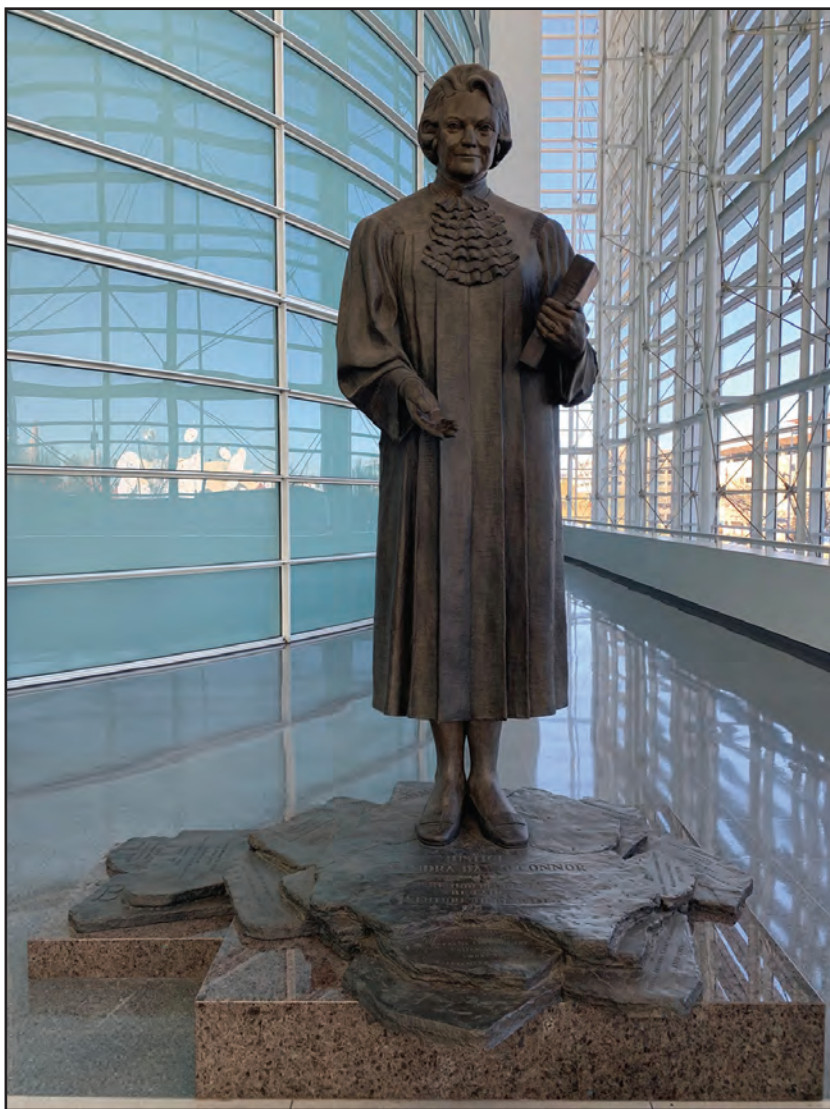




WESTERN LEGAL HISTORY

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“FIRST”



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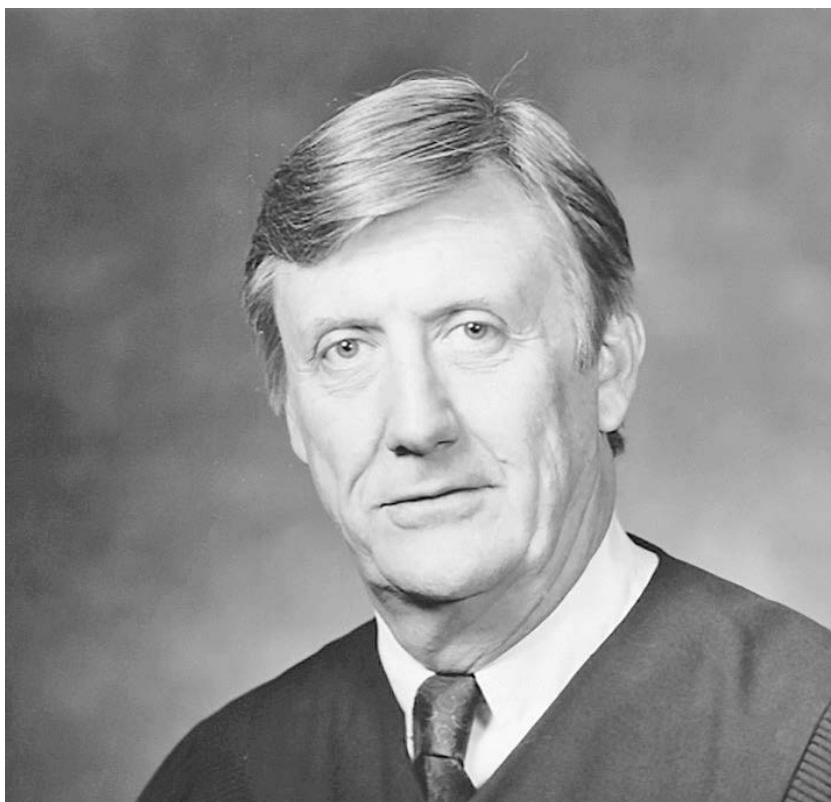
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This Issue is Dedicated to the Memory of
the Hon. Paul G. Rosenblatt
(1928-2019)

A Devoted Student of History
And a True Friend to all
Including the
Ninth Judicial Circuit Historical Society



Introduction

This issue is simply labeled “First.” Each piece represents a first of its kind in its own way

Former Arizona Supreme Court Chief Justice Ruth McGregor brings her reflections of her life-changing experience as one of the first law clerks for Sandra Day O’Connor, the first woman Supreme Court Justice. Linda Greenhouse, who for years reported on the high court for *The New York Times*, puts into perspective the impact of President Reagan’s historic appointment:

“Decades before internet memes turned Ruth Bader Ginsberg into the Notorious RBG, O’Connor was the first Supreme Court justice as rock star. From the moment she took the bench, she was a figure of history—well captured first on the eve of her retirement by Joan Biskupic in her biography-- *Sandra Day O’Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (2005).”¹

Logically paired with Ruth McGregor’s piece is Professor Carlton Larson’s book review of the more recent biography *First: Sandra Day O’Connor* (2019). Before he went on to the academy, Carlton was one of my law clerks with a serious knack for detailed edits. As you will see, not even a biographer as skilled as Evan Thomas escapes Professor Larson’s red pen.

Earlier in history but no less consequential is Gary Stuart’s piece on the efforts of Senator Ernest W. McFarland (D-Ariz.) to gain passage of the first comprehensive effort to secure meaningful benefits for returning war veterans. “Mac” as he was known to all, reflecting on his own experiences as a World War I veteran, knew that something more than a pat on the back and a few dollars was needed to smooth the transition of millions of service men and women back from Europe and Pacific theaters of war into civilian life. The resulting G.I. Bill, which provided access to low interest home mortgages, educational funding and job training, turned out to be one of the most successful social experiments in American history, helping create a vibrant new middle class. To be sure, there were earlier attempts to deal with returning war veterans. Six years after the end of World War I, Congress approved cash bonuses for returning veterans with most of the bonuses not to be paid until 1945. Angry at the delay and frustrated with the lack of jobs as

1. Linda Greenhouse, *The First and Last of Her Kind* *The New York Review of Books* (Nov. 7, 2019) at 18.

the teeth of the Depression sank in, thousands of veterans, calling themselves the Bonus Army, camped out in a field on the outskirts of Washington in 1932 and began protesting around the Capitol and the U.S. Arsenal. Eventually, Army troops under the command of General Douglas MacArthur, led tanks and bayoneted soldiers to clear the streets of Washington of Bonus Army marchers and burn down their tents and shanty houses. The spectacle of U.S. troops rousting out American war veterans was not lost on Senator McFarland.²

John Gordan provides the details of railroad taxation litigation which produced the first determination that the 14th Amendment embraced corporations as well as individuals. We know this because Justice Powell said so in *First Nat'l. Bank of Boston v. Bellotti*, 435 U.S. 765, 819 & n. 15 (1978): "It has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment. *Southern Pacific R. Co.* 118 U.S. 394 (1886)."

