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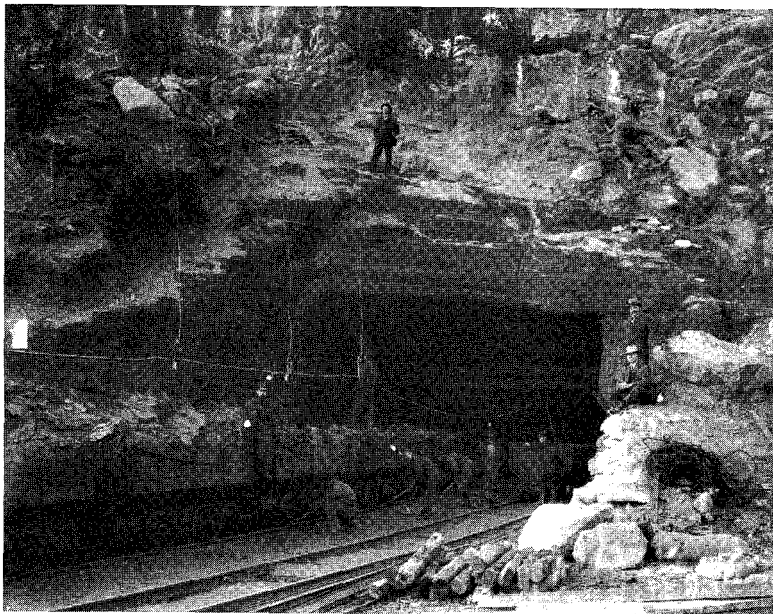
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Cover Photograph: Railroad litigation has played a significant role in western legal history, as readers are reminded in this issue's articles by Nancy Taniguchi and Daniel Levy. (Western Mining and Railroad Museum, Helper, Utah)



Coal mining, Independent Coal & Coke Company, 1907 (Utah State Historical Society)

THE SHIFTING SIGNIFICANCE OF *United States v. Sweet*

NANCY J. TANIGUCHI

In 1919, members of the U.S. House of Representatives Subcommittee on Public Lands asked the following:

How did it come about that the State of Utah was given right to that amount of lands [four sections per township]? That is a great deal more than was given to other states.

When did the [state's] title vest in this particular [school] section [Sec. 32, T. 15 S., R. 8 E., called the "Sweet section"]?

What suggested to Mr. Maynard, the agent of the Department of Justice, to bring action to cancel this [Sweet section] patent?¹

From a historical perspective, what was the significance of the *Sweet* case (*United States v. Sweet*) and the fate of the section in the context of surrounding events?²

The development of Utah was by turn anomalous to the American West and typical of it. Settled in 1847 by members of the Church of Jesus Christ of Latter-day Saints (the Mormons), Utah experienced decades of friction with federal authorities. Differences between the two ran so deep that Congress delayed Utah's statehood for almost half a century, admitting it to the Union only in 1896. Statehood itself came eighteen months

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¹U.S. Congress, House Subcommittee on Public Lands, *Hearings . . . On H.J. Res. 282*, 65th Cong., 3d sess., 1919, 14 [hereafter cited as *Hearings*].

²*United States v. Frederick A. Sweet, Administrator of the estate of Arthur A. Sweet*, 245 U.S. 563 [1918].

after the Utah Enabling Act, which permitted the writing of a state constitution.³

This long-running federal-territorial clash went through many stages, beginning with the so-called Utah War of 1857-58.⁴ When belligerency proved ineffective in "Americanizing" the Utah Mormons, the confrontation continued with increasingly punitive legislation, including the Morrill Act of 1862, the Edmunds Act of 1882, and the Edmunds-Tucker Act of 1887, all of which were designed to weaken the power of the Mormon church in Utah.⁵

From the federal standpoint, these actions were necessary because Utah's Mormons espoused two thoroughly "unAmerican" principles: theocracy and polygamy. Historians have differed on the relative significance of each, but, certainly, Utah did not become a state until these practices were supposedly abandoned.⁶ To a large extent, theocracy ended when the president and prophet of the church, Brigham Young, was replaced as territorial governor in 1857, at the beginning of the Utah War (although Young was not initially apprised of that fact by President Buchanan).⁷ The demise of polygamy took much longer. One of Young's successors, President Wilford Woodruff, first announced the end of the institution in the Woodruff Manifesto in 1890,⁸ but subsequent events proved that the practice nevertheless endured for several more years.⁹

Despite these irregularities, however, in other ways Utah typified the West, having the same problems of geography,

³28 U.S. 107 (1894).

⁴See LeRoy R. and Ann W. Hafen, *The Utah Expedition, 1857-1859: A Documentary Account* (Glendale, Calif., 1958); Norman F. Furniss, *The Mormon Conflict, 1850-1859* (New Haven, 1960).

⁵Gustave O. Larson, "Government, Politics, and Conflict," and "The Crusade and the Manifesto," both in *Utah's History*, ed. Richard D. Poll (Provo, 1978), 243-73.

⁶Regarding interpretations of the relative importance of polygamy and theocracy in retarding Utah's statehood, see Howard R. Lamar, *The Far Southwest, 1846-1919: A Territorial History* (New Haven, 1966), 363-409, which sees polygamy as one of several factors [hereafter cited as Lamar, *Far Southwest*]; Gustave O. Larson, *The "Americanization" of Utah for Statehood* (San Marino, 1971), which argues that polygamy was a pretext for anti-statehood drives; and Edward Leo Lyman, *Political Deliverance: The Mormon Quest for Utah Statehood* (Urbana, 1986), which posits polygamy and theocracy as the two central issues in the Utah statehood debate [hereafter cited as Lyman, *Political Deliverance*].

⁷Lamar, *Far Southwest*, supra note 6 at 341.

⁸Lyman, *Political Deliverance*, supra note 6 at 135-40.

⁹The best study of Mormon polygamy is B. Carmon Hardy, *Solemn Covenant: The Mormon Polygamous Passage* (Urbana, 1992) [hereafter cited as Hardy, *Solemn Covenant*].

topography, and distance that characterized much of the land west of the 100th meridian.¹⁰ Put differently, much of Utah was agriculturally unattractive or physically inaccessible, since it consisted of mountains and deserts and was far from railroads and established cities, sparsely populated, and "unproductive" (at least in the nineteenth-century view, which ignored Native-American presence and life ways). The generally accepted goal, then, was to "develop" Utah in the manner deemed most desirable.

Differing concepts of what constituted "desirable" development divided Utah's leaders and the federal authorities from the outset.¹¹ In the case of mineral lands, the conflict matured in the judiciary, ultimately resulting in the Supreme Court's decision in *United States v. Sweet*.¹² In the kaleidoscopic whirl of Progressive Era reforms,¹³ the *Sweet* case became a vehicle for the assertion of federal supremacy in a state in which federal control had been problematic. More importantly, the case set the precedent for ownership of mineral lands nationwide. Yet even this ruling did not spell the ultimate significance of the *Sweet* section.

The *Sweet* case was built on coal, which played a crucial role in Utah's rush toward modernization a hundred years ago. Coal land was greatly prized at the time in much of the arid West, where many states and territories, including Utah, lacked the dense forests needed to provide wood for fuel. Before electricity and petroleum products came into common use, coal largely powered locomotives, fueled factories, and heated homes. Railroads and coal made a natural partnership, since coal had to be transported by the ton in order to supply commercial markets. Both industries were expanding rapidly when Utah achieved statehood.

The first commercial coal developer in eastern Utah was the Denver & Rio Grande Western Railroad, which had completed

¹⁰Definitions of "the West" differ widely. I am relying here on the one provided by Walter Prescott Webb in *The Great Plains* (Boston, 1931).

¹¹The national development philosophies have been widely reported. The best description of the Mormon approach is found in Leonard J. Arrington, *Great Basin Kingdom: An Economic History of the Latter-day Saints, 1830-1900* (1958; reprint, Lincoln, 1966).

¹²245 U.S. 563 (1918).

¹³The Progressive Era is an intellectual construct of historians, subject to much debate. I am relying on the definition by Russell B. Nye in *Midwestern Progressive Politics: A Historical Study of its Origins and Development, 1870-1950* (East Lansing, 1951), 197, which states that "the rule of the majority should be expressed in a stronger government, one with a broader social and economic program and one more responsive to popular control." In this instance, both "majority" and "popular" refer to the predominant national views as opposed to those of Utah's Mormons.

its line through Utah in 1883 and which, with a monopoly into Utah's richest coal fields, began to develop the mines to power its trains and foster commerce.¹⁴ The railroad and its related coal companies subsequently presented formidable opposition to would-be commercial competitors, while exerting powerful influence on coal prices and availability.¹⁵ Although Utahans initially welcomed the Denver & Rio Grande as competition for the Union Pacific (on the scene since 1869), their fervor rapidly diminished, largely because of the newcomer's business practices.¹⁶ As a result, the state of Utah became ever more inclined to side with any viable economic competitor in an effort to reduce the price and increase the availability of that necessary fuel, coal.

Enter Arthur A. Sweet, determined to open his own coal mine in the heart of the Denver & Rio Grande's hegemony. To do so legally, since the land concerned had already been proven to contain coal by railroad development, he had to file for ownership under the federal Coal Land Act of 1873.¹⁷ This statute mandated a maximum ownership of 160 acres by an individual, 320 by a group, or 640 when a consortium of four or more had invested a minimum of five thousand dollars. It also set the most expensive land prices the federal government had to offer: ten dollars an acre for land more than fifteen miles from a railroad; twenty dollars an acre if less.¹⁸ Since a commercial mine required at least two thousand acres, this law was routinely subverted or ignored.

A favorite subversion, used by the Denver & Rio Grande in the Sunnyside area where Sweet had his claim, sometimes involved state school sections granted under the Utah Enabling Act of 1894, whereby Utah was authorized to receive four sections of land in every township—twice the then-standard amount—for the support of public schools and other institutions. As a watchful congressman asked many years later, "How did it come that the State of Utah was given the right to that amount of lands?"¹⁹ The answer varied over time, indicat-

¹⁴See Robert Athearn, *The Denver and Rio Grande Western Railroad: Rebel of the Rockies* (1962; reprint, Lincoln, 1977). The Rio Grande system existed in both Utah and Colorado and underwent several minor name changes through corporate restructuring, which are ignored here for the sake of simplicity.

¹⁵For a full description, see Nancy J. Taniguchi, *Necessary Fraud: Progressive Reform and Utah Coal* (Norman, 1996), esp. 21-46.

¹⁶Robert Athearn, "Utah and the Coming of the Denver and Rio Grande Railroad," *Utah Historical Quarterly* 27 (April 1959), 128-42.

¹⁷Arthur Sweet, Coal Certificate 172, General Land Office 1947, Book 6, Carbon County Recorder's Records, Carbon County Courthouse, Price, Utah.

¹⁸17 Stat. 607 (1873).

¹⁹*Hearings*, supra note 1 at 14.

ing a shifting subtext on the importance of the Sweet section.

The response to the congressman in 1919 stressed that other states had received bounteous land grants under a variety of acts from which Utah did not benefit, and thus its school grants were not really so large by comparison. Secondly, Utah contained a sizable public domain, estimated as "at least 78 per cent" by 1919. Consequently, the federal government still retained vast Utah holdings, even considering the generous land grants to the state. Furthermore, since so little of Utah was in private ownership, state authorities had "never received any taxes from it, and . . . [were] relieving the Government in taking care of the large Government domain."²⁰ In this light, the school-section largesse was regarded as only fair.

The original reason given for the sizable state land grant had been quite different. Instead of stressing the tax base, it emphasized the longstanding friction between Utah's dominant church and the nation-state, a drama that had faded from federal memory (though not from Utah's) by 1919. Shortly after statehood, Utah's former territorial representative to the House, Joseph L. Rawlins, recalled, "I have referred to the liberal appropriations of public lands which, in the Enabling Act, I secured for Utah—the largest ever made for State purposes. . . . These lands were [granted] . . . with a provision . . . that the public schools should be forever free from sectarian domination."²¹ This sectarian (Mormon) influence, inculcated into the youth through church-controlled schools, had allegedly perpetuated Utah's "unAmericanism," specifically its continuing acceptance of theocracy and, especially, polygamy. As he looked back, Rawlins noted the changes resulting from his land-grant support of the schools: "Complete subservience by the Mormon people to every dictate of the [church] leaders was a thing of the past; polygamy was dead; independent political parties had been set up and Statehood had been won."²²

While Rawlins saw statehood as a watershed, Utah's admission to the Union did not completely erase the deep-seated suspicions that some Mormons held of federal authority. Nor did statehood reduce the wish of state officials to control Utah's affairs as much as possible. The generous school land grants thus became a mechanism for the state to facilitate key types of development, especially given the loose wording of the Utah Enabling Act.

As it would later emerge in the *Sweet* case, the act specifi-

²⁰*Ibid.* at 15.

²¹Joseph L. Rawlins, *The Unfavored Few: An Auto-Biography of Joseph L. Rawlins*, ed. Alta Rawlins Jensen (Salt Lake City, 1954), 187.

²²*Ibid.* at 194.

cally prohibited salt lands from being alienated from the public domain, but was silent on all other types of mineral land, including coal.²³ Although the State Land Board initially took a hard look at similar land transfers in other states, it soon chose to behave as if Utah could control coal-bearing school sections, despite warnings to the contrary.²⁴ Furthermore, state officials accepted assertions that known coal lands were valuable for grazing only, or that an array of "dummies" (front men claiming land for others) were indeed filing claims for land for their own use. Through these subterfuges, the Denver & Rio Grande had locked up thousands of acres, including much of the area where Arthur Sweet filed his federal coal claim in 1902.²⁵ Thus a member of Congress was, in a sense, voicing the general confusion when he asked in 1919, "When did the [state's] title vest in this particular section?"²⁶

The answer depended in part on when the coal was discovered, and in part on the federal definition of "coal land," which, until 1914, required that the mineral on every forty-acre parcel be exposed.²⁷ This restrictive definition meant that much of the acreage known by developers to contain subsurface coal was classed as grazing land, which could then pass cheaply into private ownership, especially if it were a state-owned school section and the applicant had the favorable regard of state officials. In such instances, if coal were later "discovered" on the property, the owner could either open a commercial mine or sell the land to someone else who would.²⁸ In the freewheeling

²³28 Stat. 107 (1894).

²⁴*Third Annual Report of the State Board of Land Commissioners for the State of Utah for the Year Ending December 31, 1898* (Salt Lake City, 1899), 7-8.

²⁵*Bills of Complaint, in Equity*: 867, *United States v. Utah Fuel Company*; 868, *United States v. Pleasant Valley Coal Company*; 869, *United States v. Utah Fuel Company*; 870, *United States v. Pleasant Valley Coal Company*, all filed July 27, 1906, Box 654, Case 48590, Record Group 60, National Archives. One way of looking at this behavior applies the concept of "release of energy" used to increase productivity, a concept propounded by the legal historian James Willard Hurst. See Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison, 1956), 8-32. From Hurst's perspective, use of the dummy system fostered development because of the relatively lower risk of capital resulting from reduced investments as compared with the legal method.

²⁶*Hearings*, supra note 1 at 16.

²⁷The doctrine of geological inference, which dictated that if coal were known to be on either side of a parcel, the land in question was also to be defined as "coal land," was established in *Diamond Coal and Coke Co. v. United States*, 233 U.S. 236 (1914).

²⁸The cases that established this protection were *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321 (1906) and *United States v. Clark*, 200 U.S. 601 (1906), which allowed using the law as then interpreted by the courts to disguise the true nature of a fraudulent transaction. Marsden Burch and Fred

atmosphere of the frontier West, where land inspectors were in short supply, where the desire for "progress" (alienation of the public domain) was strong, and where commercial development was encouraged, the Land Board became known as "where men went when they wanted to swear a lie."²⁹

Under these circumstances, any challenger to the economically powerful Denver & Rio Grande was wise to follow federal law, in the hopes of engaging federal support. In filing his first coal-land claim in 1902, Sweet took precisely this tack, claiming (with two partners) 160 acres at Sunnyside, in the midst of checkerboard holdings of the Denver & Rio Grande. Armed thugs attacked him as he attempted to work his land, and a court injunction did little to dissuade them.³⁰ Despite the opposition, Sweet proved up on eighty acres, which he could not work because the railroad, with its ownership of the surrounding property, denied him commercial access. He subsequently sold the tract to a Denver & Rio Grande agent and went to work for an affiliated coal company as its telegrapher. When his employers directed him to copy messages off the telegraph wires for company perusal, he reported this illegality to the Western Union and was promptly fired.³¹ Returning to coal-mine development, he opened the first "independent" (non-railroad) mine in eastern Utah late in 1906.³²

While Sweet was breaking in on the Utah coal game, long-simmering animosities between the state and the federal gov-

Maynard, the federal prosecutors in the Utah coal-land cases, also unsuccessfully prosecuted these. In the *Detroit Timber* case, the government failed to recover timber land that had been transferred from a previous owner and for which patent had issued, resulting in conveyance. For the tracts not yet conveyed, patents were cancelled. The reasoning was that, although the original grantee might have committed fraud, *Detroit Timber* purchased the lands in good faith. The *Clark* case, decided immediately afterward, repeated the *Detroit Timber* reasoning as applied to individuals rather than to corporations. In short, these decisions signaled that sale to a second party offered protection from conviction for fraudulent entry and deprived the federal government of the land unless clear proof of fraud on the part of successive owners could be established.

²⁹*Eastern Utah Advocate*, August 9, 1906.

³⁰*Arthur A. Sweet v. Charles Mostyn Owen*, Civil 272, D. Utah, Carbon County Clerk's Records, Price [hereafter cited as *Sweet v. Owen*]; *Eastern Utah Advocate*, December 6, 1906.

³¹*Sweet v. Owen*, *supra* note 30; "Sunnyside Selections Made for Utah Fuel Company," MS 154, Utah Fuel Company Records, Box 9, Fd. 3, Lee Library, Brigham Young University; *Eastern Utah Advocate*, December 6, 1906; "Verbatim Testimony and Proceedings . . .," MS 479, Coal Legislative Hearings, Manuscripts Division, Special Collections Department, University of Utah Libraries, Salt Lake City, 216-17.

³²*Eastern Utah Advocate*, March 21, April 11, 1907.

ernment were occasionally boiling over. When the Denver & Rio Grande first moved into Sunnyside, in 1898, a practicing polygamist was elected to the U.S. House of Representatives. Brigham H. Roberts, the electorate's choice, had just fathered twins by his second wife, and the House refused to seat him. The ensuing investigation revealed not only the continuance of polygamy in Utah but its apparent acceptance by the hierarchy of the Church of Latter-day Saints, who had allegedly abandoned the practice with the Woodruff Manifesto of 1890.³³ Utah, which was viewed as a Mormon state, thus continued to exist under a cloud of "unAmerican" suspicion.

The accusation of continuing polygamy surfaced again in 1906, when Apostle Reed Smoot, one of the fifteen top-ranking officers of the Church of Latter-day Saints, was elected and seated in the Senate. The hue and cry over polygamy began once again, and, although Smoot was found to have no extra wives, other Mormons living polygamously were ferreted out. The Smoot hearings dragged on in the Senate from January 1904 to February 1907 and included "missing witnesses" and faltering testimony by the president of the church himself. The hearings concluded that polygamy continued, and that Smoot, as an apostle, very likely knew about and probably condoned it.³⁴ As in the Roberts case, however, personal behavior proved to be the deciding factor, and the monogamous Smoot was allowed to retain his seat by fellow senators such as Boies Penrose, who remarked, "I don't see why we can't get along just as well with a polygamist who doesn't polyg as we do with a lot of monogamists who don't monog."³⁵ Despite the outcome, the controversy reinforced both the generally held perception that Utahans flouted the law and the equally long-lived suspicion among Utahans that the federal government singled out their state (and especially its Mormons) for invasive, punitive treatment.

Mormon polygamists were not the only ones to scoff at Utah's laws. As we have seen, corporations active in the state continued to disregard the Coal Land Act of 1873 in their rush to secure the few remaining valuable coal tracts in the American West.³⁶ Anxiety about corporate ownership of the dimin-

³³R. Davis Bitton, "The B.H. Roberts Case of 1898-1900," *Utah Historical Quarterly* 25 (January 1957), 27-46.

³⁴Hardy, *Solemn Covenant*, supra note 9 at 251, 258-61; Milton R. Merrill, *Reed Smoot, Apostle in Politics* (Logan, 1990), 47-48, 63 [hereafter cited as Merrill, *Reed Smoot*].

³⁵Francis T. Plimpton, "Reminiscences," *Reader's Digest* 72 (June 1, 1958), 142.

³⁶For a discussion of the overall trend, see William C. Robbins, *Colony and Empire: The Capitalist Transformation of the American West* (Lawrence, 1994), 3-120.

ishing public domain—ownership that was squeezing out the “homeseekers”—animated Theodore Roosevelt’s administration, which had come to power in Washington with the death of William McKinley in 1901. Prompted by his chief forester, Gifford Pinchot, Roosevelt directed the Justice Department to scrutinize the acquisition of public lands. This, in turn, led to the formation of the Public Lands Commission in 1903, and the successful prosecution of Oregon timber-land frauds in 1904.³⁷

While a federal attorney, Marsden C. Burch, was in Oregon prosecuting these cases, he was approached by a newspaper reporter who claimed that even worse land scams were plaguing Utah. Burch consulted the U.S. attorney general and then the secretary of the interior, who told him “that he had never before heard of any coal land frauds but that if there were something there that Burch should fire away.”³⁸ As a result, in July 1906, the Justice Department filed four bills in equity against the Denver & Rio Grande-affiliated coal companies, and against a number of their employees and dummies.³⁹ Given the widespread evasion of the Coal Land Act of 1873 in Utah, indictments could hardly have stopped there.

In fact, a major federal public-lands crusade was under way. The investigations that revealed railroad-mine legal legerdemain turned up other coal-land irregularities. Continuing its prosecutions, on January 22, 1907, the Justice Department filed a bill in equity against Arthur A. Sweet, alleging the acquisition of known coal land as a school section through abuse of the state selections process.⁴⁰

The Utah State Land Board, apparently eager to back the first economic competitor to face the railroad coal monopoly, pledged five thousand dollars for Sweet’s defense. Board minutes revealed the desire to protect Sweet’s first development, known as Kenilworth.⁴¹ However, by the time the federal in-

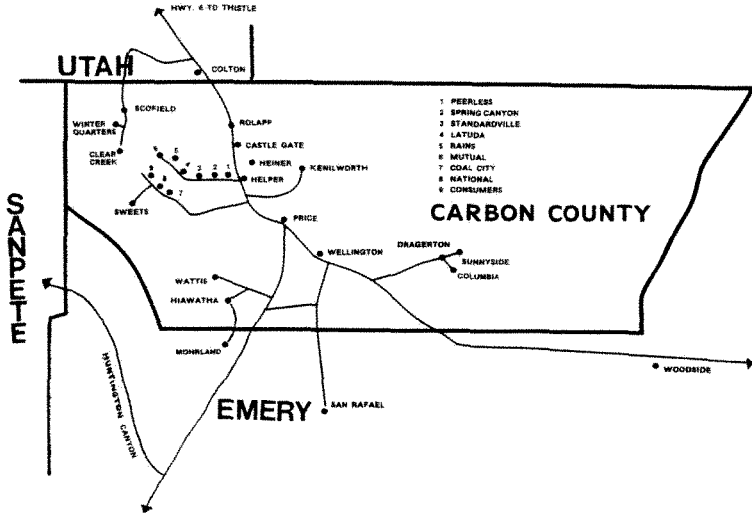
³⁷Gifford Pinchot, *Breaking New Ground* (New York, 1947), 244, 248. For a full study of the Oregon timber frauds, see Jerry A. O’Callaghan, “The Disposition of the Public Domain in Oregon” (Ph.D. diss., Stanford University, 1951), published as *Memorandum of the Chairman to the Committee on Interior and Insular Affairs, United States Senate* (Washington, 1960).

³⁸Memorandum accompanying Burch to Attorney General, March 26, 1909, Box 654, Case 48590, RG 60, National Archives.

³⁹Bills in Equity 867, 868, 870, July 27, 1906, Box 654, Case 48590, RG 60, National Archives.

⁴⁰Bill in Equity 282, January 22, 1907, in Transcript of Record, *U.S. v. Sweet*, S.Ct. Appellate Cases, 25120, RG 267, National Archives. Utah federal district court records for this case, if extant, have apparently left Utah and have not been traced.

⁴¹*Eastern Utah Advocate*, April 4, 1907; “Twelfth Annual Report of Utah State



The first Sweet development was near Kenilworth, the second at Hiawatha, and the third at Sweets. (Adapted from a map produced by the Western Mining and Railroad Museum, Helper, Utah)

dictment was filed, Sweet had sold Kenilworth and reinvested his earnings in a much more remote area on the Black Hawk coal vein, some twenty-five miles southwest of his first mine. His new development, Hiawatha (Sweet was evidently a reader), contained the disputed Sweet section, the target of the federal suit. Once it realized its mistake, however, the Land Board could hardly back down.

Thus, through a good measure of misunderstanding, the state of Utah took sides in a lawsuit against the United States government.⁴² Underscoring its assertive stance, the state issued Sweet a patent for the land in July 1908 on the premise that it could obtain known coal land under its Enabling Act, despite the existence of the federal lawsuit.⁴³

When, at the congressional hearings more than a decade later, one congressman asked, "What suggested to Mr. May-

Board of Land Commissioners for fiscal year ending November 30, 1907," Utah State Land Board, Utah State Archives, Salt Lake City.

⁴²The state of Utah was never a party to *U.S. v. Sweet*. It did become enjoined in a later suit, decided by the U.S. Supreme Court, *Utah et al. v. United States*, 284 U.S. 534 (1932). For a full discussion, see Taniguchi, *Necessary Fraud*, supra note 15.

⁴³*Hearings*, supra note 1 at 31.

nard, the agent of the Justice Department, to cancel this patent?,"⁴⁴ the answer was beside the point, but revealed a competing federal filing held by a group of capitalists from Ogden. According to testimony at the hearings, the group—comprising George Davis, LeRoy Eccles, George A. Tribe, and William A. Wright—had entered a competing federal claim on the state-conveyed Sweet section when its members had learned of the government's lawsuit against Sweet. Their filing of December 1908 had already been in limbo for eleven years of adjudication on the Sweet section.⁴⁵

While all these men were well-known capitalists, LeRoy Eccles was probably the best known of the group. He was the son of Utah's first millionaire, David Eccles, and his first wife, Bertha. (LeRoy was five when his father took a second wife in 1885.)⁴⁶ In spite of David Eccles's prominence in business circles, he was never arrested for unlawful cohabitation, nor did he attract the same scrutiny that had plagued Roberts and Smoot, at least not during his lifetime. The only real scandal broke upon his death, when a third wife presented herself, successfully claiming a portion of the multimillion Eccles estate for her son.⁴⁷ None of this tainted LeRoy, who, like Smoot, remained monogamous. He did emulate his father in business, however, and became associated with a number of western business enterprises, including the Black Hawk Coal Company, near Hiawatha, organized in 1911 by David Eccles and George Tribe, among others.⁴⁸ Although LeRoy Eccles's filing on the Sweet section predated the formation of the coal company by three years, both actions were intended to foster the development of coal near Hiawatha.

The members of Congress at the 1919 hearing were not given a direct answer as to the reason for the government's suit against Sweet, but a likely explanation is that simple consistency had prompted it, since the Justice Department had no assurance it would win its big, showy, "antitrust" suit against the monopolistic railroad—a favorite whipping boy. The value of such prudence was borne out when the government was forced, primarily by shifting politics and monetary considerations, into an out-of-court settlement with the railroad in 1909.⁴⁹ At that point, the *Sweet* case became even more crucial

⁴⁴*Ibid.* at 18.

⁴⁵*Ibid.*

⁴⁶Leonard J. Arrington, *David Eccles: Pioneer Western Industrialist* (Logan, 1975), 55, 60, 65 [hereafter cited as Arrington, *David Eccles*].

⁴⁷Merrill, *Reed Smoot*, *supra* note 34 at 61.

⁴⁸Arrington, *David Eccles*, *supra* note 46 at 267.

⁴⁹Taniguchi, *Necessary Fraud*, *supra* note 15 at 136-39.

to federal supremacy, not just over the public lands (for which the railroad would have done as well), but over the actions of the states as agents for the transfer of the public domain.

The growing importance of the *Sweet* case may have taken its toll on the defendant. Arthur Sweet never lived to see its outcome, succumbing in 1910, at the age of thirty-two, either to chronic nephritis or to "a nervous breakdown occasioned by his unremitting attention to his many and complex business interests."⁵⁰ Early in 1911, his brother and business associate, Frederick, became the chief defendant in the case, renamed *United States v. Frederick A. Sweet, administrator of the estate of Arthur A. Sweet, deceased*.⁵¹ Underscoring the importance of the suit for the Justice Department, the local newspaper explained, "The case was on at the time of the death of Sweet, the government having completed its testimony. His death abated the case, and to revive it the estate was made the defendant."⁵²

A few weeks later, Fred Maynard, the prosecuting attorney, reported on the status of several pending suits for coal land fraud. These included "the case of *United States v. Arthur A. Sweet* [sic], . . . [which] involves the question as to the right of the State of Utah to coal lands in School Sections which were known to contain coal prior to Statehood. I feel confident of obtaining a decree favorable to the government."⁵³

By that time, obtaining a viable precedent had become the focus of federal efforts. The particular defendant mattered far less, even though the Sweets were originally the antithesis of the government's target in its initial trust-busting crusade. But the nature of the players became more complex when Fred Sweet moved on to yet another coal vein in 1912, selling Hia-watha (and the disputed Sweet section) to the United States Fuel Company, a subsidiary of the Boston-based United States Smelting, Refining, & Mining Company. The new owner's holdings included not only this Utah property, but gold, silver, and copper mines and smelters in Utah, Nevada, and California.⁵⁴ A very big business had once again become the target of the government suit, although the central issue remained the legality of a state patent conveying land known to contain coal at statehood.

⁵⁰*Deseret Evening News*, July 21, 1910; "Arthur Alonzo Sweet," in *Utah Since Statehood*, ed. Noble Warrum (Chicago, 1919), 3:232-33.

⁵¹245 U.S. 563 (1918).

⁵²*Eastern Utah Advocate*, February 2, 1911.

⁵³Maynard to Attorney General, April 27, 1911, Box 655, Case 48590, RG 60, National Archives.

⁵⁴[Price] *Sun*, March 8, 1918.

A decision on the *Sweet* case was finally rendered in 1914, and Utah Federal District Judge John Marshall ruled in favor of the United States. His decision was overruled by the Eighth Circuit Court the following year, which found for Sweet, for three main reasons. First, the judges ruled that Congress had had the power to omit mineral lands from the Utah statehood grant with specific language, as it had with salt lands, but had chosen not to do so. Second, they rejected Maynard's argument that postulated a "settled public policy of the government to reserve mineral lands from sales and grants," finding no such "settled" policy in the highly variable history of state land grants. Third, they declared that the sale of mineral land, which had been prohibited in some cases, was not the same as the grant to a new state. Therefore, the state's title was valid and U.S. Fuel, through Utah and through Sweet, owned the land.⁵⁵

Given these conflicting opinions and the high stakes for government control, the Justice Department brought an appeal to the Supreme Court. The *Sweet* case was heard in December 1917, and the decision rendered the following January. Here the government finally won. In contrast to the circuit court, the justices detected a "settled policy" of reserving mineral lands to the federal government. They further reasoned that "While the mineral-land laws are not applicable to all the public land States . . . there has been no time since their enactment when they were not applicable to Utah." No mention was made of a distinction between a grant and a sale of land.⁵⁶ With this decision, the federal government at last won a coal-lands case against big business, concurrently weakening Utah's attempt at state control of mineral lands.

Although the *Sweet* decision set the precedent (which still stands) for ownership of mineral lands, it did not conclude the fight for the Sweet section. U.S. Fuel immediately claimed a purchase in good faith, while the Eccles consortium pressed for recognition of its 1908 federal coal-land filing. The next forum for adjudication became the U.S. Congress, specifically the House Subcommittee on Public Lands. The subcommittee became involved when U.S. Fuel brought a private bill, seeking to establish the ownership denied by the Supreme Court decision.

The acrimonious accusations in the hearing quoted at the beginning of this article underscored the importance of the Sweet section as a "gateway" to the coal vein otherwise cov-

⁵⁵*Carbon County News*, February 26, 1914; [Price] *News-Advocate*, October 1, 1915; *United States v. Sweet*, S.Ct. Appellate Cases, no. 25120, 154-67, RG 267, National Archives.

⁵⁶245 U.S. 563 (1918), 563-75.



Frederick A. Sweet became the chief defendant in *U.S. v. Sweet* after Arthur Sweet's death in 1910. (Courtesy The Huntington Library, San Marino, California)

ered by steep canyon terrain. Given the topography of the Hiawatha area, few sections of land afforded the necessary access to the rich coal behind the mountain fronts. Consequently, the contestants, or combatants, did all they could to paint each other in the most unflattering tones. For example, a witness for the Eccles consortium characterized Arthur and Frederick Sweet as part of "a certain class of men . . . who have preyed on the coal lands of the state . . . [and] have demoralized the coal situation in the West for years by their cut-throat competitive methods." The Sweet supporters slung their mud at LeRoy Eccles, calling him a "speculator" who intended "holding the land and asking others to pay dearly for it."⁵⁷ In the end, Repre-

⁵⁷*Hearings*, supra note 1 at 66-73.

sentative Milton H. Welling, the bill's sponsor, virtually threw up his hands and acknowledged that neither he nor the Interior Department had known about the consortium's competing filing, adding privately that he "was not particular who got the land; that he was more interested, and so is Congress, in having these lands developed by somebody."⁵⁸

Welling's pro-development proclamation mirrored the coming climate of the twenties, when the business of American was business, and "mergeritis" and a return to normalcy after the horrors of World War I characterized the United States. The stock market soared as ordinary citizens brashly speculated on a "sure thing." Even Utah's railroad-coal monopolist became the "Father of Coal Mining in Utah."⁵⁹ The Sweet section was swept up in the national mood, falling under the Department of the Interior for its final disposition. When the Subcommittee on Public Lands, startled by the vitriolic debate, declined to report U.S. Fuel's private bill forward, the competing claimants turned to the General Land Office in the Interior Department for adjudication. Appeals there ultimately brought the case before the secretary of the interior in 1921.

Before the interior secretary could decide on the fate of the Sweet section, however, Congress had its say on coal land in general. Further strengthening federal control of the nation's coal land (partially established in *Sweet*), Congress passed the Mineral Leasing Act on February 25, 1920. This statute forbade any future ownership of the nation's coal, mandating that coal-bearing substrata remain forever with the government, workable only under federal lease.⁶⁰ The secretary of the interior shortly thereafter ruled that "claimants who, prior to the date of the act, occupied and improved coal lands in good faith may be recognized in awarding *leases* of such lands."⁶¹ But both U.S. Fuel and the Eccles consortium had long sought ownership. Still chasing this goal, they pressed on.

U.S. Fuel, claiming good-faith improvements, had been working the Sweet section since 1912. The Eccles group, on the other hand, had held a legal federal claim since 1908. In the decade since the original federal indictment, several waves of reform and revision had swirled through the Congress, the courts, and the General Land Office. Legal precedents and ad-

⁵⁸*Ibid.* at 63, 67.

⁵⁹*New West Magazine*, 11:2 (February 1920), 28.

⁶⁰41 Stat. 437 (1920).

⁶¹"Coal Land Laws and Regulations—Act of February 25, 1920 (41 Stat. 437)," in *Decisions of the Department of the Interior in cases relating to the Public Lands*, vol. 47, January 1, 1919-January 21, 1921, ed. A.W. Patterson (Washington, 1921), 490. Italics added.

ministrative dicta that supposedly clarified the fate of national coal lands did not necessarily apply to the Sweet section, as subsequent events would prove.

