charlottetown Accord on

⁹⁸See Turpel, "Charlottetown Discord," *supra* note 70. In *Sparrow v. The Queen*, [1990] 1 S.C.R. 1075 at 1103, the Supreme Court of Canada said: "there can be no doubt that over the years the rights of the Indians were often honoured in the breach. . . . As MacDonald J. stated in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 [B.C.S.C.], at p.37: 'We cannot recount with much pride the treatment accorded to native people in this country.'"

⁹⁹The charter, most of which became law on April 17, 1982, is contained in Part 1 of the Constitution Act, 1982. The complex and controversial matter of the Charter's application to aboriginal governments is the subject of a future paper by this writer. See also Turpel, "Charlottetown Discord," *supra* note 70.

¹⁰⁰See, e.g., Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences," *Canadian Human Rights Yearbook* 6 (1989-90), 3. See also Menno Boldt and J. Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms," in *idem*, *Quest for Justice*, *supra* note 90 at 165-79.

¹⁰¹Section 15(1) provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." The section goes on to prohibit discrimination on the specific ground, among others, of sex. Also, section 28 of the Charter provides: "Notwithstanding anything in this charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons."

this issue, so that the charter would have applied "to all legislative bodies and governments of the Aboriginal peoples of Canada in respect of all matters within the authority of their respective legislative bodies."¹⁰² Those bodies would have been able to override some of the charter's provisions just as the Parliament of Canada and the provincial legislatures can.¹⁰³ In addition, a new section 35.7 would have been added to the aboriginal part of the Constitution Act of 1982, providing that, "[n]otwithstanding any other provision of this Act, the rights of the aboriginal peoples referred to in this Part are guaranteed equally to male and female persons."¹⁰⁴

Despite these provisions, the Native Women's Association of Canada, one of the national organizations of aboriginal women, still thought that gender equality was not sufficiently protected. It tried to get an order from the Federal Court of Canada blocking the referendum on the grounds that it would be invalid because aboriginal women were denied separate representation at the bargaining table.¹⁰⁵ That legal action failed when Justice Strayer refused their request on October 16, 1992, ruling that the issue of representation at constitutional conferences

¹⁰²This would have been included as an amendment to section 32(1) of the Constitution Act, 1982; see Legal Text, *supra* note 75 at 36. At the same time, however, s.25 of that act would have been amended to protect "any rights or freedoms relating to the exercise or protection of their [the aboriginal peoples'] languages, cultures or traditions" from the application of the Charter. As the safeguarding and development of aboriginal languages, cultures, and traditions would have been within the general jurisdiction assigned to aboriginal governments by s.35.1(3) (see text accompanying note 88, *supra*), one is left wondering how the apparent conflict between these two provisions would have been resolved.

¹⁰³See s.33 of the Constitution Act, 1982, which would have been followed by a new s.33.1 applying it to the legislative bodies of the aboriginal peoples of Canada: see Legal Text, *supra* note 75 at 36. The override provision, or "notwithstanding clause," as it is commonly called, allows the fundamental freedoms, legal rights, and equality rights provisions of the charter to be overridden.

¹⁰⁴This more general provision would have replaced the old s.35(4) (see text between notes 43 and 44, *supra*), which would have been amended to read: "For greater certainty, all the Aboriginal peoples of Canada have access to the aboriginal and treaty rights recognized and affirmed in this Part that pertain to them" (Legal Text, *supra* note 75 at 37). Also, the "Canada Clause" would have stated that the Constitution of Canada should be interpreted in a manner consistent with, among other things, the fundamental characteristic that "Canadians are committed to the equality of female and male persons": Legal Text, *supra* note 75 at 1.

¹⁰⁵See Sean Fine, "Native women aim to block national referendum in court," *Globe and Mail*, October 13, 1992. It is important to note, however, that not all aboriginal women supported the Native Women's Association's position; see Doug Ward, "Dispute widens on backing accord," *Vancouver Sun*, October 14, 1992.

is a political one that cannot be decided by the courts.¹⁰⁶ The decision did not, of course, resolve the controversial issue of whether gender equality would have been adequately protected under the accord.¹⁰⁷

Nor was it only aboriginal women who were divided over the Charlottetown Accord. While a majority of the Inuit, and possibly the Métis and non-status Indians, appear to have supported it,¹⁰⁸ many status Indians were more doubtful. At a national meeting of the status Indian chiefs from October 14 to 16, the Assembly of First Nations avoided a vote that might have rejected the accord if it had taken place.¹⁰⁹ Among other things, many chiefs thought that the process had been too rushed, and that they did not have adequate time to consult with their people and discuss the accord. This was a valid concern, since during the not quite two months between the signing of the accord and the referendum, the accord had to be translated into aboriginal languages before informed discussion could even take place in many communities. Lack of adequate time to understand, analyze, and discuss the complex agreement no doubt contributed to the rejection of the accord by 62 percent of the status Indians on reserves who voted in the referendum.¹¹⁰

CONCLUSION

The political dynamics that led to the Charlottetown Accord are unlikely to recur in Canada in the near future, if at all. The accord was a compromise agreement, the product of a certain time that has now passed. Given the decisive rejection of the accord by the Canadian populace, few politicians will want to risk attempting such a comprehensive package for constitutional reform again. Constitutional issues are likely to be treated in a more piecemeal fashion, possibly as crises, for some time to come.

Despite its rejection, the accord probably altered the relationship between the aboriginal peoples and the Canadian state in

¹⁰⁶*Native Women's Association of Canada v. Canada* (1992), 57 F.T.R. 115, *aff'd* (1992) 145 N.R. 253 (F.C.A.).

¹⁰⁷For further discussion, see Turpel, "Charlottetown Discord," *supra* note 70.

¹⁰⁸As Inuit, Métis, and off-reserve Indian votes were not recorded separately by Elections Canada during the referendum, one cannot be sure of the extent of their support for the accord. However, Inuit support is fairly certain, as the Inuit are a substantial majority in parts of northern Canada where the vote was strongly in favor. See Turpel, "Charlottetown Discord," *supra* note 70.

¹⁰⁹See *supra* note 97.

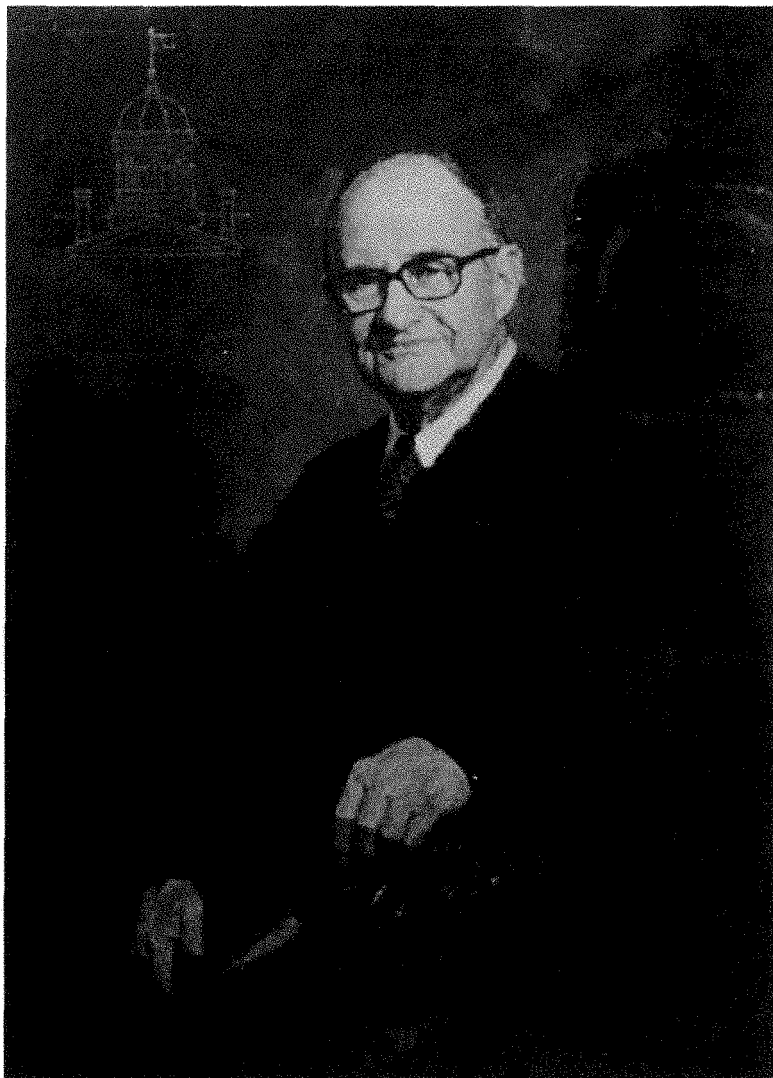
¹¹⁰See Turpel, "Charlottetown Discord," *supra* note 70.