Andrea Ordin brings us the the fascinating account of the first woman to serve as a Presidentially-appointed United States Attorney. Annette Abbot Adams (1887-1956), was appointed to the position in San Francisco (N.D. Calif.). Before that, she was an accomplished trial lawyer and Assistant U.S. Attorney with an appetite for the toughest cases. Her appointment in 1918 — before the ratification of the 19th Amendment — meant she could not have voted for the President (Wilson) who appointed her. She went on to become an Assistant Attorney General at Main Justice (also a first) and then as the first woman Justice on the California Court of Appeal. Her advice to those facing artificial barriers has remarkable currency. Even when barriers fall, they do not always bring sequential change. It would be nearly sixty years before another President (Carter) would name four women to serve in that position. One of them, appropriately, was Andrea Ordin (C.D. Calif. 1977-80).³

Last, but certainly not least, Judge Robert Lasnik (W.D. Wash.) tells of the breaking of yet another barrier when Louise Lomen (1920-1996) became the first woman to be selected as a United States Supreme Court law clerk. Born in Minnesota, brought to Alaska as a child, her family moved to Seattle. Passing up the nearly free in-state tuition at the University of Washington, she moved east to tiny Whitman College, the alma mater of Supreme Court Justice William O. Douglas. After a sterling career at the University of

2. "World War I: One Hundred Years Later: When a "Bonus Army" of World War I veterans converged on Washington, MacArthur, Eisenhower & Patton were there to meet them" *Smithsonian Magazine Online* available at: <www.smithsonianmag.com/history/marching-on-history-75797769>

3. President Carter did, of course, appoint men to be United States Attorneys. One of them was a young lawyer in Phoenix. Andrea and I worked closely together at that time and remain the best of friends.

Washington Law School, she moved even further east, this time to Washington D.C. to clerk for Justice Douglas in 1944.

A pair of closing notes: Since our last issue, we lost two remarkable individuals who were equally remarkable judges. Paul G. Rosenblatt, an Army veteran of the Korean War, was a avid student of history and a longtime supporter and board member of this journal. Born in Prescott, Arizona's Territorial capital, P.G. as he was known to all, brought a calm and welcoming demeanor to the courtroom and any room he walked into. In his last months following retirement, P.G. and wife Shannon spent their days at the Sharlott Hall history museum in Prescott, delving into the history of his native state. This issue is devoted to his tireless contributions to NJCHS and *Western Legal History*.

Stanford law grad and Navy veteran Proctor Hug was Chief Judge of the Ninth Circuit Court of Appeals. A star athlete and outstanding student at Sparks High School in Reno, Nevada, where Proc met another star student named Barbara. As my colleague Barry Silverman remarked: "There were sparks there." Married for more than sixty years, Barbara and Proc passed away within months of each other. Judicial Conferences will simply not seem the same without them.

Many thanks for your support of this journal. We look forward to continuing our quest to provide historical insight into the uniqueness of the West.



Sandra Day O'Connor Being Sworn in a Supreme Court Justice by
Chief Justice Warren Burger, Her Husband John O'Connor Looks On, 09/25/1981
(Courtesy of the National Archives)



*Ruth McGregor**

MY LIFE AS A LAW CLERK: JUSTICE O'CONNOR'S FIRST TERM

In the Phoenix hot summer of 1981, I was minding my own and my client's business as a partner at the Fennemore Craig firm. I found my trial and appellate practice challenging and rewarding and anticipated no major changes in my professional life. Then history happened, and my life and legal career took a detour.

Driving to work after the Fourth of July weekend, I turned on the radio just in time to hear President Reagan say, "She is truly a person for all seasons." Only a few days earlier, our firm's lawyers and families, including my partner John O'Connor and his wife, Arizona Court of Appeals judge Sandra O'Connor, had celebrated the nation's birthday in Prescott, Arizona. We were, of course, aware of the rumors that Judge O'Connor was being considered for the Supreme Court vacancy. As you might expect, she was dismissive of the rumors and quickly turned any conversation to another topic. Now I wondered if it was possible that the rumor was, in fact, true. But I had missed the President's opening remarks stating the person's name, and he did not repeat it throughout the remainder of his brief remarks. Only when a reporter spoke did I learn that the "she" was indeed Sandra Day O'Connor. I reacted as I later learned many women lawyers did; I burst into tears and pulled my car onto a side street until I could see to drive. Many of us hoped that the world for women in law had just changed, and it had. What I did not yet know was how my own life would change.

Within a few weeks, Judge O'Connor asked me to accept a position as one of her law clerks, dependent, of course, on her confirmation. I became the first of Justice O'Connor's nontraditional clerks: Law was my second career, following a brief time as a high school teacher; I was thirty-eight years old; and I came not from a circuit court clerkship but from private practice. I had not applied for judicial clerkships after law school, reasoning that, given

* Ruth McGregor, who finished number one in her law school class at what is now the Sandra Day O'Connor College of Law at Arizona State University, went on to become Chief Justice of the Arizona Supreme Court. Now happily retired herself, she and Justice O'Connor remain the best of friends.

what I regarded as my advanced age of thirty-one, I really should begin my practice as soon as possible. Now fate provided the opportunity to work for the First Woman on the United States Supreme Court, and there was simply no way I was going to turn down that opportunity. By early September, my husband and I had agreed on how to handle the coming year, as he could not leave his medical practice in Phoenix. I turned over my work to other lawyers in the firm, resigned from my position, and moved to Washington just in time to attend the O'Connor confirmation hearings.

Soon after her nomination, the Justice also extended offers to three clerks who had been selected by Justice Potter Stewart before his retirement: Brian Cartwright, Deborah Merritt, and John Dwyer, all of whom accepted. Because Justice O'Connor could not officially hire judicial law clerks until she was confirmed, in an attempt to anticipate what Justice O'Connor would need from her clerks, the Court hired the trio as deputies to the Clerk of Court, allowing them to begin work during the summer of 1981.

Serving as a Supreme Court law clerk is, of course, an exciting and valuable opportunity for any lawyer. Because of the unique circumstances surrounding the appointment of the first female justice, however, her clerks faced unique challenges as well as unanticipated opportunities.

The short time frame between Justice O'Connor's confirmation and the beginning of the October term raised several issues. The Justice could not occupy her chambers or obtain access to Court documents, other than public documents, until she was confirmed, and neither she nor her clerks could be hired in their official positions until that time. The Senate's confirmation vote took place on September 21, just one week before the Court's summer conference and two weeks before oral arguments began on the first Monday in October. Other chambers had been preparing for the conference and October arguments for months. Justice O'Connor and her clerks needed to complete preparations in only one or two weeks.

One of the challenges faced by the Justice and, by extension, her law clerks was to decipher the unwritten and often arcane procedures of the Court. No procedural manual awaited the Justice when she first reached her chambers, and as far as I know, no justice visited to explain how things were done. The three clerks who had spent the summer at the Court understood something of how other chambers worked, but I knew nothing at all, and none of us could predict just how Justice O'Connor would choose to organize her chambers. One of the two secretaries whom Justice O'Connor hired had some experience working at the Court, but her explanations proved to be less than entirely reliable. Soon after the start of the October 1981 term, solid help came in the form of Justice Powell's experienced second secretary, who became Justice O'Connor's first secretary.

The O'Connor chambers also faced another unique challenge: how to deal with the tens of thousands of letters received from the public. Perhaps because the O'Connor confirmation hearing was the first to be televised, and perhaps because members of the public regarded a woman as more ap-

proachable than her fellow justices, many people regarded the Justice as a friend and communicated in that vein. Because I could recognize the names of those writers who were personal friends of the O'Connors, one of my jobs during the early part of the term was to read the letters quickly and separate the personal from the general. Doing so gave me a glimpse into the public's view of having a woman on the Supreme Court. Some weeks into the term, after the initial surge had ended, the Justice was still receiving as many as a thousand letters per week. The reaction of women, particularly women in the legal profession, was overwhelming. One might have anticipated the delight expressed by women lawyers and judges, but the letters from women did not end with those groups. We heard from secretaries, many of whom would have been lawyers if born a generation later, from court clerks, from administrators, and from law students. The Justice took a special interest in the letters from children, many of whom wanted to join her on the Court when they grew up. Each writer had a story; many expressed their hope that her arrival would mark a new day for women in law.

Along with the challenges came advantages in working with Justice O'Connor. First, of course, was the opportunity to witness history in the making. As law clerks, we directly observed the respect afforded Justice O'Connor. Any appearance in public resulted in people coming forward to express their admiration and best wishes. Many requested a picture with the Justice for their daughter or their granddaughter. We also met the stream of famous and not-so-famous people who came to her chambers for a word with her.