The secretary of the interior rendered so many land decisions that only a tiny fraction of them could be published. The Sweet section disposition was not among them. News of its allocation instead came out in the local paper, which reported on February 18, 1921, that "The case that has been pending for several years before the department of the interior . . . [regarding land] commonly known as the Sweet school section and valued at \$500,000, was last Saturday decided in favor of LeRoy Eccles."⁶²

With this decision, a prominent Mormon businessman, raised by a polygamous father who had successfully evaded the "cohabitation" hunt in defiance of federal law, held right of *ownership*, not lease. County land records further reveal that Eccles and his associates were granted a federal patent by the invalid Woodrow Wilson on the very last day of his presidency, March 3, 1921. This transaction occurred well after coal-land leasing, a hallmark of federal control, had become the only legislated option. Five weeks after receiving the patent, the Eccles group sold the Sweet section to U.S. Fuel for an undisclosed amount.⁶³ In this manner, the federal attempt to wrest fraudulently acquired Utah coal land from the grasp of big business had come full circle.

Today, the Hiawatha area, of which the Sweet section is still a part, is slated as the site of a new coal-fired, electricity-generating plant. As a 1996 news article explained, the "plant takes the coal fines left behind at the U.S. Fuel mine and . . . gasifies the materials." The resultant gas is burned to generate electricity, "basically a new technology in the United States."⁶⁴ The Sweet section thus continues its contribution to the changing goals of national "progress." At the same time, the Supreme Court decision in *U.S. v. Sweet* retains its importance. For example, a recent decision stated that "known mineral lands did not vest in the state, even though the land might have been one of the sections described in the [enabling act] grant. See *United States v. Sweet*."⁶⁵ Listed first among the applicable decisions and statutes, the decision on the Sweet section, despite the land's actual removal from the public domain, remains a cornerstone of American land law.

⁶²[Price] *Sun*, February 18, 1921.

⁶³Patent Book 6, 250-51; Book 5H, 207-8, both in Carbon County Recorder's Records, Carbon County Courthouse, Price.

⁶⁴"Companies Plan Hiawatha Project," [Price] *Sun Advocate*, June 25, 1996.

⁶⁵*Kadish v. State Land Department*, 155 Ariz. 484; 747 Pac. 2d 1183 (1988).

Gringos v. Mineros: THE HISPANIC ORIGINS OF WESTERN AMERICAN MINING LAW

RAY AUGUST

Mining law first became important in American jurisprudence following the discovery of gold in California in 1848. Before that, mining had played only a small role in American society, and knowledge of its techniques and its law was limited to a handful of miners in Georgia, North Carolina,¹ Pennsylvania, and the frontier territory that would later become Wisconsin.²

According to the common interpretation, the California gold rush began when Sam Brannan, a big-voiced auctioneer, storekeeper, real-estate agent, and newspaper publisher, waved his hat in the streets of San Francisco, held up a bottle of golden granules, and shouted "Gold! Gold! Gold from the American River!"³ This version, though accepted by most American historians, was later challenged by Jay Monaghan, who cited the account of Charles de Varigny, the French consul in California

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¹Gold was the principal mineral mined in Georgia and North Carolina. Fletcher M. Green, "Georgia's Forgotten Industry: Gold Mining," *Georgia Historical Society Quarterly* 19 (1935), 210-28; idem, "Gold Mining: A Forgotten Industry of Ante-Bellum North Carolina," *North Carolina Historical Review* 14 (1937), 1-19.

²Coal and iron were mined in Pennsylvania; lead in Wisconsin. Henry de Groot, "Six Months in '49," *Overland Monthly*, 1st ser., 14 (1875), 316, mentions that coal and iron miners from Pennsylvania and lead miners from the upper Mississippi Valley were among the early immigrants to California who had knowledge of mining customs and techniques.

³Hubert Howe Bancroft, *History of California* (San Francisco, 1888), 6:56 [hereafter cited as Bancroft, *History of California*]. Bancroft gives the date as May 12, 1848.

in 1848. De Varigny claimed that the gold rush started when a Chilean supercargo on the brig *J.R.S.* offered to pay 20 to 50 percent more for gold than was being offered by San Francisco's merchants.⁴

Like the question of who started the gold rush, the origin of western American mining law is a matter of historical disagreement. Once a major concern of the courts, it faded as a cause for judicial inquiry when Congress enacted a national mining code in 1866. Nevertheless, the early pronouncements of the courts, especially the Supreme Court's opinions written by Justice Stephen Field, a Californian, and the legislative orations of Senator William Stewart of Nevada, author of the Mining Code of 1866, have been particularly influential in establishing the interpretation most commonly held.⁵ In Stewart's words,

Upon the discovery of gold in California, in 1848, a large emigration of young men immediately rushed to that modern Ophir. Those people, numbering in a few months hundreds of thousands, on arriving at their future homes found no laws governing the possession and occupation of mines but the common law of right, which Americans alone are educated to administer. They were forced by the very necessity of the case to make laws for themselves. The reason and justice of the laws they formed challenge the admiration of all who investigate them. The similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well-digested, general laws. These regulations were thoroughly democratic in their character, guarding against every form of monopoly, and requiring continued

⁴Jay Monaghan, *Chile, Peru and the California Gold Rush of 1849* (Berkeley, 1973), 1. The French consul's account is in Charles Victor Crosnier de Varigny, *Los orijenés de San Francisco* (Valparaíso, 1887), 18, and idem, *L'océan pacifique* (Paris, 1888), 262.

⁵Richard R. Powell, *Compromises of Conflicting Claims: A Century of California Law, 1760-1860* (Dobbs Ferry, N.Y., 1977), 178-79, briefly describes (and accepts) the common interpretation, i.e., "the mining camps, springing up beyond the reach of established law, followed the tradition of American frontier settlements, back to the time of the Mayflower Compact, by adopting their own rules."

For Justice Field's contributions to the development of mining law, see Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth Century America," *Law and Society* 10 (1976), 235-66 [hereafter cited as McCurdy, "Stephen Field and Public Land Law"].

work and occupation in good faith to constitute valid possession.⁶

This vision of the dauntless American ignoring the "time-honored regulations" of others to create his own individualistic rules of law has had a strong following, especially among popular historians and writers of school textbooks.⁷ It has been challenged from the outset, however, by knowledgeable authors whose work is less widely known.⁸

Henry Halleck, a lawyer who lived in California from 1846 and who was a translator of Spanish and Mexican laws, ascribed a much narrower origin to California's mining laws. He wrote: "The miners of California have generally adopted as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico, by which the right of property in mines is made to depend upon *discovery* and *development*; that is, *discovery* is made the source of title, and *development*, or working, the condition of the continuance of that title. These two principles constitute the basis of all our local laws and regulations respecting mining rights."⁹ His statement is significant in that it ignores both the notion that American mining law was a spontaneous creation and the idea that its adoption sprang from the character of the American miners. Instead, it simply says that the Americans copied their supposedly unique rules from Spain and Mexico.

Before we can consider whether Field and Stewart's view or

⁶*United States Reports* 70 (Washington, 1865), Appendix 1, 777.

⁷Hubert Howe Bancroft is representative of the historians who have adopted the Stewart-Field theory. *History of California*, supra note 3 at 6:396-97. Another nineteenth-century advocate of the Stewart-Field theory was John S. Hittell, though his arguments against the Hispanic origins of the California mining rules were not always consistent. Idem, *Mining in the Pacific States of North America* (San Francisco, 1861), 178-79, 190 [hereafter cited as Hittell, *Mining in the Pacific States*]. A contemporary adherent to the Stewart-Field theory is Charles W. Miller, Jr., *Stake Your Claim!* (Tucson, 1991), 22.

⁸See Rodman Paul, *Mining Frontiers of the Far West, 1848-1880* (New York, 1963), 23 [hereafter cited as Paul, *Mining Frontiers*].

⁹Henry Wager Halleck, "Introductory Remarks by the Translator," in J.H.N. de Fooz, *Fundamental Principles on the Law of Mines* (San Francisco, 1860), v.

Edwin Waite, who wrote about the discovery of gold by James Marshall together with Marshall and John Hittell in the February and May 1891 issues of the *Century* magazine, admitted—albeit backhandedly—that the miners knew that the Spanish Mining Ordinances of 1783 applied in the mining regions of California in 1848 and immediately thereafter. He wrote: "Only Mexican law could be said to exist, and in all the mining region there were no officers to enforce its feeble demands. Every man was a law unto himself, and it is little to say in behalf of the pioneers of California that they carried the laws of justice and humanity in their hearts to such a degree, that no more orderly society was ever known on the face of the earth than in these early days."

Halleck's is correct, we need to examine the miners' codes of the gold-rush days in California and the contemporary mining laws of both the United States and Mexico.

THE MINERS' CODES

During the three decades after the discovery of gold in 1848, miners in the Pacific and mountain states set up mining districts and enacted mining codes. Fortunately, about half the codes for the nearly one thousand districts have been preserved, although most of them are codes for districts organized well after the initial gold-rush period. Large numbers of courthouse fires in the early 1850s destroyed many of the earliest mining records.¹⁰

The codes that survived are characterized by their brevity. Most are made up of only a few one-sentence articles that require claimants to put stakes at the corners of their claims, to record the claims with an elected district recorder, and to work the claims or forfeit them for non-use. Generally, provisions are made for resolving disputes.¹¹ But overall, the codes are brief. Thus the Day's Ledge Mining District Code—possibly the briefest of them all—consists of only seventy-four words.¹²

¹⁰An excellent discussion about the number of mining districts in the West, together with a bibliography of materials containing printed copies of mining codes, can be found in James Grafton Rogers, "The Mining District Governments of the West: Their Interest and Literature," *Law Library Journal* 28 (1935), 247-59 [hereafter cited as Rogers, "Mining District Governments"].

¹¹The first California mining code of which there is a record is from the Gold Mountain Mining District in Nevada County. As with most of the surviving codes, it was copied into the county records soon after Nevada County was organized. Earlier versions may have existed but they were not recorded. A copy is in Bureau of the Census, *The United States Mining Laws and Regulations Thereunder, and State and Territorial Mining Laws, to which are Appended Local Mining Rules and Regulations* (Washington, 1885), 246 [hereafter cited as *United States Mining Laws*]. Another early mining district was Jackass Gulch, about five miles from Sonora. Its earliest enactments have not been preserved, but a revision was published in 1851 in the local newspaper and a summary of that revision is in Charles Howard Shinn, *Land Laws of Mining Districts* (no. 12 in *Johns Hopkins University Studies in Historical and Political Science* [Baltimore, 1884], 11 [hereafter cited as Shinn, *Land Laws of Mining Districts*). In *Mining Camps: A Study in American Frontier Government* (1884; reprint New York, 1948), 225 [hereafter cited as Shinn, *Mining Camps*], Shinn claims that the original laws were made orally and not recorded.

¹²The Day's Ledge Mining District Code provides:

BY LAWS

ART. 1st. Claims shall be Fifty feet along the course of the Ledge, with its dips, breadths, and angles.

2d. One stake in the centre of each claim, with the holders name and Recorders number.

This brevity is evidence, I believe, of the miners' knowledge of a more general system of law, an invocation of that system, and a statement of the modifications they considered necessary for their particular district. This can be seen in the code enacted by the miners of Willow Valley, Nevada County, California, on December 23, 1853. In addition to an obvious understanding of mining terms (quartz lead, coyote claim, tail-race, sluice-box), it clearly recognizes the "common custom and usages of miners" as a system of law separate and apart from itself.¹³

Because of the large number of districts and the consequent large number of mining codes, one would expect to find a great degree of variation between the different codes. However, this is not the case. Senator Stewart, while making his argument that the mining laws were the spontaneous product of American immigrants in the Sierra Nevada, observed that "the similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well-digested, general laws."¹⁴ Charles Howard Shinn, in his 1884 study of American mining camps, concluded that an "analysis of the hundreds of codes of old camps now obtainable—of camps from every mining county of California, Nevada, Oregon, and some of the territories—proves that the local laws and usages over this great region are based upon five principles: to have each claim of definite size; to enforce the law of use; to maintain 'inclined locations [for quartz mines]'; to record all claims; and to insist on this record as final in case of dispute."¹⁵

Because the codes regularly refer to outside rules of law and because they are remarkably similar from one district to the next, one has to conclude that they were not spontaneous creations of the miners, but were based on some common, familiar source. Gregory Yale, the first American to write a treatise on mining law, observed in 1867 that "most of the local rules and customs are easily recognized by those familiar with the Mexican law, the Continental Mining Codes, especially the Spanish, and with the regulations of the Stannary Convocation

3d. Fee for recording one dollar, transfer fifty cents. 4th. The above rules having been complied with, claims will be held good untill the first day of May 1852.

JOHN DAY,
Recorder

CENTERVILLE GRASS VALLEY, Oct. 21, 1851.

Quoted in *United States Mining Laws*, supra note 11.

¹³The Willow Valley Mining Code, Nevada County, California, adopted on December 23, 1853, is reproduced in Hubert Howe Bancroft, *California Inter Pocula* (San Francisco, 1888), 241-42.

¹⁴*United States Reports* 70 (Washington, 1865), Appendix 1, 777.

¹⁵Shinn, *Mining Camps*, supra note 11 at 265.

MINING LAWS OF SPRINGFIELD

Springfield, April 13, 1892.

At an adjourned mass meeting of the miners of Springfield and vicinity, held at Mr. McCarty's Hall, according to previous notice.

The following Resolutions and By-laws were adopted, viz:

RESOLUTIONS.

Commencing at a spring above and near Vaney's steam saw mill, the line running from thence in a westerly direction to the north side of Mr. McCarty's store, from thence to a spring at the head of Dead Man's Gulch, thence following the said gulch to the Stanislaus river, thence down the river to Horse Shoe Bend, thence in an easterly direction to Mormon Creek, intersecting it one hundred feet below the Illinois House, thence up the creek to Swampy gulch, thence up the Swampy gulch to Sullivan's Creek Water Company's reservoir, thence in a straight line to the spring, the place of commencement.

BY-LAWS.

ART. 1. A claim for mining purposes within this district shall not exceed one hundred feet square to each man.

ART. 2. That no man within the bounds of this district shall hold more than one claim.

ART. 3. That each and every man holding a claim within the bounds of this district shall work one day out of every three, or employ a substitute; otherwise such claims shall be forfeited.

ART. 4. That any persons holding claims with dirt thereon up or excavations made on such claims, such claims shall be governed by articles 2 and 3.

ART. 5. That each and every man holding a claim within the bounds of this district, shall designate such claims by setting good and

substantial stakes at each corner of their claims, or dig a ditch around said claims, with a series, signed by each person or individual of a company holding such claim.

ART. 6. Where two or more claims join together, and are worked by companies, such companies can mark on any portion of such claims as they deem expedient, complying with article 3.

ART. 7. That when any dispute arises concerning claims, and either party shall refuse to refer such dispute to a committee of five, two to be chosen by each party and the fifth to be chosen by the four, the party so refusing shall forfeit all right to such claim in dispute.

ART. 8. That all water claims in dispute shall be settled by and according to article 7.

ART. 9. That a standing committee of ten be appointed, to whom complaints shall be made in all mining disputes, and it shall be their special duty to see article 7 enforced, and that said committee be empowered to summon a posse at any time when necessary to meet them in the discharge of their duty.

ART. 10. That all laws passed by this meeting shall be retro-active.

STANDING COMMITTEE.

Chairman—Mr. J. Smith, Jr.
Mr. James Eddy, Mr. J. Roberts.
" " " S. Smith.
Dr. Hughes, " W. Crocker.
Mr. Vincent, " J. Montgomery.

W. Swenson, Secretary.

Resolved: That the proceedings of this meeting be published in the *San Francisco Herald*, and that 500 copies be printed in hand bills.

Resolved: That the Standing Committee have the supervision of printing the above.

J. HARRINGTON, President
W. L. Thayer, Secretary.

The mining laws of Springfield, California
(Courtesy California History Room,
California State Library, Sacramento)

among the Tin Bounders of Devon and Cornwall, in England; and the High Peak Regulations for the lead mines in the county of Derby."¹⁶ In 1935 John Rogers, dean of the University of Colorado Law School, put it more bluntly: "The mining rules

¹⁶Gregory Yale, *Legal Titles to Mining Claims and Water Rights in California* (San Francisco, 1867), 58.

Robert W. Swenson, "Legal Aspects of Mineral Resources Exploitation" [hereafter cited as Swenson, "Legal Aspects"], in Paul Wallace Gates's *History of Public Land Law Development* (Washington, 1968), 708-9, and John C. Lacy, "The Historic Origins of the U.S. Mining Laws and Proposals for Change," *Natural Resources and Environment* 10 (Summer 1995), 13, 17 [hereafter cited as Lacy, "Origins of Mining Laws"], argue that the first miners to arrive in California were from various backgrounds and therefore the early California mining laws cannot be traced to any particular origin or source. Swenson and Lacy fail to mention, however, that the Latin Americans were already in the mining districts and that the first Americans who went into those districts

are Spanish in origin, and can be traced directly through California to the Royal Spanish Code of 1783."¹⁷

EARLY AMERICAN MINING LAWS

Because mining was neither widespread nor important in North America before 1848,¹⁸ there was a want of both mining lore and mining law.¹⁹

relied on the Latin Americans for their knowledge of the ways of mining. See Richard H. Morefield, "Mexicans in the California Mines," *California Historical Society Quarterly* 35 (1956), 37, 39 [hereafter cited as Morefield, "Mexicans in the California Mines"].

It may well be that some of the miners who came to California from Latin America were natives of other countries. Hittell, in *Mining in the Pacific States*, supra note 7 at 15, wrote that in February 1848 "a Frenchman called Batiste, who had been a gold miner in Mexico for many years," visited John W. Marshall's mill and confirmed that "California was very rich in gold." Such miners may have been familiar with European mining laws other than those in force in Latin America, but it should be remembered that mining law in Latin America was itself European and its basic principles did not greatly differ from the general principles of mining law known to most miners in 1848.

¹⁷Rogers, "Mining District Governments," supra note 10 at 247, 251. Similar remarks may be found in many other sources.

¹⁸The lack of mining activity did not mean there was a lack of desire to find and exploit mineral wealth. The English settlers who came to America in the sixteenth and seventeenth centuries, as well as the English Crown, expected to find great quantities of gold and silver. The expected wealth was not quickly found, however, despite many "discoveries." In the spring of 1608, the first settlers at Jamestown found what they took to be gold, and gold fever ran rampant through the colony. No work was done other than the digging, refining, and loading of gold on a ship bound for England. The "gilded dirt," as Captain John Smith called it both derogatorily and accurately, turned out to be worthless.

Probably the first real mine, a lead mine, was opened in 1622 on the James River in Virginia. The next may have been the gold mine that Massachusetts Governor John Winthrop worked for a few years near Middletown, Connecticut, beginning in 1661. A blast furnace and iron mine opened in 1702 at Mattakeeset Pond, Massachusetts. A copper mine opened at Simsbury, Connecticut, in 1709 and another copper mine on the Passaic River in New Jersey in 1719. A lead mine was operated at Middletown during the Revolutionary War, from 1775 to 1778, but was abandoned thereafter.

After the American Revolution, the principal mining activity was in the South, the most important mines being in North Carolina and Georgia. According to Shinn, *Mining Camps*, supra note 11 at 36-38, the entire production of gold in the southern United States before 1850 amounted to a mere 41.73 cubic feet—an amount that could be put into 1,073 quart jars. This was about the same quantity as the total mined in California in 1848 alone. The consequences of this small production may also be seen in the rudimentary state of local mining laws. House of Representatives, 47th Cong., 2d sess., vol. 13, pt. 13, 380.

¹⁹The want of lore and law can be traced to England, where there was also little mining activity. In England, the common law presumed that subsurface

For the most part, few eastern states made any distinction between acquiring mineral and nonmineral lands. In Connecticut, Delaware, Georgia, Maine, Massachusetts, New Jersey, North Carolina, Rhode Island, and Vermont, no mining laws of a general nature were ever enacted. Kentucky, Pennsylvania, Tennessee, and West Virginia did have codes regulating work in mines, but they did not have legislation stating how mineral lands were to be claimed. And while South Carolina licensed the mining of phosphate deposits in navigable rivers, marshes, and swamps (all state-owned lands), it did not enact any laws for acquiring other mineral lands.²⁰

Of the eastern states, only New York had a general mining code. Clearly based on a civil-law model,²¹ this declared that all gold and silver mines were the property of the state, as were other mines on state lands, or lands belonging to aliens, or mines discovered by aliens. Similarly, mines of copper, iron, lead, or tin that contained more than a third part in value of gold or silver belonged to the state. New York citizens who discovered mines on state lands could work (but not own) them for twenty-one years without paying any royalty, simply by filing a notice of discovery with the secretary of state. At the end of the period, the discoverer had priority in any contract made with or under the authority of the state legislature to work the mine. No provisions, however, were made fixing the extent of the claim or describing how the boundaries were to be marked.²²

A lack of mining law was also characteristic of federal legislation before the Civil War. Although it had the constitutional power to enact mining laws, the American government did little more than the British Crown had done before independence. Federal lawmakers concentrated on selling off mines on the public lands, the first such provision being in the Northwest Ordinance of 1785. Famous now for establishing a survey system and for selling the public lands to the highest bidder, the ordinance also reserved "one third part of all gold, silver,

minerals belonged to the owner of the land. But this presumption could be overcome in three ways: by establishing that the mineral rights had been severed from the surface title by sale, gift, inheritance, or otherwise; by showing that the land contained "royal mines"; or by proving that a local custom contradicted the *prima facie* rule. Curis H. Lindley, *A Treatise on the American Law Relating to Mines and Mineral Lands* (San Francisco, 1897), 1:2 [hereafter cited as Lindley, *Treatise on American Law*].

²⁰*Ibid.* at 1:24-25.

²¹See the discussion below in note 31.

²²Rossiter W. Raymond, "Comments," in *American Institute of Mining Engineers*, 16:770; *ibid.* at 24:712; and *Engineering and Mining Journal*, 58:560.

lead and copper mines" for separate sale at a higher price.²³

At the beginning of the nineteenth century, shortly after the United States negotiated the Louisiana Purchase with France, the federal government enacted laws (modeled on French ordinances) to lease mines in the new territories. This proved to be unworkable, however, since the War Department, which had the responsibility for granting leases, allowed so many illegal entries onto the public lands that the legitimate leaseholders refused to pay royalties to the government.²⁴ As a consequence, Congress ordered the outright sale of its lead-mining interests in Missouri in 1829.²⁵ In 1846 it directed that the publicly held lead mines in Illinois, Arkansas, Wisconsin, and Iowa be sold off,²⁶ and in 1847 it did the same for the copper mines on the south shore of Lake Superior.²⁷ Congress also passed the Preemption Act of 1841, allowing any squatter residing on a 160-acre tract of land to purchase it for \$1.25 an acre before the land could be put up for auction.²⁸ Ore and salt mines were exemp-

²³*Journals of the Continental Congress*, 10:118. In 1800, Congress sought to encourage settlement in the region of present-day Wisconsin and directed the president to hire an agent to collect information about copper deposits on the south shore of Lake Superior, and "to ascertain whether the Indian title . . . to the said mines had been extinguished." Resolution of April 16, 1800. President Jefferson, however, did not move with alacrity. Not until 1843 did the Chipewewa relinquish title, and mining did not begin systematically until 1845. Abram S. Hewitt, "Century of Mining," *American Institute of Mining Engineers*, 5:170.

²⁴Lindley, *Treatise on American Law*, supra note 19 at 1:40-43.

²⁵The Missouri mines were sold, with other public lands, for \$2.50 an acre. Statute of March 3, 1829, *United States Statutes at Large*, 4:364.

²⁶Act of July 11, 1846, *United States Statutes at Large*, 9:37.

²⁷Act of March 1, 1847, *United States Statutes at Large*, 9:146.

²⁸Act of September 4, 1841, *United States Statutes at Large*, 5:453 §10. Before 1841, Congress had passed several temporary preemption acts, i.e., on May 29, 1830; April 5, 1832; March 2, 1833; July 14, 1833; June 26, 1834; June 22, 1838; and June 1, 1840. In the Act of 1834, the language was unclear as to whether preemption was extended to mineral lands. The case of *United States v. Gear*, in *United States Reports*, 44:120, held that it was not.

Lacy, in "Origins of Mining Laws," supra note 16 at 13, 17, contends that the California mining regulations "reflected some of the contemporary land practices in the United States, most notably, the unofficial preemption 'claimants unions' used in the 1830s by the homesteaders in Wisconsin and Iowa." Swenson, in "Legal Aspects," supra note 16 at 709, disagrees with Lacy on this point, stating that there is no special connection between the mining laws and the preemption doctrine because the only feature they share is the idea of priority of possession (i.e., that the first person to occupy the land has the highest priority in claiming title to it). Gates defines preemption in his *History of Public Land Law Development*, supra note 16 at 219, as "the preferential right of a settler on public lands to buy his claim at a modest price," and he notes that the basic doctrine was fleshed out at the time of the California gold rush by the federal Preemption Act of 1841, which allowed

ted from preemption, however, until President Polk recommended, and Congress extended, the privilege to mineral lands in the 1846 and 1847 acts.²⁹

Thus, before the discovery of gold in California, federal legislation concerning the survey, lease, and sale of mineral lands was of a limited nature, dealing principally with lead and copper mines, and culminating in 1847 with the decision to transfer, by auction, private sale, or preemption, all public mineral lands. Similarly, state mining legislation, because of the small number of mines in the eastern states, was equally limited. Only New York had a general mining code, and that did not specify how a mine was to be claimed or how its boundaries were to be set. Neither federal nor state law can, therefore, be used to explain the origins of the mining codes adopted by the California miners.³⁰

settlers who had erected a dwelling and who lived on and improved unsold but surveyed public lands to obtain title up to 160 acres by paying the government \$1.25 an acre. *Ibid.* at 238. Thus, while both the Preemption Act and the California mining codes provided that the first individual who moved onto the public lands could eventually acquire title to some of those lands by putting them to a useful purpose, there are too many differences in the details of the two rules to suggest that they are directly related.

²⁹Lindley, *Treatise on American Law*, *supra* note 19 at 40-43.

³⁰President Fillmore, in his first annual address to Congress in 1851, recommended that "instead of retaining the mineral lands [of California and the territories of Utah and New Mexico] under the permanent control of the government, they be divided into small parcels and sold, under such restrictions as to quantity and time as will insure the best prices and guard most effectively against combinations of capitalists to obtain monopolies." James D. Richardson, *A Compilation of the Messages and Papers of the Presidents, 1789-1897* (Washington, 1896-99), 5:87. Despite the lack of a formal federal system of mining law before the gold rush, many authors assert that California's informal "miners regulations were [not] unprecedented" in the United States. McCurdy, "Stephen J. Field and Public Land Law," *supra* note 5 at 237. For example, Joseph F. Rarick, in "Oklahoma Water Law: Stream and Surface in the Pre-1863 Period," *Oklahoma Law Review* 22 (1969), 20, argues that throughout the Mississippi Valley, "concentrations of trespassers and thieves" similar to those who settled in California "peopled and fertilized" the public land despite the "tardy movement of the government." Moreover, according to this view, these Mississippi Valley frontiersmen developed claims clubs whose rules and regulations were "comparable to the miners' codes." McCurdy, *ibid.* at 237; and see Allan Bogue, "The Iowa Claims Clubs: Symbol and Substance," *Mississippi Valley Historical Review* 45 (1958), 231-53.

The "Constitution and Laws for the Government of the Citizens of Johnson County [Iowa] in Making and Holding Claims, as adopted March 9, 1839," is in Jesse Macy, "Institutional Beginnings in a Western State," in *Johns Hopkins University Studies in Historical and Political Science* (Baltimore, 1884), 33-38, and in Benjamin F. Shambaugh, "Frontier Land Clubs or Claims Associations," *Annual Report of the American Historical Association* 1 (1900), 73-77. These rules allowed for the recording, transfer, and adjudication of land claims "to 480 acres, or three quarter sections." Most of the rules were devoted to organ-

SPANISH AND MEXICAN MINING LAW

In Spain and its American colonies, the crown claimed absolute ownership of all minerals.³¹ One of the first Spanish decrees asserting this right was issued in 1383 by Alonzo XI, and stated, "All mines of silver and gold and lead, and of any other metal whatever, of whatsoever kind it may be, in our Royal Seigniorship, shall belong to us; therefore, no one shall presume to work them without our special license and command; and also the salt springs, basins, and wells, which are for the making of salt, shall belong to us."³² This premise was transferred to Spain's American colonies soon after Cortez conquered Mexico and Pizarro subdued Peru. Indeed, in the opening years of Spain's conquest of the New World, the dominating concern of all *conquistadores* was the discovery of gold and silver, preferably when those minerals had already been extracted by the Indians. The success or failure of an expedition depended upon its locating rich mineral deposits. Not until the ill-fated Coronado expedition of 1540-42 failed to uncover the Seven Cities of Cibola in the deserts of Arizona, New Mexico, and Texas did the Spaniards' quest for expansion subside and their efforts turn to developing mines within Mexico, Colombia, Chile, and Peru.³³

izing a quasi-county government, complete with clerk, judges and marshals. Applicants had to describe their claim by giving "the range, Township, and qr. Section as is customary in describing surveyed lands," or by using metes and bounds, and were "required to put the initials of their names either on a tree or stake at each corner of their claims." Bogue cites examples of claims clubs in twenty-six Iowa counties. However, the regulations he describes, like the rules for the Johnson County claims club, relate to the acquisition of at least 160 acres of farm land, and do not apply to mining claims. *Ibid.* at 233, n. 10, and 237. The only extant rules of a mining association in the Mississippi Valley are the regulations of a group of lead miners adopted at Dubuque on June 17, 1830. Contradicting the argument that the lead miners were innovative frontiersmen, the rules provided, in essence, that the Dubuque miners were to be "governed by the regulations on the east side of the Mississippi river." Quoted in Macy, *ibid.* at 6.

³¹Spain's mining law is based on continental-European or civil-law precedents. See Nicholas J. Campbell, Jr., "Principles of Mineral Ownership in Civil and Common Law Systems," *Tulane Law Review* 38 (1957), 163, Herbert C. Hoover, "Historical Note on the Development of Mining Law," in Georgius Agricola, *De re metallica* (New York, 1950), 83-84, 96-100, and Lindley, *Treatise on American Law*, *supra* note 19 at 1:14-17.

³²Henry W. Halleck, trans., *A Collection of the Mining Laws of Spain and Mexico* (San Francisco, 1859), 4 [hereafter cited as Halleck, *Collection of Mining Laws*].

³³Initially preoccupied with finding gold mines, the *conquistadores* soon discovered that silver was more plentiful and hence more suitable for large-

During the sixteenth century, Charles V and Philip II formulated the mining laws for the Spanish colonies in a series of decrees.³⁴ At first, these were little more than general directives, and they were consequently ignored by *conquistadores* intent on acquiring wealth quickly. Nevertheless, the excitement and disorder of the initial New World mining rushes led to confusion, litigation, and repeated calls for better regulations. Don Antonio de Mendoza, the first viceroy of New Spain, responded with a reasonably complete code of mining laws, which he issued on July 3, 1536.³⁵ However, this code also proved to be inadequate and was soon and regularly revised, until taking final form on January 14, 1550.³⁶ The preamble of this first American mining code described the mining conditions in New Spain that required its promulgation. Many mines had not been registered, fraudulent registration was common, and the fear of litigation to determine true ownership was paralyzing the industry. For the government, the loss of royalty revenues compelled it to act with remedial legislation that could not be circumvented.

As Arthur Aiton, the first modern scholar to identify this code, has pointed out, "One is struck by the similarities to modern United States practice, both customary and statutory."³⁷ Indeed, the provisions dealing with the discovery and

scale production. The Crown granted miners the use of Indians, both free and slave, to work the mines, so profits were enormous. Even after free Indian labor was reduced by pestilence, starvation, and overwork, and was eventually prohibited by law, the profits from the mines remained large and the development of the industry proceeded unimpeded. For example, after Bartolomé de Medina, a miner at Pachuca, devised a system for extracting silver with a mercury amalgam (the *patio* process) in 1557, the process became so important that in 1559 the crown made the mining of mercury a government monopoly. Arthur S. Aiton, "The First American Mining Code," *Michigan Law Review* 23 (1924), 105 [hereafter cited as Aiton, "First American Mining Code"].

³⁴The decrees are collected in Tomo 2, Libro 4, Título 19, *Recopilación de las leyes de los reynos de las Indias* (Madrid, 1681).

³⁵*Traducción paleografica del libro cuarto de actas de cabildo de la ciudad de México* (Mexico, 1874), 24.

³⁶"Ordenanzas hechas por el Sr Visorrey Don Antonio de Mendoza sobre las minas de Nueva Spana" (Edward A. Ayer Collection, Newberry Library).

³⁷The identification of this code as the first American mining code was made by Aiton in "First American Mining Code," *supra* note 33 at 105-13.

It is interesting that Aiton found the California mining codes to be more like the 1550 Mining Code than the 1783 *Ordenanzas del Minera*. It hardly seems likely that the third or fourth generation of California miners since the enactment of the 1783 law would have remembered an out-of-date and unobserved mining code and turned to it rather than the law they were actually observing in the field. Perhaps this is why James Grafton Rogers concluded that "The [American] mining rules . . . can be traced directly through California to the

registration of mines are virtually identical to the provisions of the early California mining codes.

In 1563, Philip II issued a comprehensive mining code to supersede Viceroy Mendoza's ordinances.³⁸ The new statute proved defective, however, and was replaced in 1584 by a series of laws commonly called the New Mining Code.³⁹ This proved to be as long-lived as its predecessor was short-lived, remaining in effect until 1783. Mendoza's ordinances continued to be observed after the 1563 law was promulgated. They were soon forgotten after the New Mining Code went into effect, but lived on in many of its provisions.⁴⁰

In 1783, the Spanish crown again enacted a new mining code for its American colonies. Called the Royal Ordinances for the Direction, Regulation, and Government of the Mines of New Spain,⁴¹ this made few changes in the 1584 code. Like the older New Mining Code, it was remarkably long-lived, being adopted not only in Mexico but in the Spanish colonies of South America, and later by the newly independent republics of Latin America. Mexico, for one, retained the code until 1874.⁴²

Royal Spanish Code of 1783." Rogers, "Mining District Governments," *supra* note 10 at 247, 251.

The California mining codes do, of course, seem to be more akin to Mendoza's simpler 1550 Code. Relatively speaking, both are rudimentary compared with the 1783 *Ordenanzas*. It seems likely, however, that the similarity can be explained by the fact that the 1550 Code is a simpler precursor of the *Ordenanzas* while the California codes are a simpler subsequent corruption. Thus the important link between the 1550 Code and the California codes is the *Ordenanzas* of 1783.

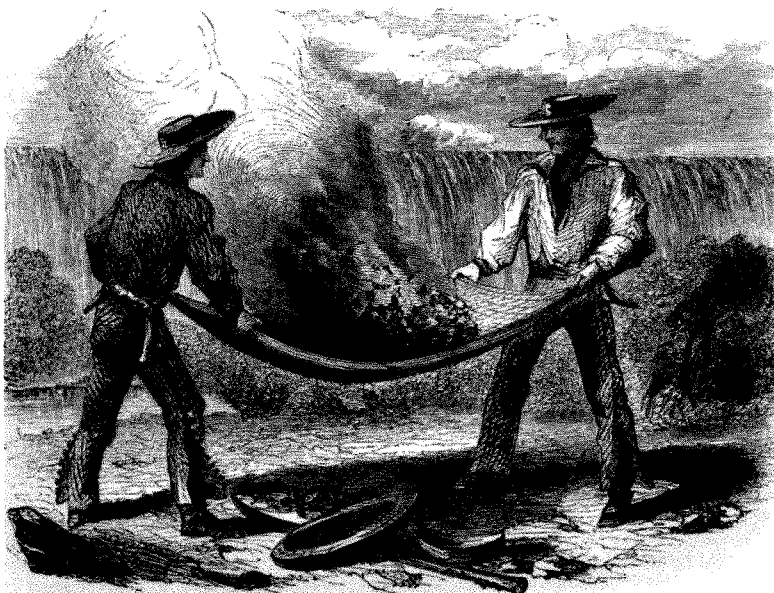
³⁸Decreed March 18, 1563. Originally collected in Book 6, Title 13, Law 5, of the *Recopilación de Castilla*. An English translation is in Halleck, *Collection of Mining Laws*, *supra* note 32 at 17-60.