fundamental and irrevocable ways. In the past, aboriginal participation in constitutional discussions was limited to so-called aboriginal issues, but this time aboriginal leaders took part in broad-ranging constitutional negotiations. Even if they were not treated as equals by the federal and provincial participants, it was recognized that they have a stake in the whole constitutional structure of the country. This new attitude was reflected in the accord, which acknowledged that they were "the first peoples to govern this land," and that "their governments constitute one of three orders of government in Canada."¹¹¹ Regardless of the fate of the accord itself, these fundamental realities can no longer be ignored.

The politicians who negotiated the accord all accepted that the aboriginal peoples' right of self-government is an inherent right, predating the colonization of Canada by Europeans and not dependent on the Canadian Constitution for its existence. Recognition of this right in the Constitution was not necessary to give it life, as that would simply have made explicit the reality that all the participants at Charlottetown must have understood anyway. For the same reason, defeat of the accord could not negate the existence of this right. It can be negated only by denying its inherency—an untenable position for those governments that acknowledged its independent foundation at Charlottetown.

The Charlottetown Accord may, therefore, have advanced the cause of self-government more than may appear at first glance. In the future, it will probably be politically unacceptable for substantial constitutional discussions to take place without the participation of aboriginal leaders. Nor should any politician feel comfortable in denying that the right of self-government is inherent. In those respects, at least, the accord is likely to have a profound impact on political consciousness in Canada. Despite its defeat, it will probably come to be regarded as a milestone along the road to acknowledging the legitimate place of aboriginal governments in Canada's political structure.

¹¹¹Consensus Report, *supra* note 84 at 3.



Judge John F. Kilkenny, who has had a distinguished career as both a trial judge and an appeals judge, has been instrumental in preserving Oregon's legal history. (Oil painting by Richard Wiley, 1977)

THE FIRST DUTY

A REVIEW ESSAY

ALFRED T. GOODWIN

The First Duty: A History of the U.S. District Court for Oregon, edited by Carolyn M. Buan. Portland: United States District Court of Oregon Historical Society, 1993; 332 pp., appendices, index; \$29.95, cloth.

Alexander Hamilton is quoted on the flyleaf of this history as saying that the first duty of society is justice. Oregon's federal judges may have agreed with Hamilton, but are likely to have found some tension between society's duty and their own professional duty to apply the law. Cases before the first United States district judges squarely presented a conflict between what appeared to be the law and what seemed consistent with equity and good conscience. The same conflict still exists, and the brief narratives of representative cases and the judges who decided them down through the years make for a good read.

This attractive volume may be picked up and opened at any of its chapters. These deal with conveniently chosen time periods, and were researched and written by six scholars. Carolyn Buan's graceful and wise editing minimizes overlaps and repetition, and the result is a useful compendium of the social and political landmarks of the Oregon Country from initial European contact to the present.

The most dramatic case in territorial days was the trial of the Cayuse Indians who were tried and executed for the killing of Dr. Marcus Whitman at the Whitman Mission. The story is

Alfred T. Goodwin is a senior judge for the Ninth Circuit Court of Appeals. He is also a member of the Board of Directors of the Ninth Judicial Circuit Historical Society.

recalled briefly, but reminds the reader sufficiently of what due process looked like in the early days of Anglo-American contact with the original inhabitants of the area.

Other tightly written segments relate the facts and the holdings in such cases as the one involving the application for citizenship of an Armenian-born Portland businessman whom the government wanted to deport as an excludable alien from Asia, and that of the "Hindu logger" whose equities commended him to the Oregon judges for citizenship, but who lost before the United States Supreme Court. The cases run almost to the date of publication, and include reference to the ability of a few owls to shut off the supply of federal saw logs to Oregon's (and Washington's) shrinking number of sawmills.

The case notes are well documented for any readers who wish to dig further. Mingled with them are biographical notes on the various federal judges who have served the Oregon Country and the District of Oregon since the mid-1800s. Like the case histories, the biographies are brief, but have notes to original sources.

Matthew Paul Deady, who at the age of thirty-five had been a member of the territorial supreme court and the 1857 Constitutional Convention, was appointed by President Buchanan to be Oregon's first United States district judge. Deady was the federal law in Oregon for forty years, and—like most good trial judges on the cutting edge of change—got reversed from time to time by the higher federal courts. Again like most good trial judges, he did his work and let the appellate judges do theirs without letting setbacks bother him. He died in 1893, two years after the organization of the Ninth Circuit (the federal appellate court that now serves the Pacific Coast), active to the end.

Oregon remained a one-judge district, and President Cleveland appointed Charles Byron Bellinger, a lawyer, state court judge, newspaper editor, and political activist, to fill the seat left vacant by Deady. Bellinger was almost immediately confronted with massive land-fraud trials, the history of which has filled a number of volumes. He also became one of the nation's earliest pro-environment judges when his docket began to fill with cases involving sheep, forest reserves, and attempts to loot public school lands. Bellinger served alone until his death in 1905, when President Theodore Roosevelt appointed Charles Edwin Wolverton, a distinguished state court judge, to serve the District of Oregon. By 1909 political forces as well as the increasing case load caused Congress to create a second judgeship for the district and President Taft looked to the Oregon Supreme Court for a judge to fill the seat.

The man appointed, Robert Sharp Bean, shared with Wolverton the growing number of cases during the turbulent industrial expansion preceding the First World War and those arising from the nation's first major Red Scare, the prohibition of beverage alcohol, and the Ku Klux Klan attacks on private schools. Bean died in 1931, and President Hoover appointed James Alger Fee, a Pendleton circuit judge and a lieutenant of artillery. Fee soon developed a reputation among Oregon lawyers as a strict courtroom manager; his dislike of the new Federal Rules of Civil Procedure caused him to enforce them with vigor and close construction in the hopes of prompting changes in them.

Despite the pressures of increasing population and industry and of political controversy, Oregon remained a two-judge district until after the Second World War. The Deady chair was occupied by John H. McNary on the death of Judge Wolverton in 1927; McNary in turn was followed in 1937 by Claude McCulloch, whose career on the district bench was notable for his free-enterprise attitude toward federal regulations during the war. Senior lawyers who sought to enforce Office of Price Administration controls still tell "war stories" about McCulloch and express their disbelief that Roosevelt had appointed him.

McCulloch occupied the Deady chair until 1959, when he became the first Oregon federal judge to take advantage of legislation that made senior status attractive to judges wanting to reduce their workload. McCulloch's senior status gave President Eisenhower the opportunity to name a Republican to the position; he selected John Francis Kilkenny, a distinguished trial lawyer from Pendleton, who had graduated in law from the University of Notre Dame, where he also played football.