We had the valuable experience of watching Justice O'Connor manage a professional and personal life that few could handle. It is difficult to imagine the pressure placed on Justice O'Connor. She knew that many were at least skeptical about the ability of an intermediate state court judge to perform the work of the Court; she knew that whatever she did or said would receive intense scrutiny; she knew the potential impact that her success or failure would have on the future of other women. And, of course, she dealt with those challenges while finding a place to live, packing up her home in Phoenix, and saying goodbye to friends and a community. She handled all those challenges with aplomb and, while doing so, proved her doubters wrong. I learned more about time management and the way to balance a personal and work life during my year at the Court than I could have learned by attending dozens of life-management seminars.¹

1. "Decades before Internet memes turned Ruth Bader Ginsberg into the Notorious RBG, O'Connor was the first Supreme Court justice as rock star. From the moment she took the bench she was a figure of history—well captured first on the eve of her retirement by Joan Biskupic in her biography *Sandra Day O'Connor: How the First Woman on the Supreme Court Became Its Most Influential Justice* (2005)." Linda Greenhouse, *The First and Last of Her Kind, The*

That year at the Court proved pivotal to my future legal life. Until then, I had planned to continue a career in private practice. At the Court, I saw the care taken by the justices in reaching their decisions and in drafting opinions explaining those decisions. I appreciated, as I had not as a lawyer, the freedom involved in resolving issues when one is not limited to the arguments that best support a client's position. I understood the difference that judges can make by talking with the public about the importance of our justice system to our American system of democracy. My experience with Justice O'Connor resulted, seven years later, in my applying for a position on the Arizona Court of Appeals, with Justice O'Connor's encouragement and support. During my twenty years as an appellate judge, I thought often of the lessons I learned from Justice O'Connor: consider each case with care; resolve the issues as best you can; and move on to the next case. Like all women in law, I owe an enormous debt to Justice O'Connor, who encouraged us to take pathways we scarcely could have imagined without her work as a trailblazer.



Justice O'Connor giving the oath of office to Justice McGregor at her Arizona Supreme Court investiture

New York Review of Books (Nov, 7, 2019), at 18. Editor's note: Professor Carlton Larson's review of Evan Thomas's recent biography of Justice O'Connor *First: Sandra O'Connor* (2019) appears in this issue.



Justice O'Connor and Justice McGregor in 2007 at the Opperman Award Ceremony



Portrait of Ernest W. McFarland while he served as Arizona Governor (approx. 1956) (All photos courtesy of McFarland Historical State Park Committee)



Gary L. Stuart*

ERNEST W. MCFARLAND AND THE G.I. BILL OF RIGHTS

In the first 108 years of statehood, Arizona has seen only fourteen people represent it in the United States Senate. Ernest W. McFarland, known to all as Mac, was one of those people. Just twenty-four citizens have served as Arizona's governor. Mac was one. Thirty-nine people served on the Arizona Supreme Court between 1912 and 2017, but only twenty have served as chief justice. Mac was one. Since 1919, only nineteen individuals, regardless of state, have served as majority leader of the Senate. Mac was one of those also. And only one person in American history has served in all of these capacities.¹

Despite this unparalleled pentad of public service spanning nearly five decades, Mac's proudest accomplishment was his role in the fashioning and creation of the World War II-era G.I. Bill of Rights.² Widely regarded as the most successful social experiment of the twentieth century, it brought expanded educational opportunities, job training, and affordable housing to millions, creating along the way a vibrant and productive middle class whose baby boomer children dot the leadership of industry and government to this day.

* Gary L. Stuart is a recovering lawyer, a one-course-per semester law professor, and a prodigious 3000-words-a-day writer. His most recent book is *Call Him MAC—Ernest W. McFarland—The Arizona Years*, published by the University of Arizona Press.

1. James Elton McMillan Jr., *Ernest W. McFarland: Majority Leader of the United States Senate, Governor, and Chief Justice of the State of Arizona* (Prescott, Ariz.: Sharlot Hall Museum Press, 2006), xiv, xxii. Along the way, Mac also was a small-town lawyer, a local prosecutor, and a rural county judge. See also "Arizona Explained: Ernest McFarland Was Political Survivor," *Republic*, Mar. 6, 2014. <https://www.azcentral.com/story/travel/local/history/2014/03/06/arizona-explained-ernest-mcfarland/6139663> (accessed 5/23/2018).

2. "Servicemen's Readjustment Act of 1944," Pub. L. No. 346, 58 Stat. 284 (1944). <http://www.loc.gov/law/help/statutes-at-large/78th-congress/session-2/c78s2ch268.pdf>. The act was generally referred to as the G.I. Bill of Rights or the G.I. Bill.

Mac's efforts were born out of personal experience. Enlisting in the U.S. Navy at the outbreak of World War I, he developed a near-fatal infection during basic training at Great Lakes Naval Station outside Chicago. He would spend 316 of his 416 days in sickbay at the U.S. Naval Hospital. Mustered out and barely alive, he received no veterans benefits and a grand total of \$14.50 in pay.³ Mac needed little motivation for his relentless efforts to bring to life what is now the motto of the U.S. Department of Veterans Affairs: "To care for him who shall have borne the battle, and for his widow, and his orphan."⁴

Elected to the Senate in 1940 and reelected in 1946,⁵ Mac knew that the first duty of a Congress on war footing was to win the war, and then to bring home the soldiers, sailors, airmen, and marines. But he also knew that just bringing them home was not enough; the successful reintegration of millions of service members into the fabric of American life would almost certainly be the most difficult task of all. His generation saw veterans who returned from World War I having to sell apples on street corners to make ends meet and bivouacking on the Washington Mall lawn to demand their promised service bonuses.⁶ But Mac regarded the obligation as more than just ensuring subsistence. His view was broader and deeper:

[T]here were things that needed to be done in order that our government and our economy would remain strong and the returning veterans would have a strong economy and a proper place in society upon their discharge from the services....[T]he interruptions to education and work of the men and women during a war cannot be over-estimated. The mere loss of that time from the regular duties of life is difficult to overcome, but many of our men and women experienced disability and tragedy, and all returned to a much different life.

3. McMillan, *McFarland*, 16–17. Seaman Second Class Ernest McFarland's official U.S. Navy Enlistment Record and Honorable Discharge Order, dated Jan. 31, 1919, signed by Ensign D. A. McDonald, confirms that Mac had a muster-out pay of \$14.50, he was not physically qualified for reenlistment, and he was honorably discharged. The Navy telegraphed his mother on Apr. 28, 1918, reporting that her son was in the hospital with a serious condition and that his recovery was "doubtful."

4. "Mission Statement," Department of Veterans Affairs, http://www.va.gov/about_va/mission.asp (last updated Aug. 20, 2015).

5. Mac's Senate years are extensively covered in the McMillan biography: "The Road to the Senate" (52–63); "First Term, 1941–1946" (67–121); and "Second Term 1947–1952" (149–253).

6. Mac: *The Autobiography of Ernest W. McFarland* (n.p., 1979), 86; McMillan, *McFarland*, 101–2.

Mac knew this could not be accomplished with slogans or speeches. Government not only had a role, he believed, but an obligation: "These men and women could hardly be expected to compete in life upon their return without assistance."⁷

The politics and the looming economic and social challenges that are always byproducts of warfare called for a lion of bipartisanship and a deep-thinking advocate. Mac had carefully studied postwar adjustment at Stanford in both the College of Law and the Department of Political Science.⁸ And a year before talk of a G.I. Bill began in earnest, he had explored the possibilities of assisting returning soldiers in opening small-business enterprises. On August 13, 1943, he was the featured speaker of the opening session of the Arizona American Legion's twenty-fifth annual convention. He argued a three-point plan. First: a bonus of \$1.00 or \$1.25 per day to be paid to returning soldiers who had served on this side of the Atlantic or "over there" respectively, with ceilings of \$500 and \$625. That was twice the bonus that had been paid to World War I veterans. Second: unfettered monthly financial assistance in grants, not loans, for any veteran wanting to return to high school, college, or vocational school. Third: low-interest, long-term loans for down payments on homes, farms, and businesses via a government bond.⁹

On the trip home to Arizona, Mac had sought the advice of Warren Atherton, the national commander of the American Legion, and told him of his plans to introduce legislation in the very near future. Atherton promised to get back with ideas and suggestions when Mac returned to Washington. Mac then broadened his outreach to other stakeholders, including other officers of the American Legion, the Veterans of Foreign Wars (VFW), and the Disabled American Veterans (DAV), as well as representatives of the educational and labor communities. From these groups Mac assembled an ad hoc committee that began to focus on a comprehensive approach to the problem. Despite the other demands on his time, he never missed a meeting of the group.¹⁰

Atherton and past American Legion national commander Harry Colmery worked with other members of Congress and on October 27 introduced Senate Bill 1767, what was known as an omnibus bill, which Mac thought inadequate to the task at hand. To advance his plan, on October 29, 1943, Mac introduced Senate Bill 1495, which sought to amend the measure

7. *Mac*, 86.

8. McMillan, *McFarland*, 22–25, 27–28, 567. McMillan received his J.D. in 1922 and M.A. in political science in 1924.

9. *Ibid.* 104.