³⁹Decreed August 22, 1584. Originally collected in Book 6, Title 13, Law 9, of the *Recopilación de Castilla*. An English translation is in Halleck, *Collection of Mining Laws*, *supra* note 32 at 69-122.

⁴⁰The New Mining Code of 1584 is remarkably similar to the California mining codes, especially as it relates to the discovery and registration of mines.

⁴¹Promulgated May 22, 1783. An English translation is in Halleck, *Collection of Mining Laws*, *supra* note 32 at 69-122.

⁴²Thomas E. Palmer, Jr., "A Study of the Mining Law of Chile," *Pennsylvania Law Review* 69 (1920), 48-49, states that the Ordinances of New Spain were adopted in Colombia, Peru, and Chile in 1785. They remained in effect in Chile until 1874, when they were superseded by a new code. The Ordinances of New Spain were adopted by Mexico and remained in effect until 1884. Thomas Black, "Ownership of the Minerals Underlying the Bancos Along the Rio Grande," *Texas Law Review* 37 (1958), 49, 51; David S. Browning, "Historic Basis of the Mexican Mining Law," *Inter-American Law Review* 7 (1965), 1; Victor H. Verity, "A Comparative Study of the Mineral, Oil and Gas Laws of the United States and Mexico," *Rocky Mountain Mineral Law Institute* 6 (1961), 435.



Mexicans winnow for gold near Chinese Camp. (Reproduced from *Harper's New Monthly Magazine* 20 [April 1860])

A significant change—significant because it was later incorporated (although not in its entirety) in California's mining codes—was the addition to the 1783 Code of provisions for the self-government of the mining districts. Title 1 of the code established a colony-wide mining organization to supervise the administration of all mines in New Spain; Title 2 created a district organization, elected by the miners, to govern the mining camps; Title 3 established rules for conducting trials at the mining camps; and Title 4 set up procedures for conducting appellate proceedings.⁴³

Like the previous Spanish colonial codes, the Royal Ordinances of New Spain are astonishingly similar to the California codes. A district board or committee was elected by the miners to administer the mining district. The board, in turn, appointed officials to implement the mining ordinances in their district, including judges who had both civil and criminal jurisdiction over mining activities and miners' disputes. Clearly, the suggestion that the California mining codes were an "original con-

⁴³See Halleck, *Collection of Mining Laws*, *supra* note 32 at 69-122.

tribution of the frontiersmen of America to the art of self-government"⁴⁴ is inaccurate.

Two questions remain to be resolved, however, before one can fully overturn the argument that the frontier mining codes were adopted by miners who, "left to their own devices, as American pioneers so often had been on earlier frontiers . . . worked out their own solutions"⁴⁵ to local conditions. How did the California miners learn about the Royal Ordinances? And why are there no records that establish the link?

THE TRANSFER OF SPANISH MINING LAW TO CALIFORNIA

When in May 1848 a launch arrived in San Francisco from Sutter's Fort with a large amount of gold, the excitement in San Francisco was tremendous. Nearly half the houses in town were soon empty.⁴⁶ News of the discovery reached Monterey, California's seat of government, within days. Thomas Oliver Larkin, the U.S. naval agent, wrote the military governor, R.B. Mason, on May 26 that the soldiers in the Monterey military post were deserting their commands, while the agitation in the town—whose residents were mainly Spanish-speaking *Californios*—was almost uncontrollable.⁴⁷

In the first week of June, Sam Brannan returned to San Francisco with twenty pounds of gold, worth five thousand dollars. His reappearance caused an almost complete exodus. Judges, school teachers, doctors, mechanics, cooks, gamblers, and even the sheriff went in search of riches in the distant diggings. Crews abandoned their ships in the harbor.⁴⁸ The *California Star*, the only newspaper in San Francisco, ceased publication on June 15.

However, not all were caught up in the mining rush. The brig *J.R.S.* did manage to get under way for Chile, albeit with a skeleton crew.⁴⁹ Other ships also helped spread news of the discovery around the world. Hawaii heard the startling tale on June 18, and more than twenty ships were soon outfitted and

⁴⁴Shinn, *Land Laws of Mining Districts*, supra note 11 at 7.

⁴⁵Paul, *Mining Frontiers*, supra note 8 at 23.

⁴⁶Ralph P. Bieber, "California Gold Mania," *Mississippi Valley Historical Review* 35 (1948), 9-10 [hereafter cited as Bieber, "California Gold Mania"].

⁴⁷Monaghan, *Chile, Peru, and the California Gold Rush*, supra note 4 at 7.

⁴⁸Bancroft, *History of California*, supra note 3 at 6:62; Bieber, "California Gold Mania," supra note 46 at 10. For a summary of the reports dealing with the many ship desertions, see Bancroft, *History of California*, supra note 3 at 6:61 n. 19.

⁴⁹Monaghan, *Chile, Peru, and the California Gold Rush*, supra note 4 at 7.

on their way. In California, the Hawaiians sold potatoes at the diggings for a dollar a pound and blankets for as much as a hundred dollars.⁵⁰ On June 28, Larkin dispatched a letter to Secretary of State James Buchanan, announcing that "every Mexican who has seen the place says throughout their Republic there has never been any placer like this one."⁵¹

The *J.R.S.* reached Valparaiso on August 19 with news of the discovery.⁵² Less than a month later, another ship arrived, with twenty-five hundred dollars in gold dust.⁵³ Even though the newspapers ignored the story at first, the information was widely circulated by word of mouth. Finally, when the *Mercurio* broke its silence on November 4 with a story entitled "The Gold Mines of California,"⁵⁴ the excitement that followed echoed San Francisco's. Several ships were fitted out and under way that same month. By the following February, more than two thousand miners had sailed north.⁵⁵ In July 1849, Chile's president stated that more than three thousand passports had been issued to California-bound travelers,⁵⁶ but the actual number of emigrants was undoubtedly much larger. The *Alta California* estimated that nearly five thousand Chileans had arrived during the same period.⁵⁷

Meanwhile, Mexicans were migrating to California, largely from Sonora and Baja California. According to the most reliable source, the first of many caravans left Hermosillo in October 1848; by March 1849, between four thousand and six thousand Mexicans had arrived in the gold fields.⁵⁸ Most returned home within a year. Some had little to show for their efforts, but many had been extremely successful. According to the official register of the prefect at the port of Guaymas, 248 persons disembarked at the port in November and December of 1849, bringing with them 416,000 pesos' worth of gold.⁵⁹ By mid-

⁵⁰Frank Soule, John H. Gihon, and James Nisbet, *The Annals of San Francisco* (New York, 1855), 149.

⁵¹George P. Hammond, ed., *The Larkin Papers* (Berkeley, 1951-1964), 7:303.

⁵²Roberto Hernandez Cornejo, *Los Chilenos en San Francisco de California (recuerdos historicos de la emigración por los descubrimientos del oro, iniciada en 1848)* (Valparaiso, 1930), 1:18.

⁵³*Ibid.* at 1:20.

⁵⁴*Ibid.* at 1:78-79.

⁵⁵*Ibid.* at 1:28.

⁵⁶*Ibid.* at 1:114.

⁵⁷Quoted in *ibid.*

⁵⁸José Francisco Velasco, *Noticias estadísticas del estado de Sonora* (Mexico, 1850), 281.

⁵⁹*Ibid.* at 289.

1849 even more Mexicans had reached California. Jacques Antoine Moerenhout, the French consul at Monterey, wrote his minister of foreign affairs on May 15, "The emigration from all parts of the Americas to this place is still increasing day by day. Over ten thousand people from Sonora and Lower California, men, women and children, have passed within a few leagues of Monterey within the last two months, and more keep coming."⁶⁰ In June 1849, Jacob Stillman wrote, "The news from California is very exciting; the rush from all quarters is astonishing. They say that there are not Americans enough to hold the country, which is in a state of anarchy; that 8,000 Mexicans from Sonora are driving our people before them."⁶¹ In 1850, a memorial was addressed to Congress asking that a customs house be established at San Pedro. Part of the rationale for its need was the allegation that "at least ten thousand Sonorans pass through Los Angeles on their way to the mines each Spring, generally returning to Mexico in the Autumn."⁶²

While this influx of Mexicans, Chileans, and other peoples from the West Coast of the Americas was pouring into California, the news from Sutter's Mill was just arriving in the eastern United States. The first notice appeared in an obscure article in the *New York Herald* on August 19, 1848, the very day that the *J.R.S.* sailed into Valparaiso. Letters carried by a naval courier arrived in Washington on September 16,⁶³ but most who heard of the discovery remained skeptical. Not until President Polk received a letter written by Colonel R.B. Mason, the military governor of California, on August 17, accompanied by "an oyster-can full" of gold dust, was he truly convinced.⁶⁴ In his annual State of the Union message to Congress on December 5, the president announced: "The accounts of the abundance of gold in that territory are of such an extraordinary character as would scarcely command belief were they not corroborated

⁶⁰Jacques Antoine Moerenhout, *The Inside Story of the Gold Rush* (San Francisco, 1935), 57.

⁶¹Jacob D.B. Stillman, *Seeking the Golden Fleece* (San Francisco, 1877), 104.

⁶²James M. Guinn, "The Sonoran Migration," *Historical Society of Southern California Publications* 8 (1909-10), 33.

⁶³Report from Larkin dated June 1, 1848. It was sent to Washington via the isthmus. Bancroft, *History of California*, supra note 3 at 6:62; Ferol Egan, *The El Dorado Trail* (New York, 1970), 23.

⁶⁴Mason wrote, "There is more gold in the country drained by the Sacramento and San Joaquin Rivers than will pay the cost of the present war with Mexico a hundred times over." Rodman W. Paul, *The California Gold Discovery Sources* (Georgetown, Calif., 1966), 96. See Bancroft, *History of California*, supra note 3 at 6:115 n. 10, for this and several other descriptions of the amount of gold Mason sent.

by authentic reports."⁶⁵ The rush from the East Coast was on. Little more than two weeks after Polk's address, John F. Crampton, a British diplomat, wrote home to England that "Upwards of five & twenty ships are already, I understand, in active preparation at New York alone, to sail for California with passengers."⁶⁶

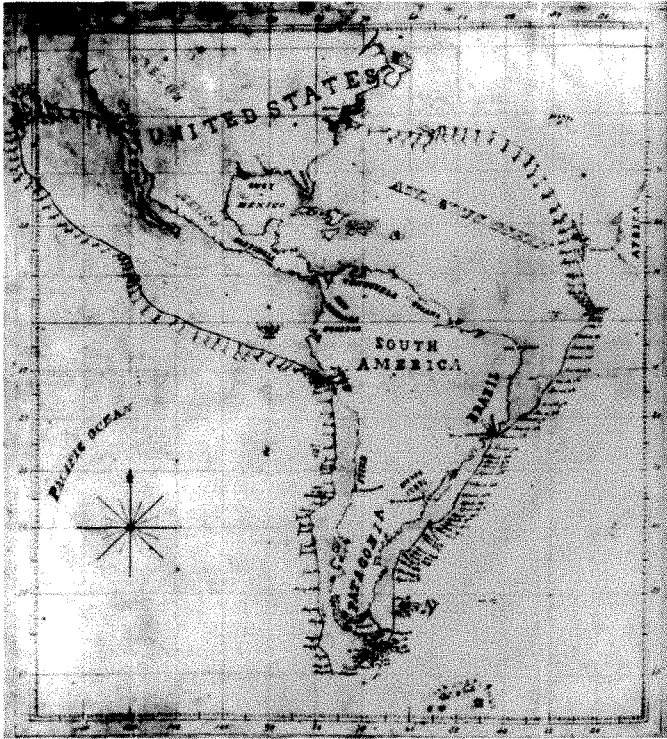
Even though emigration began in December of 1848, it would be three to six months before Americans sailing around the Horn or connecting with ships across the Isthmus of Panama would arrive in California. The first of them sailed into San Francisco on February 28, 1849, and a total of twenty-three thousand arrived by sea during the rest of the year. Those hoping to go by land had to wait in camps along the Missouri River for the spring thaw before they could begin. From St. Joseph and Independence, Missouri, the main northern route went through South Pass and then along the Humboldt River in Nevada; the principal southern route, which began at Fort Smith and Van Buren, Arkansas, went through Santa Fe and across the Gila Desert. In either case, the journey lasted approximately a hundred days, so that the earliest arrivals did not begin to appear until August 1849. Still, more than thirty-three thousand Americans went overland in 1849 before the winter snows made travel impossible.⁶⁷ Mexican and Chilean miners, on the other hand, had already spread throughout the mineral areas of California before the first Americans debarked in San Francisco or crossed the plains. In June 1848, most of the two thousand miners in California were foreigners, and most of the foreigners were Latin Americans. In July, the total number of miners increased to four thousand; by October, at the end of the first season of mining, there were about eight thousand miners along the foothills of the Sierra Nevada, at least half of whom were Latin Americans.⁶⁸

⁶⁵Quoted in Monaghan, *Chile, Peru, and the California Gold Rush*, supra note 4 at 15.

⁶⁶Crampton added that "The accounts which, by previous channels, have reached the eastern parts of the United States, of the discovery in California of a region which is represented to be more rich in gold, lying upon the surface of the soil in such a manner as to require but little labour or skill for its collections than has yet been met with on any part of the American continent, has produced an excitement which seems likely to result in one of those popular manias which the prospect of sudden gain is so apt to give rise to among a people so enterprising and so passionately addicted to all money making pursuits as the Americans." London, Public Record Office, Foreign Office 5, vol. 487, 2:139.

⁶⁷W.P. Morrel, *The Gold Rushes* (New York, 1941), 84-86 [hereafter cited as Morrel, *Gold Rushes*]; Bancroft, *History of California*, supra note 3 at 6:121-25.

⁶⁸Bancroft, *History of California*, supra note 3 at 6:70-71.



A sea-borne route to California, 1848-49 (Courtesy Federal Reserve Bank of California)

Among the first to arrive in the mining region was Antonio Franco Coronel, a native of Los Angeles. Hearing rumors of strikes, he proceeded with a party of thirty to the Sonora mining camp on the Stanislaus River. One of his men, Benito Perez, an experienced miner, found very large gold nuggets in a place soon to be called Cañada del Barro. In the manner prescribed by the Mining Ordinances of New Spain, Coronel, being the owner of the newly discovered mine, led his companions to the site and allotted claims adjacent to his own so that all could begin mining at dawn.⁶⁹

Throughout the region, Mexicans, Chileans, Peruvians, and other Latin Americans familiar with mining gave guidance, by instruction and example, on every aspect of working gold and silver ore. The simplest of all mining tools, the miner's pan,

⁶⁹Antonio Franco Coronel, "Cosas de California," Bancroft Library, 146-51; Bancroft, *History of California*, supra note 3 at 6:78-81.

used to wash gold out of sand and stones, was long known to the Mexicans as a *batea*. Other common tools were the grinder (*maza*), the stamp mill (*ingenio*), and the sluice (*planilla*). The complex system of removing gold from quartz by using a rolling mill (*arrastra*) and quicksilver amalgam was an ancient process (the *patio* process) invented in Mexico. The use of great pack trains of thirty to fifty mules that carried supplies at modest cost into the mountains was, as well, a Latin-American invention.⁷⁰ Indeed, virtually every aspect of the gold- and silver-mining industry in California was introduced by those who came first, with the knowledge and skills to work the mines. This included the laws by which the miners governed their claims and their own conduct, despite official opinions to the contrary.

Governor Mason announced in February 1848 that the Mexican system of denouncing mining claims was inapplicable to the territory.⁷¹ Because there was no American institution equivalent to the Mexican Mining Board, formal denunciation

⁷⁰Otis E. Young, Jr., *Western Mining: An Informal Account of Precious Metal Prospecting, Placering, Lode Mining and Milling on the American Frontier from Spanish Times to 1893* (Norman, 1970), 58, 69-76, 79-101, 116-17, 120-21; Morrel, *Gold Rushes*, supra note 67 at 80-81, 102-3, 105.

The idea that people moving to a frontier bring their legal knowledge with them is not new. John Phillip Reid, in *Law for the Elephant* (San Marino, Calif., 1980), considers this "lawmindedness" in an examination of American migrants on the overland trail. His concept of lawmindedness can, of course, be applied to the Latin-American miners who went to California during the gold rush, but it does not apply to the American migrants at the time, who arrived with no knowledge of mining law and were forced by necessity to turn to the Latin Americans for guidance. See Morefield, "Mexicans in the California Mines," supra note 16 at 37, 39.

Migrants' adherence to the legal system they grew up with is examined in David J. Langum's *Law and Community on the Mexican California Frontier* (Norman, 1987). Langum finds that Americans living in Mexican California before the territory's annexation by the United States in 1845 were unable to adapt themselves to many features of Mexican law because they clung to American common law. In dealings among themselves they resorted to familiar legal rules, especially when they found local rules inadequate. Like Reid's lawmindedness, Langum's idea of legal loyalties can be applied to the Latin-American miners in California. In the absence of mining laws in the new territory, they remained loyal to the system they knew at home. The opposite was true of their American counterparts, as they had no mining laws to bring with them. That the Americans assimilated not only Latin-American mining law but its technology and terminology is made clear by William Kelly, an Englishman, who, in *An Excursion to California Over the Prairie, Rocky Mountains, and Great Sierra Nevada. With a Stroll Through the Diggings and Ranches of That Country* (London, 1851), 2:23 [hereafter cited as Kelly, *Excursion to California*], tells us that the Americans looked eagerly to the Chileans and the Mexicans for "instruction and information" because they had no knowledge or experience of their own.

⁷¹Proclamation of February 12, 1848, Monterey, Microfilm 82, roll no. 1, National Archives.

was not possible. Until Congress took action to establish a mechanism for recognizing mining rights, Mason could not guarantee formal title. Nevertheless, he let the miners continue to follow the procedures they had always followed—the election of a district mining board and mining judge, the appointment of a recorder, the staking out of claims, and the recording of those claims on a first-come basis. When General Bennett Riley, who became governor on April 13, 1849, heard “numerous rumors of irregularities and crimes” in the mining camps, he paid the camps a visit. He was “agreeably surprised to learn that everything was quite the reverse.” “In each little settlement, or tented town,” he wrote, “the miners have elected their local *alcaldes*, and constables, whose judicial decisions and official acts are sustained by the people, and enforced with utmost alacrity and energy.”⁷²

The Mexican mining laws worked so well that when land-hungry Americans asked Riley to recognize the preemption system and allow only American citizens to claim 160-acre parcels, he refused. He said that he “could not countenance any class of men in their attempt to monopolize the working of the mines,” and that the whole matter was better “left to the decision of the local judicial authorities.”⁷³

In 1849 Congress created the Department of Interior, largely to supervise the nation’s public lands and its nascent mining industry. Secretary Thomas Ewing devoted much of his first report to Congress (made on December 3, 1849) to conditions in the California mines. To encourage their development, he recommended that a mint be established in the territory and that a new type of real-property estate be created. Obviously based on the Spanish and Mexican mining claim, this mining estate was to be “be held only on condition that the gold collected from the mine shall be delivered into the custody of an officer of the mint.”⁷⁴ Ewing’s report also suggested that the

⁷²Riley to R. Jones, August 30, 1849, Monterey, 31st Cong., 1st sess., H. Doc. 17, 785-92.

At the Rich Gulch diggings in Calaveras County in February 1850, the local miners who had established their own rules and elected their own officers resented the presence of a “Creole” *alcalde* who had come to the diggings with an appointment from an *alcalde* in one of the nearby towns. The Creole *alcalde* apparently tried to make the miners observe the procedural requirements of the Mexican mining laws. The miners were not obliging, and tempers cooled only after the *alcalde* consented to observe the local mining rules. Edwin G. Waite, “Pioneer Mining,” in John S. Hittel, James W. Marshall, and Edwin G. Waite, *The Discovery of Gold in California* (1891; reprint, Palo Alto, 1968).

⁷³*Ibid.* at 789.

⁷⁴Thomas Ewing, “Report of the Secretary of the Interior,” December 3, 1849, 31st Cong., 1st sess., H. Doc. 5, 12.

government, despite the fact that the "Spanish mode of disposing public lands . . . [had] ceased to be legal after the transfer of sovereignty," ought to establish rules that would allow mining claims "to be laid off according to the Spanish method."⁷⁵ The suggestion was not acted upon by the president or Congress until 1866, but in all its substantive provisions it was followed by the miners in California.

DISCREDITING THE LATIN-AMERICAN CONTRIBUTION

The knowledge and skills the Latin Americans brought to California's mines not only caused their expulsion, but also explain why they have not been recognized for their contributions to American mining law (and American law in general). During the first season of mining in California, from spring to the beginning of winter in 1848, Latin-American miners were welcome in the camps. At first, there were more Spanish-speaking miners in the field than English speakers. In addition, "The only large number of persons in California in 1848 who knew anything about mining were the Sonorans of Northern Mexico, and the value of their example and instruction made them welcome additions in and around the mines."⁷⁶

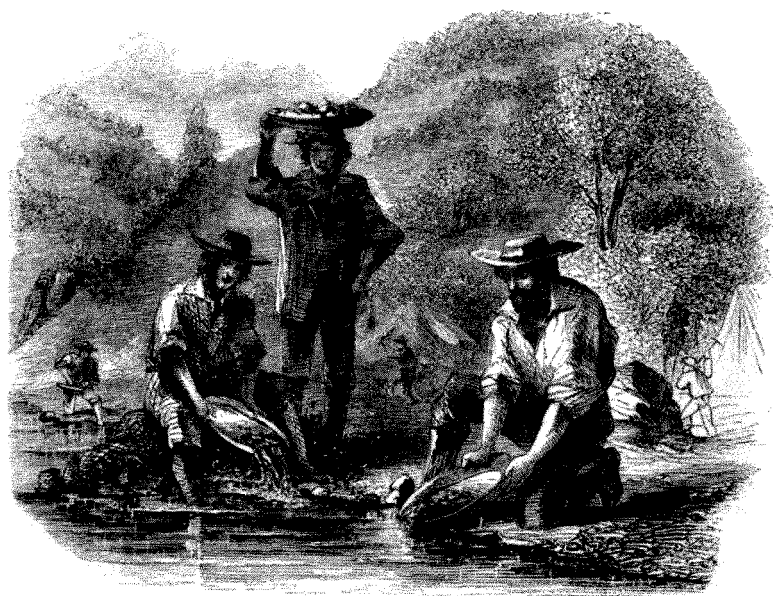
By 1849, however, feelings toward the Latin Americans had changed drastically. An Englishman, William Kelly, observed that the mines were filling with new arrivals: "Nine tenths of the new arrivals were Americans, who resorted . . . in the first instance to the Chileans and the Mexicans for instruction and information, which they gave them with careful alacrity; but as soon as Jonathan got an inkling of the system, with peculiar bad taste and ingenuous feeling, he organized a crusade against these obliging strangers. In fact, the Yankee regarded every man but a native American as an interloper, who had no right to come to California and pick up the gold of 'free and enlightened citizens.'"⁷⁷

General Persifor F. Smith, who succeeded Mason as military commander of California on February 28, 1849, was the leader of those who disliked the Latin Americans. On his way to California, he was forced to remain in Panama for several weeks, being unable to obtain passage for San Francisco, and his antagonism was aroused when he discovered that the ship he was

⁷⁵Ibid. at 11.

⁷⁶Morefield, "Mexicans in the California Mines," supra note 16 at 37, 39, citing Hittell, *Mining in the Pacific States*, supra note 7 at 15; William Kelly, *A Stroll Through the Diggings of California* (London, 1852), 28.

⁷⁷William Kelly, *Excursion to California*, supra note 70 at 2:23.



A Mexican miner watches as Americans pan for gold in the Mokelumne. (Reproduced from *Harper's New Monthly Magazine* 20 [April 1860])

supposed to have taken was filled with Chileans and Peruvians on their way north.⁷⁸ In a letter on January 18, 1849, to Secretary of War William Marcy, he declared, "I learn from many sources that there is a large emigration of people of all nations to California, and that many are going off with large quantities of gold. On my arrival there I shall consider everyone, not a citizen of the United States, who enters on public land and digs for gold, as a trespasser, and shall enforce that view of the matter if possible, depending upon the . . . favor of American citizens to engage . . . in carrying out what I propose."⁷⁹

⁷⁸In a letter of January 7, 1849, to Secretary of War William Marcy, Smith wrote, "I am partly inclined to think it would be right for me to prohibit foreigners from taking the gold, unless they intend to become citizens. I cannot decide until I arrive there and learn the disposition of the people." Smith to Marcy, January 7, 1849, 31st Cong., 1st sess., H. Doc. 17, 704.

⁷⁹Smith to Marcy, January 18, 1849, *ibid.* at 707. One of Smith's American compatriots in Panama addressed a letter to the *Panama Star* that asked citizens in California to support Smith. It said: "If foreigners come, let them till the soil and make roads, or do any other work that may suit them, and they may become prosperous, but the gold mines were preserved by nature for



Americans crossing the Isthmus of Panama on their way to California in 1849. (Reproduced from *Harper's New Monthly Magazine* 11 [June 1855])

The Americans in the northern mining districts overwhelmingly supported Smith.⁸⁰ When General Bennett Riley succeeded Smith after the latter's six-week stint as governor, he observed that "in some of the northern *placers* a party of Americans and Europeans, urged on by political aspirants, who seem willing to endanger the peace and tranquility of the country, in order to promote their own personal interests, have assumed the authority to order all Mexicans and South Americans from that part of the Territory."⁸¹ Miners on Deer Creek

Americans only, who possess noble hearts, and are willing to share with their fellow-men more than any other race of men on earth, but they still do not wish to give all. . . . We will share our interest in the gold mines with none but American citizens." Quoted in Josiah Royce, *California, from the Conquest in 1846 to the Second Vigilance Committee in San Francisco* (New York, 1948), 238-39.

⁸⁰Kelly, *Excursion to California*, supra note 70 at 33.

⁸¹Riley to Jones, August 30, 1849, 31st Cong., 1st sess., H. Doc. 17, 788.

elected an *alcalde* to drive the Latin Americans from their district.⁸² Along the tributaries of the San Joaquin, the Americans and Europeans refused to work with the Mexicans and South Americans.⁸³ Riley noted that "some of the English, Irish and German emigrants in the northern *placers* assisted in this movement against the Mexicans, Peruvians and Chilians, and probably exerted themselves much more than any of our own citizens to create a prejudice and excitement against the Spanish race."⁸⁴

Discrimination became formalized in 1850. On January 30 of that year, the Jacksonville District miners adopted a code with a provision that "no person coming direct from a foreign country shall be permitted to locate or work any lot within the jurisdiction of this encampment."⁸⁵ On March 3, miners along the Yuba adopted district rules prohibiting all but native-born and naturalized American citizens from holding claims.⁸⁶ On April 13, the California state legislature adopted a statute entitled "An Act for the Better Regulation of the Mines, and the Government of Foreign Miners," which provided that "no person who is not a native or a natural born citizen of the United States or who may not have become a citizen under the treaty of Guadalupe Hidalgo (all native Californians, Indians excepted) shall be permitted to mine in any part of this state, without having first obtained a license."⁸⁷ The license fee was set at twenty dollars, renewable monthly.

This law was not vigorously or uniformly enforced, except against the Latin Americans and the newly arriving Chinese.⁸⁸ In May 1850, the foreign miners in the Sonora camp, number-

⁸²Bancroft, *History of California*, supra note 3 at 6:404.

⁸³*Ibid.*

⁸⁴Riley to Jones, August 30, 1849, 31st Cong., 1st sess., H. Doc. 17, 788.

⁸⁵Owen Cochrane Coy, *Gold Days* (Los Angeles, 1929), 191-93. For studies on xenophobia and racism in California, especially with respect to Mexican Americans, see Robert F. Heizer and Alan F. Almquist, *The Other Californians: Prejudice and Discrimination under Spain, Mexico and the United States to 1920* (Berkeley, 1971), 138-53 [hereafter cited as Heizer and Almquist, *The Other Californians*]; Leonard Pitt, *The Decline of the Californios: A Social History of the Spanish-Speaking Californians, 1846-1890* (Berkeley, 1966) [hereafter cited as Pitt, *Decline of the Californios*]; and Reginald Horsman, *Race and Manifest Destiny: The Origins of Racial Anglo-Saxonism* (Cambridge, Mass., 1981) [hereafter cited as Horsman, *Race and Manifest Destiny*].

⁸⁶William Downie, *Hunting for Gold* (San Francisco, 1897), 80.

⁸⁷*California Statutes* (1850), 221.

⁸⁸Heizer and Almquist, *The Other Californians*, supra note 85 at 154-77, discusses the early legal status of the Chinese in California. Gunther Barth, *Bitter Strength: A History of the Chinese in the United States, 1850-1870* (Cambridge, Mass., 1964), 113-17, discusses prejudices toward the Chinese in the California mines.



Judge Brown trying a "thievish Mexican." (Reproduced from *Harper's New Monthly Magazine* 11 [June 1855])

ing three or four thousand, asked the state tax collector if he would enforce the law. Supported by the sheriff, he replied that he would. The foreign miners retreated to their mines determined to resist his efforts, while messengers were sent by the local judge to every nearby American camp to find help for the collector. The next day 180 armed Americans marched through the district, collecting the tax and expelling those who refused to pay.⁸⁹

Soon large numbers of the Latin Americans began to leave the mines.⁹⁰ San Francisco's *Evening Picayune* for August 14, 1850, reported "with tolerable certainty that from fifteen to twenty thousand Mexicans, and perhaps an equal number of Chilenos, are now leaving or preparing to leave California, for their own country." General Riley thought that much of the

⁸⁹A.L. Besancon, Report to the California Senate, *California Senate Journal* (1850), 660-61.

⁹⁰Bancroft, *History of California*, supra note 3 at 6:404.

incentive for imposing the tax came from merchants who saw their profits plunge when Mexican teamsters began carrying goods into the mines at reduced fares. "This has reduced the prices of provisions in the *placers* one and two hundred per cent," he wrote. Thus "Some of the merchants who had large stocks of goods in the mines, and those who were engaged in transportation at the prices formerly paid, have suffered by the change, and it is natural that they should feel incensed against the class of foreigners who have contributed most to effect it."⁹¹

The same merchants who clamored for the law's enactment were the first to clamor for its repeal. With the departure of the Mexicans and South Americans, the merchants' profits tumbled. One observer wrote that "much has been said of the amounts of gold taken from the mines by Sonorans, Chileans and Peruvians, and taken out of the country," but that this was not true: "Not one pound in ten, gathered by these foreigners, is shipped off to their credit: it is spent in the country for provisions, clothing and in the hazards of the gaming table."⁹² The *Alta California*, in an editorial on March 7, 1851, agreed, stating that Latin Americans "expended nearly all of their gold as they lived." The Americans, on the other hand, "came here only to make a pile and carry it out of the country." On March 14, 1851, the tax was repealed. Because of political troubles in their homeland, large numbers of Peruvians arrived in California in 1851 and 1852.⁹³ Mexicans also streamed back into the mines by the thousands.⁹⁴ They found that although the mining tax had been repealed, the prejudice of the American miners had not dissipated.

In Mariposa County, the American miners of the Mariposita District held a meeting in June 1852, and voted to expel all foreigners. Notices were posted on trees telling all those who were not American citizens to leave within twenty-four hours, or be hanged. The local sheriff advised the Mexicans to leave when he was unable to quell the riotous mood of the one hundred or more armed Americans who had gathered to lynch them. During the night, the Latin Americans gathered their tools and movable property and departed. What was left of their possessions was put up for auction by the crowd that had driven them off and sold for some thirteen hundred dollars.

⁹¹Riley to Jones, August 30, 1849, 31st Cong., 1st sess., H. Doc. 17, 789.

⁹²Walter Colton, *Three Years in California* (New York, 1850), 365.

⁹³*Alta California*, April 5, 1852.

⁹⁴*Alta California*, April 21, 1851. See also Richard Morefield, "The Mexican Adaptation in American California, 1846-1875" (1955; reprint, Saratoga, Calif., 1971), 10-11.

Three hundred dollars was applied to debts due to a local trader, and the balance divided among the assemblage. Later, the sheriff told the U.S. district attorney from Los Angeles that "the majority of those engaged in the affair were foreign Irish and Englishmen—and that it was in a spirit of wanton maliciousness that the outrage was performed." The district attorney reported that he "was induced to believe" the sheriff's story.⁹⁵ As one historian later noted, "Nothing could be fairer than the course pursued by the Americans if we eliminate the Mexicans from the situation. . . . As an example of probity and business rectitude to the fleeing Mexicans, who by this time were 'beyond the mining regions,' they paid the current bills of the latter, divided the substantial sum remaining among those present and then blamed it on the Irish."⁹⁶

Coronel, who had led the Mexican miners to the Stanislaus River in 1848 and again in 1849, explained the prejudice of the Americans simply: the Latin-American miners, especially those from Sonora and Chile, were more experienced and more capable of selecting the best claims, and their skills were regarded with envy by the Americans.⁹⁷ On their side, the Americans were concerned about establishing their own rights in California. They felt that noncitizens were robbing them of their share of the wealth. Bayard Taylor, after accusing the Latin Americans of being armed bandits, warned that "If not excluded by law, they will return and recommence the work of plunder."⁹⁸ Another American, Albert Lyman, wrote, "Unless still greater discoveries should be made . . . the *placeres* will be so much exhausted that they can not be worked without cheap labor and expensive machinery."⁹⁹

This fear of the Latin Americans was accompanied by an

⁹⁵Isaac Stockton Keith Ogier, to William L. Marcy, November 15, 1853, quoted in George Cosgrove, "A Diplomatic Incident on the Little Mariposa," *California Historical Society Quarterly* 21 (1942), 361.

⁹⁶*Ibid.* at 359.

⁹⁷Coronel, "Cosas de California," *supra* note 69 at 140-86; Pitt, *Decline of the Californios*, *supra* note 85 at 48, 50-51.

⁹⁸Bayard Taylor, *El Dorado, or, Adventures in the Path of Empire* (New York, 1850), 67.

⁹⁹Albert Lyman, *Journal of a Voyage to California and Life in the Gold Diggings* (New York, 1852), 146. A state senator suggested an international conspiracy: "It is a matter of great national policy that the vast amount of California gold or at least a portion of it, should first find its way out through our own country. . . . The United States Constitution forbids an export tax; and in the absence of laws in this and other respects, we all know that up to this time [1850] three quarters of all the gold sent from this State has passed directly to other nations. The foreign proprietors of gold diggers, and the agents of foreign bankers control at present this matter in their own quiet way." *California Senate Journal* (1850), 493-97.

American "superiority complex."¹⁰⁰ Hubert Howe Bancroft interpreted the dislike for the Latin Americans and the lack of respect Americans had for their mining laws in the following way: "[The] Spanish laws, which governed the experienced Mexicans, had little influence owing to the subordinate position held by this race, and to the self-adaptive disposition of the Americans."¹⁰¹ For Charles Howard Shinn, the fact that the Americans were "from Aryan stock" explained why the "true pioneers" did not need to look to others for help in working out their system of government or their laws.¹⁰² This theme also prevailed in Senator Stewart's proclamation that American miners were forced, from the necessity of the case, to make laws for themselves.¹⁰³ Meanwhile, in the camps, those who knew the true origins of the mining laws did not reveal their knowledge, and those who followed them adopted the district mining codes in "entire ignorance" of their true origins.¹⁰⁴

Clearly, the mining practices of California and the American West are derived from those described in the Royal Ordinances of 1783 and in its predecessors. The first experienced miners in California, the Mexicans and Chileans, taught the Americans who followed them how to mine, and gave them their mining law. The Americans' xenophobia and envy in turn led them to expel their tutors from the mines and to conceal the true origins of their mining law. Thus western mining codes, far from displaying American ingenuity and inventiveness in the face of adversity, are, rather, xenophobic examples of plagiarism and prejudice.¹⁰⁵

¹⁰⁰For an "attempt to describe the position that Mexican and Spanish-speaking miners occupied in California in the period 1848-1853," see Morefield, "Mexicans in the California Mines," *supra* note 16 at 37-44. Morefield concludes that Spanish speakers were the subjects of widespread racial discrimination.