Judge Kilkenny, who at this writing is ninety-two years of age and still turning out a few opinions, began to keep track of the occupants of the Deady, Bean, and Solomon seats, the last being a third seat created in 1949 for the District of Oregon. That work has been continued by Judge James M. Burns. Kilkenny's distinguished career as a trial judge was capped in 1969 by his appointment to the Ninth Circuit, where he served two years as an active judge, and more than a score of years as a senior circuit judge. He was succeeded by this writer, from the Oregon Supreme Court, who followed Kilkenny to the Ninth Circuit Court of Appeals in 1971.

Returning to the district judges, the Bean chair became open when, in 1955, President Eisenhower responded to the petition of thousands of Oregon lawyers and either elevated, or banished, Judge Fee to the Ninth Circuit, depending on one's point of view of the matter. In his place, the president appointed William G. East, a circuit judge from Eugene, Oregon. East was

appointed despite the efforts of the late William Tugman, the editor of a Reedsport newspaper, to question the judge's fitness after a minor car accident.

East served the District of Oregon until 1967, when his health caused him to take senior status, but he continued to serve as a senior district judge, and by assignment to the Ninth Circuit Court of Appeals, until his death in 1985. He was succeeded in 1967 by Robert C. Belloni, an Oregon circuit judge from Coos County, who served until he took senior status in 1984, and who at this writing remains busy as a senior judge. With reference to the Bean seat, all the occupants between 1909 and 1987 had been Oregon circuit judges, and all of them except Fee had come from Oregon's old Second Judicial District, encompassing Lane, Douglas, Coos, and Curry counties.

Meanwhile, in 1949, postwar growth and backlogs of litigation had produced a need for a third judge in the district. President Truman appointed Gus J. Solomon to the new chair, facing down some conservative opposition who thought the relatively young lawyer's record in defending persons accused of "subversive" affiliations or activities disqualified him from defending the Constitution. Solomon defended constitutional and statutory rights with wisdom, compassion, and dispatch. Known from Tampa to Anchorage as "the fastest gavel in the West," he served as an active judge for twenty-two years. His total service to the district and the nation was longer than that of any Oregon judge since Judge Deady.

The Solomon chair was filled by James Burns in 1972. Solomon continued to serve as a senior judge, sitting both as a trial and an appellate judge for another fifteen years. Burns, who had been a Multnomah County circuit judge, took senior status in 1989, and was replaced in 1990 by Robert E. Jones, also a former circuit judge from Multnomah County, who was appointed from the Oregon Supreme Court.

The Kilkenny-Burns notes on the continuity of the Oregon district judgeships from the Deady, Bean, and Solomon chairs ran into a box canyon for tracing purposes in 1980. That year a Democratic Congress gave President Carter the opportunity virtually to double the size of the federal courts. The District of Oregon gained two new judgeships, and Owen M. Panner replaced Otto R. Skopil, Jr., who was elevated to the Ninth Circuit Court of Appeals. Skopil replaced this writer on the Deady seat when I was appointed to the Ninth Circuit.

Judge Skopil is the only Oregon district judge, and one of very few in the nation, to be appointed by a Republican president to one Article III judgeship and then, seven years later, to be appointed by a Democratic president to another. This phenomenon speaks well both of Skopil's recognized skill and in-

tegrity as a lawyer and a judge, and of Senator Hatfield's ability to make things happen in Washington, D.C. The Skopil appointment was frequently mentioned by his friend the former judge of the Fifth Circuit Griffin Bell, of Atlanta, when, as attorney general of the United States, Bell was sometimes asked why President Carter appointed so many Democrats to federal judgeships. The attorney general would point with pride to Oregon and ask, "What are you complaining about?"

Helen J. Frye, from the Oregon circuit court in Eugene, and James A. Redden, the attorney general of Oregon, together with Panner, all took their oaths of office the same day. Panner has been assigned (more or less arbitrarily) the Deady seat, and Frye and Redden occupy the new judgeships created in the 1980 omnibus judgeship bill.

In 1991 another new seat on the federal district court in Oregon was created. Judge Michael R. Hogan, also of Eugene, was a United States magistrate judge for fifteen years and had tried civil cases with the enthusiastic consent of the litigants when he became an Article III judge in 1991 and took up the criminal half of the calendar as well. His judgeship will be the Hogan seat.

Judge Edward Leavy, after nearly twenty years' service as a state circuit judge in Eugene, became a magistrate in 1976, and tried civil cases on stipulation of the parties for eight years. He was appointed to the Bean seat in 1984, succeeding Judge Belloni. (Both Leavy and Belloni had begun their judicial careers in Oregon's old Second Judicial District, as had Bean, East, Goodwin, and Frye.)

Leavy went on to the Ninth Circuit in 1987. The Bean seat was next occupied by Judge Malcolm Marsh, from Salem, a distinguished trial lawyer and leader of the bar.

Frye, Redden, and Hogan will in time be succeeded by new appointees, and future statisticians may be able to attach their names to the chairs occupied by subsequent generations of the Oregon judiciary. More than half the judges who have served the District of Oregon during the past 135 years are still hearing and deciding cases. As the federal courts prepare to turn their calendars to years beginning with a "2," this book is a convenient and well-written review of the work of Article III judges in the Far West.

 UNITED STATES DISTRICT JUDGES FOR OREGON

<i>Name</i>	<i>Seat</i>	<i>Dates</i>
1. Matthew P. Deady	(D)	Mar. 9, 1859–Mar. 24, 1893
2. Charles B. Bellinger	(D)	May 1, 1893–May 12, 1905
3. Charles E. Wolverton	(D)	Dec. 5, 1905–Sept. 21, 1926
4. Robert S. Bean	(B)	May 3, 1909–Jan. 7, 1931
5. John H. McNary	(D)	Mar. 7, 1927–Oct. 25, 1936
6. James A. Fee	(B)	Apr. 6, 1931–Apr. 30, 1954*
7. Claude McCulloch	(D)	Sept. 24, 1937–Dec. 31, 1958
8. Gus J. Solomon	(S)	Nov. 14, 1949–Sept. 1, 1971+
9. William G. East	(B)	June 22, 1955–Apr. 10, 1967+
10. John F. Kilkenny	(D)	Aug. 15, 1959–Sept. 26, 1969*
11. Robert C. Belloni	(B)	Apr. 10, 1967–Apr. 4, 1984+
12. Alfred T. Goodwin	(D)	Dec. 22, 1969–Dec. 17, 1971*
13. Otto R. Skopil, Jr.	(D)	June 12, 1972–Oct. 20, 1979*
14. James M. Burns	(S)	June 12, 1972–Nov. 24, 1989+
15. Owen M. Panner	(D)	Mar. 24, 1980–July 28, 1992+
16. James A. Redden	(R)	Mar. 24, 1980–
17. Helen J. Frye	(F)	Mar. 24, 1980–
18. Edward Leavy	(B)	Mar. 18, 1984–Apr. 8, 1987*
19. Malcolm Marsh	(B)	Apr. 16, 1987–
20. Robert E. Jones	(S)	Apr. 20, 1990–
21. Michael R. Hogan	(H)	Sept. 16, 1991–

*Elevated to Court of Appeals

+Took senior status

N.B.: Dates for judges Jones and Hogan are dates of appointment; all other judges' beginning dates are official dates of entry on duty.

BOOK REVIEWS

Partial Justice: Federal Indian Law in a Liberal Constitutional System, by Petra T. Shattuck and Jill Norgren. Providence, R.I.: Berg Publishers, 1991; 208 pp., notes, bibliography, index; \$14.95, paper.

Partial Justice synthesizes existing scholarship and goes well beyond it, clearly stating and quite effectively developing an argument. Although it is not the definitive work on American Indian law, it is an important, serious, well-documented contribution, to be read with Wilkinson and Deloria and Lytle.