10. *Ibid.* 88, 110–13.

proposed by the American Legion.¹¹ It was too late in the first session of the seventy-eighth Congress to complete passage of the legislation, but the foundation was laid for the major work to be done in 1944. The sticking point for many was the mustering out of bonus pay in the omnibus bill. Senator Robert Taft (R-Ohio) saw the bill as “utopian” planning. Congressman Evert Dirksen, (R-Ill.) labeled it New Deal-type national planning, exclaiming, “Gabriel had blown his fiscal horn.” In the end, the bonus issue was excised from the bill, and after further revisions later in the session, the “Mustering-Out Payment Act of 1944” would be signed into law.¹²

When Mac took the Senate floor on October 29, he asked that his address to the American Legion on assisting returning veterans be included in the *Congressional Record* along with the text of S.B. 1495. He wanted to press upon his colleagues the need to be prepared for the inevitable turmoil that occasions the return of service members from harm’s way.¹³

When the last shot is fired, of the 11 million men in the armed forces, approximately 9 million will be discharged and will come back to take their places in private life....In making this sacrifice many of them will have given the best years of their lives....They have been forced to leave good homes and fight...under the most trying conditions. Both their mental and physical strength is being taxed to the uttermost, so we cannot expect them to return and be able to take up just where they left off, whether it was at school or at work. They will need assistance, which will necessarily have to vary in accordance with their needs....The assistance, which we give them, although different, must be of equal value in order to be equitable. I have, ever since our entry into the war, given thought to legislation, which would meet the dif-

11. “Adjusted-Service Compensation and Furlough with Pay for War Veterans,” *Congressional Record*, 78th Cong., 2d sess., Oct. 29, 1943, 8882–8885 (Introductory comments and bill). <http://www.govinfo.gov/content/pkg/GPO-CRECB-1943-pt.7/GPO-CRECB-1943-Pt.7-6-1.pdf>. McFarland’s speech to the American Legion convention on Aug. 13, 1943, in Phoenix was printed also (8885–8886), as well as comments by bill coauthor Sen. Burnet Maybank (8886).

12. McMillan, *McFarland*, 107–9. President Franklin Roosevelt signed S.B. 1543, Pub. L. No. 225 (58 Stat. 8) on Feb. 3, 1944. <https://www.loc.gov/law/help/statutes-at-large/78th-congress/session-2/c78s2ch9.pdf>.

13. Mac’s views on veterans’ assistance were reported in *Dunbar’s Weekly*, a Phoenix newspaper, on Nov. 29, 1943: “Sen. McFarland Deals with Post-War Program for Our Fighting Men.” This article was included in his autobiography, *Mac*, 87–88.

ferent needs of men and women returning from the service, and at the same time give assistance of equal value.¹⁴

While there was certainly a consensus for aiding returning World War II vets, there was also considerable anxiety. Many could recall the rank and file of unemployed World War I veterans who sometimes led violent marches in Washington demanding their promised bonuses.¹⁵ In 1943, as war raged again in Europe, Columbia University sociologist Willard Weller captured that fear in his book *The Veteran Comes Back*:

Give the GIs a chance to have a stake in the society. Lack of a stake in the social order makes the veteran dangerous. They have been trained in the use of violence, want action, and cannot wait for long political discussions. They are also accustomed to organized effort. All these factors can make them politically dangerous.¹⁶

American Legion national commander Warren Atherton implied a similar threat: "The veterans will be a potent force for good or evil in the years to come. They can make our country or break it. They can restore democracy, or scrap it." His predecessor Harry Colmery predicted ominously "troubled time ahead."¹⁷ And, of course, there were sociopolitical factions in play. Many Republican members of Congress remained steadfastly against what they saw as more New Deal largesse.

But it was wartime, and there were opponents to the bill as well as supporters. It went to full conference in the House and Senate on Thursday, June 8, 1944—two days after D-Day in Normandy. The House and Senate conferees had agreed on Sections I, II, and III (the education and loan features) but were deadlocked on Section IV—veterans' job placement. Including Mac, there were seven senators and seven representatives on the confer-

14. Mac, 87–88.

15. There is some excellent material on the "Bonus Riots." The vets camped out on the Washington Mall and had to be forcibly removed by U.S. Army personnel led by Colonel Douglas McArthur. When the vets returned in 1932, FDR sent the First Lady. "Hoover sent the troops; Roosevelt sent Eleanor with coffee and donuts." See also: National Public Radio, "The Bonus Army: How a Protest Led to the G.I. Bill" at <http://www.npr.org/2011/11/11/142224795/the-bonus-army-how-a-protest-led-to-the-gi-bill> (accessed May 24, 2018); Wyatt Kingseed, "The 'Bonus Army' War in Washington" at <http://www.historynet.com/the-bonus-army-war-in-washington> (accessed May 24, 2018), originally published June 2004 in *American History Magazine*.

16. McMillan, McFarland, 102. The quoted portion is compiled from statements on pages 185–88 in Willard Waller's *The Veteran Comes Back* (New York: Dryden Press, 1944).

17. Keith W. Olson, *The G.I. Bill, the Veterans, and the Colleges* (Lexington: University Press of Kentucky, 1974), 4, 101.

ence committee. Three voted to accept the version Mac wrote in the Senate, and three were opposed and wanted the House version instead. But Rep. John Gibson (D-Ga.) eventually broke the tie and voted for the Senate version. The result was amended S. 1767, which became the Servicemen's Readjustment Act of 1944, popularly known as the G.I. Bill of Rights, which President Roosevelt signed into law on June 22, 1944.¹⁸

Once the G.I. Bill of Rights became law, Mac expressed concern for how returning veterans might start or continue small businesses. He spoke often and vigorously by linking small business with the "roots of our life ideals" and the "preservation of independence and self-reliance." He saw most veterans as "middle-class entrepreneurs, including farmers [who] were both capitalists and laborers." He believed this to be a symbiotic relationship. He hoped for "community responsibility as well as in maintaining an equitable business environment, one in which the veteran would fully participate and not be unfairly shut out."¹⁹

In many ways, Mac was destined to do what he did for returning World War II veterans. As a World War I veteran and a lifetime member of the American Legion, he naturally felt intense concern for the health and welfare of veterans. He well remembered that he owed his life to a team of Navy doctors and nurses at the Great Lakes Naval Hospital during World War I. In 1919, he had moved to Arizona, at twenty-five, wearing his Navy uniform, jobless, with only ten dollars in his pocket. Years later, reminiscing about the G.I. Bill, Mac observed:

The G.I. Bill of Rights has paid great dividends. There had been fear among some educators that the quality of education would be submerged in a flood of demobilized veterans entering schools. This fear was proven unfounded....We could have hardly done [what we promised in the bill] without the thousands of engineers, doctors, dentists, nurses, school teachers, scientists, accountants, mechanics, and trained workers in almost every walk of life. Not only was education improved, but also the whole economy of our nation was improved by the work of these veterans. I am proud to have had the opportunity of assisting with the inauguration of this program.²⁰

While other members of Congress played significant roles in securing the G.I. Bill's passage, at the end of his Senate service, Mac was recognized by his fellow senators as the Father of the G.I. Bill.²¹ In his foreword to James

18. See footnote 2.

19. McMillan, *McFarland*, 114–15.

20. *Mac*, 88.

21. McMillan, *McFarland*, 113. Senator Bennett Champ Clark and Representatives John Rankin and Edith Nourse Rogers were significant collaborators.

Elton McMillan's landmark biography of Mac, former Arizona governor Bruce Babbitt put it this way:

The measure and its successors have been used by over forty million veterans. Mac saw it primarily as an investment in the future, and, indeed, its ultimate benefits far outstripped its initial promises. Historians now see the GI Bill as a congressional landmark—the progenitor of the vast, prosperous middle class that has distinguished America since WWII. McFarland, as author of the sections on education and on business and home loans, simply refused to compromise on those provisions. On this count alone, he deserves his stature as one of the most important figures in Arizona history.²²

The Veterans Administration was responsible for carrying out the provisions of the new law. Educators and the VA predicted that only 7 percent, a few hundred thousand of the 16 million eligible veterans would take advantage of the G.I. Bill's education benefits. But recognizing a good thing when they saw it and surprising everyone, about 7.8 million, nearly 50 percent, flooded colleges, universities, high schools, and trade schools.²³ Determined to get ahead, in the peak year, 1947, veterans accounted for 49 percent of college admissions. Somehow the campuses accommodated them all as colleges and universities scrambled to find more classrooms, laboratories, cafeterias, and study space, as well as housing, and in the process they became transformed.²⁴ Students flocked to economics and business courses, and colleges awarded more degrees in engineering than in any other field.²⁵ Graduate-level enrollments in physics grew faster than in other

22. Ibid. xiii.

23. "The G.I. Bill: In 10 Years, 8 Million," *Newsweek* (Oct. 4, 1954), 88 (available on ProQuest). Of the 7.8 million, 2.2 million attended college, 3.5 million enrolled in schools below the college level, and 2.1 million took on-the-job and on-the-farm training. Early enrollment figures of fifteen thousand seemed to confirm expectations, but within another year, enrollment rose exponentially to impressive rates. Suzanne Mettler, *Soldiers to Citizens: The G.I. Bill and the Making of the Greatest Generation* (New York: Oxford University Press, 2005), 41–42.