¹⁰¹Bancroft, *History of California*, *supra* note 3 at 6:396-97.

¹⁰²Shinn, *Land Laws of Mining Districts*, *supra* note 11 at 7.

¹⁰³*United States Reports* 70 (Washington, 1865), Appendix 1, 777.

¹⁰⁴John A. Rockwell, *A Compilation of Spanish and Mexican Laws in Relation to Mines* (New York, 1851), 25.

¹⁰⁵For studies on the staying power of xenophobia, see David J. Weber, "'Scarce More than Apes': Historical Roots of Anglo-American Stereotypes of Mexicans," in *New Spain's Far Northern Frontier: Essays on Spain in the American West, 1540-1821*, ed. David J. Weber (Albuquerque, 1979), 293-307; and Horsman, *Race and Manifest Destiny*, *supra* note 85. An intellectual history of racism in the United States, which describes attitudes of Americans toward Mexicans in California during the gold-rush period, is Ronald T. Takaki, *Iron Cages: Race and Culture in Nineteenth-Century America* (New York, 1979), esp. 154-64.



Leland Stanford, one of the builders of the Central Pacific and the Southern Pacific railroads (Stanford University Archives)

CLASSICAL LAWYERS AND THE SOUTHERN PACIFIC RAILROAD

DANIEL W. LEVY

Then, faint and prolonged, across the levels of the ranch, he heard the engine whistling for Bonneville. Again and again, at rapid intervals in its flying course, it whistled for road crossings, for sharp curves, for trestles; ominous notes, hoarse, bellowing, ringing with the accents of menace and defiance; and abruptly Presley saw again, in his imagination, the galloping monster, the terror of steel and steam, with its single eye, cyclopean, red, shooting from horizon to horizon; but saw it now as the symbol of a vast power, huge, terrible, flinging the echo of its thunder over all the reaches of the valley, leaving blood and destruction in its path; the leviathan, with tentacles of steel clutching into the soil, the soulless Force, the iron-hearted Power, the monster, the Colossus, the Octopus.

—Frank Norris, *The Octopus*¹

Frank Norris's 1901 novel *The Octopus* is an account of the massacre that occurred at Mussel Slough in 1880, the moment

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¹Frank Norris, *The Octopus: A Story of California* (1901; reprint, New York, 1986) [hereafter cited as Norris, *Octopus*]. For a discussion of the passage in another context, see David J. Bederman, "The Imagery of Injustice at Mussel Slough: Railroad Land Grants, Corporation Law, and the 'Great Conglomerate West,'" *Western Legal History* 1 (1988), 237 [hereafter cited as Bederman, "Mussel Slough"].

when popular antipathy toward railroads had intensified and reached its height.² Norris recounts the story of relations between a group of squatters misled into believing that they would be sold land for a low advertised price and the railroad that was to sell the land. The settlers, in fact, worked to make the land productive, and to locate sources of water. Eventually, the railroad ejected the squatters, who had attempted to force the railroad's hand by filing a suit in federal district court to void the railroad's title to the land. The final, violent showdown, in which a militant core of squatters resisted the U.S. marshal's attempt to dispossess them of their land, resulted in the death of five settlers and two federal marshals.

Despite being an inaccurate historian of the incident, Norris understood what the railroad meant to Californians. His images so aptly characterize the railroad on three levels of abstraction that I have adopted them to describe the roles of the railroad's own lawyers. On the first and most pragmatic level, the train's whistle announces an aroused body of wealth, warns of the fury to be unleashed upon those who obstruct it. Like the train, the lawyer is the unseen voice of the corporation, making the appropriate noises at the correct times, translating the desires of his masters into material results, administering to the details of the life of the company.

This essay considers the ways in which four men, all of whom were counsel to the Central Pacific and/or the Southern Pacific Railroad, contributed to its principal ends from the early 1860s to the 1880s. Their achievements, which guaranteed the railroad's economic preeminence and survival, included minimizing potentially damaging regulations, acquiring low-cost land, obtaining preferential government treatment, ensuring the stability of the labor force, arranging limited shareholder liability for corporate debt, maintaining the Central Pacific's monopoly over transportation into and out of California, and creating a hierarchically organized, national firm with huge economies of scale. However, even more important to the Central Pacific (reorganized in 1884 as the Southern Pacific Railroad)³ was the resolution of the fiscal, legal, and public-

²For a general retelling of the story of Mussel Slough and an assessment and review of its numerous literary representations, see *ibid.* For an interesting study of the episode in the history of American vigilantism, see Richard Maxwell Brown, *No Duty to Retreat: Violence and Values in American History and Society* (New York, 1991), 87-127. Norris's depiction of the incident, however, is not the accurate account it pretends to be. See William Devereil, *Railroad Crossing: Californians and the Railroad, 1850-1910* (Berkeley, 1994), 144-48.

³Stuart Daggett, *Chapters on the History of the Southern Pacific* (New York, 1922), 151-52 [hereafter cited as Daggett, *History of the Southern Pacific*].

relations crises that its enormous debt to the federal government was to create.

In discussing these critical goals, this essay describes the legal strategies that emerged over the railroad's early life, and assesses the role of the four lawyers both in the corporation and in the early development of law in California.⁴ It appears that Hall McAllister, Silas W. Sanderson, Creed Haymond, and Alfred A. Cohen were an integral part of many of the social conflicts from 1850 to 1888, which were either engendered or exacerbated by the railroads. If the history of American law is in part a contest over how to set rights and to negotiate entitlements, these men participated in that contest on more fronts than elite corporate lawyers would today. In varying capacities, Cohen, Haymond, McAllister, and Sanderson were involved in the tensions between capital and labor; between new immigrants from China and white workers who had emigrated from the East; between rival corporations often out to destroy or control one another; between corporations and a state struggling with their regulation; and among ordinary people living in a boom-bust economy without well-established legal or social institutions to regulate competing claims to natural resources.

Applied to a lawyer, Norris's second characterization of the railroad as a "galloping monster" with a "cyclopean" eye surveying the land from horizon to horizon describes an employee or agent who does the railroad's bidding in every available forum, not simply as a conventional litigator in a courtroom, but also as a legislator, a judge, or a corporate adviser, or before the popular press. If we consider the different paths that Sanderson, Cohen, Haymond, and McAllister traced for themselves, we will see that their roles included the general counsel, either outside the corporation but retained by it, or employed directly as in-house counsel, who was interested in substantive legal outcomes and concerned with translating the corporation's desires into reality; the representative or spokesman who acted as the voice of the corporation before official bodies besides courts and before society more generally, the lawyer who "put things in a telling way before the people";⁵ the well-placed agent or financial mover who put the corporation in contact with sources of capital or helped arrange deals, most

⁴The outstanding general study of the construction of legal doctrine in California's private law (tort, contract, real estate, etc.) is Gordon Morris Bakken, *The Development of Law in Frontier California: Civil Law and Society 1850-1890* (Westport, Conn., 1985).

⁵Robert W. Gordon, "Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920," in *Professions and Professional Ideologies in America*, ed. Gerald L. Geison (Chapel Hill, 1983), 81 [hereafter cited as Gordon, "Legal Thought"].

importantly securing capital from eastern or European financiers; and the lobbyist-lawyer, permanently involved with guaranteeing favorable legal treatment by the federal government in Washington.⁶

Between the 1860s and late 1880s, a number of critical changes occurred in the legal profession. Not only were the California and national bars rapidly being wedded to industrial growth in the same way as the economy,⁷ but national law schools that disseminated a kind of pre-*Erie*, transcendent commercial law were becoming more prominent. Law firms and bar associations began to be formed in larger numbers so as to serve business clients across the nation, thereby solidifying the stature of elite corporate lawyers.⁸ At the same time, lawyers in California began to specialize in greater numbers.⁹ The emerging models for these lawyers were the legal technocrat, the legal craftsman, the entrepreneurial lawyer, and the reformist lawyer. In short, lawyers were paving the way for their prominence in the republic today, refining a training that is now considered a general preparation for many other fields besides the law itself.

The final description in the Norris passage, of a "soulless Force," without subjectivity, shows a power that is neither good nor bad; it is evil only if one is unlucky enough not to be on the train, compelled to confront what is left behind. Norris hints at this depersonalized view of the development of the railroad's power at the beginning of the novel, and returns to it at the end after the tragic murders at Mussel Slough (Norris's Rancho Los Muertos):

⁶While not part of this essay, since the late 1860s the railroad had retained permanent counsel in Washington. The activities of its lawyer-lobbyists there, Richard Franchot, formerly a member of the New York congressional delegation, and Charles H. Sherrill, would later raise numerous public questions. In particular, large unaccounted-for expenditures would become a source of controversy before the Pacific Railway Commission. U.S. Pacific Railway Commission, *Testimony Taken by the United States Pacific Railway Commission*, pt. 1-10 (Washington, 1887), 24-25, 39 [hereafter cited as U.S. Pacific Railway Commission, *Testimony*].

⁷See Gerard W. Gawalt, "The Impact of Industrialization on the Legal Profession in Massachusetts, 1870-1900," and Gordon Morris Bakken, "Industrialization and the Nineteenth-Century California Bar" [hereafter cited as Bakken, "Industrialization"], in *The New High Priests: Lawyers in Post-Civil War America*, ed. Gerard W. Gawalt (Westport, Conn., 1986) [hereafter cited as Gawalt, *New High Priests*].

⁸See John A. Matzko, "'The Best Men of the Bar': The Founding of the American Bar Association," and Wayne K. Hobson, "Symbol of the New Profession: Emergence of the Large Law Firm, 1870-1915," in Gawalt, *New High Priests*, supra note 7; Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln, 1991), 33-50 [hereafter cited as Bakken, *Practicing Law*].

⁹Bakken, "Industrialization," supra note 7 at 127, 143.

"Believe this, young man," exclaimed Shelgrim, . . .
"Try to believe this—to begin with—that *Railroads builds themselves*. Where there is a demand sooner or later there will be a supply. Mr. Derrick, does he grow his wheat? The Wheat grows itself. What does he count for? Does he supply the force? What do I count for? Do I build the Railroad? You are dealing with forces, young man, when you speak of Wheat and the Railroads, not with men. There is the Wheat, the supply. It must be carried to feed the People. There is the demand. The Wheat is one force, the Railroad, another, and there is the law that governs them—supply and demand. Men have only little to do in the whole business. Complications may arise, conditions that bear hard on the individual—crush him maybe—but the *Wheat will be carried to feed the people* as inevitably as it will grow. If you want to fasten the blame of the affair at Los Muertos on any one person, you will make a mistake. Blame conditions, not men."¹⁰

The passage considers no one to have had subjectivity and agency in building a corporation's power. Rather than simply saying that the four railroad lawyers concerned were driven by events around them, this essay will look at their activities. How did these lawyers contribute to the development of the language of classical legal liberalism?¹¹ Were they creatures of the era's ideological currents, inevitable products of their time? How much did they contribute to, or resist, those currents? And should we, then, "blame conditions," or men? If, as one scholar suggests, "the main task of the legal elite [was] to show that the activities and goals of their clients . . . fit into a traditional, but continually self-renewing and self-transforming framework of justice,"¹² how successful were the four lawyers

¹⁰Norris, *Octopus*, supra note 1 at 575-76 (emphasis in original).

¹¹Among the central elements of legal liberalism are: the desire for systematization of rigid legal categories; the solidification of dichotomies (e.g., public-private; mine-yours); the end of legal distinctions based on the status, function, or identity of legal actors (e.g., the specific legal duties of common carriers or innkeepers, or the specific limitations on the purposes of corporations); a focus on abstract relational concepts as generative of the best legal rules (e.g., will in contract, negligence in torts); the belief that all outcomes in specific cases ("subrules") could be derived from these core concepts; and a commitment to and belief in a neutral, nonredistributive state. See Morton J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (New York, 1992), 9-31 [hereafter cited as Horwitz, *Transformation of American Law*].

¹²Gordon, "Legal Thought," supra note 5 at 81.

in deploying a set of ideological constructs and modes of analysis—to achieve the pragmatic ends of Leland Stanford and Collis P. Huntington, the two most powerful shareholders of the corporation? How independent of the corporation did this legal thinking allow them, as professionals, to be, and what kind of independence, if any, did they attain?

As a preliminary answer to the question of ideology, Stanford's attorneys, particularly McAllister and Sanderson, the most intellectual of the four, were at the vanguard of doctrinal development and its application in the areas of corporate personality, minimal shareholder liability for corporate debt, and industrial organization. It was their work that was partly responsible for the official acceptance, at least as a matter of formal legal precedent, of corporate personality, a key legal doctrine that afforded corporations rights to liberty and property under the Fourteenth Amendment equal to those held by individuals. As we shall see, this interpretation of corporate rights conditioned the *Lochner* era, an era of intense judicial scrutiny of any legislative limits imposed on contractual and economic rights.

On the question of professional and intellectual independence, Haymond and Cohen underwent the most dramatic changes in their relationships with the Central Pacific. Both were at one point considered enemies of railroad interests, in roles as reformer, competitor, opposing counsel, or disgruntled employee. On the other hand, Sanderson, a former justice on the California Supreme Court, left the bench in 1870 to head the legal department of the corporation until his death, and never worked for another employer. Similarly, McAllister, although never employed by the corporation full time, was retained over a long period; ideologically, his thinking most closely matched the language of corporate interests.

In concluding, this essay reevaluates the conditions of independence for a lawyer,¹³ along two axes: structural and professional (a lawyer and his livelihood vis-à-vis the corporation); and ideological (a lawyer's interests compared with the corporation's).

As a matter of both independence and ideology, what remains puzzling in connecting legal thinking and legal practice are the views these lawyers had of corruption and competition at a time when the very meaning of appropriate competition was being challenged. In the late 1880s, it became clear to many that the directors of the Southern Pacific had enriched themselves at the expense of the federal government, which

¹³See generally Robert W. Gordon, "The Independence of Lawyers," *Boston University Law Review* 68 (1988), 1.

had generously subsidized the construction of the transcontinental railroad in the mid-1860s. At the same time, economic competition no longer resembled the form it had taken during the Jacksonian era, when these four lawyers grew up, but was, rather, particularly oligopolistic.¹⁴ The classical legal tradition of treating all legal entities without regard to identity here seems devoid of much of the explanatory power it once had. One of the goals of this essay is to understand how these lawyers faced the challenges to, and the contradictions within, their thinking.

EARLY YEARS, MIGRATION, AND ARRIVAL IN SAN FRANCISCO

Three of the four lawyers were born in the eastern United States to parents who were members of an old political and economic elite undergoing the first changes of industrialization.¹⁵ They were essentially the sons of "Protestant back country gentry."¹⁶

Silas Woodruff Sanderson was born on April 16, 1824, in Vermont.¹⁷ After an early education at Williams College in Massachusetts and Union College in New York, he completed his studies at what would become Albany Law School and was admitted to the bar in 1849. Most likely, he would have been acquainted with, or known of, another Albany-trained lawyer whose practice began in the mid-1840s, Leland Stanford.¹⁸ Later

¹⁴*Ibid.* at 78.

¹⁵Much of the biographical information about McAllister, Haymond, Sanderson, and Cohen contained in this essay is in the extensive railroad and California history collections of the Stanford libraries, including the University archives, the curators of which the author thanks.

¹⁶Robert W. Gordon, "'The Ideal and the Actual in the Law': Fantasies and Practices of New York City Lawyers, 1870-1910" [hereafter cited as Gordon, "Ideal and Actual"], in Gawalt, *New High Priests*, supra note 7 at 50; Arnold Roth, "The California State Supreme Court, 1860-1879: A Legal History" (Ph.D. diss., University of Southern California, 1973), 35 [hereafter cited as Roth, "California Supreme Court"].

¹⁷J. Edward Johnson, *History of the Supreme Court Justices of California 1850-1900* (San Francisco, 1963-66), 1:89-91 [hereafter cited as Johnson, *Supreme Court Justices*]; idem, "Silas W. Sanderson," *California State Bar Journal* 25 (1950), 105 [hereafter cited as Johnson, "Silas Sanderson"].

¹⁸George T. Clark, *Leland Stanford* (Stanford, 1931), 35 [hereafter cited as Clark, *Leland Stanford*]. Another notable graduate of Albany Law School was David Colton, who practiced law in a small San Francisco firm into the early 1860s, and would eventually be taken on by the Stanford group as a partner after the death of Hopkins. Johnson, *Supreme Court Justices*, supra note 17 at 1:185-86.

he moved to Florida, where one of his brothers lived, and finally arrived in Placerville, California, in 1851.

Like Stephen J. Field, the Supreme Court justice, who also attended Williams and who migrated west in 1849,¹⁹ Sanderson attempted mining as a career. Eventually (again like Field), he settled into the practice of law and law enforcement, becoming district attorney for El Dorado County.²⁰ From 1862 to 1863 he served in the California Assembly, where he was a strong force for the pro-Union Democrats. In 1864, he was elected to a two-year term on the California Supreme Court, during which he served as chief justice. Before the second term began he resigned from the bench in 1866 to accept a position as solicitor general of the Central Pacific Railroad.²¹

Creed Haymond was born in Beverly, Virginia (now West Virginia), in 1836, the son of a state circuit court judge who took his son along when making rounds of the state to observe the proceedings over which he presided.²² These early experiences were to prove formative in Haymond's life, for he acquired a broad view of human experience that was to underscore the need for the construction of legal institutions and the reform of older ones that no longer worked.

In 1852, as part of a small group of youths, he made a journey of about three and a half months across the country to California, where he "engaged in mining, packing, merchandising, and ditching, on a large scale, in the northern part of Sierra County."²³ For a time he also carried the mail for Wells, Fargo. In 1859, he began his study of law with two men, one of whom would become lieutenant governor of California. The other became the first U.S. district judge of Nevada. Early in Haymond's career, he specialized in criminal defense, and appeared

¹⁹Carl Brent Swisher, *Stephen J. Field: Craftsman of the Law* (Washington, 1930), 25-26 [hereafter cited as Swisher, *Craftsman of the Law*].

²⁰Johnson, "Silas Sanderson," supra note 17 at 106. Field became *alcalde*—a title akin to mayor—of Marysville, California, and eventually entered into the private practice of law before being elevated to the federal bench in 1857, on which he served until he was named to the U.S. Supreme Court in 1863. Swisher, *Craftsman of the Law*, supra note 19 at 31-32. On the crude, pre-formal system of justice these officials practiced in the 1850s, see Bakken, *Practicing Law*, supra note 8 at 99-113.

²¹Deposition of S.W. Sanderson, *Ellen M. Colton v. Leland Stanford, et al.* (1883), 1-4; Bakken, *Practicing Law*, supra note 8 at 107.

²²Oscar T. Shuck, *Bench and Bar in California* (San Francisco, 1889), 324 [hereafter cited as Shuck, *Bench and Bar*]. A substantially similar biographical sketch of Haymond appears in idem, *History of the Bench and Bar in California* (Los Angeles, 1901), 580-83 [hereafter cited as Shuck, *History of the Bench and Bar*].

²³Shuck, *Bench and Bar*, supra note 22 at 329.

as counsel in a number of celebrated trials in the 1860s.²⁴ He also served in the National Guard of California and fought in various battles against Native Americans in Nevada, attaining the rank of colonel.²⁵

The most important of Haymond's early activities came through his work involving the resolution of conflicting mining claims. He participated in the conflict between established miners who had staked large—sometimes unreasonably expansive—land claims and newly arriving ones who hoped to dispossess their predecessors.²⁶ Not content with simply achieving substantive results for his clients, he recognized that the accepted but informal practices among miners and competing claimants were inadequate to solve the problems of allocating resources. In two important early cases that he was to win, Haymond argued for bright-line rules to determine what constituted proper acceptance, forfeiture, and abandonment of mining claims—rules that grew out of local custom, but needed to be solidified by some formal state authorities.²⁷

The task of lawyers and judges in this litigation was to establish judicial review of the monopolistic practices of early-arriving miners who staked claims that were too extensive. The difficulty was in balancing the desire for fixed categories and legal rules to separate reasonable from unreasonable claimant behavior with a respect for traditional property rights and at-

²⁴*Ibid.* at 330-33.

²⁵*Ibid.* at 330-33, 337.

²⁶Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America," in *Land Law and Real Property in American History*, ed. Kermit L. Hall (New York, 1987), 364-66.

²⁷Two examples of cases decided with reference to, and in the hope of, solidifying local mining custom were *Wiseman v. McNulty*, 25 Cal. 230 (1864) (requiring that someone receive property for forfeiture to be effective), and *Richardson v. McNulty*, 24 Cal. 339 (1864) (holding that there could be no abandonment of land claims where property was exchanged in gift transaction); see also *Hess v. Winder*, 30 Cal. 349 (1866). Chief Justice Sanderson reviewed the history of mining customs during the same year, recognizing not only their importance, but the need for legislative formalization. Echoing Haymond's pro-codification sentiments, he also expressed a healthy skepticism of common-law process: "[These customs] were well few, plain and simple, and well understood by those with whom they originated. They were well adapted to secure the end designed to be accomplished. . . . [A]nd it was a wise policy on the part of the legislature . . . to give them the additional weight of a legislative sanction. . . . And it is to be regretted that the wisdom of the Legislature in thus leaving mining controversies to the arbitrament of mining laws, has not always been seconded by the Courts and the legal profession, who seem to have been too long tied to the treadmill of the common law to readily escape its thralldom while engaged in the solution of a mining controversy." *Morton v. Solambo Copper Mining Co.*, 26 Cal. 527, 532-33 (1864).

tempts by politically autonomous groups to install a regime of self-governance.²⁸ The expense and delay in resolving these claims made clear to Haymond that the methods and laws for resolving disputes and allocating scarce resources that existed in the mid-1860s were inadequate. The challenge that classical legal liberalism (a discourse which was only beginning to be formulated) set for itself was to depoliticize the determination of when a particular land use was unreasonable; in other words, to generate legal rules and categories that were predictable and neutral. This task Haymond was to take seriously.

Hall McAllister was generally considered the greatest lawyer at the time in California, a well-rounded, expert trial practitioner to whom less able lawyers turned in the face of seemingly insoluble problems.²⁹ After his death in 1888, the San Francisco Bar Association, which he had helped found, declared that he had tried and won more cases and collected larger fees than any other lawyer in California.³⁰ McAllister, whose statue still stands today on the street named after him in front of San Francisco's city hall, was born in Savannah, Georgia, on February 9, 1826. His father, Matthew Hall McAllister, had a long and distinguished career in politics in Georgia before settling in the West, where he became the first federal circuit judge in California in 1855.³¹

In 1846, the younger McAllister began his studies at Yale, although he left before completing his education there, perhaps as a result of the increasingly dire economic straits of his family. In 1849, he sailed around South America and landed in San Francisco, where he quickly established himself as one of the leading lawyers of the time. His family followed him to California in 1850, when they learned of the great economic possibilities there. Hall reported to his father that he was making in two months what his father made in an entire year.³² Hall

²⁸McCurdy, "Public Land," *supra* note 26 at 366-67.

²⁹Any discussion of California's early lawyers considers McAllister to have commanded the most influential role. See, e.g., Shuck, *History of the Bench and Bar*, *supra* note 22 at 417; *idem*, *Bench and Bar*, *supra* note 22 at 21; Jackson A. Graves, *California Memories, 1857-1930* (Los Angeles, 1930), 37 [hereafter cited as Graves, *Memories*]; Bakken, *Practicing Law*, *supra* note 8 at 39, 54, 126.

³⁰*Dictionary of American Biography*, s.v. "McAllister, Hall"; Shuck, *Bench and Bar*, *supra* note 22 at 21.

³¹Ward McAllister, *Society As I Have Found It* (New York, 1890), 20-23 [hereafter cited as McAllister, *Society*]. On the life and career of the elder McAllister, see generally John T. Gordan III, *Authorized By No Law: The San Francisco Committee of Vigilance of 1856 and the United States Circuit Court for the District of California* (Pasadena, 1990).

³²McAllister, *Society*, *supra* note 31 at 19.

McAllister, his father, and his brother, Cutler, thereupon began what would become a lucrative and thriving litigation practice in a variety of areas, especially criminal defense, debt collection, mining claims, and real estate.³³

McAllister was considered a model of earnestness, hard and methodical work, respectfulness, strength, collegiality, and moderation—in short, a model of personal rectitude and a true legal “scientist.”³⁴ His reputation for effective advocacy, his agile mind of impressive breadth, and his association with powerful corporate interests merited the attention of the journalist and author Ambrose Bierce, a frequent contributor to two San Francisco newspapers of the era, the *Wasp* and the *Argonaut*, who criticized the lawyer’s “ambidextrous conscience.”³⁵

Alfred A. Cohen took a significantly more circuitous path to San Francisco. And, unlike his three colleagues at the Southern Pacific, he did not maintain a permanent practice on the West Coast after his arrival. He was born on July 17, 1829, in London. In 1847, he sailed to Jamaica.³⁶ He arrived in San Francisco in 1857 and settled in Alameda County, where he was the first supervising county judge. In 1863, he gave up the active practice of law to help finance and construct the first railroad through Alameda County, the San Francisco & Alameda.³⁷ In 1865 he acquired the San Francisco & Oakland Railroad, and subsequently built the first trans-bay ferry terminals.³⁸ The ferries, which many had expected to fail, were a great success, and spurred the development of small towns across the bay. In 1868, however, Cohen encountered financing difficulties. He sold the two railroads and the ferry terminals to the Central Pacific and joined their legal department, where he stayed until 1876.³⁹

³³Shuck, *Bench and Bar*, supra note 22 at 25; see also Bakken, *Practicing Law*, supra note 8 at 54.

³⁴Shuck, *Bench and Bar*, supra note 22 at 21-25; Gordon, “Ideal and Actual,” supra note 16 at 56.

³⁵*Dictionary of American Biography*, s.v. “Bierce, Ambrose.” Bierce’s poem “To An Insolent Attorney” also vilifies McAllister for saving “scoundrels from their cells.” *The Collected Works of Ambrose Bierce—Black Beetles in Amber* (1892; reprint, New York, 1966), 5:240.

³⁶Almost all the early biographical information on Cohen is from “Alfred A. Cohen and Adams & Company” (n.p., n.d.), Robinson Collection, Stanford University Archives [hereafter cited as Cohen Manuscript]. See also *San Francisco Chronicle*, February 21, 1954, for a short sketch of the major events in Cohen’s life.

³⁷Cohen Manuscript, supra note 36 at 155.

³⁸*Ibid.* at 155-56.

³⁹*San Francisco Chronicle*, February 21, 1954; David Lavender, *The Great Persuader* (Garden City, N.Y., 1970), 186-89, 221 [hereafter cited as Lavender, *Great Persuader*].

Newspapers and other contemporaneous accounts describe this entrepreneur-lawyer as truculent, eloquent, biting, literate, and quick-witted. Opinions of him were never ambivalent: either he was unquestionably ethical, beyond the slightest disrepute, or he was justifiably accused of financial improprieties. He was constantly embroiled in financial controversy. The first in a long series of questionable financial dealings involved a major bank.⁴⁰

Early in 1854, San Francisco began its first bout with the adverse effects of a boom-bust economy, when the radical slowing of the production of gold and the need for new machinery to maintain production and exploration threw the credit markets into chaos.⁴¹ More than \$3.5 million was withdrawn from the six largest banks. One victim of the run on banks was the A.A. Adams & Co. banking house. Cohen, as a trusted associate with experience in finance, was appointed receiver of the bank's assets. To protect the gold on hand from the mob violence that was afflicting the banks, he made a nocturnal withdrawal of an unweighed quantity of gold.

There followed a series of accusations that Cohen had stolen \$50,000 of gold and had thrown the bank's records into the bay. Cohen in turn accused the bank of trying to extort \$10,000 from him. The principals of the bank responded with an accusation that Cohen had sold them \$400,000 worth of low-quality gold dust. The matter (like other financial imbroglios involving Cohen) ended quietly and without resolution. Once the flurry of inaccurate press reports had subsided, newspapers began to treat the saga as ludicrous.⁴²

In a number of ways, San Francisco was an ideal place for lawyers to search for opportunities and carve out professional roles. It was a city filled with middlemen, attached to the swings of changing technology, to the application of new technologies to hard rock mining, to building construction, to new forms of commerce and new modes of transportation.⁴³ Lawyers like Cohen, with connections to financial institutions in the East, would prosper by maneuvering in these spaces.

While Cohen became an entrepreneurial lawyer able to move

⁴⁰A concise narration of these events appears in Robin W. Winks, *Frederick Billings: A Life* (New York, 1991), 73-79 [hereafter cited as Winks, *Frederick Billings*].

⁴¹*Ibid.*

⁴²*Ibid.* Shuck reports, however, that the trial ended with a verdict of \$290,000 against Cohen. *History of the Bench and Bar*, *supra* note 22 at 448. Other details may be found in *Ex Parte Cohen*, 6 Cal. 319 (1856); *Adams v. Haskell and Woods*, 6 Cal. 316 (1856); *In re A.A. Cohen and E. Jones*, 5 Cal. 594 (1855).

⁴³Shuck, *History of the Bench and Bar*, *supra* note 22 at 67.

capital between two appropriate points and McAllister was extremely successful as a courtroom advocate for his clients, Haymond would solidify his stature in the early 1870s by completing one of the first sets of codes adopted in the United States.

The codification of California law was not the product of an ideological conflict driven either by those who aimed to reallocate the authority to make common-law rules to the legislative branch, or those motivated by a coherent jurisprudence about common-law methodology. Haymond, as chairman of the commission charged with the task and the member who performed most of the conceptual work behind the codes, seems, rather, to have been much more motivated by a faith that legal science could impose order on unstable social relationships simply by enunciating legal rules. To him, law could define rights in such a way that "the citizenry would be capable of understanding and acting upon them."⁴⁴ Clearer rules could promote economic growth and regulate those competing for resources. Haymond presented his work as common-sense pragmatism, or as legal science's version of common sense, and not as a reform of substantive legal rules. Delivering the revised codes to the California legislature in 1874, he wrote, "Every enlightened state, and every citizen thereof feels it to be a necessity that its laws should be certain, exact, and accessible, not doubtful, inexact, to be found in session acts running through a series of twenty years."⁴⁵ In his attempt to disseminate a fixed, collected body of principles, much of his early work involved the distribution of printed copies of the code.⁴⁶

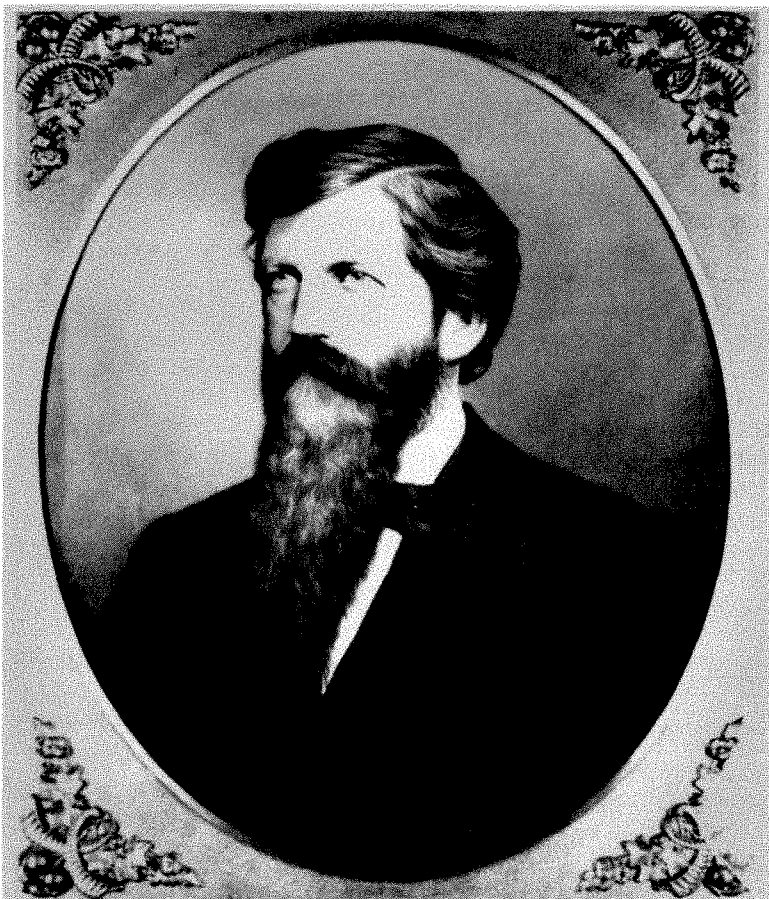
The code went into effect on January 1, 1873, and shows Haymond as a mild, cautious reformer, not necessarily dissatisfied with the current distribution of property and rights.⁴⁷ Nor does he seem particularly concerned with the judicial administration of private law remedies. The code did, however, go further in changing existing state law than the few codes promulgated by other states; it provided for new (although limited) state regulations of railroads, insurance companies, telegraphs, and banks, and innovations in married-women's property and

⁴⁴Gordon, "Legal Thought," supra note 5 at 83.

⁴⁵*Report of the Code Commissioners of California* (Sacramento, 1874), 3 [hereafter cited as *Report of Code Commissioners*].

⁴⁶*Ibid.* at 9.

⁴⁷One contemporaneous account, however, suggested that Haymond was radically antirailroad in the days before he became its legal counsel, "ha[ving] stumped California from one end of it to the other in violent opposition to that corporation, even advising his hearers to tear up its tracks." Graves, *California Memories*, supra note 29 at 45. Graves generally considered Haymond to be a "low-browed" lawyer and of questionable moral character. *Ibid.* at 43, 60.



Creed Haymond (Courtesy California History Room, California State Library, Sacramento)

landlord-tenant laws.⁴⁸ It was not simply a transplantation of the famous codes that David Dudley Field had prepared for eventual partial adoption in New York, but was a "thorough-going critical reconsideration of the New York provisions,"⁴⁹ adapted for a radically different milieu.

⁴⁸Morton J. Horwitz, "The Place of Justice Holmes in American Legal Thought," in *The Legacy of Oliver Wendell Holmes, Jr.*, ed. Robert W. Gordon (Stanford, 1992), 41.

⁴⁹Arvo Van Alostyne, "Commentary—The California Civil Code," in *West's California Civil Code* (St. Paul, 1954), 1.

On a deeper level, Haymond was preoccupied with social disorder and its effect on the development of the state of California, whose "self-image was characterized by a complex mixture of confidence and insecurity. Californians were convinced that their state was destined to become the world's foremost empire, but they were simultaneously apprehensive that they did not possess even the basic elements of civilization. . . . Above all else, Californians worried [that] their state lacked the capacity for order."⁵⁰ Solidly exhibiting his faith in legal science, Haymond felt that the fixity and predictability of written rules would channel Californians' energy into achieving the state's destiny. He regarded the writing down of laws as part of a progression toward a new civilization, whose bounties too often created chaos, vigilantism, and social conflict.

While other codification movements may be described as following a "hypnotically regular beat [of] radical proposals to change the law followed by minor legal reforms,"⁵¹ California's movement, oddly, had a short-term success (a radical change in form), but had only minimal effect on the medium and long terms in making common-law adjudication predictable through legislative enactment. The codes would not, as Haymond hoped they might, be "enriched and adorned" by successive generations.⁵² They were not consistently amended, and were to a large extent "ignored . . . and considered [by commentators] to be defective in form and content."⁵³ Common-law adjudication continued largely oblivious to their existence.⁵⁴ Nonetheless, the codes produced—or, more likely, contributed to—long-term effects in changing the social order, and helped instill some sense of fixity and predictability that Californians needed and wanted. In this last sense, codification represented a monumental step.

THE FOUNDING OF THE CENTRAL PACIFIC

In 1851, after a fire had consumed the office in Port Washington, Wisconsin, where he had established his law practice, an-

⁵⁰Lewis Grossman, "Codification and the California Mentality," *Hastings Law Journal* 45 (1994), 617, 621-22 [hereafter cited as Grossman, "Codification"].

⁵¹Robert W. Gordon, "Book Review," *Vanderbilt Law Review* 36 (1983), 431.