Petra Shattuck and Jill Norgren ask whether law on Native American sovereignty and property rights remained autonomous or succumbed to political pressure, and thus whether using the law was a "better way" for Native Americans. They answer that, ultimately, law was *not* a "better way": at best, Native Americans never obtained an entire vindication of their rights, only an "uncertain pattern" (p. 54) of victories that were often small and not lasting. This notion of "partial justice" is but one of the authors' underlying themes. Others include the question of whether Indians or non-Indians were parties to cases; the Indians' use of Anglo attorneys; conflict between "friends of the American Indians" and expansionists; and, in particular, the contest of law with power.

The original principles of American Indian law embodied a commitment to law (not force) that could have benefitted the Native Americans. However, through the subsequent distortion of those principles, Native Americans were dispossessed of land and their civil rights under the cover of legal rhetoric. Even the reformers' commitment to law was not total, since they sometimes argued for the importance of the rule of law to shore up the system's legitimacy, thus permitting the taking of Indian land if done by law.

In their intensive treatment, in which the authors abjure the usual focus on landmark cases, they deal with cases in the context of the overall development of American Indian law. They begin with *Fletcher v. Peck*, *New Jersey v. Wilson*, and *Johnson v. M'Intosh*, none of which involved Native Americans as parties. *Fletcher*, in which tribal land rights were limited to occupancy, started the process by which justice was compromised. In the Cherokee cases somewhat later, when Native Americans

were direct parties, the federal government made inconsistent promises to them and to the states, and dissenting justices were left to speak out for the Indian-as-sovereign. Law, not power, predominated in *Worcester v. Georgia*, but the case had little ultimate effect.

The authors cast further light on previous discussion of the late-nineteenth-century move toward assimilation by relating it to the law. For example, they place the Supreme Court's ruling in *Crow Dog*, leading to the Major Crimes Act, in the context of assimilation and the United States' desire to assert criminal jurisdiction. They also show the relationship between allotment and citizenship in the connection between *Elk v. Wilkins* (no citizenship for an Indian who had left the tribe) and the Dawes Act. Twentieth-century Supreme Court rulings do not receive the same thorough coverage as earlier rulings, but the reader can turn elsewhere for that material. Shattuck and Norgren have made a far more valuable contribution with their analysis of the earlier period than if they had offered another treatment of contemporary cases.

The authors treat law in the late nineteenth and early twentieth centuries not through cases but through some key legal concepts, which together made the United States government's actions toward Native Americans unreviewable. These are the shift from guardianship to trusteeship, the federal government's plenary power (deriving from placement of relations with the Indians in treaty and commerce clauses), and the political-question doctrine. In examining more recent law, the authors look first at the Indian Claims Commission, which they relate effectively to assimilation and use to raise questions about American commitment to fairness at law. They are severely critical of the commission on both procedural and substantive dimensions. They point out that use of an adversary model for Indian land claims was similar to pre-Indian Claims Commission litigation, hiding the tension between law and power, and increasing lawyers' influence. Turning to the Indian Civil Rights Act, they argue that *Santa Clara Pueblo v. Martinez* (in which the Supreme Court said that the tribe must respect individual Indians' constitutional rights but was the forum for such matters) was important for self-determination, but that its premises were at fault. They would modify the ruling in favor of tribal judicial systems independent of the tribal councils.

The authors conclude that a two-tiered system of federal Indian law has developed. On one tier, there is no restraint on government policy, which is exempt from constitutional restrictions and provides Indians with no rights; on the other, actions actually taken by government are subject to "formal legal rationality" (p. 191), including due process. However, the

existence of the former makes the latter ineffectual as a constraint on depredations, by the government and private citizens, of Indian lands and other Indian rights. In the "*Standing Bear* phenomenon" (p. 193), the Court, operating on the second tier, may criticize the government, but the Congress, operating on the first tier, may then reverse the Court's action, and the Court will in turn uphold the new explicit statement of the government's "plenary power."

Shattuck and Norgren have thoroughly explained and persuasively argued the existence and development of "partial justice," which provides a useful explanatory theme for cases and other legal developments that otherwise appear isolated or independent of each other. One should note, however, that partial justice and a two-tiered system of law apply not only to Native Americans but to efforts to protect the rights of any minority through the law and the courts: victories occur from time to time, but the courts are often unwilling to reinforce their prior actions and it takes action in other arenas to sustain any victories that have been obtained.

Stephen L. Wasby
The University at Albany

A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492-1992, by Thomas Berger. Seattle: University of Washington Press, 1991; 183 pp., notes, index; \$12.95, paper.

In this work, Thomas R. Berger, a lawyer in British Columbia recognized both for his work in justice for Native peoples and for his book *Village Journey*, once again defends Native rights. At first glance, this relatively short work might be criticized for its over-broad history of the Native peoples of South, Central, and North America, but further scrutiny reveals that the author intends to shed light on the long and terrible shadow that has obscured Native sovereignty, and to teach a valuable lesson in human rights.

According to Berger, this shadow has been cast by the five hundred years of European ideologies and policies imposed on the Native peoples of the New World. These included slavery and Christianity; the removal of Native peoples from their lands and the creation of reservations; and assimilation. Despite such onslaughts, Native peoples still exist today, fighting to hold onto their land, their distinctive ideas of land tenure, and their way of life. Because official policy refuses to acknowledge the separate identity of Native peoples, writes Berger, "the

place of the Indians in this world is indistinct and shadowy" (p. x). He makes the implicit claim that, in order to overcome the shadow, it is necessary to clarify the legal position of Native peoples and provide them with the means to maintain their identity.

The book's principal strength is its historical consideration of the legal status of Native peoples. The author notes that the history of Native-Anglo relations has been based on European growth and industrialization, made possible at the expense of Native peoples whose history has been one of massacre, disease, devastation, and suffering. The thread tying the Native histories together is the desire to possess their land, and Berger discusses the different systems employed throughout the Americas to achieve this, including the *encomiendas*, the reservations, and the *reducciones*.

In all, *A Long and Terrible Shadow* is a profound and intense appeal for the self-determination of peoples and for human rights. The reader should be forewarned that it goes beyond the customary examination of national approaches to Native policy, and is an invitation to break with the past. Berger urges that a fair and equitable policy should be established between national governments and the nations within their realms, that political theories and policies should be formed and adopted to provide a place for Native rights. His book suggests that until these things occur, Native peoples will remain in the shadow of the dominant society.

Ramona Skinner
University of Alaska, Fairbanks

To Reclaim a Divided West: Water, Law, and Public Policy, 1848-1902, by Donald J. Pisani. Albuquerque: University of New Mexico Press, 1992; 487 pp.; \$40.00, cloth; \$19.95, paper.

Donald J. Pisani's *To Reclaim a Divided West: Water, Law, and Public Policy, 1848-1902*, the latest volume in the *Histories of the American Frontier* series, joins an array of recent popular and scholarly studies on the control and development of water in the West. Pisani's goal is to correct what he sees as a misguided focus on aridity as the key factor in western history. Most specifically, he hopes to refute Donald Worster's *Rivers of Empire* [New York, 1985], which describes the West as a "hydraulic civilization" where the desire to conquer aridity by mastering water has led to a concentration of power. Pisani criticizes Worster and others who have considered the role of

the federal government in western water development for failing to study history from "the ground up." When properly examined, Pisani argues, the history of western water and of the laws governing it reveals a pattern of "fragmentation," not the centralization of power Worster describes.