24. Thomas J. Craughwell and Edwin Kiester Jr., *The Buck Stops Here: The 28 Toughest Presidential Decisions and How They Changed History* (Beverly, Mass.: Fair Winds Press, 2010), 165–66. Classes began early (7:30 a.m.) and concluded late (10:30 p.m.) as extra teachers were hired (ninety-one at Iowa State University) and graduate students were pressed into service. Quonset huts "littered" campuses, gymnasiums were filled with cots and rooms in private homes in communities provided housing for single and married student veterans. "G.I. Bill: In 10 Years," 90.

25. "G.I. Bill: In 10 Years," 90.

fields of study.²⁶ “There was a “determination to get ahead, a grim competitive spirit, an emphasis on individual careerism and success” as the lights burned late for tens of thousands who would not have thought about college before the G.I. Bill.²⁷ Demanding full rights of access to higher education, many of the four hundred thousand black veterans attended colleges.²⁸ Professors acknowledged that the quality of veteran scholarship set standards that would prevail for years, dispelling prior concerns.²⁹ Among the alumni were executives, doctors, lawyers, teachers, actors, writers, and scientists, as well as congressmen (Bob Michel), senators (Bob Dole, Daniel Inouye, George McGovern, John Warner), presidents (George H. W. Bush, Jimmy Carter, Gerald Ford), and Supreme Court Justices (William Rehnquist, John Paul Stevens, Byron White).³⁰ The schools gained financially, receiving some \$15 billion from the VA for student tuition and subsistence.³¹

26. *Oxford Encyclopedia of the History of American Science, Medicine, and Technology*, edited by Hugh R. Slotten (New York: Oxford University Press, 2014; online 2015).

27. “G.I. Bill: In 10 Years,” 90. Quote by Harvard dean Wilbur J. Bender in 1947.

28. “Education (African Americans),” *Encyclopedia of African American History 1896 to the Present*, edited by Paul Finkelman (New York: Oxford University Press, 2009; online 2009). The overwhelming majority of blacks received their higher education at segregated black schools in the South. Two-thirds of those graduates remained to teach and practice in the South. Reginald Wilson, “More Than 50 Years Later G.I. Bill Impact Still Felt,” *Philadelphia Tribune*, Feb. 10, 1995, 6A. (available on ProQuest).

29. *Ibid.*

30. Edward Humes’s *Over Here: How the G.I. Bill Transformed the American Dream* (Orlando: Harcourt, 2006) presents personal stories of veterans who utilized the bill’s benefits.

31. “G.I. Bill: In 10 Years,” 90.



McFarland with soldier in Korea and with veterans

Before the war, home ownership was an unreachable dream for the average American, but postwar home ownership soared. From 1944 to 1952, the VA backed nearly 2.4 million home loans for World War II veterans.³² About 4 million, or 25 percent, were granted a loan to finance a home, farm, or business.³³ Despite shortages of building supplies due to demand, more than 5 million homes were built after the war in new neighborhoods outside urban areas (suburbia). The homes all needed new appliances, furniture, and other goods, and the owners needed automobiles to get to work. The growth in consumer commodities created a ripple effect in a surging economy as local shopping centers, grocery stores, and service industries followed the migration from urban downtowns to suburban residents.³⁴ The average male veteran's income level rose 51 percent between 1947 and 1953, engendering the consumer culture.³⁵ The number of people in America's middle class rose substantially.³⁶

The G.I. Bill went from being a "safety net" for servicemen returning to civilian life to an "engine of opportunity" for millions of veterans as an "icon of federal wisdom and national goodwill."³⁷ Approximately 78 percent of (or about 12.4 million) World War II veterans participated in one or more of the benefit programs.³⁸ Only a relatively small portion did not (3.3 million), some because they did not need them.³⁹ Of unemployment pay, less than 20 percent of the funds set aside by Congress were spent.⁴⁰

The G.I. Bill of Rights was innovative landmark legislation that not only supported returning soldiers but also, for the first time after a war, enabled them to pursue success. The law was far-reaching, allowing millions of Americans to fulfill long-held dreams of social mobility, and reshaping the

32. "The G.I. Bill of Rights," *Social Welfare History Project*, Virginia Commonwealth University, at <https://socialwelfare.library.vcu.edu> (accessed May 20, 2018).

33. Glenn C. Altschuler and Stuart M. Blumin, *The G.I. Bill: A New Deal for Veterans* (New York: Oxford University Press, 2009), 8.

34. "Housing and Economic Development," *The Oxford Encyclopedia of American Social History*, edited by Lynn Dumenil (New York: Oxford University Press, 2012; online 2013).

35. "G.I. Bill: In 10 Years," 90.

36. Mettler, *Soldiers*, 87–105. Some sources report a rise from 13 percent to 43 percent. "Social Conditions," *Encyclopedia of African American History*.

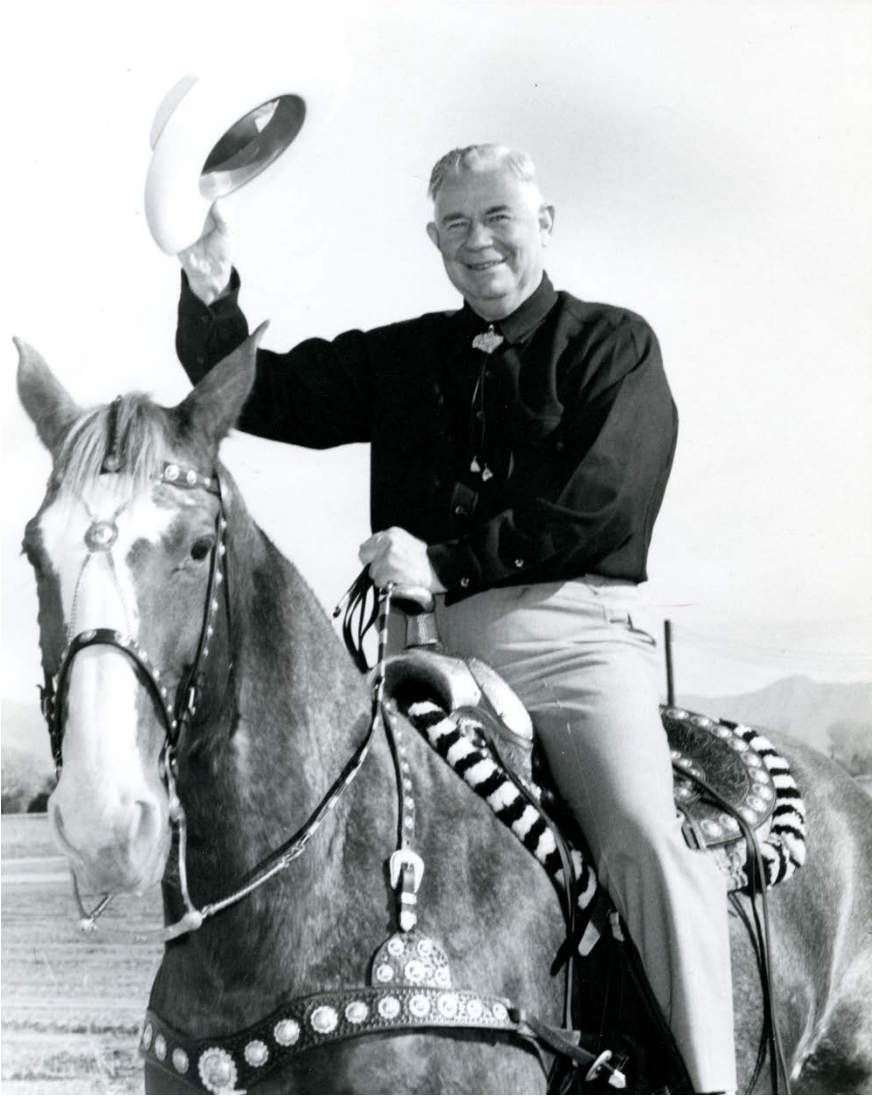
37. Altschuler, *G.I. Bill*, 6, 106.

38. *Ibid.* 8.

39. *Ibid.* 8–9.

40. Mettler, *Soldiers*, 6. Most veterans who used the program did so for about 20 weeks. Only 14 percent exhausted their full entitlement.

national landscape. Its transformation of American society, too, is a lasting legacy.⁴¹



41. Management theorist Peter F. Drucker's analysis of the G.I. Bill was that it might well be regarded as the "most important event of the 20th century," as the education provisions for veterans "signaled the shift to the knowledge society." Altschuler, *G.I. Bill*, 3.