⁵²*Report of Code Commissioners*, supra note 45 at 3-4, 13.

⁵³Izhak England, "Li v. Yellow Cab Co.: A Belated Inglorious Centennial of the California Civil Code," *California Law Review* 65 (1977), 4.

⁵⁴*Ibid.* The codes eventually came to be looked upon by the California courts as a species of restatement. See Grossman, "Codification," supra note 50 at 619-20 and n.13.

other eastern-born lawyer migrated to California, where he entered the grocery, provisions, and wholesale business.⁵⁵ A wise mining investment started Leland Stanford's road to the statehouse, the U.S. Senate, and the corporate boardroom of a company popularly thought of as having a stranglehold on the state's economy, and certainly on its transportation. By 1861, Stanford had become partners with Collis P. Huntington, Charles Crocker, and Mark Hopkins. The "Big Four," as they would come to be known, then formed the Central Pacific Railroad Company.⁵⁶

The corporation was formed in anticipation of the legislation that Congress would pass in 1862 authorizing the construction of a transcontinental railroad⁵⁷ and creating the Union Pacific Railroad to build the eastern part of the line. Congress assigned the construction of the western spur to the Central Pacific. It was to build from San Francisco to the California-Nevada border, and then to terminate where the two railroads met.⁵⁸ The most important provision of the law, which would both guarantee the success of the venture and raise the corporation's most serious legal problems over the next fifty years, were the federal subsidies.

In addition to generous grants of land,⁵⁹ the federal government subsidized the railroads by loaning them money at a low interest rate for thirty-six years. For each mile from San Francisco to the Sierra Nevada, the government would loan the company \$16,000; through the Sierras, \$48,000 per mile; and from the eastern edge of the mountains to wherever the line met up with the Union Pacific, \$32,000 per mile. Payments were made after each stretch of forty miles of track was completed. Moreover, Congress mandated that the security interest in the railroad would be a second mortgage. This made it possible for the railroads to sell senior debt securities of their own to raise even more money.⁶⁰ When the debts eventually became

⁵⁵Clark, *Leland Stanford*, supra note 18 at 35-46.

⁵⁶Neill Compton Wilson and Frank J. Taylor, *Southern Pacific: The Roaring Story of a Fighting Railroad* (New York, 1952), 235-36 [hereafter cited as Wilson and Taylor, *Southern Pacific*]; Bederman, "Mussel Slough," supra note 1 at 243.

⁵⁷Act of July 1, 1862, ch. 120, 12 Stat. 489.

⁵⁸Daggett, *History of the Southern Pacific*, supra note 3 at 50-55.

⁵⁹The Central Pacific eventually received a total of more than ten million acres of federal land. *Ibid.* at 54.

⁶⁰*Ibid.* at 20-21; see also David C. Frederick, "Railroads, Robber Barons, and the Saving of Stanford University," *Western Legal History* 4 (Summer/Fall 1991), 227 [hereafter cited as Frederick, "Railroads, Robber Barons"]. An interesting example of the selling documents used by the railroad's New York bankers, Fisk and Hatch, to promote the company's venture is Fisk and Hatch, Bankers,

due in the 1890s, the total amount owed the government was approximately \$60 million.⁶¹

The major criticism leveled against the company in the late 1880s was that, by contracting the actual building of the line to their privately held construction companies, most notably the Western Development Company and the Contract & Finance Company, the Big Four had enriched themselves at the expense of the public fisc.⁶² Early legal problems for the railroad, however, came in its relationship not with Washington, but with the municipal and county governments that had purchased railroad bonds. Most often the railroads, having exhausted their credit in New York, demanded that a town buy bonds in exchange for the railroad's passing through, the only way a town could guarantee its uncertain future.⁶³ County subscription to Central Pacific bonds contributed approximately \$1.5 million to the railroad's coffers, capital that was critical to the railroad's ambitions to expand and forestall competition from other lines. The state's contribution was the assumption of twenty years of interest payments on the bonds.⁶⁴

On one particularly acrimonious occasion, the city of Stockton was to subscribe to the bonds of the Stockton & Visalia

Railroad Communication Across the Continent with an Account of the Central Pacific Railroad of California (New York, 1868).

Federal subsidies were not the only policies that funneled capital into railroad investment. The relatively rapid retirement of Civil War debt meant that eastern capitalists were left with excess cash, which they proceeded to pour into corporate, particularly railroad, securities. Additionally, tight federal money policy attracted overseas investment in U.S. railroad bonds. Gerald Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917* (Baltimore, 1994), 35 [hereafter cited as Berk, *Alternative Tracks*].

⁶¹Daggett, *History of the Southern Pacific*, supra note 3 at 21, 52-54.

⁶²Lavender, *Great Persuader*, supra note 39 at 355.

⁶³Ibid. at 25-35. Railroads often dealt with burgeoning towns with impunity. Los Angeles had no railroad until 1869. Wilson and Taylor, *Southern Pacific*, supra note 56 at 237. At a Los Angeles city council meeting, Charles Crocker once declared, "If this be the spirit with which Los Angeles proposes to deal with the railroad upon which the town's very vitality must depend, I will make grass grow in the streets of your city." Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention* (1930; reprint, New York, 1969), 47 [hereafter cited as Swisher, *Motivation and Political Technique*]. Far from making Los Angeles into a ghost town, the Southern Pacific contributed significantly to the boom in Southern California's population. In 1887, during a rate war with the Santa Fe Railroad, fares from St. Louis to Southern California dropped to as little as one dollar per person. In that year alone, nearly 100,000 people took advantage of these "colonist fares" and moved to California. Wilson and Taylor, *Southern Pacific*, supra note 56 at 240. Between 1880 and 1890, the population of Los Angeles County tripled to over 100,000. *Compendium of the Eleventh Census*, pt. 1 (Washington, 1892), 9, 69-76.

⁶⁴Daggett, *History of the Southern Pacific*, supra note 3 at 26.

Railroad, a line owned by the Stanford group. In 1870, the state legislature passed a statute requiring the town to raise the money to buy the necessary bonds.⁶⁵ The town sued, claiming that the law requiring it to levy a tax was unconstitutional. Because the railroad was held as a private corporation, the town's position was that the constitutional requirement that governmental takings be for a public purpose had not been satisfied. Silas Sanderson, who had just left the bench to head the Central Pacific's legal department, represented the railroad against the city. While the litigation is less important for the substantive outcome achieved (the town was forced to levy the tax and contribute to the railroad's construction),⁶⁶ it is a perfect example of the interconnectedness of the railroad's long-term strategy and the gradual development of the classical legal language of fixed spheres of behavior. Sanderson wrote in his brief:

My political dictionary does not teach me that monopolies should be protected at the expense of labor, but it does teach me that the cause of labor may be vastly promoted by the judicious exercise of the taxing power in favor of public improvements which are calculated to develop the country and widen the field of labor and production. . . . [This dictionary] does not teach me that granting special privileges is the main object of legislation, but it does teach me that granting them is one of the objects of legislation, and that they should be granted whenever in the opinion of the legislature they are required to promote the general good. . . . Congress has created the Union Pacific [and the Central Pacific] as public agent[s] to build a railroad. [They are] therefore public corporations, notwithstanding all [of their] capital [being] owned by private individuals. . . . Hence from their first creation to the present time, [the UPRR and the CPRR] have been characterized both in legislative and judicial parlance as quasi public-quasi private.⁶⁷

⁶⁵1870 Cal. Stat. 551.

⁶⁶*Stockton v. Visalia Railroad Co. v. Stockton*, 41 Cal. 146 (1871), affirmed the statute's constitutionality. Simply because property was privately held did not preclude its being also of public use, thereby satisfying the constitutional requirement that the taking in the form of a tax be for public use. *Ibid.* at 159-64, 192-93. Several years before taking his seat on the Supreme Court, Sanderson had been involved in similar litigation, but on the other side of the issue. See *Dougllass v. Placerville*, 18 Cal. 644, 646 (1861).

⁶⁷Silas W. Sanderson, Reply of the Southern Pacific Railroad to the Third and Last Brief of Respondents, *Stockton v. Visalia R.R. Co. v. Common Council of the City of Stockton* (1870), 6-9, 36.

In this early railroad litigation, Sanderson was still not uncomfortable with the notion that the public and private spheres were not rigidly separated, as they would be in a fully developed classical reasoning.⁶⁸ Nor was he completely averse to the idea that "special" legislation, in the form of a state's grant of privileges to particular corporations, might be necessary to promote the public good. Such special legislation would eventually work to the advantage of the railroad, allowing it to establish a vast network of trains upon which towns depended for their survival.

Sanderson would fully agree with the notion that legal reasoning could be mechanically dictated by rules. He recognized that rigid rules forbidding the passage of certain laws were not helpful, except as general policy guides that should be superseded when necessary. For Sanderson, the economic health of California's farmers, traders, new immigrants, and miners fell under this rubric, and thus was a public purpose.⁶⁹

As an example of the legal reasoning that preceded the eventually dominant classical legal thinking, Sanderson seems to have had no difficulty in conceptualizing the intermediate categories—in this case, property that was both public and private—that would mark the classical period.⁷⁰ Having a middle category, the "quasi public-quasi private," was to become much more problematic in the railroad's later litigation.

During the corporation's infancy, this philosophical stance served the railroads extremely well, as the corporation was in tremendous need of capital, available in large measure only from state and local governments.⁷¹ The principals of the corporation amassed enormous personal fortunes with little personal liability: they were the owners of private property and the beneficiaries of public funds. It was left to lawyers to reconcile the apparent contradiction in a private citizen's reaping windfall profits through taxation. This was not too difficult, but the railroad's lawyers had to constitute a middle category, one in which the corporation was public enough to be the beneficiary of governmental patronage and private enough to remain a source of private profit. The lawyers' task was made easier by

⁶⁸Horwitz, *Transformation of American Law*, supra note 11 at 206.

⁶⁹Compare Sanderson's articulation of a middle ground with Justice Miller's refusal to do so in *Loan Association v. Topeka*, 87 U.S. 655 (1874), a case that presented the similar question of whether taxation to aid a railroad was for a public purpose.

⁷⁰Horwitz, *Transformation of American Law*, supra note 11 at 207.

⁷¹The post-Civil War boom in railroad financing by eastern investment banks fueled by federal fiscal policy did not begin until the early 1870s. Berk, *Alternative Tracks*, supra note 60 at 26-35.

the fact that popular antipathy to the railroads had not yet made them the targets of the intense scrutiny to come.⁷²

Litigation in which individual towns attempted to resist the dictates of the state promoting railroad development was quite common in California. Hall McAllister was retained as the defense in a number of such cases, including a suit involving the city of San Francisco.⁷³ In 1863 the city voted to subscribe to one million dollars of Central Pacific stock to be paid for by the sale of municipal bonds, stock that had not sold well to the public.⁷⁴ Suspecting that the election had been fraudulently influenced by the railroad, citizens protested against the transaction, claiming that it was a swindle. McAllister represented a citizen-taxpayer in his suit against the city board of supervisors.

The substantive legal question, however, had little to do with the election, but concerned the question of whether the legislative act permitting the election and, ultimately, the purchase of railroad stock paid for with municipal bonds could constitutionally exempt the city from shareholder liabilities. McAllister lost the case. The city was permitted to issue bonds to purchase the stock, and thus became liable for the corporation's debt.⁷⁵ When the state intervened to forge a compromise plan, citizens again protested, claiming that the state could not constitutionally force them to spend \$600,000 in the interest of a private corporation, an expenditure that was not necessarily

⁷²The episode involving Stockton ended five years later, again in litigation. When the Stanford group decided to end the railroad not in Visalia, but in the smaller, less commercially advantageous town of Oakdale, Stockton sued, claiming that the enabling act provided for a railroad to be built into Visalia through the San Joaquin Valley. The railroad responded by saying that all that was required was that it build in the direction of Visalia, which in fact it did. The town represented by McAllister lost. *Stockton v. Visalia R.R. Co.* 51 Cal. 328, 334-35 (1876).

⁷³Daggett, *History of the Southern Pacific*, supra note 3 at 31-40.

⁷⁴*French v. Teschemaker*, 24 Cal. 518, 520 (1864); Lavender, *Great Persuader*, supra note 39 at 120-22.

⁷⁵Sanderson, who wrote the *French* opinion, held that the provision at issue, California Constitution of 1849, Art. 4, § 36, which provided for proportional stockholder liability for corporate debt, was not self-executing. Its sparse language, he thought, was too vague to decide what proportion of a corporation's debts an individual stockholder could be liable for. *French*, 24 Cal. at 541-42. Thus only a legislative pronouncement could fill the gap and, in the absence of such a law, two private parties could contractually waive the personal shareholder liability protection of the provision. *Ibid.* at 560. The decision was viewed with such disfavor that the legislature soon clarified the constitutional language, thereby overturning it. See California Civil Code § 322 (1874). Nonetheless, thirty years later, the decision was relied upon to relieve Stanford's estate of any liability for the railroad's debt. *United States v. Stanford*, 69 F. 25, 43 [C.C.N.D. Cal. 1895], *aff'd*, 161 U.S. 412 (1896); Frederick, "Railroads, Robber Barons," supra note 60 at 239, 241-42 and n.80.

in the interest of the city, but was destined "to be squandered for the benefit of the few individuals who style themselves The Central Pacific Railroad of California."⁷⁶ McAllister, again opposing the railroad, lost the case; later, as retained counsel for the Central Pacific, he would have many subsequent occasions on which to argue the relationship between a private corporation and the government.

At the beginning of the 1870s, the already tense relationship between the corporation and the citizens and state government had begun to sour further.⁷⁷ One scholar describes the situation as follows:

Californians of the 1870s were struggling with the certain knowledge that the frontier was receding from them. Social conditions . . . have been described as a "cauldron of hostility, prejudice, and litigation, racial as well as corporate." Hostility and antagonism to the Chinese and hostility and antagonism to the corporations, to the railroads had merged, fused, and flared into incandescence.⁷⁸

With the completion of the transcontinental railroad in 1869, ten thousand Chinese workers were competing with white workers for jobs in the San Francisco economy.⁷⁹ The corporation would begin to have trouble passing off its activities as being in the public interest.

THE LEGAL WORK EXPANDS

The work of McAllister, Haymond, Cohen, and Sanderson was to expand significantly in the 1870s, beginning with the achievement of Central Pacific's monopoly on transport into

⁷⁶H. and C. McAllister, Defendant's Brief, *California ex rel Central Pac. Railroad of California v. Henry P. Coon, et al.* (1864), 4-5.

⁷⁷While the railroad's economic power in California has been well chronicled, one scholar has called for a "general revision of the anti-corporation view," claiming that the railroads in California were not "the all powerful entities [they] were made out to be." Richard J. Orsi, "Railroads in the History of California and the Far West: An Introduction," *California History* 70 (Spring 1991), 9; see also William F. Deverell, "The Los Angeles 'Free Harbor Fight,'" *California History* 70 (Spring 1991), 29.

⁷⁸Howard J. Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment* (Madison, 1968), 14 [hereafter cited as Graham, *Everyman's Constitution*].

⁷⁹Barbara Allen Babcock, "Clara Shortridge Foltz: Constitution-Maker," *Indiana Law Review* 66 (1991), 858.

and out of California. The Stanford group had come to control the only line to the east, and dominated the lines around San Francisco. The Southern Pacific lines (connecting San Diego and Los Angeles to the more northern cities) were beginning to carry more traffic more profitably.⁸⁰ Sometimes the corporation harassed its rivals with strike suits, making it as difficult as possible for them to proceed. For example, the Central Pacific sued the California Pacific Railroad, which was competing with it near Sacramento, claiming that the latter had no right to build a bridge over a certain part of a river.⁸¹ Clearly, the legal controversy was invented for the purposes of the suit and had little to do with the goals of the corporation. The Central Pacific's in-house counsel, Sanderson, was merely ringing legal bells to scare the railroad's adversaries out of its path.⁸² The suit was unsuccessful, but it did obstruct a potential competitor and signalled that such competition would not be treated lightly. Eventually the Central Pacific was to have a virtual monopoly on railroads in California: Rather than obstructing the California Pacific with strike suits, it simply acquired the line.⁸³

The lawyer who contributed the most to this monopoly was Alfred Cohen. In 1870, having sold his interests in two San Francisco-area railroads and ferry terminals, he joined the staff of the Central Pacific, where his duties were to arrange for the acquisition of smaller lines.⁸⁴ However, after six years with the railroad, he had a serious falling out with the Big Four.

⁸⁰Daggett, *History of the Southern Pacific*, supra note 3 at 104-5.

⁸¹Silas W. Sanderson, Brief for Appellant, *California Pac. R.R. v. Central Pac. R.R.* (1870).

⁸²Eventually, even individual farmers would fall victim to the corporation's ability to obstruct opponents by erecting legal barriers. For example, in 1882 one group was formed to lobby for, among other things, "the establish[ment of] a simple, speedy, and inexpensive system of procedure in civil cases, thereby enabling [them] to obtain legal relief against the existing abuses of these corporations without being subjected to the expensive and protracted method availed by them [sic] to interminably prolonged suits by technical defenses." *Pamphlet of the Farmers' and Merchants Association for the Prevention of Railroad Extortion* (1882), Timothy Hopkins Transportation Collection, Box 17, Folder 17, Stanford University Archives [hereafter cited as Hopkins Collection].

⁸³See Daggett, *History of the Southern Pacific*, supra note 3 at 104 and passim.

⁸⁴U.S. Pacific Railway Commission, *Testimony*, supra note 6 at 2391-96; see also Timothy Hopkins to B.A. Worthington, December 3, 1914, Hopkins Collection, Box 16, Folder 18. By 1880 and largely by 1870, the Central and Southern Pacific system, with Cohen's assistance, had acquired or substantially built up the following lines: Stockton & Visalia, California Pacific, Stockton & Copperopolis, Placerville & Sacramento, San Francisco & North Pacific, San Pablo & Tulare, Los Angeles & Independence, San Joaquin Valley, California & Oregon, Los Angeles & San Pedro, San Francisco & San Jose. Swisher, *Motivation and Political Technique*, supra note 63 at 52; see also Wilson and Taylor,



Alfred A. Cohen (Courtesy California History Room,
California State Library, Sacramento)

Southern Pacific, supra note 56 at 235-38; By-laws of the Central Pacific Railroad Co. (n.p., 1870) (including list of railroad lines that had been constructed or taken over by that time). For an authoritative history of the construction and acquisition of the Southern Pacific system, see Bureau of News, Development Department, Southern Pacific Company, "Historical Outline" (n.p., 1933), Stanford University Libraries.

In 1876, Charles Crocker accused Cohen of embezzling some \$50,000 from a sale of land to the railroad and of arranging a fraudulent coal transaction for a \$56,000 gain to himself.⁸⁵ Cohen counterclaimed for the remainder of the money the company owed him from the sale of his railroads and ferry terminals in 1870.⁸⁶ In the suit, he had a perfect opportunity to aim public verbal darts at the railroad's principals. The well-publicized trial suggests that the conflict between the parties was largely personal, and not over any significant wrongs committed.⁸⁷ In one of his ad hominem flourishes, Cohen extemporized, "General David D. Colton [a major shareholder] will never go from among us by the ordinary processes of nature. When that dread hour arrives wherein a mourning community can hope to contain him no longer, it will only be necessary to cut the thread that binds him to this cold earth, when, like one of the painted, transparent bags of gas sold by toy vendors on the street corners, he will sail quietly away through the clouds and be seen no more."⁸⁸

Cohen launched his next, more significant, salvo from within the state legislature. In testimony, he came out in strong support of the Archer Bill, which would have fixed the maximum rate for freight that the railroads could exact.⁸⁹ Having left the corporation, Cohen, who had contributed to the achievement of this monopoly power, said:

The rights of the people are being invaded by this corporation, and they demand redress. We are shut off from competition with other producers, and other markets because we cannot compete in the matter of the carrying trade. [Former] Governor Stanford . . . says in effect that we should leave this matter of regulating freights and fares to competition. This is a very good statement to come from him. His road received \$27 million from the government.⁹⁰

⁸⁵Amended Complaint, *Central Pacific R.R. Co. v. Alfred A. Cohen* (1876), Hopkins Collection, Box 7.

⁸⁶Alfred A. Cohen, Defendant's Answer, *Central Pacific R.R. Co. v. Alfred A. Cohen* (1876).

⁸⁷Oscar Lewis, *The Big Four* (New York, 1946), 112-13, 288-89 [hereafter cited as Lewis, *Big Four*].

⁸⁸*Ibid.* at 288.

⁸⁹See California Senate Committee on Corporations, Railroad Fares and Freights, in *Report on Senate Bills Nos. 332, 319 & 224 and Assembly Bill No. 182* (Sacramento, 1875), 4-5.

⁹⁰*Ibid.* at 18 (Statement of Mr. Cohen).

some of the most influential legal minds of the time in addition to its normal corporate counsel, Haymond and Sanderson. John Norton Pomeroy, a founding professor at the Hastings College of Law and a leading constitutional scholar and treatise-writer,¹³⁷ and Roscoe Conkling, a former Republican senator and a member of the very committee that had drafted the Fourteenth Amendment,¹³⁸ received large commissions to join the Southern Pacific's legal team.¹³⁹

The railroad company sued the state, claiming that the provision unconstitutionally deprived them of the equal protection of the laws by assessing railroad property in a way that applied exclusively and specifically to the railroad's property, and not to personally held or other non-railroad corporate property.¹⁴⁰ In *San Mateo v. Southern Pacific Railroad Co.*,¹⁴¹ each attorney extensively briefed the question of corporate personality, that is, whether a corporation could be considered a person and therefore a holder of legal rights for the purposes of the Fourteenth Amendment. All expected the substantive legal outcome to hinge on whether the Fourteenth Amendment's protections applied to corporations.¹⁴²

Conkling, producing a copy of the report of the committee that drafted the Fourteenth Amendment, asserted that it had been the original intent of the drafters to include corporations among those protected. Despite the attention some historians

¹³⁷*Dictionary of American Biography*, s.v. "Pomeroy, John Norton."

¹³⁸See Graham, *Everyman's Constitution*, supra note 78 at 15-16. Conkling had turned down the chief justiceship, leaving the opportunity for Morrison Waite. *Ibid.*; Charles A. Beard and Mary R. Beard, *The Rise of American Civilization* (New York, 1927), 2:111-13. On the relationship between Huntington and Conkling, see Charles J. McClain, "From the Huntington Papers: The Huntington-Conkling Connection," *Pacific Historian* 29 (Winter 1985), 31-46 [hereafter cited as McClain, "Huntington Papers"].

¹³⁹Conkling received \$5,000 per year for his work on the initial round of tax litigation. In terms of yearly salaries, the others received the following amounts: Cohen received \$10,000 (1871-76) and later \$15,000 (1881-88); Haymond, \$10,000 (1879-87); Sanderson, \$12,000 (1870-71), \$18,000 (1871-76), and finally \$24,000 (1876-85). McAllister was paid an annual \$10,000 retainer fee. U.S. Pacific Railway Commission, *Testimony*, supra note 6 at 4683-747.

¹⁴⁰Graham, *Everyman's Constitution*, supra note 78 at 398.

¹⁴¹13 F. 747 (C.C.D. Cal. 1882).

¹⁴²Justice Field sat in circuit court. He granted the railroad's motion to remove the case from state to federal court, and invited their consideration of the question. He suggested what his eventual resolution of the outcome might be as follows: "If [the amendment] also include artificial persons, as corporations . . . it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporations. It may be that the chain which binds the individuals into a single artificial body, does not keep them in their united form from the protection of the amendment." *San Mateo v. Southern Pac. R.R. Co.*, 13 F. 145, 151 (C.C.D. Cal. 1882).

may have paid Conkling, an originalist interpretation of the Fourteenth Amendment seems to have had little importance in determining the outcome of the railroad-tax litigation, especially since Field's eventual opinion was an explicit rejection of another historically grounded approach to the Fourteenth Amendment, the one that had led to the *Slaughter-house* decision.¹⁴³

Haymond's argument also seems to have been of little weight in determining the outcome of the case. Haymond asserted that because the act that created the Union Pacific Railroad had at the same time contracted with the Central Pacific Railroad, a corporation created under California law, it was transformed into a "national corporation." The Central Pacific was thus an "instrument of the general government" and, according to Marshall's opinion in *McCulloch v. Maryland*,¹⁴⁴ could not therefore be constitutionally taxed by the state government.¹⁴⁵

Pomeroy and Sanderson were much more influential in the court's acceptance of a "partnership theory" of corporate personality. To them, personifying the corporation was a way of protecting the property rights of the real, human corporators that constituted the business.¹⁴⁶ This was not necessarily an assertion of "corporate autonomy per se," but, rather, a protec-

¹⁴³See Argument of Roscoe Conkling, in *Arguments and Decisions in San Mateo County v. Southern Pacific Railroad (1882-1883)*, Stanford University Libraries [hereafter cited as *Arguments and Decisions*]. On Conkling's use of the committee report, see Fiss, *Troubled Beginnings*, supra note 122 at 726. Graham's central suspicion is that there was a conspiracy. He fears that Conkling's post hoc rationalization of corporate personality as the intent of the framers of the Fourteenth Amendment was the motivating force behind the ultimately pro-business decisions in *San Mateo* and *Santa Clara*. See Graham, *Everyman's Constitution*, supra note 78 at 23-67.

¹⁴⁴17 U.S. (4 Wheat.) 316 (1819) (holding that state could not tax instrumentality of federal government created under implied powers).

¹⁴⁵Argument of Creed Haymond before the Circuit Court of the United States, in *Arguments and Decisions*, supra note 143 at 1-10. A decade before, Sanderson had made a substantially similar claim in arguing that California's railroad commission could not fix maximum rates, as well as claiming that the state's regulation would interfere with exclusive congressional control over interstate commerce. See S.W. Sanderson, *An Argument Against the Power of the Legislature of the State of California to Regulate Fares and Freights on the Central Pacific Railroad* (Sacramento, 1872), 4-8, 25-49, 54-55. On the evolution of state involvement in interstate commerce regulation, see Herbert Hovenkamp, "Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem," *Yale Law Journal* 97 (1988), 1062-67 [hereafter cited as Hovenkamp, "Regulatory Conflict"].

¹⁴⁶See Gregory A. Mark, Note, "The Personification of the Business Corporation in American Law," *University of Chicago Law Review* 54 (1987), 1455-64 [hereafter cited as Mark, "Personification of the Business Corporation"].

rate capitalism more generally. Haymond, however, seems to have been the less ideologically sophisticated ally of railroad and corporate interests. His role by the mid-1880s was, rather, that of a corporate spokesman before public bodies.

The reactions by lawyers for corporate interests could not have been, as Herbert Hovenkamp would have us believe, a merely mechanical response to specific commercial needs. It is much fairer to say that Sanderson and Haymond, each functioning at a different level of abstraction, saw themselves as participating in the construction of a legal language necessary as a mediating force, a language used to communicate to courts and to society. Neither seems to have been motivated by the bad-faith desire to "capture" the judiciary that would occur later during the *Lochner* era. As a former judge and a codifier of laws, each had too much faith in the systemic integrity of the judiciary. Each seemed interested in finding an answer to the "great problem of the 1870s: determining government's proper role in American economic life."¹⁶⁶

The last of the legislative responses to the perceived excesses of the Central Pacific and its debt were the federal ones. In 1878, Congress, concerned that the principals of the corporation were depleting its treasury for their personal gain and thereby crippling its ability to pay off huge debts, passed the Thurman Act, which mandated that the railroad deposit 25 percent of its annual earnings into a sinking fund.¹⁶⁷

The Central Pacific challenged the legislation by declaring a dividend instead of depositing its earnings into the fund. The railroad's litigation strategy was to contractualize the original federal grants of aid. Sanderson hoped to persuade the court that allowing post-hoc modifications of the original relationship between the Central Pacific and the federal government would be to ensure the entrance of uncertainty and the possibility of arbitrary, one-sided changes to contracts. Allowing such interference with a private deal would be a dangerous precedent for any investor hoping to borrow from, or lend to, the government.¹⁶⁸ The court rejected this complete contractu-

¹⁶⁶Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *Journal of American History* 61 (1970), 973 [hereafter cited as McCurdy, "Justice Field"].

¹⁶⁷See Swisher, *Motivation and Political Technique*, supra note 63 at 46; Wilson and Taylor, *Southern Pacific*, supra note 56 at 101-02. The circumstances leading up to the sinking fund litigation are also sketched in Charles Fairman, *Reconstruction and Reunion, 1864-1888*, in *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York, 1987), 7:604-15.

¹⁶⁸See McCurdy, "Justice Field," supra note 167 at 974, 981-85.

alization of the original relationship over Field's dissent,¹⁶⁹ recalling that the United States was *both* creditor of the corporation *and* sovereign of it, and that regulation of this "practical monopoly to which the citizen is compelled to resort" was reasonable for the same reasons that regulation over grain elevators had been approved in *Munn*.¹⁷⁰

THE RAILROAD RESPONDS TO FEDERAL INVESTIGATORS

Federal scrutiny would subside slightly until the celebrated case of *Colton v. Stanford* forced a series of incriminating revelations about the activities of the Southern Pacific.¹⁷¹ In 1878, David Colton, who had been taken on as a major shareholder by the Big Four, died. His widow signed a settlement with the remaining principals about how to pay off Colton's debts to his partners. The settlement left her less than satisfied, and she eventually sued to have the agreement rescinded and the transaction undone.¹⁷² McAllister led the legal staff of the Central Pacific, and Sanderson, Cohen, and Haymond, among others, helped to secure witnesses and marshal the mass of necessary evidence. Eventually, a judge ruled that there had been no bad-faith negotiations between the parties, and the settlement agreement was deemed valid.¹⁷³

What transformed the trial from just another bout of litigation

¹⁶⁹*Sinking Fund Cases*, 99 U.S. 700 (1879). The companion case involving the Central Pacific was *Central Pacific Railroad v. Gallatin*, 99 U.S. 700, 727 (1879).

¹⁷⁰99 U.S. at 724-27. Sanderson argued and Field agreed that the Central Pacific was a state corporation formed under California law, even if was considered a party to a contract with the federal government. Thus, for purposes of avoiding its debt to the federal government, Sanderson asserted that federalism should prevent Congress from intervening with a state corporation. *Ibid.* at 753. Later, in the *San Mateo* tax litigation, Haymond argued the opposite, that a franchise conferred by Congress could not be taxed by the state. The legal strategy of the company, and even its legal status, clearly changed when the adversary was the federal government. The Supreme Court ultimately accepted Haymond's argument and voided the mode of assessment used by California. See *California v. Central Pac. R.R. Co.*, 127 U.S. 1 (1888).

¹⁷¹By 1887, the Central Pacific had been reorganized and become part of the Southern Pacific Company, a Kentucky corporation. In contrast to the restrictive rules imposed upon California companies, it was given almost unlimited power, in particular the ability to issue more bonds. 1884 *Kentucky Acts*, ch. 403, §3. Unlike California's, Kentucky's corporation law provided for limited shareholder liability. Wilson and Taylor, *Southern Pacific*, *supra* note 56 at 103; see also 1876 *Kentucky Acts*, ch. 56.

¹⁷²Lewis, *Big Four*, *supra* note 87 at 307-9.

¹⁷³*Colton v. Stanford*, 82 Cal. 351 (1890).

drawn out over seven years into an outright political scandal was a packet of six hundred letters between Colton and Huntington, admitted into evidence during the 1883 trial.¹⁷⁴ "Their hastily scrawled pages exposed the railroad's political methods with . . . thoroughness. . . . In [his] letters Huntington named scores of office holders in California and Washington who took orders from the railroad, who was on the railroad's payroll, whose career would be made or ruined by the railroad."¹⁷⁵ These tales of influence peddling, bribery, and other forms of outright corruption, on top of the already touchy debt crisis, not to mention other scandals involving the Union Pacific Railroad in the 1880s, all precipitated the formation in March 1887 of the Pacific Railway Commission. The committee was to hold hearings on the financial arrangements and business practices of the railroad companies that had received federal aid.

The thousands of pages of testimony before the commission began with questions posed to Huntington. Among the topics he was asked about were the activities of the legal representatives of the Southern Pacific and the unaccounted for "legal expenses" of the corporation. The commission suspected, quite justifiably, that the unvouched-for monies, which at one point tallied up to nearly five million dollars, were used to make the payoffs to members of Congress and state legislatures chronicled in detail in the Colton letters.¹⁷⁶

Haymond and Cohen participated in the hearings extensively in an attempt to control the damage done to the corporation by detailed revelations and to make federal probes as difficult as possible. It was Haymond and Cohen, and not Sanderson or McAllister, who appeared most often as direct representatives of the corporation before official bodies and as spokesmen for

¹⁷⁴Huntington had been living in New York at the time the letters were written, traveling to Boston and Washington trying to secure loans for the railroad. The letters appear in the testimony in the final record, *Ellen M. Colton v. Leland Stanford et al.* (San Francisco, 1883), at 1605-1848. They were also published in the popular press. See *San Francisco Chronicle*, December 23, 1883. As part of the radically antirailroad San Francisco mayoral campaign of Adolph Sutro, they were reprinted on campaign leaflets in 1890. A scrapbook of the letters and campaign leaflets is in the Hopkins Collection, Box 7. An interesting example of popular reaction to the revelations is Joseph H. Moore, *An Open Letter, A Protest, and A Petition* (San Francisco, 1895).

¹⁷⁵Lewis, *Big Four*, supra note 87 at 311-312. One of those officeholders was Roscoe Conkling, who, at the height of his power and influence in the Senate, had a correspondence with Huntington that indicates unequivocally that he received large sums of money to be invested on Conkling's behalf in direct violation of federal law. See McClain, "Huntington Papers," supra note 138 at 31-36.

¹⁷⁶U.S. Pacific Railway Commission, *Testimony*, supra note 6 at 5-27, 3697, 3715.

the railroad's interests to the people of the state.¹⁷⁷ This was a distinct form of legal work at which Cohen and Haymond excelled. Before the commission, they took testimony from their own witnesses, subpoenaed others, and tried to rebut the accusations of corruption, self-dealing, and predatory practices in fixing freight and passenger rates. Also important was the ominous existence of the railroad's debt to the federal government. Cohen's perspective was that the government had received more, in the form of free transportation of mails and troops, than it had given to the railroad in land grants and subsidy bonds.¹⁷⁸ In response to questions about the Colton-Huntington letters, Cohen, who had been a member of the *Colton* trial team a few years earlier, claimed that he could not comment on the issue because it was protected by attorney-client privilege. When it was time to review the letters in rebuttal testimony, Cohen led Huntington through a series of evasive musings and non-answers about what the letters could have meant.¹⁷⁹ This and similar obstruction tactics continued throughout the hearings.

Leland Stanford then came before the commission and was asked questions about how to account for large "legal expenses," whether money had been used to influence legislation, and what lawyers were employed as agents to represent the company before various legislative bodies. On the advice of Haymond and Cohen he refused to answer. The commission filed a suit to order him to answer the interrogatories. McAllister, still retained by the Central Pacific, dealt with all substantive legal questions about how the committee hearings could be constitutionally conducted, what evidence could be admitted, and who could be questioned.¹⁸⁰

McAllister asserted that Stanford had fulfilled all the legal responsibilities included in the original act of 1862, and had no duty to appear before a congressional committee to answer charges of criminal activity.¹⁸¹ An order for him to answer

¹⁷⁷For example, Haymond appeared frequently before the state railroad commission to challenge the rates set by the body by comparing them with those in other states or to rebut the criticisms of the Southern Pacific's employment practices. See, e.g., *Daily Evening Bulletin* (San Francisco), January 23, 1883.

¹⁷⁸U.S. Pacific Railway Commission, *Testimony*, supra note 6 at 2399, 2381-2406.

¹⁷⁹*Ibid.* at 3699-3766. Huntington's general position was that free railroad passes or campaign contributions were not necessarily "bribery," but defensive maneuvers designed to forestall numerous *attacks* on the railroad's interests. See *ibid.*; Lavender, *Great Persuader*, supra note 39 at 366.

¹⁸⁰See U.S. Pacific Railway Commission, *Testimony*, supra note 6 at 3538-47.