Pisani's purpose is to illuminate core themes of American governance and law—federalism, localism, and state mercantilism—that enabled states, territories, and committees to pursue their own concerns in the nineteenth century. Essentially unconstrained, westerners were divided geographically into disparate, often competing communities. As they confronted diverse climates—some of which were arid while others were humid—they developed multiform legal systems for assigning water rights and resolving disputes. Pisani unearths these disputes through an examination of early newspapers. Riparian rights and prior appropriation (the two doctrines most discussed by students of western water law) were no more natural or appropriate than the earlier Spanish and Mexican systems to which the author gives well-deserved attention; instead, each was the product of specific, historical, and local circumstances.

Rather than approving the diversity and experimentation federalism allowed, however, Pisani displays a concern—similar to that of James Willard Hurst—that the nineteenth-century state apparatus was underdeveloped and that the law properly ought to have promoted rational, balanced social arrangements. He chides western water law for not producing "peace and order," and concludes that the law itself helped divide the West "into rich and poor states and territories, upstream and downstream communities, and agricultural, mining and stock-raising regions" (p. 68)—a conclusion that assigns far too much causality to an abstracted law, given the inherent disruptive-ness of the competition for resources in a capitalist, extractive economy. Assuming that government should be above this struggle, Pisani despairs that lack of planning is symptomatic of the "structural weaknesses of the American system of governance" (p. 169).

At the heart of his account is a simple pluralist model that emphasizes the role of interest groups within government. The author makes no systematic analysis of class or economic power, but focuses his most detailed research on legislative efforts. Scouring the regional press, the *Congressional Record*, and the personal papers of western politicians, he describes the divisions among western congressmen, scientists, and engineers and delineates the positions of the various irrigation lobbies. The Reclamation Act of 1902, he argues, emerged from the proposals of these players as a result of the give-and-take of

traditional politics; it neither represented nor created unity in the region, but "simply provided something for everyone"—though he does not demonstrate the reality of this assertion.

Unfortunately, despite the promise of the book's title, non-legislative aspects of law are not well presented. Lawyers and judges are generally absent as personalities or serious participants, even though much western water law was made by judges. Legal concepts such as "beneficial use" and the "water right," which were hotly debated by reformers, irrigators, and the courts, are mentioned but never explored. And although in his search for context Pisani reaches back to claims that medieval notions of mercantilism underpin the Constitution, he ignores the more immediate role of legal precedent, dismissing such issues as less important than the local context of early disputes and labeling them "top-down" history. Here the author's definition of power in American society limits the questions he asks and prevents him from exploring the interconnections between law, ideology, and control.

Even on its own terms, *To Reclaim a Divided West* is flawed by sloppy treatment of events, ideas, and causality. Pisani centers his argument on federalism, spanning the period 1848-1902, yet he fails to analyze the nationalizing impact of the Civil War and Reconstruction. In a text bristling with footnotes, court decisions—even those labeled "famous"—are often uncited and sometimes unnamed or carelessly described. Statements from those involved in the conflicts of the period are accepted as objective evaluations of the status of the law. At times Pisani summarizes other historians' work with so little critical analysis that opposing explanations of the role of climate, wealth, and law appear with seeming abandon, a particularly glaring fault in the author's treatment of the complex and changing attitudes toward riparian and appropriative rights. These problems, as well as the limits of the book's theory, weaken its explanatory and narrative force, giving it a patched, uneven quality that mirrors the fragmentation Pisani ascribes to the West itself.

M. Catherine Miller
Texas Tech University

Flooding the Courtrooms: Law and Water in the Far West, by M. Catherine Miller. Lincoln: University of Nebraska Press, 1993; 256 pp., bibliographical essay, notes, index; \$45.00, cloth.

In 1863-64, Henry Miller and Charles Lux began building their livestock empire after a major drought had wiped out

most of their cattle. By purchasing Mexican ranchos, filing claims under the Swamp Land Act of 1850, and cashing in depreciated land script acquired from army veterans, they pieced together a hundred-mile-long strip of pasture adjoining the San Joaquin River between Fresno and Modesto and another forty miles along the Kern River between Bakersfield and Tulare Lake. They also acquired a controlling interest in the San Joaquin and Kings River Canal and Irrigation Company, which sold water to farmers and stockmen as well as to appropriators and riparian owners. In all, the cattle barons acquired nearly a million and a half acres in California, Oregon, and Nevada, and at one time owned a million cattle and a hundred thousand sheep. Since much of their land was riparian and thus permitted them to ration access to the water, they exercised de facto control over economic development in the entire San Joaquin Valley. And since land in that part of California had little value without water, Miller and Lux spent vast sums to define and protect their water rights against rival claimants. The company's prosperity—indeed, its survival—depended on its success in court.

As Catherine Miller shows in this well-researched and carefully argued book, the company was able to fight simultaneously on different legal fronts in different states. Sometimes it ran counter to the legal position it had taken in earlier suits. In the 1880s, it demanded that riparian rights take precedence over prior appropriation in California. It triumphed in *Lux v. Haggin* (1884, 1886), but no single ruling was conclusive or all-inclusive. Farmers could acquire title to water by "prescription" (uncontested use). If riparian claimants did not protest an illegal diversion within five years, that use of water became a legal right. Miller and Lux and other riparian owners thus returned to court repeatedly. The result in any given case was impossible to predict because it depended on the location of the court, the ingenuity of the lawyers, and the personalities and training of the judges, among many other considerations.

Lux v. Haggin was the first in a series of important water cases that helped define the law of water in California and the West. Later opinions decided such issues as whether riparian owners had a right to spring floodwaters as well as the "average" or "normal" flow of a stream; whether riparian owners were limited to a "reasonable use" of water; whether private water companies could charge whatever the market would bear for water; and whether the value of water rights could be included in the valuation of a company (for the purpose of determining a fair return on "capital"). Sometimes Miller and Lux put private property rights first; at other times—for example, when the irrigation company they controlled ran afoul of other

riparian owners—they argued for the same public rights they tried to limit in the Madera Irrigation District.

The author tells these stories clearly and in rich detail, and her conclusions are far-reaching. She demonstrates that the “riparian doctrine” was not “static doctrine that fixed the control of water in the hands of the few” (p. 93). It could, in fact, take on “a more democratic cast, allowing new entrepreneurs and small landowners to irrigate and retain claims of water even when challenged by wealthy and powerful opponents such as Miller and Lux” (p. 93). She disputes two of Donald Worster’s conclusions in *Rivers of Empire*—that aridity was the basic determinant of patterns of water use in the West and that attempts to centralize control over water inevitably followed the construction of dams and canals.* Instead, “in the San Joaquin Valley, the move to centralize control came not from those who had water, but from those who lacked it” (p. 182). The legal system, according to the author, operated “with immediate, apparent independence,” but never with complete predictability (pp. 175-76). Nor was water law in any sense “autonomous.” It reflected rival models of economic development, no one of which was able to achieve dominance.

Catherine Miller is the first scholar to use the massive Miller and Lux papers, and she uses them with skill and precision. However, some readers will find the detail daunting. Individual actors seldom emerge from the book’s legal shadows. I wish Miller had spent more time discussing the larger context of economic development in California and the West from the 1870s to the 1930s, and had paid more attention to legislatures and administrative commissions as well as courtrooms. After all, nineteenth-century corporations often found it easier to control legislators than judges. Above all, the author pays inadequate attention to Miller and Lux as a business and to rivalries and disagreements among its founders and leaders. The two-decade battle between Henry Miller and the heirs of Charles Lux was only one event that demonstrated deep divisions within the company. Still, this book was not intended as a history of Miller and Lux, nor should it be criticized as such. The story is exceedingly well told, within the limits set by the author.

Donald J. Pisani
University of Oklahoma

*Donald Worster, *Rivers of Empire* (New York, 1985).

Desert Lawmen: The High Sheriffs of New Mexico and Arizona, 1846-1912, by Larry D. Ball. Albuquerque: University of New Mexico Press, 1992; 414 pp., maps, illustrations, notes, index, appendices; \$45.00, cloth.