By John D. Gordan, III*

The San Mateo and Santa Clara Railroad Tax Cases (1882–1886) From the Trenches

Introduction

In 1882 and 1883, in two state railroad tax collection cases that were removed to the United States Circuit Court for the District of California,¹ Justice Stephen J. Field, sitting with U.S. Circuit judge Lorenzo Sawyer, ruled that the Fourteenth Amendment to the Constitution of the United States extended to corporations. The judgment thus nullified both the provision in the California state constitution of 1879 specific to the taxation of railroad mortgage bonds and its allegedly unfair statutory enforcement.

As a first step to achieving this, Justice Field had to transform the concept of a corporation from “an artificial being created by the state” to, as he put it, “an aggregation of individuals united for some legitimate

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1. *County of San Mateo v. Southern Pacific R. Co.*, 13 F. 145 (C.C.D. Cal. 1882) (on motion to remand), 13 F. at 722 (September 25, 1882) (judgment for defendant on demurrer), *dism.*, 116 U.S. 138 (1885); *County of Santa Clara v. Southern Pacific R. Co.* [and five other cases], 18 F. 385 (C.C.D. Cal. September 17, 1883), *aff'd.*, 118 U.S. 394 (1886). There were dozens of companion cases brought by the State of California and its counties disposed of concurrently with the *Santa Clara* action and one brought by the County of San Bernardino, *County of San Bernardino v. Southern Pacific Railroad Co.*, 118 U.S. 417 (1886); the railroads had not paid their 1880–1882 taxes.

business.”² While this approach was arguably upheld by the Supreme Court, in the end the Supreme Court’s decision to grant the protection of the Fourteenth Amendment to corporations in general and to the railroads in particular came, not in a reasoned opinion of the Court—or indeed in any opinion at all—but instead in a two-sentence aside from the bench attributed to the chief justice in the reporter’s introduction to the *Santa Clara* opinion.

As the late Howard Jay Graham, a librarian at the Los Angeles County Law Library,³ demonstrated in a series of articles published over a thirty-year period,⁴ in arguing the *San Mateo* case in the Supreme Court, railroad counsel claimed that the Fourteenth Amendment’s protections of the freedom of newly emancipated slaves had been a mere detail in a congressional purpose expansive enough to shield the corporate assets of a handful of California railroad barons from allegedly unfair state taxation.

Using documents hitherto overlooked, this article proposes to examine for the first time an aspect of these cases at a lower—perhaps “baser” is a better word—level, in the trial or circuit court. Beneath the Constitutional

2. Morton J. Horwitz, *The Transformation of American Law 1870–1960—The Crisis of Legal Orthodoxy* (New York: Oxford University Press 1992), 69–73. Justice Field’s analysis was not universally accepted by his California contemporaries, including Governor Stoneman. Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W. W. Norton, 2012), 170.

3. Graham is credited with the Fourteenth Amendment research crucial to the outcome of *Brown v. Board of Education*. Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America’s Struggle for Equality* (New York: Knopf, 1976), 627–29.

4. These fourteen essays are usefully collected and republished in a single volume: *Everyman’s Constitution—Historical Essays on the Fourteenth Amendment, The “Conspiracy Theory,” and American Constitutionalism* (Wisconsin Historical Society Press, 2013). Parts of Graham’s work are borrowed for such polemical histories as Thom Hartmann, *The Crash of 2016: The Plot to Destroy America—and What We Can Do to Stop It* (New York: Grand Central, 2013), 148–53, and *Unequal Protection: How Corporations Became “People” and How You Can Fight Back* (San Francisco: Berrett-Koehler, 2010), 36–48; Jack Beatty, *Age of Betrayal: The Triumph of Money in America 1865–1900* (New York: Knopf, 2007), 166–82; Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (San Francisco: Berrett-Koehler, 2003). See also Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Norton, 2018), 152–60; Malcolm J. Harkins III, “The Uneasy Relationship Between Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System,” *St. Louis Journal of Law and Policy* 7 (2014): 201, 215–45.

debate, the railroads' litigation tactics, facilitated both by the peculiarity of the relevant California constitutional and statutory provisions and also, ultimately, by violent disagreements among those representing the state and counties, effectively tied the California authorities in knots for half a dozen years.

While purporting to be eager to facilitate a Supreme Court review of their claim to the Fourteenth Amendment's protections, the railroads instead seeded the proceedings with minor state law side issues obviating that review and abruptly settled the *San Mateo* case behind the back of the county's counsel when it became the only case posing the risk of Supreme Court review on its Constitutional merits.

For such an examination, a different guide is useful—one with the eye and experience of a litigator. Such a guide is available in the person of John T. Doyle,⁵ a leader of the San Francisco bar best remembered for the “Pious Fund” litigation he conducted over many decades. Doyle, whose published pamphlets⁶ and newspaper interviews shed light on the dark side of this litigation at this less esoteric level, was not involved in it as counsel, but he did not remain silent on the sidelines.⁷ His views were informed by having been one of the three members of the Board of Railroad Commissioners of the state from 1876 until its destruction two years later by the railroad

5. Oscar T. Shuck, *Bench and Bar in California* [Historical Reproduction] (Los Angeles: Bibliolife, 2009), 112–22; Thomas F. Prendergast, *Forgotten Pioneers: Irish Leaders in Early California* (San Francisco: Trade Pressroom, 1942), 189–97; Francis J. Weber, *The United States v. Mexico: The Final Settlement of the Pious Fund* (Los Angeles: Historical Society of Southern California, 1969); Kenneth M. Johnson, *The Pious Fund* (Los Angeles: Dawson's Book Shop, 1963); Oscar T. Shuck, “John T. Doyle” in *History of the Bench and Bar of California* (Los Angeles: Commercial Printing House, 1901), 518–20.

6. J. T. Doyle, *The Central Pacific R. R. Debt: California's Remonstrance Against Refunding it*. (N.P., 1896), “How to Build Railroads, Mortgage Them for Twice Their Value Before They Are Built, Keep Half the Bonds and the Railroad Also: The Value of Such Bonds as an Investment,” *American Law Review* 29 (1895): 905–12, and “Abuses in Railroad Transportation,” Letter to Hon. Abram S. Hewitt (March 15, 1881).

7. See, e.g., “John T. Doyle,” *The Daily Examiner* (San Francisco), February 21, 1884, in which he recognized the legal position accurately but without knowledge of the prospective settlement imbroglio: “The taxes for 1880–81–82 are all in suit under existing laws; some of the cases have been tried, decided and appealed, and the rest are held untried to abide the decision of the appeals. No legislation we could pass on the subject of collecting taxes can, so far as I can see, affect those suits. They have got out of the reach of legislation, and will have to be fought out to the end as they stand.”

interests.⁸ In this capacity, he served with George Stoneman, the future California governor who was directly involved in these cases.

Of even greater use are the three volumes he compiled, which consist variously of pleadings, arguments, court papers, official reports, and news articles in these two cases. The first volume contains the circuit court opinions in the two cases, the county's circuit court argument, and the Supreme Court brief in the *San Mateo* case, preceded by an unpublished essay by Doyle.⁹ The second and third volumes are devoted to the *Santa Clara* case. These two volumes, which were transferred from the University of California, Berkeley, Law School Library, have remained unrecognized in the Bancroft Library.¹⁰ The second of the two-volume set, it is easy to tell, contains the heavily revised draft of the circuit court argument by Santa Clara's lead outside counsel, Delphin Delmas. The first of the two-volume set contains the circuit court record in that case and a comprehensive collection of news articles about the case, indexed and annotated in John T. Doyle's handwriting. It also includes an envelope addressed to Doyle in Menlo Park, postmarked 1900, which he used as a placeholder.¹¹

8. Carl Brent Swisher, *Stephen J. Field, Craftsman of the Law* (Washington, DC: Brookings Institution, 1930), 243.

9. The first volume, with Doyle's signature and the year "1899" on the flyleaf, starts with an eight-page typewritten essay beginning: "Although I hope some day to write the history of the litigation over Railroad taxes in California, *in extenso*, I [t]hink it well to set down as introductory to the following papers an outline of what occurred."

10. A request for any bibliographic or provenance information regarding the two-volume set was made to the Bancroft Library, which replied that it had none and suggested an inquiry to the Law Library at the Berkeley Law School. The latter had no provenance information either.

11. The handwriting transcribing the circuit court record is both distinctive and quite different from the handwriting revising Delmas's argument in the *Santa Clara* case. In the *Santa Clara* case file at the National Archives branch in San Bruno, CA, there is a document called a "Praeipce," captioned in the case and addressed to "the Clerk of Court," in the same hand as the transcription of the circuit court record, captioned in the case, as follows: "Please make out a transcript in above cause on writ of error to the U.S. Supreme Court with writ & copy and citation & copy," signed "D. M. Delmas, Attorney for Plaintiff." It seems very likely that this is a copy of the order Delmas gave for one of the volumes now in the Bancroft Library, made by the same person who made the transcription, the unused pages of which were employed as a scrapbook for the collection of new clippings about the case.