¹⁸¹Hall McAllister, Answer of Leland Stanford, *In the Matter of the United*



Silas W. Sanderson (Courtesy California History Room, California State Library, Sacramento)

acterization of *Santa Clara's* extension of Fourteenth Amendment protections to corporations as dramatic and monumental been projected onto the case by later generations trying to justify more extensive theories of corporate personality?¹⁶²

As an expression of the work of lawyers, is the acceptance of corporate personality much more than an episode of pragmatic legal problem-solving technology? Was it merely a way for the Central Pacific not to have to pay its taxes as assessed by the state? Or is corporate personality a recognition of the individuals behind a fictional corporate veil? Could it be that Fourteenth Amendment jurisprudence was simply a means of guaranteeing "that the owners of property held in the name of a corporation would receive the same constitutional protections as the owners of property held in their own name" and of as-

overburdened opponents." *Everyman's Constitution*, supra note 78 at 415 n.172.

¹⁶²Horwitz, *Transformation of American Law*, supra note 11 at 75.

signing "the power to assert constitutional rights in corporate held property"?¹⁶³ That is, were Stanford's lawyers trying to allow the Big Four the benefits of a corporate form, limited shareholder liability for their vast debt and effective aggregation of wealth, with the standing that a natural individual had to challenge excessive state regulation, a "have-your-cake-and-eat-it-too" strategy?

These are difficult questions for the legal historian, but any monocausal theories of how the *Santa Clara* and *San Mateo* decisions fit in their legal-historical context are unhelpful. Any explanation of lawyers' roles must relate "legal thinking and legal acting."¹⁶⁴ Lawyers are always problem-solvers and actors on a number of levels. Most basically, they often work on behalf of clients who have specific, pragmatic needs for which lawyers have technocratic solutions. Sanderson and Haymond clearly recognized that a decrease in state taxes would furnish the Southern Pacific system with more ammunition in its battle against competing railroad systems, and they worked to achieve this end.

Equally often, although perhaps less obviously so, lawyers solve problems for, and are motivated by, the ideology of a specific interest group, an agglomeration of participants who see their economic futures as inexorably bound.¹⁶⁵ Sanderson and Haymond understood the ramifications of their work for corpo-

¹⁶³Herbert Hovenkamp, "The Classical Corporation in American Legal Thought," *Georgetown Law Journal* 76 (1988), 1593. Hovenkamp's analysis suggests that corporate personhood is a pragmatic solution to the issue of how corporations could have the standing necessary to challenge state or federal laws, devoid of ideological content.

¹⁶⁴Gordon, "Legal Thought," *supra* note 5 at 70.

¹⁶⁵For example, the impact of the notion of corporate personality proposed by Sanderson and Pomeroy would be somewhat powerful as a first step in protecting railroad corporations on the verge of bankruptcy in the 1890s. By the mid-1890s, much railroad property was in receivership. Hovenkamp, "Regulatory Conflict," *supra* note 145 at 1043 and n.139. It was left to later receivership cases to protect the corporation as an entity, not as the sum of individually held property, but as a protectable whole in and of itself. Once the corporation was an entity worthy of protection on its own (for example, when the Court saw nationwide railroad systems as valuable as *systems*), its inability to meet its obligations would not result in its being dismantled for the benefit of creditors, but, rather, turned over to a receiver, usually current management. See Berk, *Alternative Tracks*, *supra* note 60 at 48-65. Morton Horwitz has concluded that the *San Mateo* and *Santa Clara* litigation represented the culmination of the partnership theory of the corporation; it was left to successive litigation to project the natural-entity theory of the corporation onto *Santa Clara*. *Transformation of American Law*, *supra* note 11 at 69-76. For a fine treatment of the role of railroad lawyers in subsequent developments of Fourteenth Amendment jurisprudence into the 1890s, see Richard C. Cortner, *The Iron Horse and the Constitution: Railroads and the Transformation of the Fourteenth Amendment* (Westport, Conn., 1993).

Here, we begin to see that the middle category so carefully articulated a generation before has collapsed. Stanford has achieved his power either at the government's expense or at his own; classical legal language had difficulty entertaining the notion that government subsidization of private industry—by definition intrusion or interference with the market—could have occurred.

Cohen continued his anti-railroad activities in a wider forum than his own suit or in appearances before the legislature. He did this by publicly pointing out the inaccuracies in official corporate documents used to sell railroad bonds,⁹¹ as counsel for private clients in a number of shareholder suits against the railroads,⁹² or by representing towns claiming that their own officials had illegally purchased stock in a private corporation or towns whose land had been appropriated by the railroad.⁹³

He also campaigned more generally for state regulation of the railroads. In a speech in San Francisco in 1879 to a group of farmers, he laid out what he thought was wrong with the railroad: the corporation's directors had enriched themselves at the public's expense by engaging in the self-dealing of construction contracts to the privately held arms of the Central Pacific empire; the railroad had a monopoly in California; the railroad was charging higher prices per mile for short hauls than for long hauls; the corporation's unfair profit margins were unfair compared with those of eastern railroads. On this last point, Cohen gave detailed calculations, claiming that the Central Pacific had net earnings of \$6,800 per mile, compared with \$4,700 per mile for the next-most-profitable railroad, the New York Central.⁹⁴

As for the ideological content of Cohen's discourse, there is an obvious tension. Fully in line with a strand of classical thinking grounded in an inherent Jacksonian suspicion of corporate privilege and concentrated wealth, he recognized that concentrations of wealth and power endanger "the welfare, business, and property of the community in allowing such vast

⁹¹See, e.g., A.A. Cohen, *Southern Pacific First Mortgage Bonds: A Review of Statements of Mr. C.P. Huntington* (n.p., 1876), Hopkins Collection, Box 7.

⁹²U.S. Pacific Railway Commission, *Testimony*, supra note 6 at 2381 (testimony of A.A. Cohen). In one such suit, *Robinson v. Central Pacific Railroad*, Cohen dredged up from a previous shareholder suit and widely publicized a series of damaging calculations of the amount for which the railroad had contracted with its own construction companies. See Alfred A. Cohen and Delos Lake, Complaint, *John R. Robinson v. Central Pacific Railroad Company* (1876); Lavender, *Great Persuader*, supra note 39 at 277-78, 302-3.

⁹³See, e.g., Trial Transcripts, *Collis P. Huntington v. City of Oakland* (1880), Hopkins Collection, Box 17, Files 13-15.

⁹⁴Alfred A. Cohen, *An Address on the Railroad Evil and its Remedy*, Platt's Hall, San Francisco, August 2, 1879 (San Francisco, 1879).

and irresponsible power to be exercised by a few men."⁹⁵ The solutions, for Cohen, were both republican and statist: he wanted to turn corporations into mini-republics by spreading control out among a number of shareholders, and he would use legislative power to limit the powers corporations could have. This is where his thinking seems to diverge from the classical. It is also where the holding of private property in public trust, a middle category between totally private and totally public property, can be constituted:

From men who have been so richly endowed much might have been expected. We might reasonably have hoped that, grateful for the munificent generosity of Congress and the State, County, and Municipal governments, they would have felt that a great trust had been conferred upon them; that the people of the Pacific Coast were the beneficiaries of the trust; that this vast property placed in their hands was to be regarded and operated for the benefit of those whose representatives had voted to confer it.⁹⁶

Cohen's return to the employ of the corporation after 1883 would give him other opportunities to speak before the public about how corporations should best be controlled and treated by the state.⁹⁷

A description of Hall McAllister's practice into the 1870s can suggest nothing other than its being a remarkable success. In addition to founding the San Francisco Bar Association in 1872,⁹⁸ McAllister established himself as a leading appellate advocate, arguing and winning a number of cases in front of the Supreme Court. Most often these cases were brought on behalf of the wealthy corporate clients who had come to his firm to solve complex commercial, tax, copyright, and real-estate problems that their own corporate counsel could not solve.⁹⁹ These

⁹⁵Ibid.

⁹⁶Ibid.

⁹⁷*Cohen Manuscript*, supra note 36 at 155; *Lewis, Big Four*, supra note 87 at 310.

⁹⁸See Kenneth M. Johnson, *The Bar Association of San Francisco: The First Hundred Years 1872-1972* (1972), 4-6.

⁹⁹McAllister was attorney for a variety of major corporations in California, among them The Pacific Mail Steamship Company, the New Almaden Mining Company, the Spring Valley Water Works, and, much earlier, John C. Frémont, the California senator, governor, and candidate for president. See Winks, *Frederick Billings*, supra note 40 at 98-100; *Frémont v. Merced Mining Co.*, 9 F. Cas. 772 (C.C.N.D. Cal. 1858); *Frémont v. Flower*, 17 Cal. 199 (1861). For other examples of McAllister's litigation practice, see *Walker v. State Harbor Comm'n*, 84 U.S. 648 (1873); *Martinetti v. Maquire*, 16 F. Cas. 920 (C.C.D.

clients, including the railroad, utilized the model for managing legal expenses in which a salaried corporate counsel handled most cases and outside litigation counsel dealt with more specialized matters.¹⁰⁰ One notable case in 1871, illustrating the breadth of McAllister's practice, called for the Court to decide whether states could constitutionally put an ad valorem tax on certain imported items. McAllister persuaded the Court that imported items did not lose their character as imports until they were removed from their original packages, and thus could only then be constitutionally taxed by the states.¹⁰¹

LEGISLATIVE RESPONSES AND DAMAGE CONTROL BY LAWYERS

The late 1870s marked the beginning of a serious downturn in the economies of California and the rest of the nation. Hostility toward the railroads coalesced, and legislatures in Sacramento, San Francisco, and Washington all responded. "Following a relatively cooperative era between the public and private sectors and a genuinely distributive political climate generated by rapid economic and institutional growth, legislative activity in the 1870s shifted significantly from promoting economic development toward emphasizing its regulation," as one writer has put it.¹⁰²

On a practical level, the challenge to Stanford's lawyers was to control the damage done to corporate interests by regulation. On an ideological level, their tasks were to articulate new discursive boundaries within the legal system in order to protect the railroad from regulation, criticism, and competition. This rethinking would be particularly difficult as the norms upon which classical legal liberalism was predicated began to vanish or be to unrealizable. As the economy changed from competitive to corporate capitalism, the normal conditions were no longer small-scale enterprises, an absence and abhorrence of

Cal. 1867). The *Frémont* litigation is described in Roth, "California Supreme Court," *supra* note 16 at 260-67.

¹⁰⁰See Bakken, *Practicing Law*, *supra* note 8 at 123.

¹⁰¹*Low v. Austin*, 80 U.S. 29, 32 (1872). The decision, characterized as nonsensical by numerous commentators, was not overruled for another hundred years. See *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976) (holding that original meaning of "import-export" clause did not encompass an added value tax on all goods and discussing *Low* at length); Frank H. Easterbrook, "Stability and Reliability in Judicial Decisions," *Cornell Law Review* 73 (1988), 424.

¹⁰²Katha G. Hartley, "Spring Valley Water Works v. San Francisco: Defining Economic Rights in San Francisco," *Western Legal History* 3 (Summer/Fall 1990), 288 [hereafter cited as Hartley, "Spring Valley Water Works"].

monopoly power, low entry and exit barriers to business, and republican self-determination. The critical determination to be made on both practical and ideological levels was over the role government was to play in economic life. In the 1860s, the railroad needed government subsidies to survive, and was forced to build up enormous debts. In the 1880s, however, the debt was preventing it from securing more credit, expanding, and competing with rival lines like the Texas Pacific that were hoping to enter California. Lawyers who had successfully justified public financing of private enterprise needed new reasons to explain why the company should be free from the dictates of meddling creditors—an especially difficult task when the principal creditor was the federal government itself.

One of the emerging social phenomena in the floundering economy was the discrimination against Chinese laborers originally brought by the Central Pacific to the United States¹⁰³ and then released into an already tight labor market.¹⁰⁴ The railroad, which had flooded the state with more cheaply manufactured goods from the East, made small commercial markets more competitive. The depression of 1873 and the consequent constriction of credit in the East had begun to affect California.

Creed Haymond, who had been elected to the state senate in 1875, chaired a special committee to study the “problem” of Chinese immigration. The goal of the committee was to lobby the federal government to renegotiate with China the treaty that allowed immigration by Chinese subjects and granted civil rights to those already in the United States.¹⁰⁵ Haymond hoped to reverse “this tide and to free this land from what is a monstrous evil and promises to be a lasting curse.”¹⁰⁶ His commis-

¹⁰³Wilson and Taylor, *Southern Pacific*, supra note 56 at 18-29. It was Charles Crocker's idea in the mid-1860s to use Chinese laborers to do the more backbreaking work of grading the track bed while white workers did the job of laying the actual track. Ibid.; Lavender, *Great Persuader*, supra note 39 at 161.

¹⁰⁴See Linda C.W. Przybyszewski, “Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit,” *Western Legal History* 1 (1988), 25 [hereafter cited as Przybyszewski, “Lorenzo Sawyer”]. There was 15 percent unemployment in California at the time. Hartley, “Spring Valley Water Works,” supra note 102 at 299.

¹⁰⁵The Burlingame Treaty, signed in 1868, allowed for increased migration and trade, and mandated that Chinese be afforded the same rights as citizens of the “most favored nation.” Additional Articles to the Treaty Between the United States of America and the Ta-Tsing Empire of the 18th of June, 1858, Art. V-VI, 16 Stat. 739, T.S. no. 48 (July 28, 1868); see generally Earl M. Maltz, “The Federal Government and the Problem of Chinese Civil Rights in the Era of the Fourteenth Amendment,” *Harvard Journal of Law and Public Policy* 17 (1994), 229.

¹⁰⁶Special Committee on Chinese Immigration, *Chinese Immigration: Its Social, Moral, and Political Effect—Report to the California State Senate* (Sacramento, 1878), 4.

sion took extensive testimony over a period of months, and concluded that the Chinese were politically, legally, and socially incapable of inclusion in American society. In his view, they did not and could not perform the duties of citizenship, integrate, learn English, respond to a U.S. education, or contribute to the economy. Most importantly, the legal clarity he had worked to achieve with the codification of California law was not applicable to the Chinese. Haymond concluded that they were "not amenable to our laws" because they were governed by "secret tribunals antagonistic to our legal system" that were founded upon "moral ideals wholly distinct from our own."¹⁰⁷

The California Constitution of 1879 reflected the rabid anti-Chinese prejudices of the Haymond Commission's conclusions. An article entitled "Chinese" read in part: "The Legislature shall prescribe all necessary regulations for the protection of the State . . . from the burdens and evils arising from the presence of aliens who are or may become vagrants, paupers, mendicants, criminals, or invalids inflicted with contagious or infectious diseases."¹⁰⁸ A particularly damaging supplement to this official expression of hatred and xenophobia prohibited the employment of any Chinese workers by corporations.¹⁰⁹

The lawyers who would successfully challenge the constitutional provision as a violation of the Fourteenth Amendment were Hall McAllister and Delos Lake. Representing Tiburcio Parrott, the president of a large mining company that employed

¹⁰⁷*Ibid.* at 61-65.

¹⁰⁸California Constitution of 1879, Art. 19, §1. More generally, the new constitution represented the victory of agricultural interests and represented a detailed set of limitations on legislative and corporate power. See Gordon Morris Bakken, "California Constitutionalism," *Pacific Historian* 30 (Winter 1986), 13-14. On the role of racism in the California constitutional convention, in particular hostility toward the Burlingame Treaty, see *idem*, "Constitutional Convention Debates in the West: Racism, Religion, and Gender," *Western Legal History* 3 (Summer/Fall 1990), 239-44. The circumstances surrounding the new constitution are described in Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly* 17 (1989), 35.

¹⁰⁹California Constitution of 1879, Art. 19, §2, read in part: "No corporation now existing or hereafter formed under the laws of this State shall, after the adoption of this Constitution, employ, directly or indirectly, in any capacity any Chinese or Mongolian." A subsequent state statute made it a misdemeanor punishable for fine or imprisonment for any corporation to employ Chinese. See *An Act To Amend The Penal Code By Adding Two New Sections Thereto, To Be Known As Sections 178 And 179, Prohibiting The Employment Of Chinese By Corporations* (1880). (Although the legislature passed the statute in February 1880, it was never formally included within the code, as a suit challenging the constitutional provision began almost immediately after passage.)

many Chinese, they had been hired by the Chinese Consulate in San Francisco.¹¹⁰

In Re Tiburcio Parrott came before the circuit court in March 1880. McAllister's argument pressed several layers to the protection of Chinese citizens. The first was the general protection of peremptory international law; the second was the Fourteenth Amendment's protection of all persons, not simply newly freed slaves. The provision was a blatantly inequitable exercise of the state's legislative power, which served to subjugate an entire class of persons on racial grounds. Such an application was void under the Supremacy Clause, as it directly contradicted stated federal policy in the Burlingame Treaty, which clearly afforded Chinese immigrants rights equal to those of other citizens.¹¹¹

However, Judge Ogden Hoffman's decision¹¹² did not consider the effect of these provisions on the rights of Chinese at any length. Not only did he decide the case "irrespective of the rights secured to the Chinese by the treaty," but he declared "that the unrestricted immigration of the Chinese to this country is a great and growing evil, and that . . . it will be a menace to our peace and even to our civilization are opinion[s] entertained by most thoughtful persons."¹¹³ Hoffman based his decision to strike down the provision on the "constitutional right [of corporations] to utilize their property, by employing such laborers as they choose."¹¹⁴ The law was simply an unreasonable exercise of the state's power to alter the general economic and social context in which corporations acted.

By way of comparison, Judge Lorenzo Sawyer, who had sat with Silas Sanderson on the California Supreme Court,¹¹⁵ did

¹¹⁰Charles J. McClain, *In Search of Equality: The Chinese Struggle against Discrimination in Nineteenth-Century America* (Berkeley, 1994) 85 [hereafter cited as McClain, *In Search of Equality*]. Lake was another lawyer born and educated in upstate New York. He arrived in California in 1850, and was eventually appointed U.S. attorney for California by Lincoln. After a stint as a state court judge, he entered a lucrative private practice. Alonzo Phelps, *Contemporary Biography of California's Representative Men* (San Francisco, 1881), 49-51. In 1879, he represented the Central Pacific in the test case that the landholders at Mussel Slough had brought, see *Southern Pac. R.R. Co. v. Orton*, 32 F. 457 (C.C.D. Cal. 1879) (holding that lands set aside by federal land grant cannot be withdrawn from grant by action of state law); Bederman, "Mussel Slough," supra note 1 at 240 n.13. He died just before the railroad began its suit challenging the California Constitution's taxation clauses.

¹¹¹McClain, *In Search of Equality*, supra note 110 at 87-88.

¹¹²1 F. 481 (C.C.D. Cal. 1880). Hoffman had attended Williams College in Massachusetts with Sanderson.

¹¹³*Ibid.* at 493, 498.

¹¹⁴*Ibid.* at 493-94.

¹¹⁵Johnson, *Supreme Court Justices*, supra note 17 at 1:3, 95-97; Orrin Kip

not base his concurring opinion on the rights of corporations; he was much more disturbed by the rampant sinophobia that inspired the provision.¹¹⁶ For Sawyer, it was the right to labor included among the privileges and immunities that guaranteed that the Chinese subjects in the United States could not be victimized by a racist legislature. Nor could they be victimized by a statute that legally inscribed their inferiority. Finally, the state could not challenge the supremacy of a federal treaty and the policy judgments contained therein by driving Chinese immigrants from the state.¹¹⁷ It would take another twelve years for Congress to enact legislation that achieved the goals that Haymond had recommended.¹¹⁸

For several years after *Parrott*, McAllister continued to be involved in litigating Chinese civil-rights cases. The litigation involved municipal ordinances—mostly restrictions San Francisco had placed on Chinese laundry operators—and federal limitations on Chinese immigrants intending to enter the

McMurray, "An Historical Sketch of the Supreme Court of California," in *The Record: Historical and Contemporary Review of Bench and Bar in California* (San Francisco, 1926), 6, 12. In 1885, with Matthew Deady and Stephen J. Field, Sawyer became one of the first members of the Board of Trustees of Stanford University. *The Founding Grant of Stanford University with Amendments, Legislation, and Court Decrees* (Stanford, 1987), 3. For a discussion of the civil-rights jurisprudence of Sawyer, see Przybyszewski, "Lorenzo Sawyer," *supra* note 104 at 23, 42-43 (demonstrating how Sawyer went much further in involving the federal judiciary in the protection of the rights of Chinese than did Field and Hoffman); see also Christian G. Fritz, "A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California," *American Journal of Legal History* 32 (1983), 348.

¹¹⁶Przybyszewski, "Lorenzo Sawyer," *supra* note 104 at 23.

¹¹⁷*Parrott*, 1 F. at 508-10, 512-13, 516-17; Przybyszewski, "Lorenzo Sawyer," *supra* note 104 at 29-31. One historian of the Fourteenth Amendment states that the two judges were actually eager to base their decision on an assertion of corporate personality—that is, they were willing to say that corporations should be considered persons for the purposes of the Fourteenth Amendment and thus the holders of rights. Graham, *Everyman's Constitution*, *supra* note 78 at 393 n.88.

¹¹⁸The Geary Act, An Act to Prohibit the Coming of Chinese Persons Into the United States, 27 Stat. 25 (1892), required Chinese to carry certain identification documents, drastically limited their access to federal habeas proceedings, punished illegal residents, and required Chinese to prove their legal residence. McClain, *In Search of Equality*, *supra* note 110 at 202-3. Another lawyer who worked for the Southern Pacific during its tax litigation, William Maxwell Evarts, was central to the unsuccessful legal challenge to the statute. See *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (holding that Congress's greater power to exclude Chinese aliens included lesser power to require registration and identification of Chinese aliens). On reactions to the Chinese-Americans' legal strategy after the Geary Act, see Ellen D. Katz, "The Six Companies and the Geary Act: A Case Study in Nineteenth-Century Civil Disobedience and Civil Rights Litigation," *Western Legal History* 8 (Summer/Fall 1995), 227 [hereafter cited as Katz, "Geary Act"].



Hall McAllister (Courtesy California History Room,
California State Library, Sacramento)

country as laborers.¹¹⁹ Laundries had been attacked in the public press as nuisances and San Francisco responded with a series of rigid regulations, neutrally framed, but clearly motivated by

¹¹⁹See, e.g., *Ex Parte Tom Tong*, 108 U.S. 556 (1883); *Ex Parte Hung Hang*, 108 U.S. 552 (1883); *In re Wo Lee*, 26 F. 471 (C.C.D. Cal. 1886); *In re Low Yam Chow (Case of the Chinese Merchant)*, 13 F. 605 (C.C.D. Cal. 1882) (challenges to documentary requirements to show merchant status); *In re Ah Tie (Case of the Chinese Laborers on Shipboard)*, 13 F. 291 (C.C.D. Cal. 1882), and *In re Ah Sing (Case Of the Chinese Cabin Waiter)*, 13 F. 286 (C.C.D. Cal. 1882) (challenge to regulations prohibiting Chinese laborers from entering from foreign port); *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882) (challenge to requirement that those intending to operate laundries obtain signatures of 12 residents of block). For a description of this litigation, see McClain, *In Search of Equality*, *supra* note 110 at 98-172. For an analysis of late-nineteenth- and early-twentieth-century litigation and a comparison of the protection of the civil rights of Chinese under judicial and administrative regimes, see Lucy E. Saylor, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern American Immigration Law* (Chapel Hill, 1995).

racial animus more than anything else.¹²⁰ Eventually, McAllister had the opportunity to make law with much broader implications for Fourteenth Amendment jurisprudence than the Ninth Circuit law being carved out by Judge Stephen J. Field, sitting at the circuit court level, and Sawyer. At issue was an 1880 city ordinance prohibiting the operation of laundries in other than brick buildings. Exceptional permits could be granted by the city's board of supervisors. When none of the petitions for exceptions filed by Chinese was granted, and nearly all those filed by whites were, outraged Chinese laundry operators, who ran three-quarters of the laundries in the city, sued. McAllister took the case, retained by the Chinese Consolidated Benevolent Association,¹²¹ a coordinating council of six large immigrant organizations.¹²²

Had the discrimination obviously motivating the city supervisors manifested itself on the face of the statute, McAllister would have had an easier time convincing the Court that there had been a violation of the Equal Protection Clause, especially after *Strauder v. West Virginia*, a case in which the Court had struck down a state statute excluding from jury service all African Americans.¹²³ Instead, McAllister had the steeper uphill climb of challenging a seemingly neutral law. His terse brief argued, first, that the discriminatory administration of the statute was really "an occult proviso to the city ordinance." To assert simply that the law was not discriminatory would be to ignore the fact "that the body which passed the law is the same that operates it so as to produce discrimination."¹²⁴ Secondly, the ability of the city unilaterally to grant exemptions for any reason whatsoever, and the likelihood of impermissible discrimination in the exercise of that discretion, heightened the Court's duty to monitor such standardless administration:

¹²⁰For example, the city enacted strict zoning rules and required petitions in order for Chinese citizens to obtain licenses. McClain, *In Search of Equality*, supra note 110 at 99-101.

¹²¹Virginia L. Clark, "Yick Wo Wins Equal Rights," *California Historian* 39 (March 1993), 6.

¹²²The Benevolent Association was a federation of organizations that helped Chinese immigrants with credit, dispute resolution, and legal representation, and was the unofficial governing body of the Chinese-American community in San Francisco. See Owen M. Fiss, *Troubled Beginnings of the Modern State, 1888-1910*, in *The Oliver Wendell Holmes Devise: History of the Supreme Court of the United States* (New York, 1993), 8:304 [hereafter cited as Fiss, *Troubled Beginnings*]; Katz, "Geary Act," supra note 118 at 227 n.2, 231-32.

¹²³100 U.S. 303 (1880).

¹²⁴Hall McAllister, L.H. Van Shaick, and D.L. Smoot, Argument-Brief for Appellant and Plaintiff in Error, *Yick Wo v. Hopkins*, in *Landmark Briefs and Arguments of the Supreme Court of the United States, Constitutional Law*, ed. Philip B. Kurland and Gerhard Casper (Washington, 1975), 9:8-9.

With such a measure, providing in terms for the insertion of illimitable provisos and exceptions, it is not only the privilege, but it would seem to be the duty, of the courts to scrutinize its operations closely, and declare the Act itself a nullity, because it establishes a system by which forbidden results can be and are accomplished without any possible redress to the persons aggrieved.¹²⁵

Justice Mathews's opinion¹²⁶ is extraordinary for its acceptance of the propositions that the administration or enforcement of an apparently neutral law, if carried out in a racially discriminatory fashion, violated the Equal Protection Clause; that the Court should scrutinize statutes that gave unchecked, potentially limitless power to the civil authorities charged with their enforcement; and that the Fourteenth Amendment applied equally to Chinese as it did to the newly freed African Americans on whose behalf it had supposedly been passed, a conclusion that flew in the face of the ruling of the *Slaughterhouse Cases* of ten years before, which had limited the reach of the Fourteenth Amendment's privileges and immunities clause.¹²⁷ This was a point that McAllister did not argue. He relied instead on the Supreme Court's gradual but nearly complete extension of the Equal Protection Clause to apply to those other than African Americans, i.e., both corporations and individuals. As we shall see, this development of Fourteenth Amendment jurisprudence, particularly as applied to corporations, was achieved largely in litigation begun by the legal department of the Southern and Central Pacific Railroads.¹²⁸

¹²⁵*Ibid.* at 8.

¹²⁶*Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹²⁷83 U.S. (16 Wall.) 36 (1873) (holding that the Fourteenth Amendment could not be used by white workers to challenge a state regulatory scheme). Given the role of the Equal Protection Clause in the development of corporate personality, the importance of *Yick Wo* in the extension of Fourteenth Amendment protections should not be overstated. See, e.g., Walter H. Hamilton, "The Path of Due Process of Law," in *The Constitution Reconsidered*, ed. Conyers Read (New York, 1938), 146. Note also that between the time of the *Slaughterhouse Cases* and *Yick Wo*, six new justices had come onto the Court, including Chief Justice Waite, Justice Harlan, and Justice Mathews, the author of *Yick Wo*.

¹²⁸McAllister was to be involved in one further piece of civil-rights litigation on behalf of Chinese immigrants. In *Baldwin v. Franks*, 120 U.S. 678 (1887), he represented the interests of the Chinese in the habeas petition of a group of prisoners who had conspired to violate the rights of Chinese citizens. For a review of this case, see McClain, *In Search of Equality*, *supra* note 110 at 173-90.

Like Haymond in the early part of his career, McAllister was involved with a crucial case regarding water rights. *Lux v. Haggin*, 69 Cal. 255 (1886), was probably the most important water-law case of the nineteenth century, and

FOURTEENTH AMENDMENT RIGHTS FOR CORPORATIONS

Hatred of the Chinese and the railroad company went hand in hand, just as did the jurisprudential extension of Fourteenth Amendment protection to both. Dennis Kearney, an organizer and agitator, sounded the unified cry, "The Chinese, the Corporations, the Southern Pacific must go."¹²⁹ More urgently than the "problem" of Chinese immigration, the need for solutions to the problems caused by railroads was the main reason that a constitutional convention was called for 1879.¹³⁰ As one scholar has described the situation, "Railroad corporations seemed to be running wild and wreaking havoc in the places where their coming had been looked to as a boon to prosperity."¹³¹

One of the resulting constitutional provisions that aroused the Central Pacific's ire was the taxation scheme eventually included in Article Thirteen of the new constitution. It allowed citizens to deduct the amount of any debts or mortgages from the total taxable property value before determining the value of the property to be taxed, thereby shifting the tax burden to the lender. Railroad companies and other "quasi-public corporations," however, were unable to take advantage of these deductions.¹³² From their perspective, they would have to pay taxes

involved the rights of prior claimants of land bordering rivers under traditional common law (riparians) and later users drawing water from the river through irrigation [appropriators], a policy furthered by federal law. Donald J. Pisani, *From the Family Farm to Agribusiness: The Irrigation Crusade and the West, 1850-1931* (Berkeley, 1984), 191.

McAllister won a victory for the defenders of riparian interests, as well as victories on appeal in 1881 and on a rehearing by the California Supreme Court. The decision was considered so monumental that a group of prominent lawyers angered by the decision, many of whom were small farmers or landholders in the irrigation-dependent southern part of the state, petitioned the government for the reorganization of the California Supreme Court. See San Francisco Bar Association, *Memorial of the Bar Association of San Francisco to the Legislature of the State of California* (San Francisco, 1886). For an excellent review of the entire controversy, see M. Catherine Miller, *Flooding the Courtroom: Law and Water in the Far West* (Lincoln, 1993).

¹²⁹Graham, *Everyman's Constitution*, supra note 78 at 371.

¹³⁰Swisher, *Motivation and Political Technique*, supra note 63 at 44-45.

¹³¹Ibid. at 45.

¹³²California Constitution of 1879, Art. 13, §4. The new constitution also included a provision outlining a regulatory commission. Article 12, §22, attempted to improve the regulation that the state had adopted in 1875 by making the commissioners elected, giving them substantial investigative and increased rate-fixing powers. The first commission had been a dismal failure. "Indeed the railroads seemed to profit by the scheme in that they appeared to submit to a political agency, which in fact they were able to control." Swisher, *Motivation and Political Technique*, supra note 63 at 112-13; see also Daggett, *History of the Southern Pacific*, supra note 3 at 52-58, 184-97.

on something on which individuals would not. This provision was just the sort of "special" legislation the application of which depended on the formal legal status of the parties, a distinction that classical liberalism rejected as a noxious privilege, a threat to "equality, harmony, freedom, and the overall economic and political liberty that property established."¹³³

To one of the convention's delegates, however, this pragmatic solution to corporate mischief was unproblematic. He explained:

It was made to appear to the Committee on Revenue and Taxation that the railroad companies were in debt in very large sums, in the form of bonds, and that those bonds were held in Europe, New York, and other places outside this state. . . . Under a decision of the Supreme Court of the United States . . . it has been held that these bonds are not within the jurisdiction of the state, and cannot be taxed. So unless this exception is made, the railroad companies will have a good thing of it.¹³⁴

He was right; the railroad was mortgaged up to \$40,000 per mile, approximately 100 to 150 percent of its assessed value. Not having to pay state taxes on such enormous value would allow the Central Pacific that much more leverage in its continuing battles against other railroads, particularly the systems being built by Tom Scott (the Penn Central Railroad) and Jay Gould (the Texas & Pacific Railroad).¹³⁵ To the state treasury, as well, the amount of money involved was quite significant, and the delinquent payments had a serious effect on the state's fiscal health. For the years 1880 and 1881, the Central Pacific owed the state a total of \$1,118,000 in taxes.¹³⁶

In the legal battles that ensued, the company marshaled

¹³³Stephen A. Siegel, "Understanding the *Lochner* Era: Lessons from the Controversy over Railroad and Utility Rate Regulation," *Virginia Law Review* 70 (1984), 190 [hereafter cited as Siegel, "*Lochner* Era"].

¹³⁴Swisher, *Motivation and Political Technique*, supra note 63 at 78.

¹³⁵Graham, *Everyman's Constitution*, supra note 78 at 410. Despite controlling approximately 4,700 miles of railroad lines in the United States and Mexico by the early 1880s, the company continually needed to expand to forestall competition on the transcontinental lines, particularly the southern ones. Clark, *Leland Stanford*, supra note 18 at 339; Swisher, *Motivation and Political Technique*, supra note 63 at 45-46, 60. One example of the legal and business battles between the Central Pacific and the Texas & Pacific was over the exclusivity of the federal land grants to the latter. See Silas W. Sanderson, *Answer of Defendant, Texas & Pacific v. the Southern Pacific Railroad Co. of New Mexico* (1881).

¹³⁶William C. Fankhauser, *A Financial History of California* (Berkeley, 1913), 300-301.

tion of "individual property held in corporate form."¹⁴⁷ Sanderson's brief was a mix of pragmatism and political philosophy, combining his concern for the essential role of national corporation in economic life and concern for the property rights of the individuals behind the corporation.

Quite similar to Field's view, Sanderson's larger goal was to force the state to justify how it doled out legal and financial benefits and burdens, and to delineate what role it would play in the economic life of private individuals. To Sanderson, the ultimate end of the judiciary should be the construction of a rational system for the allocation of rights to stockholders and powers to state regulators.¹⁴⁸ It was critical that, if the state were to be allowed to classify property based on the property's owner, and not on the character of the property, there needed to be some limiting principle to prevent arbitrary classifications based on status.¹⁴⁹ If corporations were forced to accept the propriety of rate regulation established in *Munn v. Illinois*¹⁵⁰ and directly applied to state regulation of railroads in the *Railroad Commission Cases*,¹⁵¹ "there [had to] be some means to define the limits of the power of the State over its corporations after they have expended money and incurred obligations upon the faith of grants to them, and the rights of the corporations . . . and the people"¹⁵² would be protected. For the Central Pacific, Field, and Sanderson, that means was the extension of the Fourteenth Amendment to corporations.

While the legal questions of corporate personality behind *San Mateo* were dismissed as moot,¹⁵³ the arguments marshaled by the railroad's lawyers had an immense impact. Four years later, in *Santa Clara County v. Southern Pacific Railroad*,¹⁵⁴ substantially similar questions arose regarding the ability of the state to assess property owned by corporations differently from property owned by others. The railroad expected that the case would again hinge on whether corporations were protected by the Fourteenth Amendment. This time Sanderson was joined as counsel by William Maxwell Evarts, a pillar of the eastern bar.¹⁵⁵

¹⁴⁷*Ibid.* at 1462-63.

¹⁴⁸Argument of Silas W. Sanderson, in *Arguments and Decisions*, *supra* note 143.

¹⁴⁹*Ibid.*

¹⁵⁰94 U.S. 113 (1877).

¹⁵¹116 U.S. 307 (1886).

¹⁵²Siegel, "Lochner Era," *supra* note 133 at 209 (citing Stephen J. Field).

¹⁵³116 U.S. 138 (1882).

¹⁵⁴118 U.S. 394 (1886).

¹⁵⁵*Dictionary of American Biography*, s.v. Evarts, William Maxwell.