Larry D. Ball notes that "the role of the county sheriffs in the territories remains only imperfectly known" (p. x). To rectify this, the author of *Desert Lawmen* uses material from territorial archives, library collections, and newspapers to illuminate the development and operation of the sheriff's office in Arizona and New Mexico during the territorial period. Although Arizona and New Mexico achieved territorial status more than a decade apart, the development of the sheriff's office within their counties offers a natural comparison.

Dividing his study into chapters that discuss such topics as "Servant of the Court," "Deathwatch," "Keeper of the Keys," and "*Conservator Pacis*," the author weaves a variety of informative and entertaining stories into this excellent study on lawmen. One of them is an anecdote about a posse, armed only with revolvers, whose members chased after train robbers. Catching up with the bandits, Deputy Sheriff Francisco Vigil "ordered them to surrender, [but] he made the mistake of issuing this command while out of effective pistol range" (p. 208). This cost Vigil and two others their lives.

The office of sheriff carried with it a wide variety of duties, including serving warrants, subpoenas, and jury venires; arresting criminals; operating a jail; handling the execution of condemned prisoners; maintaining the peace; and gaining reelection to office. This last included buying votes with liquor and promises. Once elected, the sheriff hired an undersheriff, deputies, and a jailer. They had to be men he could trust, since a defeated outgoing sheriff had to open his books to the closest scrutiny by the incoming sheriff and the general public. Despite low pay, poor facilities, and the dangers involved, the office of sheriff was prestigious and highly sought after.

Each spring and fall the sheriff participated in selecting jurors for the impending trials. Serving court papers to prospective jurors and witnesses was often arduous: In December 1883, a Pima County deputy sheriff rode "more than 500 miles" in serving jury summonses. The sheriff called the court into session and had to maintain decorum by collecting weapons from spectators. During one trial in Las Vegas, New Mexico, the "surprised" bailiff collected forty-two revolvers.

Keeping the peace sometimes proved dangerous, especially when the sheriff tried to arrest men who had been drinking. Such arrests usually occurred at night, on dark streets outside saloons. Ball notes that the sheriff "had to assume that every

such disturber of the peace carried a gun" (p. 181). He also reveals that when lawmen killed citizens while attempting to arrest them, "juries 'almost invariably' ruled in favor of them" (p. 193).

The "Deathwatch" was the sheriff's most unpleasant task. An impending execution required increased vigilance to prevent the prisoner's escape, the building of a scaffold, and preparations for the hanging. Some sheriffs tried to avoid pulling the trap. In 1904 Sheriff Stewart Hunt (Cochise County, Arizona) "instructed his jailer, Mack Axford, to prepare himself for the task. Axford promptly resigned" (p. 153). Ball rightly claims that the execution in 1861 of Paula Angel (the only woman executed between 1846 and 1912) in Las Vegas, New Mexico, was an anomaly, but his suggestion that "the district courts convicted many women of murder in both Arizona and New Mexico territories" (p. 158) seems unrealistic. My research on homicide in Gila County, Arizona, and seven nineteenth-century California counties showed that six out of 214 and twenty-six out of 1,317 cases respectively were women accused of murder. Five of them were convicted.

Covering so much territory, it is difficult not to commit a factual lapse or two. For example, three, not two, Apaches (Gon-shay-ee, As-ki-say-la-la, and Pah-sla-gos-la) committed suicide in the Pinal County jail (p. 151), and Sheriff Jerry Ryan of Gila County executed only one Apache, Nah-deiz-az (p. 157), misspelled Nah Diaz (p. 172).

Ball has provided an excellent study of the operations of desert lawmen that should please the specialist as well as the general reading public. He has included a superb selection of photographs, as well as county boundary maps, and useful appendices listing sheriffs and their years of tenure, legal hangings, and lynchings. His book is highly recommended.

Clare V. McKanna, Jr.
University of Nebraska-Lincoln

Badge and Buckshot: Lawlessness in Old California, by John Boessenecker. Norman: University of Oklahoma Press, 1993; 333 pp., illustrations, bibliography, index; \$12.95, paper.

In *Badge and Buckshot*, John Boessenecker has searched court records, newspapers, and government documents for factual information to create an interesting, readable, and well-illustrated narrative. The author, who is a lawyer, spins a good yarn in loosely connected chapters about lesser-known outlaws and lawmen in California's history, and also shows that the

state's lawlessness did not end in the 1880s, when the "once roadless, isolated backcountry of the Sierra, the coastal ranges, and the great valley became extensively populated" (pp. xi-xii). In doing so, Boessenecker offers a "clearer view" of law and order in the nineteenth century and develops a "perspective on California social history rarely examined by modern scholars" (p. xii).

Nineteenth-century America emphasized both keeping the peace *and* arresting felons. Thus the author stresses the man-hunts and shootouts engaged in by five lawmen in their roles as city marshals, constables, deputy sheriffs, and sheriffs. In tracking lawbreakers and the use of firearms, Steven Venard of Nevada County stood out. In compiling a rogues' gallery and taking prisoners alive, San Joaquin County's Thomas Cunningham was one of the more innovative officers of his day. And Ben Thorn of Calaveras County should be honored for his half-century of dedication to law enforcement—one of those career-minded police officers seen throughout the American West. Although the author gives a two-page summary of the criminal-justice system of early California and points out some of the duties of local peace officers—collecting taxes and building roads, for instance—this reviewer would have liked to see more information and analysis about the operation of the offices of town marshal and sheriff. More emphasis on law-and-order strategies rather than Wild West gunplay would lead to greater understanding of the lives and times of the lawmen about whom Boessenecker writes.

The second half of *Badge and Buckshot* deals with the criminal activities and escapades of Ingram's Rangers—desperadoes who robbed stagecoaches and trains and ranged throughout the western states and territories. As expected, local peace officers and the private police killed or jailed most of them. The most notorious of these outlaws to be jailed in California was Bill Miner. The most horrendous shootings Boessenecker documents occurred when Deputy Sheriff W.P. Edwards, wounded but still firing, killed Dudley Johnson in Orange City in 1898, and when two lawmen used shotguns to kill the Gates brothers as they reached for their weapons in bed in Separ, New Mexico, in 1905.

For readers of this volume on western violence and police work, one point is disturbing. Although the author tries to put both outlaws and lawmen within the social context of California in the nineteenth century, the lawlessness of the time can be exaggerated. For example, the writings of Kevin J. Mullen indicate that burglary was more important than robbery and that criminal homicides numbered in the tens, not the hundreds (as Boessenecker believes) in the early development of

Anglo San Francisco.* Still, the author notes that the book is not "a sociological study of frontier crime," but, rather, gives "due recognition of the services rendered California by those long-forgotten lawmen of great moral and physical courage, who, with badge and buckshot, established a framework for law and order in a turbulent era" (p. xii).

Harold J. Weiss, Jr.

Jamestown Community College, New York

Make No Law: The Sullivan Case and the First Amendment, by Anthony Lewis. New York: Random House, 1991; 356 pp., notes, index; \$25.00, cloth; \$13.00, paper.

The case of *New York Times v. Sullivan* (1964) is the subject of *Make No Law*, a paean to freedom of expression by the award-winning journalist Anthony Lewis. *Sullivan* began with a full-page advertisement, titled "Heed Their Rising Voices," which appeared in the *New York Times* on March 29, 1960, and was paid for by the Committee to Defend Martin Luther King, Jr. The text highlighted the confrontation in February 1960 between Montgomery and Alabama state police and sit-in demonstrators at the cafeteria of the State Capitol in Montgomery and at Alabama State University. The ad named no public officials in Alabama, but left little doubt in readers' minds that these officials were bent on the destruction of King and the civil-rights movement.