Delphin Delmas,
Santa Clara's lead outside counsel.

The volumes also reflect the internecine warfare that existed in both of the two cases between California governmental entities and their own counsel. In one instance Delmas persuaded Governor Stoneman to obtain a writ of mandamus against the attorney general, who proceeded to ignore it. Had the attorney general not done so, however, the financial outcome for the governmental entities would have been much worse. Also of importance to this story—and again apparently unnoticed—is the transcript of a hearing held in 1889 in the California state assembly, to which government officials, counsel, and United States Circuit Judge Lorenzo Sawyer were summoned as witnesses, the latter to explain the post-trial proceedings in these and later cases using files produced from the circuit court!

The *San Mateo* and *Santa Clara* cases are only episodes in a tax struggle between the state and the railroads that had begun years earlier and would continue until near the end of the nineteenth century. An early railroad redoubt—that the federal statutes that created them and the federal purposes that they served shielded them from state taxation—fell in the courts.¹² At the circuit court level, these three cases pitted the then-attorney general of California, A. L. Hart, against the second-ranking in-house lawyer and public spokesman for the Central and Southern Pacific Railroads, Creed Haymond.¹³

12. *Huntington v. Central Pacific Railroad Co.*, 12 F. Cas. 974 (C.C.D. Cal. 1874) (Case No. 6,911); *People v. Supervisors of Sacramento County*, 59 Cal. 321 (Cal. 1881); *Central Pacific Railway v. State Board of Equalization*, 60 Cal. 35 (Cal. 1882). See "The Power of a State to Tax the Franchise of the Central Pacific Railroad Company Considered," *Argument of Creed Haymond, before the Supreme Court of California 1881* (San Francisco: H. S. Crocker, 1882).

13. Curiously, despite their importance in California railroad tax litigation, and despite the availability of contemporaneous and more recent biographical material about leading members of the California bar, there is

I. County of San Mateo v. Southern Pacific Railroad Co.

A. In California 1881

John T. Doyle's pamphlet¹⁴ provides a simple introduction to the issue: In 1879 a provision was incorporated in our State constitution, excepting railroad mortgage bonds from the general rule of taxing moneys invested on mortgage. It was done at the instance of the railroad people themselves, to enable them to sell their Southern Pacific bonds, which, if subject to local taxation in California, would obviously have been impossible. The measure was introduced in the convention by Mr. Henry Egerton, one of their standing counsel; stated by him to be satisfactory to his clients, and passed without amendment, *nem. con.*

Up to that time in California, the property interest granted in a mortgage by a mortgagor remained taxed to the mortgagor along with his residual interest in the property mortgaged. However, the California constitution of 1879 made the mortgagee's interest in a mortgaged property taxable to the mortgagee—except for railroad property, where both the property interest encumbered by the mortgage and the unencumbered residual interest in the property remained taxed to the railroad in full, irrespective of the existence or amount of the mortgage.

Taxes on railroads operating in more than one California county were calculated by a statutory body named the State Board of Equalization and then apportioned to the counties according to the railroad's miles of track within each county. The state board reported a single number valuing a railroad's statewide "franchise, roadway, road-bed, rails and rolling-stock"; other railroad property was to be valued and taxed by the county in which it was located.

very little available about Hart or his successor, E. C. Marshall. Haymond is a different story. See Shuck, *Bench and Bar*, 580–82 ("Creed Haymond") and 191–94 ("The California Code of Laws," in which Haymond is described as "The Father of the Codes"). See also Daniel W. Levy, "Classical Lawyers and the Southern Pacific Railroad," *Western Legal History: The Journal of the Ninth Circuit Historical Society* 9 (1996): 177. Haymond spoke at length in the 1889 California State Assembly hearing discussed below. His appearance before a committee of the U.S. Senate a year before generated a transcript printed as a 240-page book: *The Central Pacific Railroad Co., Its Relations to the Government. It Has Performed Every Obligation: Oral Argument of Creed Haymond, Its General Solicitor, Made Before the Select Committee of the United States Senate, March 17th and 26th and April 7th, 1888.*

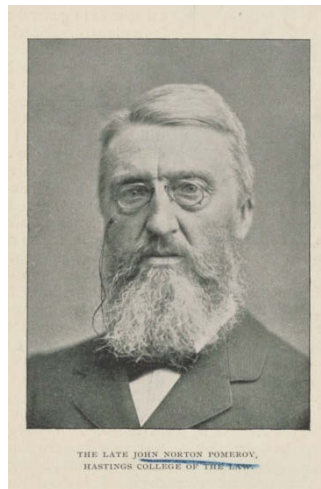
14. See Doyle, "The Central Pacific Railroad Debt," 17–18.

Once the taxes for 1880 were levied under the method prescribed by the new constitution, according to Doyle's unpublished account in the first volume referred to above:

the railroad people did not find it convenient to pay their share, and therefore, to borrow time, got up a contention that they were unjustly treated in some way; and Huntington brought a suit in the Federal Court against one of the railroads, and Stanford, Crocker & al., its directors, setting forth his alleged grievance, and that there was collusion between Stanford, &c. and the State officers to cheat the company by improperly paying these improper and oppressive taxes; praying an injunction against doing so. The suit was plainly a collusive one and the whole town recognized its transparent dishonesty. Judge Hoffman caused much laughter by affecting to believe that a quarrel had broken out between Huntington and his associates. Sawyer, the circuit judge however who had no sense of humor, treated the thing as quite serious, and by preliminary injunction, postponing hearings &c. (wherein he was ably seconded by Hart, the Attorney General) wasted the time until it was too late to advertise the road for sale with other delinquent property that year; when he succeeded in working out a decision against Mr. Huntington. The collection of that year's taxes was however deferred for a year.¹⁵

15. In light of the absence of any reference to this litigation in Doyle's later published account cited in note 7, above, and of the similarity between it and the lawsuit by Huntington referred to in note 13, it is appropriate to reproduce a paragraph from the February 22, 1881, edition of the *New York Times*:

SAN FRANCISCO, Feb. 21.—A bill in equity was filed today, in the United States Circuit Court, by C. P. Huntington, to restrain the Central and Southern Pacific Railroads and their branches from paying, and Tax Collectors in the different counties through which they pass from collecting, the taxes levied on the basis of the assessment fixed by the State Board of Equalization. Fifty suits have been drawn, covering every mile of railroad owned by the two companies in this State. The complainant alleges that the tax and assessment are void on constitutional grounds: First, because the bill under which the assessment was made embraced more than one subject; second, because the clause of the Constitution dividing the executive, legislative and judicial powers of the Government is infringed by the act of the Board of Equalization; third, because the board did not assess the property at its actual value; fourth, the board did not assess the improvements separately, as the law provides. Judge Sawyer granted the



John Norton Pomeroy,
counsel for the Southern Pacific Railroad Co. and
founder of the Hastings Law School.

The County of San Mateo, among many others, brought suit in late April 1882 in the California Superior Court for San Mateo against the Southern Pacific Railroad Co., for its unpaid fiscal 1882 tax bill for \$7,247.63, plus interest and penalties. The railroad filed its removal petition a month later, its answer having raised, among others, its federal Constitutional defenses bottomed on the application of the Fourteenth Amendment to corporations. The states' motion to remand was later denied in an opinion by Justice Field.¹⁶ On August 16, 1882, the railroad filed an expanded amended answer of thirty-five paragraphs; on the same day, the county served in response a "Demurrer to 2d defense in amended answer," pleading simply that the "second defense does not state facts sufficient to constitute a defense to said action."¹⁷

In the circuit court, the county was represented by Attorney General Hart and A. L. Rhodes of Rhodes & Barstow, a former chief justice of California; the railroad's counsel were John Norton Pomeroy, founder of the Hastings Law School,¹⁸ and Creed Haymond, among others. There was

restraining order, summoning the defendants to show cause why an injunction should not be granted, returnable next Monday.

16. See *San Mateo*, 13 F. at 145.

17. *Transcript of Record, Supreme Court of the United States No. 721, The County of San Mateo, Plaintiff in Error, vs. The Southern Pacific Railroad Company*, filed October 12, 1882, 20–32, 33.