Before argument began, Chief Justice Waite, without having submitted the question to a formal conference vote by the justices, announced in one "disquietingly brief"¹⁵⁶ sentence the definitive end of a dormant Fourteenth Amendment in the area of economic and social legislation. No longer would the amendment be bound to the limited historical circumstances—racial discrimination against newly freed African Americans—that inspired its passage:¹⁵⁷ "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."¹⁵⁸

Lawyers for the Central Pacific were clearly integral in freeing the Fourteenth Amendment from the stranglehold of the *Slaughter-house* ruling, extending it to persons other than African Americans and eventually to corporations.¹⁵⁹ As a historical question, what remains is to assess the significance of the decisions, and, for the purposes of this essay, the meaning of Sanderson's and Haymond's participation. Were the decisions "symbols of the subservience of the Supreme Court during the Gilded Age to the interests of big business"?¹⁶⁰ Had the Supreme Court simply been overwhelmed by the legal expertise of the Central Pacific and other massive corporations trying to manage the huge debts they owed to the federal government?¹⁶¹ Or, as Morton Horwitz has suggested, has the char-

¹⁵⁶Horwitz, *Transformation of American Law*, supra note 11 at 67.

¹⁵⁷*Ibid.* at 69.

¹⁵⁸118 U.S. 394, 396 (1886); see also *California v. Central Pac. R.R.*, 127 U.S. 1 (1888).

¹⁵⁹Sanderson, Pomeroy, and, most notably, the county's brief saw these two questions as being collapsed into one: either the amendment applied only to African Americans, or it applied to all legally cognizable individuals, i.e., Chinese in the United States and corporations. It is not obviously an all-or-nothing question as to who besides African Americans could make an effective due-process claim. For example, Judge Woods, hearing the *Slaughter-house Cases* on circuit with Justice Bradley (who dissented at the Supreme Court level), had emphatically rejected the notion that corporations could be either Fourteenth Amendment citizens or persons. *Insurance Co. v. New Orleans*, 13 F. Cas. 67, 67-69 (C.C.D. La. 1870); *Live-Stock Dealers' & Butchers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. Cas. 649 (C.C.D. La. 1870).

¹⁶⁰Horwitz, *Transformation of American Law*, supra note 11 at 66; see also Mark, "Personification of the Business Corporation," supra note 146.

¹⁶¹Graham characterizes the reasons behind the corporation's victories in the tax litigation as the result of the "sheer lopsidedness of talents, resources . . . not judicial bias, but disproportionate briefing . . . better prepared counsel who explored the risks of arbitrary legislation much more effectively than their

would, McAllister argued, violate his Fifth Amendment right not to give compelled testimony. Writing for the Circuit Court, Field agreed with McAllister, although he stressed much more the constitutional limits of congressional powers to intrude into the private affairs of citizens out of the context of judicial proceedings.¹⁸²

Months after the hearings, Haymond returned as a public spokesman to Washington to sum up the Central Pacific's position on what had transpired. Just as during the Colton trial the lawyers had ignored the letters revealing the methods the corporation used to achieve its ends, Haymond did not attempt to address the major charges of corrupt, predatory, and exploitative practices. Nor did he characterize the relationship of creditor-debtor between the federal government and the Central Pacific as the Supreme Court emphatically had.

Instead, the relationship was completely contractualized, as if the parties were two random individuals, leaving no room for politics, morality, or concerns of equity. In his view, it had been an arm's-length business relationship: the government had asked the company to build the railroad; it did so; and that should have concluded the relationship. Since the Central Pacific had performed its obligations, Haymond argued, the government could not take any measures to place new ones on the railroad to settle the debt, which did not come due until 1896, and he assured the committee that the "United States can sustain no loss unless by reason of its own ill-advised action."¹⁸³ He began by asking the government to "descend from its high position and place itself on this matter in the attitude of private creditor":

We were wedded to the United States in the hour of darkness and peril. . . . We were then stronger in credit than our spouse. The United States wanted road constructed for military purposes across the mountains upon which the storm king sat enthroned. . . . We did it faithfully and honestly, and all the obligations of that marriage contract on our part have been performed as truly as the proudest woman of our race ever kept the obligations which she owed to her husband. . . .

States Pacific Railway Commission, reprinted in U.S. Pacific Railway Commission, *Testimony*, supra note 6 at 4169.

¹⁸²*In re Pac. Rwy. Comm'n*, 32 F. 241, 249-59 (C.C. Cal. 1887); see also Carl Brent Swisher, *American Constitutional Development*, 2d ed. (Boston, 1954), 395-96.

¹⁸³Creed Haymond, *The Central Pacific Railroad Co.: Its Relations to the Government, Testimony before Select Committee of the U.S. Senate* (San Francisco, 1888), 227 [hereafter cited as Haymond, *Central Pacific*].

It may be that the United States, which has performed none of its obligations towards us, has grown tired of the alliance. It may be that the time has come when, in defiance of the laws which bind us together, the bonds are to be broken.¹⁸⁴

What escaped Haymond was that public concern over the corporation's practices was a political problem, not simply a private matter between two contracting parties. Serious issues, apart from whether the parties had strictly complied with the original terms of their bargain, could not be ignored. The Pacific Railway Commission and the senate committee that considered its recommendations were as concerned with the railroad's compliance with an original deal as with the questions of how much power the railroad could be permitted and how it was to behave as a market participant in its sphere of activity.¹⁸⁵ Classical legal language provided Haymond with a discursive way out. By "depoliticiz[ing] public law categories,"¹⁸⁶ for sure, law was rid of moral, inherently subjective standards. At the same time, however, his defense of the railroad's practices fails as a compelling or coherent language through which the story of the Central Pacific could be retold. It also smacks of a certain hypocrisy: the railroad crying foul at such a late date, while asking that its debt be refunded.

Haymond's apology obscures more about the railroad's behavior than it enlightens. While Haymond may have been the Central Pacific's experienced spokesman, putting things in a "telling way" to the people, he seems to have ignored the thrust of what Congress was reacting to when it formed the commission: unsavory practices resulting in too much concentrated wealth and power in one corporation. The inadequacies of classical legal language, however, are even worse than a sim-

¹⁸⁴Ibid. at 12, 190-93, 228-29.

¹⁸⁵The commissioners estimated the cost of constructing the railroad from San Francisco to Promontory, the line for which the original subsidy was given, and analyzed the relationship between the railroad and its affiliated construction companies. They concluded that the likelihood that the corporation would be able to repay its obligations to the federal government, due in the late 1890s, was improbable. *Report of the Commission and of the Minority Commissioner of the United States Pacific Railway Commission* (Washington, 1887), 22-26, 33, 71-73, 79-83, 144-45. The majority's recommendation, despite the scathing tone accusing the railroad of self-dealing and deception before the commission, was that the debt be refunded; the minority's more radical approach was to foreclose and sever any government ties with the operation of the railroad. Ibid. at 151-53. The president then passed on the recommendations to a select senate subcommittee.

¹⁸⁶Horwitz, *Transformation of American Law*, supra note 11 at 27; see also Gordon, "Ideal and Actual," supra note 16 at 61.

ple disregard for public concern. Attempts to refigure the legislation that had originally granted the transcontinental railroad franchises to the Central Pacific, including the massive subsidies,¹⁸⁷ appear to be self-serving efforts to conceal the principals' enrichment at the expense of the federal government.¹⁸⁸ To the commission's charge of self-dealing, Haymond's response that "the Commissioners entirely misapprehended the situation . . . from the fact that [they] did not properly apprehend the nature of those things which in California are called corporations"¹⁸⁹ so abstracts the legal from the political and moral categories that he sounds morally bankrupt, unable to argue about what is fair, powerless to address the real conclusions of the commission.¹⁹⁰

CONCLUSION

If classical legal liberalism's explanatory power was waning at the end of the 1880s, the careers of these four lawyers ended as their discursive tools were being taken away. Sanderson died

¹⁸⁷Haymond saw the original act as a promise by the railroad either to build the road, repay the money loaned it by the government, or surrender its ownership of the railroad. See, e.g., *idem*, *Central Pacific*, supra note 183 at 54.

¹⁸⁸See Daggett, *History of the Southern Pacific*, supra note 3 at 80. For equally unpersuasive arguments that counsel for the railroad presented for public consumption, see Creed Haymond, *To the People: The Railroad Tax Cases, History of the Litigation, An Open Letter* (San Francisco, 1887); Roscoe Conkling, *The Central Pacific Railroad Company in Equitable Account with the United States: A Review of the Testimony and Exhibits* (New York, 1887).

¹⁸⁹Haymond, *Central Pacific*, supra note 183 at 191.

¹⁹⁰The railroad's debt outlasted Cohen, McAllister, Haymond, and Sanderson. In 1886, Stanford announced that to memorialize his son, who had died in adolescence, he would found a university. On his death in 1893, his fortune was estimated at \$30 million, nearly all of which was left for the purpose. Wilson and Taylor, *Southern Pacific*, supra note 56 at 105. Such a large estate suggested that he could have repaid the portion of the Central Pacific's debt for which, as holder of nearly one-quarter of the stock, he was liable, approximately \$15 million. The government's claim was especially compelling in light of California's constitutional provision that held stockholders personally liable for corporate debt. The decision in *United States v. Stanford*, 69 F. 25 (C.C.N.D. Cal. 1895), *aff'd*, 161 U.S. 412 (1896), effectively guaranteed the continued survival of Stanford University by refusing to hold the Stanford estate liable for the Central Pacific's debt. For a fascinating retelling of this story, see Frederick, "Railroads, Robber Barons," supra note 60.

Instead of foreclosing on the railroad, in 1897 the government agreed to refund the Central Pacific's debt for an additional ten years, to begin in 1899, and took an interest in the entire Southern Pacific system as security. The \$60 million debt was finally repaid in full in 1909. *Ibid.* at 255 n.141; Wilson and Taylor, *Southern Pacific*, supra note 56 at 242. For a comprehensive review of the plans to rescue the Southern Pacific, see Daggett, *History of the Southern Pacific*, supra note 3 at 395-424.

first in 1887, followed by both Cohen and McAllister in late 1888, and Haymond a few years later in 1893.

All of them lived at a time when new forms of legal work were taking shape along with rapid social and economic transformations, changing the conditions of independence that lawyers had formerly enjoyed. Sanderson, the former judge and in-house counsel, was the least professionally independent of the four. His legal thinking was wedded, consciously or not, to his long-time employer, and he remained within the managerial hierarchy of the company, tied exclusively to its litigation work. Haymond was slightly more independent ideologically, having started his career as an adversary of the railroad, or at least as a hopeful reformer. Nonetheless, he became its spokesman and defender, and, by virtue of his close relationship with Leland Stanford as well as his employment with the company, the railroad's conduit to the public when it was under tremendous official and popular scrutiny.¹⁹¹ Cohen, by using his legal, financial, and tactical acumen, achieved professional independence, alternating as the railroad's virulent public critic and its defender. McAllister gained the highest professional autonomy of the group by remaining essentially a trial practitioner. He could choose his clients, demand high fees, and involve himself in constitutional cases without being driven by the pragmatic ends of his corporate employers.

The careers of all four are impressive. All involved themselves in social conflict in ways in which today's corporate lawyers cannot. All had careers that crossed boundaries, either in the public and private sectors, in courtrooms, boardrooms, and committee hearing rooms, or on both sides of a similar issue. Most importantly, all of them, to varying degrees, were "bright legal technicians," businessmen, and applied legal theorists,¹⁹² capable of reflection on how they were—even if at times only tenuously—participants in social change. They remain models of praxis in action, and in this, a close consideration of their careers repays the student.

¹⁹¹For an example of Haymond's personal attachment to Stanford, see Haymond, *Central Pacific*, supra note 183 at 231-35. The relationship makes it unlikely that Haymond ever served as a brake on the railroad's excesses. For a description of this function of corporate counsel in a modern context, see Robert W. Gordon and William H. Simon, "The Redemption of Professionalism?," in *Lawyers' Ideals/Lawyers' Practices*, ed. Robert L. Nelson, David M. Trubek, and Rayman L. Solomon (Ithaca, 1992), 248-57.

¹⁹²Gordon, "Ideal and Actual," supra note 16 at 173.

BOOK REVIEWS

Crossing Over the Line: Legislating Morality and the Mann Act, by David J. Langum. Chicago: University of Chicago Press, 1994; 312 pp., illustrations, appendix, notes, index; \$24.95, cloth.

Crossing Over the Line: Legislating Morality and the Mann Act, by David Langum, is a well told, insightful, and sometimes very funny history of the Mann Act. The "White Slave Traffic Act" (as it was originally called) was passed in 1910 by Congress, apparently in response to public hysteria over a largely mythical industry: the abduction of virginal white girls by dark-skinned foreigners for the purpose of prostitution. Congress responded to this hysteria, itself fueled by fears of urbanization, Victorian moralism, and xenophobic racism, with a law that by its language prohibited (and still prohibits) much more than the "white slavery" it was intended to target. As originally written, the Mann Act prohibited the interstate transportation of a woman or women for any "immoral purpose," which the Supreme Court eventually interpreted as not only prostitution, but also fully consensual and even noncommercial sexual acts as well. Thus the act could be read, and for about twenty years *was* read, as criminalizing the act of a man's crossing a state line with a woman who was not his wife with the intent or hope of having sexual intercourse.

Langum traces the history of this clearly ludicrous attempt to legislate morality through (approximately) four periods, from its passage through its use first as a weapon in the "morals crusade" against sexual liaisons and then as a means of harassing gangsters, radicals, black men who consorted with white women, and other assorted "undesirables," to the postsexual revolution of the 1970s and 1980s. Although still on the books, the act is now little more than an anachronism, and so far removed from public consciousness that it is no longer useful even for stand-up comedians and talk-show hosts.

Langum uses his history of the Mann Act primarily to sound familiar liberal warnings about the folly of attempting to legislate morality. What the history of the act shows, he argues (for the most part convincingly), is that such an attempt carries with it costs that greatly outweigh any change in behavior it may (but probably won't) induce: Such legislation conflicts

with our commitment to individual liberty and freedom of sexual expression; it permits a majority to impose its own values on nonconformists; it presents endless opportunities for prosecutorial abuse of discretion; it facilitates blackmail and extortion; and, particularly when it sets out to regulate normal sexual impulses, it is bound to fail. Langum demonstrates that the Mann Act presents an almost perfect example of each of these costs of paternalistic and moralistic legislation, and concludes that the fact that the act is now virtually a dead letter is an unambiguous liberal triumph. He ends by warning against the temptation to use repressive law in similar ways in the future to counter natural sexual inclinations.

However, his conclusion that the act is now obsolete with regard to consensual, noncommercial sexual activities may be unduly optimistic. He argues that the amendment to the act in the mid-1980s, which deleted the "immoral purpose" language and substituted the more legalistic requirement that the culpable intent must be to engage in activity that is criminal, effectively closes the door on the prosecution under the act of consensual, noncommercial sex between adults. Most states, Langum contends, have repealed or decriminalized both fornication and adultery, and although "deviant sex" such as oral sex or anal sex is still widely criminalized, it is a bit of a stretch to think that a heterosexual couple crossing a state line has the intent to engage in those particular sexual practices even if they do have the specific intent to engage in sex. But it is not such a stretch to ascribe such an intent to a same-sex couple, for whom those particular sexual practices are not deviant, but typical. It is surely not paranoid to worry that, given the right unholy mix of homophobic fervor, popular clamor, and fundamentalist revivalism, we could, with the aid of the Mann Act, reenact much of this history, from the moral crusade through the prosecutorial targeting of undesirables, but this time with gays and lesbians, rather than extramarital adulterers and fornicators, in the cross-fires. Given the current political climate, this possibility is surely more than just theoretical.

The second problem *Crossing the Line* reveals is more general. The lesson Langum convincingly draws concerns the ill effects of moralistic legislation, but it is important to remember that, whatever its origin and however wrongheaded its overuse, the Mann Act also covers a serious wrong: the trafficking in women and girls toward the end of prostituting them. Some of that transporting, both historically and today, is clearly "nonconsensual," fully within the language of the act, and occasionally even prosecuted as such. And some of that transporting, particularly today, concerns underage girls in such desparate circumstances that the line between consent and

nonconsent is virtually meaningless. As Langum's book shows, use of the Mann Act against these crimes has (strangely) plummeted, even while the numbers of prostitutes, including those transported for that purpose across state lines, has skyrocketed. Langum does not present a theory or even a tentative explanation as to why this has happened, but the still largely untold story of the lives of the persons prostituted, and of the failure or refusal of local, state, or federal law enforcement to intervene in their lives by prosecuting the pimps and johns who coerce them, is an important one that urgently needs to be told. One of the costs of moralistic legislation may be that, by focusing the attention of both conservative moralists and their liberal critics on consensual sexual behavior, such legislation distracts all of us from the much graver and more intractable problem of widespread sexual violence and coercion.

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A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937, by William G. Ross. Princeton: Princeton University Press, 1994; 368 pp., notes, index; \$39.50, cloth.

William G. Ross's book, *A Muted Fury*, analyzes the history of critics of judicial power in the United States between 1890 and 1937. As Ross points out, "The proper scope of judicial review in America is a source of perennial controversy," and he traces that controversy by examining the judiciary's most vocal critics in the period: Populists, Progressives, and the labor unions—primarily the AFL-CIO.

The book's thesis is well captured in its title: the fury of the most vocal critics of the courts was "muted." The factors muting this "intense fury" included public respect for the judiciary as a guardian of personal liberties and property rights; divisions and disputes among critics; organized campaigns by the elite bar in opposition to plans to curb judicial power; the prevailing conservatism of Congress; the recognition by critics that a strong judiciary could serve as an ally of social and economic reform; and the flexibility of judges to adapt both to the changing needs of society and to changing political circumstances.

Ross's thesis is well argued and presented. There is a long history of challenges to the scope of judicial power in the United States, a historical tradition that extends back to colonial America. Anyone who studies American legal history is bound to be struck by the legalistic and litigious nature of

Americans and how integral court power and challenges to that power are to American politics. Ross's book is an especially welcome addition to this field of study at a time when this "perennial controversy" is enjoying renewed vigor.

Of course, the book covers a time when the attacks on the judicial branch of government came not from the Right but from the Left. The discussion begins in 1890, when populism was becoming a strong force in American politics, particularly in the West. Generally speaking, the book focuses on populism and the labor movement during the period 1910-1937. In my view, this treatment does run the risk of conveying the misconception that populism evolved into progressivism, although Ross himself recognizes the distinction between the two.

In his introduction Ross discusses the immediate causes of populist antagonism toward the courts (the judiciary's "solitude for the rights of railroads and other corporations that exploited farmers and workers who formed the core of the populist constituency") and goes on to note populism's anti-elitism and its faith in direct democracy. Progressives, on the other hand, believed that reform could be directed by the state and could bring "greater rationality and order to society." Progressivism's fundamental elitism naturally led Progressives to have a deep-seated respect for the judiciary and made Progressive calls for reform of the institution more problematic. However, in parts of the book the distinction between populism and progressivism is lost. I disagree with Ross that the initiative and referendum and recall movements were Progressive movements at all. Perhaps this is a minor point, but it does explain some of the apparent contradictions that Ross sees in the Progressive movement. A broader treatment of labor unions, beyond the AFL, would have been welcome, too.

However, *A Muted Fury* does trace very well the various proposals to reform the judiciary, particularly in the 1910s and 1920s, including proposals for the election of federal judges, the recall of judges, the judicial referendum (i.e., the recall of judicial decisions), the reenactment of any federal statute that the Supreme Court declared unconstitutional, and the requirement of unanimity in Supreme Court decisions involving the constitutionality of any federal statute.

Ross ends the book with a treatment of the 1937 Roosevelt court-packing plan, showing how strong were the factors that militated against reform. Despite the fact that the 1937 plan was put forward by FDR at the height of his popularity, and despite the long history of calls for judicial reform (including reform of the U.S. Supreme Court), ultimately the "forces of inertia" worked to safeguard the court from this "reform" plan. Thus Ross demonstrates that throughout the period covered by

his book, the entrenched conservative forces of American politics and society worked against the possibility that any of these reform proposals would ever become law. Perhaps unfortunately, he also shows us that even a hundred years ago politicians were not beyond manipulating certain groups for their own political purposes, even if they sometimes had no intention of enacting the reform plans they espoused.

Karsten H. Rasmussen
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Senator Alan Bible and the Politics of the New West, by Gary E. Elliott. Reno: University of Nevada Press, 1994; 360 pp., illustrations; \$34.95, cloth.

In his recent study, Gary Elliott gives us an excellent history of major aspects of the political career of Alan Bible, who represented Nevada in the United States Senate from 1955 to 1974. Elliott's account is solidly based on Bible's Senate records and extensive interviewing.

The book includes brief but significant accounts of Bible's childhood, education, and early political career in the Nevada attorney general's office. A highlight of the period was his involvement with Senator Patrick McCarran and his powerful electoral organization. Most illuminating, however, is the account of Bible's career as a Nevada senator, throughout which Bible conceived of himself almost entirely as an advocate for Nevada's interests. This meant providing federal dollars and protection for the mining and ranching interests of the state and ensuring continued federal development of water resources for the arid West. Bible had little direct involvement with Nevada's gambling industry, despite its growing importance, although he was always vigilant about protecting its interests against possible federal control. He also pushed through the Southern Nevada Water Project, making possible the recent gambling-based growth in that part of the state.

Partly because of his personal characteristics, Bible was a classic Senate insider, wielding great power as a member of the Appropriations and Interior committees while remaining virtually unknown nationally. He placed a strong emphasis on political loyalty, and an early friendship with Lyndon Johnson remained important to both men throughout their careers.

Anyone interested in mining, ranching, and water politics, both in the West and across the nation, can learn a great deal from the accounts of several controversies in each of these areas. To this reviewer, two major themes are particularly en-

lightening. The first of these is taken up with the role of Bible and many other western senators (the foremost of whom were Democrats) in using the federal government to promote economic development in the region. Elliott points out that the pork-barrel orientation of many western senators dovetailed neatly with the interests of other Democrats (whose party controlled the Senate) in enlarging the federal role to advance social and economic policies that were of little interest to most western politicians.

The second of these themes addresses the significance of a government official's role in creating public policy. According to Elliott, Bible's largest public contribution was the substantial expansion of the national park system during his tenure as chairman of a key Interior subcommittee, in which position he was responsible for the addition of forty-seven new units to the national park system (pp. 198-99). (Although his efforts to create the first national park in Nevada failed, this goal was achieved later.) In saving lands for public parks and recreational uses, Bible had to widen his land-use philosophy to include recreation and wilderness preservation as legitimate goals of federal policy, which in turn led to conflicts with the development-oriented local and national interests he had served for many years.

These shifts in the senator's thinking, suggests Elliott, were not because of lobbying efforts or any major switch on Bible's part from a local to a national view, but because the Nevadan came to appreciate the beautiful state resources that were often threatened by development. Of great interest is Bible's passionate appeal for the preservation of public lands in Alaska, which resulted from his visit to parts of that state (pp. 195-98).

One topic not dealt with adequately is Bible's role in the civil-rights revolution that occurred while he was in the Senate. Elliott suggests that Bible was in favor of civil rights, but it is more accurate to say that the senator practiced "avoiding" the issue (pp. 134, 177, 200-201). In fact, Bible routinely refused to vote for cloture so that civil-rights bills could be voted upon. This was true even in 1964, when the crucial Civil Rights Act had to overcome a Southern filibuster. Bible explained this behavior by saying that he needed allies in case majority-backed legislation threatening Nevada's economic interests was proposed, but it is more likely that his avoidance was intimately linked with his alliances with powerful members of the "Senate club," many of whom were white Southerners chosen by electorates from which most black voters were excluded. A fuller examination of Bible's civil-rights record, including the years when he chaired the District of Columbia committee, is

necessary in order to understand important aspects of the Senate over several decades.

Overall, however, Elliott concludes that Bible served honorably and honestly until illness forced his retirement; he was universally respected and trusted by his colleagues and by most Nevadans. Readers in this day and age may need to be reminded that such decent public servants do exist.

Elmer R. Rusco

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The Navajo-Hopi Land Dispute: An American Tragedy, by David M. Brugge. Albuquerque: University of New Mexico Press, 1994; 308 pp., illustrations, notes, bibliography, index; \$35.00, cloth.

Set aside by executive order on December 16, 1882, as a reservation "for the Moquis [Hopis] and such other Indians as the Secretary of Interior may see fit to settle thereon," a thirty-nine-hundred-square-mile tract of remote and arid land in northeastern Arizona has been the source of a long, acrimonious, and sometimes violent dispute between the Navajo and Hopi Indians. Frankly admitting that it takes "the Navajo side of the fence" (p. x), this book will hearten Navajo supporters just as surely it will anger Hopi proponents, for it is an opinionated and often polemical reflection on a life devoted to archaeological exploration in aid of the Navajos' position in the decision that rejected Navajo and Hopi claims to exclusive rights to the entire 1882 Executive Order Reservation, allocated to the Hopis the exclusive interest in land management District 6, and granted to both Navajos and Hopis a joint, undivided, and equal interest in the surface and subsurface rights of the reservation outside District 6.*

After sketching the precolonial and colonial background, David Brugge moves briskly through the years of Mexican independence, United States succession, and the reservation of land under the 1882 Executive Order. Styling the period after 1882 as one of Hopi expansion at Navajo expense, he describes the evolving conflict between the two tribes over surface and subsurface rights to the 1882 Executive Order Reservation, the 1943 definition and "reserv[ation] specifically for Hopi use" of land management District 6, and the crystallization in the public mind of an image of the Hopi as a peaceful, temperate, and

**Healing v. Jones*, 210 F. Supp. 125 (D. Ariz., 1962), *aff'd*, 373 U.S. 758 (1963).

inoffensive people, and of the Navajo as aggressive and semi-nomadic predators with a proclivity to commit depredations against the Hopi. In the book's most effective chapter, the author relates the drafting and enactment of the Act of July 22, 1958, which authorized the two tribes to sue over their respective rights and interests in the 1882 Executive Order Reservation and established a three-judge court to decide those rights and interests. Brugge then recounts the archaeological investigations he and his colleagues conducted to support the Navajos' case in *Healing v. Jones*, as well as his spiritual odyssey into the lives and ways of traditional Navajos living on the disputed land. After a detailed narrative of the *Healing* trial, he discusses the role and effectiveness of federal and tribal officials and their attorneys in negotiating a settlement of the land dispute between the Navajo Tribe and the Hopi Tribal Council (but not the "traditional" Hopi faction, which rejected the council and regarded the *Healing* suit as "illegal"), and the subsequent effects of the decision. He ends with his final thoughts on the land dispute.

Brugge states his "ultimate thesis" as being "that prejudice and stereotyping were decisive in the outcome of the [*Healing*] case" (p. x), as well as the federal legislative and executive treatment of the land dispute. However, *Healing* is far more elusive, positing at the beginning an image of aggressive and migratory Navajos preying upon timid and peaceful Hopis, disclaiming at the end that any "unkind things" said about the Navajos influenced its decision, and resolving the legal issues under the language of the 1882 Executive Order, the 1958 Act, and Interior Department practice. Although apparently a source of Brugge's disillusioned outrage, the fact that *Healing* was not decided according to a jurisprudence based on archaeological findings of long, continued, and effective occupation of territory, but by legal constructs derived from statutory language and executive practice often disconnected from whatever "fairness and justice" that archaeological research might yield, does not necessarily support the conclusion that its "decisive" premise was prejudice against a Navajo stereotype.

Just as troubling as his assertions about *Healing's* outcome is Brugge's decision to forsake a narrative of the last twenty years in favor of a chapter of "final thoughts" that too often lapse into charges of "ethnic bias," "racism," and "prejudice," which remain far too common in this debate. One can admit that a misguided image of Navajo and Hopi Indians played a role in this story without overstating it or obscuring more intriguing questions, like the effect of Navajo and Hopi language and the role of translation in the *Healing* trial, or the role of mining and energy interests in the land dispute. The preoccupation with

stereotypes and ethnic prejudice stands in the way of providing the uninitiated reader with an informative description of the 1974 Navajo-Hopi Settlement Act, the partition of the "joint interest area," and the process of relocating Navajos and Hopis displaced by the partition. As *Hopi Tribe v. Navajo Tribe* demonstrates, the land dispute continues to preoccupy the courts, the tribes, their members, and the government.* This still-inflammatory saga may not be ready for critical analysis for a generation or more.

J.J. Feeney
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Preserving Paradise: Why Regulation Won't Work, by David L. Callies. Honolulu: University of Hawaii Press, 1994; 127 pp., notes, bibliography, index; \$16.95, paper.

David Callies's book, *Preserving Paradise*, explains the impact of recent Supreme Court decisions on governments' ability to regulate private land use and offers alternatives to restrictive laws, plans, ordinances, and regulations. The essence of its arguments, emphasizing the *Nollan v. California Coastal Commission* (1987), and *Lucas v. South Carolina Coastal Council* (1992) U.S. Supreme Court decisions, is that regulation of private property by county governments should be approached carefully, keeping in mind the expansion of the Constitution's Fifth Amendment takings provisions. Further, though not explicitly stated, state and federal agencies are put on notice that restrictive regulations may affect a takings of property under the Fifth Amendment if it deprives a private property owner of the value of her or his holdings without compensation.

This argument is clearly illustrated by a simulated case study of regulations of development in Hawaii. Following the author's arguments, applicants for development permits in Honolulu County, facing a tangle of federal, state, and local regulations and permit requirements, are in a position to litigate a takings case successfully. Through this example, Callies sounds a clear warning to regulatory agencies at all levels that different methods of planning and management are needed. Alternatives offered as substitutes for existing regulatory structures include property purchase or transfers, use of the public-trust doctrine, and cooperative local planning with both private and public parties involved in the process.

*46 F.3d. 908 (9th Cir., 1994).

The author's description of the state of planning and regulatory regimes in the face of recent Supreme Court decisions is extremely accurate and opportune. This is especially true in the face of an even more recent decision, in *Dolan v. City of Tigard* (1994), and codification of these cases by states such as Arizona (Arizona HB 2229, 1995), which now require a demonstrated nexus between public need and private rights.

One concern with the book is the shortness of the recommended solutions section. While some of the ideas appear worthy of consideration, they need additional reasoned analysis in order for their merits to be judged properly. Additionally, some of the solutions appear to replace one form of regulation with another, which may eventually lead to the same quandary from which the author is attempting to move away.

Regardless of reservations about the final chapter's recommendations, the correctness of the author's legal analysis and the timeliness of the message make this book essential reading for planning and zoning officers, lawyers, and academics in the fields of planning, policy, public administration, and the environment. In addition to excellent examples, the author provides a sound insight into the *Lucas* and *Nollan* cases, which are readily comprehended by the reader. An expanded second edition, with updates and more detailed attention to proposed resolution of takings concerns, is greatly needed and anticipated.

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Making Law, Order, and Authority in British Columbia, 1821-1871, by Tina Loo. Toronto: University of Toronto Press, 1994; 240 pp., photographs, maps, tables, notes, bibliography, index; \$45.50, cloth; \$18.95, paper.

This is a powerful book. It is also a provocative work that stays in one's mind. In short, it makes one think. What greater praise, particularly for an author's first book, can be offered?

Making Law, Order, and Authority in British Columbia is a tight case study of the evolution of Anglo-American legal institutions. The place is the outer west of the British Canadian empire, and the time is the fifty years before British Columbia achieves provincial status. Such a place and time suggest problems of legal stability—the creation of law, the maintenance of order, and the establishment of authority.

In this book Tina Loo shows her uncanny ability to avoid

what could have been a tedious, insignificant survey of provincial legal history or an inflammatory journey into colonial "founderitis." Instead, she turns her subject—mid-nineteenth-century British Columbia history—into a carefully crafted treatment of colonial state building. From the "Club Law" formulated by the Hudson's Bay Company to the elitist mechanizations of Supreme Court Judge Matthew Begbie, in seven chapters and a conclusion Loo traces the stops and starts of British legal institutions as they are introduced to British Columbia proper and Vancouver Island.

She asks important questions of her impressive research. How was nineteenth-century liberalism crucial to the evolution of law, order, and authority? Why did liberalism carry within it the seeds of the uneven development of law? What kinds of legal shortcomings evolved in British Columbia? How was authority limited? What is the role of place in the founding of legal institutions in the North American West? How did the law provide simultaneously for economic security and liberty and also social engineering? What kinds of concepts of justice did European British Columbians share? Many scholars have grappled with just one or two of these questions in a lengthy work, and most have not done so nearly as successfully as Loo.

One aspect of her work is not as persuasive as others. This pertains to her last full chapter, "Bute Inlet Stories: Crime, Law, and Colonial Identity," before her conclusion. In some ways this chapter might have been the one that anchors Loo to the nascent beginnings of a North American new western legal history, but it does not quite do so. Here she attempts to explain how British rhetoric used to describe the brutal killings of a white road crew and their rescue party by Chilcotin Indians and the subsequent execution of five Chilcotins shows the evolution of British Columbian identity. In explaining this event, she embraces multiple concepts of "Self" and "Other" for textual historical analysis. She ultimately concludes that British Columbian identity was, and is, a fleeting thing in a process of "being and becoming" (p. 153). This really does not help the reader to understand the Bute Inlet tragedy or the legal response, especially from the Chilcotin perspective. There may be too much postmodernism at play in this chapter to make it an effective discussion of race and violence in the North American West, but the author should not be taken to task for her own explanations of this kind of theory. My point is simply that it does not seem to work well on this particular topic.

One final aspect of this book should be noted. The back page states that the author writes with "wit and elegance." That is certainly true. Loo employs a number of thoughtful and grace-

ful writing techniques that allow her people to explain their story within a larger construct. This is a very well written and smartly organized work.

In short, *Making Law, Order, and Authority in British Columbia* is a work of outstanding scholarship that is essential reading for western legal historians. We have much to learn from Tina Loo.

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Done in Oil: An Autobiography, by J. Howard Marshall II.
College Station: Texas A & M University Press, 1994; 304 pp.,
illustrations, index; \$29.95, cloth.

Few lawyers had a more colorful career in the American petroleum industry than the late J. Howard Marshall, who, from after the First World War to the 1990s, actively participated in many of the major changes that swept the nation, the industry, and the legal profession. He deserves to be as well known as his more famous contemporary, Thurman Arnold. He has placed everyone in his debt by putting his thoughts on paper in a sprightly, well-written autobiography, sometimes informal, sometimes profound, and always interesting.

As a young lawyer and a shining star on the Yale law faculty during the early years of the Great Depression, Marshall was one of the bright young men whom Secretary of the Interior Harold Ickes brought to Washington to mold early New Deal programs, particularly in relation to the oil industry. Ickes had been impressed by an article Marshall had co-authored, "Legal Planning of Petroleum Production," which appeared in the *Yale Law Journal* in February 1931, and which he updated two years later. Ickes subsequently drafted Marshall to formulate the Oil Code of the National Recovery Administration. During World War II, with executives from the oil industry and veterans from New Deal agencies, Marshall played a significant role in shaping the Petroleum Administration for War, which managed wartime policies. Officially he served as the agency's legal counsel; unofficially, his influence extended far beyond the legal domain. After the war he became president first of Ashland Oil, then of a succession of other oil companies. By the 1970s he had become a millionaire, and left the corporate world to become an independent entrepreneur, investing mainly in oil and gas properties.

The book makes a fine contribution to the history of federal and state regulation of the American petroleum industry. Al-

though Marshall was a firm believer in the efficacy of market forces in the nation's economy, his legal philosophy allowed for government intervention whenever it seemed practical and appropriate. He emphasized the importance of individual innovation and creativity rather than bureaucratic mediocrity in fashioning successful government regulatory policies. Such creativity, he stressed, was the key to an effective regulatory environment for business and government.

Gerald D. Nash
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The Courthouses of Texas: A Guide, by Mavis P. Kelsey, Sr., and Donald H. Dyal. College Station: Texas A & M University Press, 1993; 342 pp., illustrations, appendices, bibliographic essay, index; \$29.50, cloth; \$15.95, paper.