The ad was an emotional appeal that played fast and loose with the facts. The errors were minor, but they were nonetheless errors, and their existence had substantial legal ramifications in Alabama when truth was the only defense to a charge of libel. The city commissioners of Montgomery, including Lester Bruce Sullivan, seized on these inaccuracies to bring suit against the *Times*.

In 1964 a unanimous Supreme Court, with Justice William J. Brennan, Jr., writing for it, overturned the five hundred thousand dollars in damages levied by a Montgomery jury against the *Times*. Brennan's opinion established in federal constitutional law the doctrine of actual malice, which provided that for the accused to be found guilty of libeling a public official it had to be shown that he or she had knowingly made statements that were either false or were made with utter and reckless disregard for the truth. Brennan carved out a limited privi-

*Kevin J. Mullen, *Let Justice Be Done: Crime and Politics in Early San Francisco* (Reno, 1989).

lege for libelous speech: the actual malice test did not protect *all* libelous statements aimed at public officials, but only those that could pass the muster of the test. As Lewis makes clear, Brennan sought in *Sullivan* "to respect two interests, reputation and freedom of expression" (p. 244).

Make No Law concentrates far more on freedom of expression than it does on the role of reputation in public life. *Sullivan*, Lewis explains, brought civil libels against public officials under the protection of the First Amendment through the due-process clause of the Fourteenth and ended the exclusive authority enjoyed by the states in handling public libel law. Lewis applauds these developments, Brennan's role in bringing them about, and the general course of First Amendment law that flowed from them. "In the years following *Sullivan*," he writes, "the Court resoundingly vindicated the promise of the First Amendment that in the United States there shall be 'no law . . . abridging the freedom of speech, or of the press'" (pp. 234-35).

There are, however, reasons to question such trumpeting. First, Brennan's opinion, even in granting only a qualified privilege to libelous statements, places individual dignity, reputation, and community well-being in jeopardy. Traditionally, the law of public libel had protected the so-called "best men"—elected and appointed officials—from slanderous attacks on their personal and professional characters. Under these rules the concept of community drew strength from deference to public officials and measured discourse about public affairs. Brennan's opinion left these officials exposed as never before and enshrined the idea that the quantity rather than the quality of expression was to be protected. The opinion eroded the core values of civic republicanism, in which virtuous people conducted public affairs in a disinterested manner but almost always at considerable sacrifice to themselves.

Moreover, *Sullivan* extolled the Northern preference for a free marketplace of ideas while dismissing the devotion of Southern moderates to habits and manners of civility. These Southern whites complained bitterly that Brennan's opinion was another example of an overbearing and hypocritical North foisting its egalitarian individualism on them. The story of *Sullivan*, therefore, is far richer and ultimately more instructive about the relationship of the press to individual rights, community interests, and the conduct of public life than Lewis acknowledges.

In addition, the book suffers from uneven research. Instead of going to Montgomery to interview the concerned parties, to hunt through the public records, and to read widely in the local newspapers, Lewis resorted to long-distance telephone inter-

views. As a result, for example, he fails to credit M. Roland Nachman, who argued the case for Sullivan before the Supreme Court, for discovering the advertisement and for instigating the lawsuit. Because Lewis had access to the *Times* (for which he has long been a featured writer) and its management, he tells the liberal, Northern, and pro-press side of the story in greater detail, with much more sympathy, and ultimately a stronger factual base than he does that of the Southern defendants. What he misses is the struggle by the moderate white community of Montgomery against the Klan and rabid segregationists generally.

Lewis writes with the charm, grace, and wit we have come to expect. But *Make No Law* falls short as sound history because it refuses to take seriously that which its author neither understands nor likes.

Kermit L. Hall
University of Tulsa

BRIEFLY NOTED

American Indian Law Deskbook, by the Conference of Western Attorneys General. Niwot, Colo.: University Press of Colorado, 1993; 481 pp., table of cases, table of statutes and codes, bibliography, index; \$49.95, cloth.

The practice of Indian law in the United States has long been complicated by the lack of an adequate reference tool for charting the intricate web of laws regulating relationships between federal, state, and Indian governments. The Conference of Western Attorneys General is to be commended for filling this gap.

In concise, clear language, the *American Indian Law Deskbook* explains the historical and legal background for federal Indian policy, analyzes significant court decisions (both federal and state), and discusses sovereignty and jurisdictional issues relating to such problems as environmental regulations, child welfare, and water rights. Emerging issues such as gaming and state-tribal agreements are also treated. The publishers plan to issue annual supplements to keep users abreast of recent developments in Indian law.

Legal historians will find the book useful for its summaries of complex areas of law and for its references to cases and statutes. It is an essential tool for anyone working with Native Americans and the law.

New Directions in American Indian History, edited by Colin G. Calloway. Norman, Okla.: University of Oklahoma Press, 1992; 272 pp., index; \$32.50, cloth; \$13.95, paper.

This first volume in the Newberry Library's D'Arcy McNickle Center Bibliographies in American Indian history is a valuable collection of bibliographies and bibliographic essays that describe recent scholarship and indicate areas in need of more study.

The six essays in Part One, "Recent Trends," review work on such topics as the Southern Plains peoples, American Indian women, and historians' use of quantitative methods. Legal historians will be especially interested in chapter 5, "Indians and the Law," by George Grossman, director of the law library at Northwestern University. The three chapters in part 2, "Emerging Fields," suggest directions for historical research in Native American economics, religion, and linguistics.

New Directions in American Indian History is an important reference work for any student of the subject.

The Lawmen: United States Marshals and Their Deputies, 1789-1989, by Frederick S. Calhoun. New York: Penguin Books, 1991; 388 pp., notes, index; \$11.95, paper.

First published during the U.S. Marshals Service's bicentennial in 1989 and now released in paperback, *The Lawmen* recounts the federal marshals' role during two hundred years of American history, from the Whiskey Rebellion to the invasion of Panama. U.S. marshals, appointed by the president, have served the federal judiciary since George Washington's time, principally as servers of process.

Remarkably independent and flexible throughout most of its history, the service has become increasingly institutionalized and centralized in the late twentieth century as the scope of its duties has expanded. These duties include supervision of the federal witness-protection program and the national asset seizure and forfeiture program, as well as the court security officers' program.

This well-researched and engaging book, written by the bureau's staff historian, does not eschew controversy. Nor does it emphasize only the colorful. It is a fine institutional history by a journeyman historian.

Law of the Range: Portraits of Old-Time Brand Inspectors, by Stephen Collector. Livingston, Mont.: Clark City Press, 1991, 120 pp., illustrations; \$45.00, cloth.

In July 1884, a group of vigilantes headed by the Montana cattle baron Granville Stewart hanged a dozen men they suspected of rustling cattle. To avoid a recurrence of such an episode, the following year the Montana Legislature created the Board of Stock Commissioners and directed it to hire brand inspectors and range detectives. The men in these handsome black-and-white images still carry out this duty, mandated by the state to protect the cattle industry.

Stephen Collector's photographs depict veteran cattlemen, their faces creased by wind and sun, men who take their work seriously and feel an obligation to society. Many of them have served their government in some other capacity, sometimes as deputy sheriff, sometimes in elected office. Each portrait is accompanied by a brief biography. "Love working with the cattle and the people," one retired inspector is quoted as saying. "A brand inspector keeps honest people honest and dishonest people uneasy."

In unmanipulated and striking images, the photographer has distilled the essence of fifty westerners engaged in an honorable tradition.

ARTICLES OF RELATED INTEREST

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

Amerasia Journal 19:1 (1993). Commemorative Issue, "Japanese American Internment, Fiftieth Anniversary."

"America's Waters: A New Era of Sustainability—Report of the Long's Peak Working Group on National Water Policy," *Environmental Law* 24:1 (1994), 125-44.