What a wonderful journey Mavis P. Kelsey must have had, literally and intellectually, as he visited each county seat in Texas to photograph its courthouse. The county courthouse has played a significant and emotional role in the lives of many Americans and many American communities, and Texas, with its 254 counties and its tremendous geographic diversity, provides a unique opportunity for analysis of county courthouse architecture and history. *The Courthouses of Texas: A Guide* makes two significant contributions toward that analysis: a record of all courthouses built by the counties and, thanks to Kelsey's tour of Texas's county seats, the first complete collection of color photographs of a courthouse in each county.

The main body of the book consists of one page for each of Texas's counties, listing the county name, seat, and population, the number of courthouses with dates of construction, and a description of those still standing. This is followed by the street location of the current courthouse and a "notes" section, which differs significantly from county to county, but which usually includes information about the founding or naming of the county and county seat.

An opening essay provides background on the evolution of Texas's counties, a discussion of the social context of the courthouse square, an overview of courthouse construction in Texas and the architectural styles used for public building, and an overview of the courthouses by era of construction. The book closes with a series of appendices that deal with the naming of counties and county seats.

Unfortunately for the serious student of courthouses, far more information than is provided about the buildings would

be required for proper analysis of their historical import. Although there is a photograph for each county, when more than one courthouse is still standing and both cannot be included in a single image, the photographic record is incomplete. Photographs of the interiors and of the exterior detail would also be interesting. Of course, the great number of buildings makes a more inclusive photographic record prohibitive, but the failure to explain which buildings are included in the image could easily have been remedied. And a more extensive description of the buildings in the text would have provided a strong base for the single image.

While the county naming information is quite interesting, it is often irrelevant to the courthouses. The authors' decision to include so much text on naming makes me wonder whether the book might be better entitled *Counties and Courthouses of Texas*. The history of county formation and the designation of the battle for county-seat status is more meaningful, as it shows the social and political context from which the decisions of courthouse location, design, and construction arose. The co-author, Donald Dyal, has included some wonderful tidbits about the fate of some of the earlier courthouses, such as the fire that destroyed the 1891 Motley County Courthouse, started (apparently) by the sheriff as he "left town with the county's funds," and the reuse of the stones from the 1886 Jack County Courthouse in the Jacksboro City Hall.

I enjoyed Kelsey's architectural history in the opening essay, his obvious love for the majestic architecture of the nineteenth century, and his frustration with the institutional architecture of this century. His discussion of the "Texas Renaissance" style and his references to "motel" style show a practical approach to the difficulties of defining buildings designed with features from various formal styles, or no style, thus defying definition. I also found useful his discussion of the specific architectural styles within the broad building "eras," and his references to photographs in the book as examples of each. Unfortunately, in the main text only the broader terms are used, which in some cases is inaccurate without further explanation. More attention to these subjects would have greatly improved the book's usefulness as a research tool.

Still, the authors have described their work as a guide, not a study. For the traveler interested in grand architecture and local history, the courthouse photographs, county and county name history, and directions to the courthouses and historical museums should be a functional ticket to a marvelous journey of discovery.

Lynn C. Stutz
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A Vast Amount of Trouble: A History of the Spring Creek Raid, by John W. Davis. Niwot: University Press of Colorado, 1994; 304 pp., illustrations, appendix, bibliography, index; \$22.50, cloth.

John W. Davis, a Wyoming lawyer and president of the Washakie County Bar Association, is the author of this extensively researched and well-written narrative of a 1909 murder case in the Big Horn Basin. The narrative is contextualized with the conflict between cattlemen and sheep men over range, the transition from frontier to twentieth-century social norms, and the law of the West. As a teaching tool and a fascinating narrative, this book deserves our attention.

The tale of murder is western. Three sheep men cross a deadline and seven cattlemen murder them. The sheep wagon and two of the deceased are burned. Sheep dogs are shot dead. Gunmen waste the sheep. Dark and bloody ground awaits the investigative arm of the law. Felix Alston, the sheriff of Big Horn County, arrives and collects forensic evidence. Others support this evidence gathering. The sheriff interrogates people in the vicinity and develops a case. Two of the enemy deviants turn state's evidence and the trial of the alleged trigger man ends in a guilty verdict despite an ardent cattleman on the jury. Deals are made after verdict and five men are sent to the state prison. Within five years, all of the felony murder convicts are out of jail. Three sheep men are dead, families are destroyed, and there's not a single hanging at the end of the criminal-justice process. This certainly does not sound western, but it is exactly why we should take notice.

Western legal history, particularly criminal-justice administration, is too often thought of as the tales of Judge Roy Bean or the law west of Fort Smith, hanging judges, and Henry Plummer at the end of a rope. Not so in the wilds of Wyoming and not so at the pen of John W. Davis. Rather, he provides us with a thick description of investigation, grand-jury proceedings, indictments, informations, jury selection, trial tactics, jury deliberations, bargains after verdict, and brief incarcerations. He also analyzes the impact of the case. The killings of sheep men end. Marginal men continue their marginal lives and the figures in the criminal-justice administration system rise in their professions. The tale has victims and a twist of justice that is very American, both western and eastern.

Davis's book is also very much a tale of the past. The crime is committed in April 1909. The defendants go to trial on November 4, represented by nine attorneys. The people have four attorneys. Sentencing takes place on November 13. Trial often continues until 6 p.m. The judge gives the jury instructions at 6 p.m. The jury deliberates until midnight, taking five votes, and

arrives at a verdict the next morning. One prisoner dies in jail of spotted fever in 1912. One is released the same year; all are out of custody by 1914. The rapidity of the process in contrast to the present is graphic, but it does give us pause to ask why.

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In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America, by Charles J. McClain, Jr. Berkeley: University of California Press, 1994; 385 pp., bibliography, index; \$35.00, cloth.

The role of the Chinese in American history occupies "at best an obscure niche in the historical consciousness of the average educated American," observes Charles McClain at the beginning of his landmark study, *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America*. He addresses this problem by recounting constitutional challenges to discriminatory practices aimed at the early Chinese community during the last half of the nineteenth century in California—the "epicenter of Sinophobia and the place where virtually all the great Chinese cases originated" (pp. 3, 6). Exploiting a wide variety of sources, including some held at the San Francisco Theological Seminary (Presbyterian) of San Anselmo never before tapped by legal historians, McClain's study makes significant contributions to the constitutional and cultural history of Chinese Americans, as well as to that of the West and the rest of the United States.

In Search of Equality dismantles the view found in some earlier histories that the Chinese were a passive, politically backward people who made no attempts to assimilate into American culture. Chinese immigrants quickly adopted the American practice of submitting their grievances to legal institutions for resolution. This approach was contrary to their own deep-rooted cultural traditions, though Chinese Americans relied upon another tradition, mutual-aid associations (*hui-kuan*), to organize their advocacy efforts. They hired a lobbyist, rounded up diplomatic support, and sought out leading lawyers to plead against a succession of discriminatory practices. These included a variety of restrictions upon economic activities, especially those of Chinese laborers; upon Chinese participation in legal proceedings; upon cultural practices, notably the wearing of a queue by Chinese men; and upon attending integrated schools and living in integrated neighborhoods. Constitutional advocacy also sought to protect Chinese from mob

violence, harsh public-health measures, and measures aimed at prohibiting Chinese from becoming American citizens.

McClain skillfully dissects the multifaceted strands of jurisprudence woven into Chinese constitutional litigation. Throughout the book he contextualizes Chinese cases within the framework of nineteenth-century legal analysis and precedent. For example, a prominent theme in cases involving restrictions upon Chinese enterprise, especially laundries, was freedom from economic discrimination by government, a pre-eminent principle of Jacksonian jurisprudence. But the laundry cases also foreshadowed twentieth-century equal-protection jurisprudence that race constituted an unlawful basis for the distribution of government benefits and burdens. While both of these legal principles seek to foster individual enterprise, each envisions a very different role for government. They begin to illustrate the complexity of late-nineteenth-century jurisprudence. McClain provides another example of complexity in the decisions of some Chinese cases reflecting formalistic lawmaking that characterized constitutional law at the time. In a number of other cases, however, the judiciary (as it would later be pursuant to twentieth-century realism) struck down laws neutral on their face because their intent and implementation were manifestly discriminatory.

Does Chinese constitutional litigation, then, suggest some revision of the origins of realism? Perhaps, but McClain points out that the jurisprudence of these cases, with some notable exceptions, usually had little impact upon that of the present century. Another striking example of this point is to recall the litany of discriminatory practices attacked by Chinese litigants, which had many parallels to later constitutional attacks by members of minority groups, notably those by African Americans. Yet later courts rarely cited decisions of Chinese cases as precedent. Why not? Does the lack of impact of Chinese litigation upon the development of American constitutional law provide a classic example of the peripheral place of Chinese experience in American consciousness? Further probing of this question could prove to be illuminating.

In Search of Equality also provides a fascinating study of the workings of American federalism. It encompasses lawmaking of federal and state legislative and administrative bodies, as well as judicial decisions from local police courts all the way to the U.S. Supreme Court. Frequently, though not always, it casts courts as a counterpoise to majoritarian sentiment—a virulent Sinophobia—that infected legislative and administrative agencies. But the Chinese also scored some victories in the lawmaking of legislatures and administrative agencies, notably in post-Civil War civil-rights legislation. In this light McClain

rightly celebrates the rule of law. But in the end it was developments in federal immigration law, providing the foundation for this field of twentieth-century law, that effectively curtailed the expansion of a Chinese community in the late-nineteenth-century United States.

The theme of community conflict and conquest is by now familiar to American historians, and *In Search of Equality* provides another example of it, as well as of some accommodations made in response to the exercise of legal, diplomatic, and economic pressures. For example, some Americans viewed California as an outpost of occidental civilization threatened by onrushing masses of Chinese (and, later, Japanese) immigrants. Among the allegations in a pleading advocating enforced Chinese residential segregation was that "the Chinese were as a race criminal, vicious, and immoral, that they were all incorrigible perjurers, [and] that they abandoned their sick on the street to die" (p. 229).^{*} Further, from an eyewitness account of the lifting, pursuant to a court order, of a precipitous and ineffective quarantine of San Francisco's Chinatown during an outbreak of bubonic plague, McClain records the following scene. As "The Board of Health's inspectors . . . folded their tents and retreated in good order . . . a horde of Chinese poured through the lines like the advance guard of a relief column. In short order the district was again presenting to the world the picture of a lively, bustling commercial activity. . . . No more sullen crowds gathered on the street corners to excitedly discuss the iniquities of the white man" (p. 275).

In spite of such passages, and excellent material on the *hui-kuan*, it is the cultural dimensions of this history that remain least developed. This is not a criticism, but, rather, an observation about McClain's circumstances and choices in undertaking this study. Legal records have limitations as sources of cultural history, and fire destroyed a great many of those relevant to it. Further, throughout the book McClain stakes his sympathies with the Chinese. But in the main his approach is that of the precise expounder of constitutional law doctrine who is careful not to make sweeping and passionate generalizations. Though there remains much to learn about the experience of Chinese Americans, *In Search of Equality* represents a giant step in recovering the legal history of a people who are just beginning to receive the attention in American historical literature that they deserve.

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^{*}The quoted material is McClain's summary of the pleading. The court later struck these allegations from the record.

Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century, by Sidney L. Harring. New York: Cambridge University Press, 1994; 301 pp., illustrations, index; \$54.95, cloth; \$17.95, paper.

The law of the United States dealing with Native Americans has often been called anomalous, both because of its internal inconsistencies and because of the disconnections between legal doctrines and the realities of their implementation. Sidney L. Harring, professor at the Law School of the City University of New York, has made a useful contribution in providing examples of these anomalies.

Harring takes as his point of departure the Supreme Court's decision in *Ex parte Crow Dog*, 109 U.S. 556 (1883), reversing a death sentence of the Dakota territorial court for the killing of one Brule Sioux by another, on the Brule Sioux reservation, on the ground that American Indian tribes retained the sovereignty to deal with such cases under their own systems of justice. Harring very much favors this outcome. In his words, "Only Brule law could penetrate this unknowable world, come to an understanding of Crow Dog's case, and settle it in a way that preserved the integrity of the Brule people" (p. 282). The Supreme Court's concession to the autonomy of Native-American legal systems, however, soon ran into a contradictory legal doctrine by which the Supreme Court treated American Indian tribes as "wards" of the U.S. government under the "plenary power" of their "guardian," the U.S. Congress.

Exercising its plenary power, Congress reacted to the *Crow Dog* decision by passing the Major Crimes Act in 1885, giving federal courts jurisdiction over a list of intratribal crimes. Two years later, Congress enacted the Dawes Act, which decimated many tribal communities by the sale of large portions of tribal lands and the allotment of the remainder into individual parcels.

Harring attributes Congress's reaction largely to pressure from the Bureau of Indian Affairs and assimilationist "reformers" who spread racist misinformation about the "primitive" state of tribal life and law. He raises the possibility that *Crow Dog* was a "test case" encouraged by the BIA and the reformers to provoke just such a congressional backlash (which probably credits the BIA and the reformers with greater competence than they possessed). Harring also points out that much legal doctrine affecting Native Americans was created without the participation of the tribes. Rather, the contest was often between non-Indian landholders who traced their titles to original American Indian owners, and between the federal and state governments contesting jurisdiction in Indian country—a contest decisively won, at the level of doctrine, by the feds.

But Harring's book is less a book about legal doctrine than about what he calls "social history." Its major contribution is in spotlighting little-used and unexplored original sources (state appellate court opinions, trial court records, newspapers, archival sources) to demonstrate that the implementation of the law differed radically from the law in the books. The differences cut both against and for tribal sovereignty. Treaties went unenforced; states (the "deadliest enemies" of tribes), though lacking jurisdiction, often applied their laws in Indian country; and federal Indian agents, the police and courts established under their dubious administrative authority, and the military at times operated without any semblance of legal justification. But members of tribes also managed to operate outside the legal framework to preserve elements of sovereignty and to win a unique place in American law.

For examples of the resilience of tribal law, Harring discusses not only the Brule Sioux, but also two other tribes. The Creeks of Oklahoma, who had among the most developed tribal legal systems, put up overt resistance when their tribal status was terminated, and the Tlingit of Alaska, who were subjected to the full force of white law, simply continued their traditional practices while white authorities lacked the power to stop them. In the course of these discussions, Harring explores a variety of issues such as intratribal factionalism, the impact of white infusions into tribal life by settlement and intermarriage, and the influence of economic interests from railroads to bootleggers.

Unfortunately, the connection of each section to the main theme of the book is often left unclear, making the book seem disjointed; conclusions at the ends of chapters raise new issues and contain statements not substantiated by the foregoing text; references are discussed before they are described; a portion of one chapter is repeated verbatim in another. It is regrettable that such interesting original research is damaged by such poorly organized presentation.

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From King's Courts to Justice Courts: A Notable Judicial Odyssey, by Cliff Young. Falon, Nev.: AD-IN Publications, 1994; 176 pp., illustrations; \$12.95, paper.

"During the past several years, I have been privileged to visit every justice court in Nevada." So begins Nevada Supreme

Court Justice Cliff Young's retelling of what he learned visiting all fifty-six townships in Nevada. *King's Courts* is more of a group oral history than secondary historical commentary, as Young's compilation is based chiefly on the memories shared by the justices of the peace during his visits. What he saw on his "notable judicial odyssey" was also carefully recorded, filling the book with black-and-white photographs showing every current Nevada justice of the peace and most of their court-houses and courtrooms. The result is an important primary historical document preserving a contemporary piece of western and American legal history.

The record also perpetuates Young's sense of humor. The book's cover shows a JP in front of the cave where he lived, and sprinkled throughout are anecdotes and stories of life on the "judicial front lines." The author recounts how one enterprising judge did double duty as constable with a roadside table where he could ticket, arrest, and collect fines from speeders. Another JP's house straddled the Utah/Nevada border, and criminal defendants visiting the restroom at the back of the house needed to be "extradited" back to the front-porch courtroom. Other stories are told of creative rural JP solutions, such as the judge who restricted a husband to one bar and his feuding wife to the other in the two-bar township in order to keep the peace.

Fortunately, *King's Courts* does more than retell whimsical folk stories. A profound respect for Nevada's justices of the peace permeates the entire book. There are no condescending attitudes like those in some JP studies, nor are the difficulties, problems, and frustrations of these elected judicial officers completely ignored. There are complaints about the complex jurisdictional problems for those in national recreation areas, on American-Indian reservations, or in overlapping urban districts. There are concerns about courthouse space, uneven work loads, audit needs, and security (including a photo of a bullet hole in one courtroom door and the experience of one JP escaping a gun-wielding assailant only by being quick on her feet). But always there's Young's attitude that these individuals are his peers, and that their work is just as fun, challenging, and important as his own on the Nevada Supreme Court.

Such perspective is rare among studies of justices of the peace—the few that there are in any jurisdiction. The general lack of legal literature on JPs may account for Young's sparse citing to other sources in his introduction and absence of footnotes in the rest of the book. The two urban townships that wrote their own chapters are the only sections to cite reported cases on Nevada's limited-jurisdiction judges. Previous studies of Nevada's justice courts are not mentioned, nor are other

resources on Nevada's JP history.* The reader interested in knowing where to look for further information will be disappointed (as will be those who use indexes, as there is none in *King's Courts*).

But Young did not seek to write the definitive academic treatise on Nevada's courts of justice. Instead, he has visited every JP in the state, compiled their stories and photos in alphabetical order (by name of county), and secured funding from the Nevada Judicial Historical Society to publish the results. This is not a book for everyone, although Young does try to speak to a wide audience. His express intention was to "secure photographs and prepare sketches of Nevada's justice courts to record their place at this stage of the evolutionary process." Legal historians throughout the West interested in the contemporary local administration of justice will refer to this book, even with its shortcomings, in the future. Judicial folklorists will treasure it.

G. LeGrande Fletcher

Washoe County Law Library, Reno

Keeping the Peace: Police Reform in Montana, 1889 to 1918, Robert A. Harvie. Helena: Montana Historical Society Press, 1994; 194 pp., illustrations, appendix, bibliography, index; \$19.95, cloth; \$11.95, paper.

This book examines three critical decades in the history of law enforcement in Montana. From 1889 to 1918, progressive ideas regarding police practices and policies replaced the cruder methods of the frontier era. Previous authors have often concentrated their efforts on the more romantic territorial period, which spawned legends of outlaws and lawmen. In contrast, *Keeping the Peace* eschews the romantic tales while expertly documenting the transition to modern times through the histories of seven Montana communities—Whitefish, Kalispell, Hamilton, Dillon, Bozeman, Glasgow, and Miles City.

*None of the following legal or historical sources appears in *King's Courts*. An early legal title is Jabez F. Cowdrey, *A Treatise on the Law and Practice in Justices' Courts*, vol. 2, 1858-1875 (San Francisco, 1889). Statistics on some justice court cases are printed with the Nevada Attorney General Opinions from 1875 to 1911. Some JP dockets are listed in the Works Progress Administration inventories of Nevada county archives, ca. 1938. See also *Nevada's Court Structure* (Carson City, 1968) and *Facility Study: Nevada Justice and Municipal Courts* (Carson City, 1978). For biographical sources on individual judges and other Nevadans, see J. Carlyle Parker and Janet G. Parker, *Nevada Biographical and Genealogical Index* (Turlock, Calif., 1986).

Robert A. Harvie, an associate professor of criminal justice, begins his book with a valuable background chapter on frontier law enforcement, thereby setting the stage for the next seven chapters on progressive reform. Evidently, the main problems faced in the early period resulted from a combination of underfunding and rural isolation. Peace officers were in scant supply, and it was not unusual for days to pass before crimes were reported. A crime taking place in sparsely inhabited counties might prove impossible to solve because of geographical obstacles and a dearth of means of communication.

Another dilemma concerned funding for marshals and sheriffs. Sheriffs were paid on a percentage basis of taxes collected, and this function of the office overshadowed the solving of crimes. At the same time, they received exorbitant fees for transporting and housing criminals. Within towns in the territorial period, law enforcement was in the hands of marshals who, like the sheriffs, received fees for services performed, waiting (if they could) until the issuance of arrest warrants before pursuing criminals because a substantial fee accompanied serving the warrant. Not surprisingly, one of the earliest and most important progressive reforms was an 1895 state law to replace the town marshals with appointed, salaried police chiefs who served under the mayor and council. When Montana towns gradually moved to eliminate marshals in favor of police forces, they were copying a law-enforcement system already widely in place in the East.

During the progressive years, transients were believed to be responsible for most criminal acts, and numerous arrests that were made related to vagrancy. Police also resorted to a policy of "keep 'em moving," and homeless men were regularly given a quick escort out of town. But the pressure from townspeople to rid their communities of undesirables had to be weighed against the needs of area farmers for seasonal workers, as successful farming in the rural areas depended upon an adequate supply of inexpensive transient labor.

The police of the Progressive Era also had to enforce laws that regulated moral conduct and attempted to improve the community's quality of life. Their efforts to suppress prostitution and gambling were never completely successful, since they generally opted to regulate the vices rather than to eliminate them. As town life improved with modernization, the police became concerned with such chores as controlling domestic animals, enforcing leash laws, and ensuring that citizens removed trash from their properties. Considerable time and effort was also spent on supervising bicycle, horse, and motor-vehicle traffic.

While much beneficial change in community and county law

enforcement occurred, old problems like the undue influence of politicians and leading citizens remained. Nevertheless, the period witnessed striking changes. By 1918, law enforcement throughout Montana was responding quickly to crimes by using automobiles and the latest means of communication. Crime-solving techniques such as the use of fingerprints became customary, and the hinterlands no longer offered a secure refuge for law breakers. Within communities, crime was deterred through the commonsense use of regular patrols.

Keeping the Peace is an important book for anyone interested in law-enforcement studies or in the history of the American West. The book is a pleasure to read and the scholarship is thorough and objective. It compares favorably with Roger McGrath's classic, *Gunfighters, Highwaymen, and Vigilantes* (1984), and Larry D. Ball's recent books on territorial marshals and sheriffs, and it stands as an excellent model for additional studies on the topic.

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Logic and Experience: The Origin of Modern American Legal Education, by William P. LaPiana. New York: Oxford University Press, 1994; 254 pp., notes, bibliography, index; \$39.95, cloth.

The title of William LaPiana's insightful book is obviously a reference to Holmes's aphorism from *The Common Law*. But Holmes, as LaPiana notes, also used the same line a few months earlier in reviewing the second edition of Langdell's casebook on contracts. The significance of Holmes's dichotomy, made contemporaneously in this theoretical work and his practical review of a practical book, is compounded by the thrust of his remark: Law has two poles, and the theoretical is less important than the practical. Irony carries the power of this observation still further. That is, that Holmes should find the same point an apt description of his own work and that of Langdell, to whom he is usually diametrically opposed.

LaPiana's choice of this phrase for his title, with its dual contexts and pungent irony, neatly captures the nature of his book's approach. This is a book about dualities. For LaPiana, the pre-1870 American law had aspects of scientific theory (logic) and practical pleading (experience) that were largely separate. Langdell's unappreciated genius lies in his blend of the two into a single approach to legal education that grew out of a suprising concern with the practical rather than the theoretical.

In this, he was more similar to Holmes than has been generally realized. Like Holmes and Langdell, LaPiana finds experience to be more important than logic. For him, it is the key to understanding the origins of American legal education.

Roughly half the book (chapters 2 through 4) describes the antebellum intellectual milieu of legal education and the development of the case method. LaPiana begins by recounting the story of Langdell's appointment to the Harvard Law School in 1870. In his account, though, it is President Eliot rather than Langdell who is the primary engine of change. LaPiana contends that Langdell was brought in chiefly to raise the standards of the law school rather than to change its pedagogical methods. Many of the ancillary changes in the school, such as promoting faculty from within its ranks and having the law faculty made up of full-time professors, served Eliot's institutional goal of bringing the law school more directly under the president's aegis.

LaPiana then jumps back to describe the nature of law practice and legal education before Langdell. In antebellum America, law, like many other areas of knowledge, was often seen as a Baconian system susceptible to rigorous, inductive, scientific analysis that would, in the end, reveal an orderly system. Legal education took as its purpose the inculcation of first principles into aspiring lawyers but did not bother to lead students through the inductive steps; it was enough for them to master the principles from which the applications could be derived. It was apprenticeship in the practitioner's office that really prepared students to become lawyers, both because it provided an entrée to clients and, more importantly, because it provided exposure to the writ system. It was the writ system by which most practicing lawyers organized their substantive knowledge, and law schools did not teach its workings.

The core of LaPiana's thinking is in chapter 4, in which he explores Langdell's conception of the law, and chapter 6, which compares that conception to Holmes's philosophy. LaPiana finds that the primary genesis for Langdell's changes at Harvard came from New York's adoption of the Field Code in the late 1840s. That code abolished the writs, but the New York courts left in place the underlying substantive concepts. Langdell, a New York practitioner at the time, saw that to analyze a set of facts, shape a lawsuit, and prevail in court took an understanding and rationalizing of the substantive principles that had hitherto been kept separate by the separate writs. In LaPiana's view, Langdell merged theory and practice (logic and experience) by applying the prevailing theoretical scientific model of induction to the newly discovered raw material of substantive law. This raw material was to be found, of course, in the re-

ported appellate cases. The method was theoretical but was driven by practical concerns.

Holmes and Langdell have often been seen as antitypes, and it is central to LaPiana's purpose to dispel that notion. They were, in fact, philosophically close. Both believed in the primacy of cases and both believed that law was essentially positivist in nature. That is, both subscribed to Austin's location of all law in the command of the sovereign. The differences, argues LaPiana, are mostly in their emphasis. Langdell stressed the inductive properties of cases, their capacity to yield up general principles. Holmes, on the other hand, turned more to the empirical function of cases. To him, cases represented forms of the sovereign's command that might, it is true, be rationalized into larger rules, but that, in their essence, were experiential.

A signal value of this book is LaPiana's examination of the legal thought of Ames, Gray, and Thayer, Langdell's initial disciples, showing that each, in varying degrees, accepted the shared tenets of Langdell and Holmes. An added virtue is the tracing—more extended than typical—of the dominance of the case method within Harvard and its spread to other schools. These struggles are put into the larger context of legal practice in the remaining chapters.

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Eagle Down Is Our Law: Witsuwit'en Law, Feasts, and Land Claims, by Antonia Mills. Vancouver: University of British Columbia Press, 1994; 208 pp., notes, references, index; \$24.95, paper.

On May 11, 1991, I was invited to Kispiox, B.C., to attend the headstone or naming feast for a Gitxsan hereditary chief, Delgamuukw. The previous holder of the name, Ken Muldoe, had died a year earlier; according to Gitxsan law and tradition, it was now time to confer the name on his successor. The feast was held in the community hall, where each clan sat in its designated area, the chiefs of the various houses dressed in traditional regalia. It lasted from late afternoon until midnight and beyond. Food was eaten, debts were paid, the name was transferred, speeches were made (all in the Gitxsan language) and gifts were bestowed upon everyone for witnessing—or notarizing, as one anthropologist has suggested—these transactions.¹

¹Philip Drucker, *Cultures of the North Pacific Coast* (New York, 1965), 56.

I received a mug, ten dollars, a pair of socks, and some food-stuffs.

It was a remarkable event, put on by a remarkable people. The timing was significant, too. Only weeks earlier, the Supreme Court of British Columbia had ruled in a land-claims case that the Gitksan and their Wet'suwet'en neighbors had no aboriginal rights: their title to their lands had been implicitly extinguished by nineteenth-century colonial ordinances that did not mention the Gitksan, the Wet'suwet'en, or their title. The trial, the style of cause of which was *Delgamuukw v. British Columbia*, had been the longest in the province's history.²

Two years later, the British Columbia Court of Appeal partially reversed the trial judge, and urged the provincial and federal governments to negotiate some sort of compromise with the Gitksan and the Wet'suwet'en.³ By that time the two governments and the First Nations Summit, a coalition of British Columbia tribes, had agreed on a treaty process and the provincial legislature had established a statutory body to oversee and "facilitate" this process.⁴ The Gitksan-Wet'suwet'en's appeal to the Supreme Court of Canada was adjourned by consent soon thereafter, to see whether treaty negotiations could replace litigation. Unfortunately, negotiations with the Gitksan broke down in 1996, and the appeal is on once again. It is clear that a long, frustrating, and rocky road lies ahead, not only for the Gitksan and the Wet'suwet'en but for all of Canada and all those First Nations that choose to engage in treaty-making. I say "choose" because some First Nations have refused to participate in the process, insisting that they will negotiate only with Ottawa.

Antonia Mills's book is therefore a timely one. A product of "participant observation" (the author spent two years living in the area), it is in essence the report she prepared at the request of the Wet'suwet'en for submission to the trial court. It consists of detailed descriptions of their society, their feast system and other institutions, their law, and their relationship with Canadian society and its institutions. Although the Gitksan and the Wet'suwet'en are different peoples who speak languages from very different language groups (Tsimshian as op-

²*Delgamuukw v. British Columbia* (1991), 79 DLR (4th) 185 (BCSC). Spellings of tribal names in British Columbia vary. "Gitksan" until recently was spelled "Gitksan," and "Wet'suwet'en" has been used more often than "Witsuwit'en."

³*Delgamuukw v. British Columbia* (1993), 104 DLR (4th) 470 (BCCA).

⁴Bill 22, the Treaty Commission Act (1993). A comparable federal statute was passed in December 1995.

posed to Athapaskan), they occupy contiguous territories, and over the centuries the culture of the Wet'suwet'en has become similar to the more hierarchical, coastal culture of the Gitxsan. This influence, somewhat surprisingly, became an issue at trial; it also makes Mills's book relevant to the Gitxsan naming feast that I witnessed at Kispiox, and in this respect it was most informative.

The book is less useful where legal and historical matters are concerned, because the author makes a number of small errors; however, most of these are in the prologue and epilogue that were added for publication, so they should not affect the report's value as anthropology.⁵ Given that science and the law are institutions that are designed to do very different things, the fact that Mills adds little in the way of a solution to the difficult problems posed by the role of expert anthropological evidence and elders' testimony in land-claims litigation is more disappointing. The trial decision in *Delgamuukw* is an excellent example of such problems, and it provoked an outcry from anthropologists who were angry about the way in which the judge had treated elders' and expert testimony.⁶ There was even talk of applying for intervenor status before the court of appeal—a proposal that suggests that not only was the trial judge somewhat out of his element in dealing with social-science evidence, but that Canadian anthropologists are clearly not used to having judges assess and criticize their testimony. Indeed, it is probably accurate to say that one of the reasons Mills was moved to published her report was to refute some of what the judge had said about the plaintiffs' witnesses, both expert and otherwise. Yet there is not much here on how one might reconcile the two approaches.

One should be slow, however, to fault a book for what it does not do. What *Eagle Down* does do, it does well; even if the misunderstandings on both sides were resolved, it would still be unclear how to reconcile the two in litigation. The author expresses the hope that other expert witnesses in land-claims cases will publish their reports; subject to some troubling diffi-

⁵For example, Governor James Douglas is called "John" (p. 7), the Royal Canadian Mounted Police are incorrectly described as policing Gitxsan territory in the 1880s (p. 9), legal counsel is spelled "council" (p. 11), the account of the trial judge's treatment of hearsay evidence is confusing (p. 17), the number of judges who are said to have decided the Gitxsan appeal is incorrect (p. 185), and, most importantly, it is not true that the appeal court held that the Royal Proclamation of 1763 applies in British Columbia (p. 185).

⁶See, for example, some of the essays in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, ed. Frank Cassidy (Montreal, 1992), and in the special issue of *BC Studies* (Autumn 1992) devoted to the *Delgamuukw* trial.

culties about who owns the knowledge and therefore who may veto its publication, this seems an excellent idea.⁷

Of course, an informed judgment about the effectiveness of an expert's evidence and a trial judge's assessment of it requires access to the court transcript. Created and no doubt distorted by litigation, in *Delgamuukw* this transcript constitutes the written record of a people: excluding the legal argument, documents, affidavits, cross-examination on affidavits, and commission evidence, it runs to 23,500 pages. But even without such access—which is difficult although the transcript is on computer disks—readers will discover that Mills's book allows them a fascinating look at one of the components of that record, before it was transformed by the legal process into a judicial decision. That is her contribution, and it is a valuable one.

Hamar Foster
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The Legal Culture of Northern New Spain, 1700-1810, by Charles R. Cutter. Albuquerque: University of New Mexico Press, 1995; 227 pp., illustrations, notes, index; \$39.95, cloth.

Though the title of this book suggests a somewhat greater geographic coverage than it offers, Charles Cutter's account of matters of law in New Mexico and Texas up to the closing years of Spanish dominion is done with care. The far less extensive legal developments in California can be nicely annexed to a subsequent volume.

The Legal Culture of Northern New Spain proceeds from the general to the particular in government and law, beginning with a broad examination of governmental control and process and narrowing to consideration of local procedures and customs. For the student of similar subjects in English North America, several points may seem startling: the merger of tort and crime under the wider concept of delict, the comparative mildness of punishment for criminal offenses, and the almost total absence of legal professionals—although, by careful sifting of the evidence, the author did find a few people who performed limited professional services.

The blending of subject matter over a large area is very successful, though the inhabitants of New Mexico and Texas were rarely in contact. The differences in settlement patterns and

⁷See Hamar Foster and Alan Grove, "Looking Behind the Masks: A Land Claims Discussion Paper for Researchers, Lawyers and Their Employers," *University of British Columbia Law Review* 27 (1993), 213, 235-37.

administrative control are nonetheless amply delineated. Cutter's speculation on the operation of day-to-day justice and the details of the trial process are careful and restrained. His occasional surmises with respect to silences in the records in such matters as judgments are cautious, though his reliance on non-borderlands evidence for the realities of frontier municipal activities may not always be fully justified.

Overall, one must look hard to find omissions from this study. Somewhat more might have been said on sanctuary and possibly on the use of stamped paper, but this is not, after all, an encyclopedia. Like the rest of us, the author may not have sought out all instances of recourse from the far north to the *audiencias* of New Spain, but something must be left for the rest of us to do. The strengths of his book are so numerous and pronounced that to dwell on any omission would seem like carping. The publisher, however, must be taken to task for the inexcusable printing of footnotes at the end of the book and an index that should be considerably more detailed.

This work is a splendid achievement. Readers will be richly rewarded by paying close attention to Cutter's well-written study, and those of us who work in the field can scarcely avoid a feeling of envy.

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ARTICLES OF RELATED INTEREST

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

Alschuler, Albert W., "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," *Michigan Law Review* 94:8 (August 1996).

Arnold, Richard S., "Judicial Politics under President Washington," *Arizona Law Review* 38:2 (1996).

Bleakley, Geoffrey T., "Murder on the Koyukuk: The Hunt for the Blueberry Kid," *Alaska History* 11:1 (Spring 1996).

Brown, Louis M., "Lawyering Decisions: New Materials for Libraries to Collect," *Law Library Journal* 87:1 (Winter 1995).

Burns, Robert P., "The History and Theory of the American Jury," *California Law Review* 83:6 (December 1995).

Case, Carole, and Ronald A. Farrell, "Denunciation and the Illusion of Social Control: The Case of the Nevada Black Book," *Law and Social Inquiry* 20 (Fall 1995).

Childs, William R., "Texas, the Interstate Oil Compact Commission, and State Control of Oil Production: Regionalism, States' Rights, and Federalism during World War II," *Pacific Historical Review* 64:4 (November 1995).

Cravez, Pamela, "A Revolt in the Ranks: The Great Alaska Court-Bar Fight," *Alaska Bar Review* 13:1 (June 1996).

Deloria, Vine, Jr., "Reserving to Themselves: Treaties and the Powers of Indian Tribes," *Arizona Law Review* 38:3 (1996).

De Meo, Antonia, "Access to Eagles and Eagles' Parts: Environmental Protection v. Native American Free Exercise of Reli-

gion," *Hastings Constitutional Law Quarterly* 22:3 (Spring 1995).

Dwyer, Lynn E., and Dennis D. Murphy, "Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act," *Natural Resources Journal* 35 (Fall 1995).

Elliott, Gary E., "Law, Politics, and the Movement toward Constitutional Equality in Nevada: The Revolution in Legislative Apportionment—Part II," *Nevada Historical Society Quarterly* 39:2 (Summer 1996).

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