August, Ray, "Cowboys v. Rancheros: The Origins of Western American Livestock Law," *Southwestern Historical Quarterly* 96 (April 1993).

Babbitt, Bruce, "The Public Interest in Western Water," *Environmental Law* 23:3 (1993), 933-42.

Bell, Catherine, "Aboriginal Claims to Cultural Property in Canada: A Comparative Legal Analysis of the Repatriation Debate," *American Indian Law Review* 17:2 (1992).

"Beyond *Nixon*: The Application of the Takings Clause to the Papers of Constitutional Officeholders," *Washington University Law Quarterly* 71:3 (Fall 1993), 871-900.

Biscardi, Francine, "The Historical Development of the Law Concerning Judicial Report Publication," *Law Library Journal* 85:3 (Summer 1993), 531-44.

Bisset, William T., "Tribal-State Gaming Compacts: The Constitutionality of the Indian Gaming Regulatory Act," *Hastings Constitutional Law Quarterly* 21:1 (Fall 1993), 71-94.

Brodhead, Michael J., "Visions of a Better World: Comparisons of Kansas Jurists David J. Brewer and Frank Doster," *Kansas History* 16 (Spring 1993).

Buckingham, Royce Scott, "The Erosion of Juvenile Court Judge Discretion in the Transfer Decision Nationwide and in Oregon," *Willamette Law Review* 29:4 (Fall 1993), 689-710.

Burke, Craig Cassin, "Fencing Out Politically Unpopular Groups From the Normal Political Processes: The Equal Protection Concerns of Colorado Amendment Two," *Indiana Law Journal* 69:1 (Winter 1993), 275-98.

Cachey, Diana A., "Dumping in the Mountains: Insurers Pay Defense, Not Cleanup, Costs in *Hecla Mining Co. v. New Hampshire Insurance Co.*," *Public Land and Resources Law Digest* 30:1 (1993).

Chapin, Kristen, "Indian Fishing Rights Activists in an Age of Controversy: The Case for an Individual Aboriginal Rights Defense," *Environmental Law* 23:3 (1993).

Chapman, David, "Blind Justice on the Touchet," *Columbia: The Magazine of Northwest History* (Winter 1993-94), 14-20.

Crouch, Barry A., "'All the Vile Passions': The Texas Black Code of 1866," *Southwestern Historical Quarterly* 97 (July 1993), 13-34.

De la Garza, Rodolfo, and Louis DeSipio, "Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage," *Texas Law Review* 71:7 (June 1993), 1479-1540.

DeJong, David H., "'See the New Country': The Removal Controversy and Pima-Maricopa Water Rights, 1869-1879," *Journal of Arizona History* 33 (Winter 1992).

Dirck, Brian, "'Labors of the Profession': The Law Practice of Nathaniel Hart Davis, a Texas Lawyer, 1850-1882," *East Texas Historical Journal* 31 (Spring 1993).

Domowitz, Ian, and Thomas L. Eovaldi, "The Impact of the Bankruptcy Reform Act of 1978 on Consumer Bankruptcy," *Journal of Law and Economics* 34:2 (October 1993), 803-36.

Dunning, Harrison, "Confronting the Environmental Legacy of Irrigated Agriculture in the West: The Case of the Central Valley Project," *Environmental Law* 23:3 (1993), 943-70.

Earl, Phillip I., "Murder at the Jewel House: The Logan-Barieau

Case Controversy," *Nevada Historical Society Quarterly* 35 (Fall 1992), 177-94.

Easterbrook, Frank H., "Text, History, and Structure in Statutory Interpretation," *Harvard Journal of Law and Public Policy* 17:1 (Winter 1994), 61-70.

Ezell, Mark, "An Overview of the Juvenile Justice System in Washington," *Columbia: The Magazine of Northwest History* (Winter 1993-94), 3-5.

Fass, Paula S., "Making and Remaking an Event: The Leopold and Loeb Case in American Culture," *Journal of American History* 80:3 (December 1993), 919-51.

Fogleman, Amelia A., "Sovereign Immunity of Indian Tribes: A Proposal for Statutory Waiver for Tribal Businesses," *Virginia Law Review* 79:6 (September 1993), 1345-80.

Frickey, Philip P., "Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law," *Harvard Law Review* 107:2 (December 1993), 381-441.

Gilbert, James N., "The Death of Crazy Horse: A Contemporary Examination of the Homicidal Events of 5 September 1877," *Journal of the West* 32 (January 1993).

Golden, Michael, "Journal for the Pole: The Life and Times of Fred H. Blume, Justice of the Wyoming Supreme Court," *Land and Water Law Review* 28:1 (1993).

Gouveia, Grace Mary, "'The Beleaguered Indian': The Controversy Surrounding Section 9 of the Navajo-Hopi Rehabilitation Act," *Maryland Historian* 23 (Spring/Summer 1992), 1-17.

Green, Donald E., "The Contextual Nature of American Indian Criminality," *American Indian Culture and Research Journal* 17:2 (1993), 99-120.

"Guilty Until Proven Innocent: Leonard Peltier and the Sublegal System," *Boston College Law Review* 34:4 (July 1993).

Haeuber, Richard, "Indian Forest Policy in Two Eras: Continuity or Change?," *Environmental History Review* 17 (Spring 1993), 49-76.

Haller, Robert, "The Drama of Law in the Nebraska State Capi-

tol: Sculpture and Inscriptions," *Great Plains Quarterly* 13 (Winter 1993).

Henderson, Roger C., "Tort Reform, Separation of Powers, and the Arizona Constitutional Convention of 1910," *Arizona Law Review* 35:3 (1993), 535-620.

Hoffer, Peter Charles, "Text, Translation, Context, Conversation: Preliminary Notes for Decoding the Deliberations of the Advisory Committee that Wrote the Federal Rules of Civil Procedure," *American Journal of Legal History* 37:4 (October 1993), 409-39.

"In Memory of Chief Judge Robert F. Peckham," *Hastings Law Journal* 44:5 (July 1993), 973-90.

Isenberg, Andrew, "Toward a Policy of Destruction: Buffaloes, Law and the Market, 1803-83," *Great Plains Quarterly* 12 (Fall 1992).

Jacobsen, Joel K., "An Excess of Law in Lincoln County: Thomas Catron, Samuel Axtell, and the Lincoln County War," *New Mexico Historical Review* 68 (April 1993).

James, Elizabeth, "The Allotment Period on the Nez Perce Reservation: Encroachments, Obstacles, and Reactions," *Idaho Yesterdays* 37 (Spring 1993).

Jefferson, Jon, "Timmmberr!," *ABA Journal* 79 (October 1993).

Kanazawa, Mark, "Pricing Subsidies and Economic Efficiency: The U.S. Bureau of Reclamation," *Journal of Law and Economics* 36:1 (April 1993).

Keiter, Robert B., and Peter H. Froelicher, "Bison, Brucellosis, and Law in the Greater Yellowstone Ecosystem," *Land and Water Law Review* 28:1 (1993).

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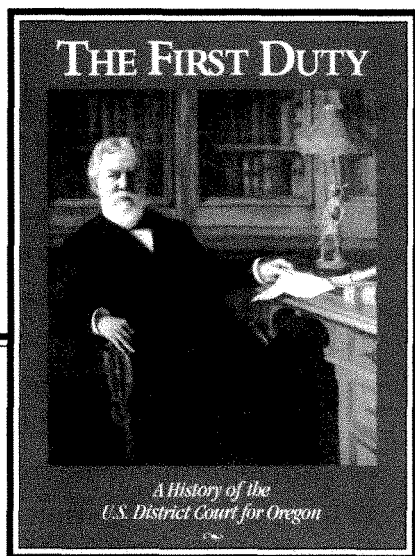
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