18. The railroads had hired Pomeroy for the case at Justice Field's urging. C. Peter Magrath, *Morrison R. Waite: The Triumph of Character* (New York: Macmillan, 1963), 219–22. According to Pomeroy's son, his father and Field

neither a trial nor an evidentiary hearing. The case was argued on the merits before Justice Field and Judge Sawyer from August 21 to August 29, 1882. Pomeroy's and Haymond's arguments fill nearly 300 printed pages, the attorney general's 104. Given that those arguments are limited to the Fourteenth Amendment issues, it must be supposed that the parties had already reached the agreement embodied in a stipulation filed on September 20, 1882, that the action:

is hereby submitted upon the plaintiff's demurrer to the first affirmative defense (second defense) in the defendant's answer. And it is further stipulated that judgment final in the action may be rendered upon demurrer, it being agreed that for purposes of this proceeding the other defenses are withdrawn from the consideration of the court.¹⁹

It is not possible to identify in the amended answer reproduced in the Supreme Court *Transcript of Record* or the case file at the San Bruno National Archives branch which part of it was addressed by the county's demurrer. However, Doyle's unpublished account of the case contains a description of what happened:

For some unassigned reason the San Mateo County case was selected from all those brought, in which to test the right, and after pleading several defences [*sic*], as if to show how many hard nuts to crack it might be made to present, an agreement was come to between the parties, by which all the other defenses were withdrawn [handwritten interlineation: not from the record but from the consideration of the court] and a single plea substituted, to the effect that the road was assessed at twenty five or twenty six thousand dollars per mile; that it was eleven hundred miles long and that it was mortgaged for "*more than three thousand dollars per mile*" which the authorities had refused to deduct from the value, as would be done in the case of an individual: hence unjust discrimination, denial of equal protection of the laws &c. To this plea the plaintiffs demurred.

There is nothing in the printed Supreme Court transcript of record that resembles Doyle's description of the "single plea substituted." However, the pamphlet publication of the opinions that the judges rendered on September 25, 1882, five days after the filing of the stipulation, begins with a

shared a "warm and devoted friendship. Between them there was an intellectual sympathy at almost every point; and on Justice Field's part the helpfulness and solicitude, one might almost say, of an elder brother." Swisher, *Stephen J. Field*, 254. See David M. Rabban, *Law's History: American Legal Thought and the Transatlantic Turn to History* (New York: Cambridge University Press, 2013), 32–35.

19. Rabban, *Law's History*, 34.

“Statement of the Case,” which is also reproduced in the report of the case in the *Federal Cases* but which does not appear in the transcript of record. The statement says in pertinent part that, to obtain the funds to construct the railroad, it:

executed and delivered a mortgage on its railroad, rolling stock, appurtenances and franchise, and upon diverse tracts of land belonging to it, and situated in different parts of the state; that the indebtedness so secured exceeds \$3,000 per mile, and is still subsisting....

The statement then alleges the unjust discrimination of not allowing the railroad to reduce the valuation of its property by the amount of the mortgage, a “right common to all other persons,” the lack of notice and opportunity to be heard with respect to it, and the exemption from the state taxation to which the railroad was entitled as an instrument of the federal government. There is no specific allusion to the Fourteenth Amendment.

The introductory portion of Justice Field’s opinion sets out the railroad’s contentions under the Fourteenth Amendment against the validity of the tax as (1) a denial of equal protection of the laws because it “was not allowed any deduction for the valuation of its property for the mortgage thereon”; and (2) a deprivation of its property without due process of law, because under the California constitution, it received no notice of the assessment and had no opportunity to be heard before the State Board of Equalization. The state responded that (1) the classification of property and apportionment of taxes were consistent with a state’s power to tax and in conformity with the California constitution; (2) the Fourteenth Amendment had been enacted for the protection of newly emancipated slaves; and (3) the requirement that the railroad identify for the State Board of Equalization the amount and value of its property was a sufficient opportunity for it to be heard.²⁰

Two weeks earlier, the county and the railroad had entered into an agreement under which the railroad paid the \$7,247.63, the full amount due in taxes, and another \$724.76 in attorneys’ fees for the county’s lawyers, Rhodes & Barstow. These amounts were “to be credited upon any judgment that may be obtained by plaintiff...” or “[i]n case judgment shall be rendered in said action in favor of defendant, then said sum of money...shall be paid into the treasury of the County of San Mateo as a donation by said defendant...”

Doyle became aware of both the stipulation and the payment and reacted strongly:

About the time the demurrer was coming on to hearing, I accidentally heard of our Board of Supervisors borrowing so singular a sum as eight thousand and so many hundred and so

20. *San Mateo*, 13 F. at 729–30.

many dollars and so many cents. I knew at once that there was some rascality in it and naturally suspected the railroad people. A comparison of the amount of their taxes with that of the loan and their exact correspondence confirmed the suspicion and it did not take long to get at the details of the corrupt intrigue. I at once wrote to Judge Rhodes [San Mateo's counsel], giving him the truth about the railroad mortgage, pointing out the objections to trusting the case on so false and apparently oppressive a statement of it, as the plea demurred to gave[,] and urging correction to conform to the truth. I was surprised to receive a reply from him adhering to what he had done and making light of my objection. He pushed the case to trial, and of course was beaten, the opinions of the Judges showing plainly enough that the hardship of the case had greatly influenced the decision. Judge Field dwells on it and turns it various ways, to illustrate its extreme injustice, with all the [i]ngenuity which he possessed in so eminent a degree. Sawyer did his little best at it too...²¹

And Doyle was certainly right that Justice Field's opinion responded to the railroad's claims of unfairness in including the value of mortgages in their assessment, saying:

If we now look at the scheme of taxation prescribed by the constitution of California for the property of railroad companies, we shall perceive a flagrant departure from the rule of equality and uniformity so essential to equality in the distribution of the burdens of government....There is here a discrimination too palpable and gross to be questioned, and such is the nature of the discrimination made against the Southern Pacific Railroad company in the taxation of its property. Nothing can be clearer that the rule of equality and uniformity is thus entirely disregarded.

Justice Field also sustained the railroad's attack on the failure to provide for notice and a hearing after the Board had determined the assessment,

21. Doyle was even more outspoken in his later published pamphlet, where he said that the railroads:

affected a wish to waive all other controversy and try this constitutional question only. To secure control of the litigation, they procured a collusive suit to be brought by the Supervisors of San Mateo County (to whom they loaned the amount of the county taxes, on terms evidently corrupt on their face) in which the facts were admitted by demurrer, in a shape presenting apparently a case of hardship so great, as to lead the Circuit Court of the United States to decide in their favor.

finding that it conflicted with “the great principle which lies at the foundation of all just government...as old as *Magna Carta*.”

He was similarly polemical in sustaining the appropriateness of an expansive treatment of the protections of the Fourteenth Amendment to corporations, rather than limiting their application to newly emancipated slaves, whose reported mistreatment in the Southern states he considered to be “probably much exaggerat[ed],” so that “[u]ndoubtedly much misconception and falsehood” were mingled in the advocacy in Congress for the enactment of what became the Fourteenth Amendment.²² This line of analysis was reformulated and carried to absurd lengths in the argument for the railroad in the Supreme Court by S. W. Sanderson:

It is very clear, if we look back over the history of the past twenty years, that this country has done a great deal for the negro race. It has stricken the fetters from their ankles and their hands, and it has endowed them with a second manhood. It has made them free men; it has endowed them with the rights of citizenship, political and civil, and it has placed them on a par and equality with the white man. *But that is none too much; we do not complain of that. We only say that something should now be done for the poor white man. We ask that he may be lifted up and put upon a level with the negro.* [emphasis supplied]

Justice Field’s sympathies were undoubtedly favorable to the progress the railroads represented and to the individuals who owned and ran them,²³ but one cannot help wondering whether his relationship with their lead counsel, John Norton Pomeroy, may have had a role to play. In both 1880 and 1884 Field hoped to be nominated as the presidential candidate of the Democratic party. After he failed in 1880, his persistence included the preparation of a book of laudatory essays,²⁴ all but two unsigned, completed in 1881 and copyrighted in 1882. A note by two persons who were at least ostensibly the editors²⁵ states: “The articles in this volume are a compilation made by the political and personal friends of Judge Field. The greater part of

22. *San Mateo*, 13 F. at 735–36, 738–39, 751.

23. For example, Swisher, *Stephen J. Field*, 240–46.

24. J. Norton Pomeroy, *Some Account of the Work of Stephen J. Field as a Legislator, State Judge, and Judge of the Supreme Court of the United States* (S. B. Smith, 1881).

25. The two persons named are Chauncey F. Black, then lieutenant governor of Pennsylvania—and son of Jeremiah S. Black, sometime justice of the Pennsylvania Supreme Court, attorney general of the United States, and reporter for the Supreme Court of the United States—and Samuel B. Smith, who served in the California legislature with Field and was briefly his law partner in the 1850s. Stephen J. Field, *Personal Reminiscences of Early Days in California* (Washington, DC: [NP], 1893), 97–98.

them were prepared in 1880. Those added since have been furnished principally by members of the Bar of California.”

Two of the essays are signed. The first and by far the longest essay in the book is signed by John Norton Pomeroy. One of the letters that Justice Field wrote to Pomeroy discovered by Graham, dated June 21, 1881,²⁶ concerns the draft of his essay:

Some months ago I wrote to you respecting the sketch of a certain person's Legislative and Judicial work, and stated that it was so strong in its award of commendation that I should hardly dare to show it to my friends....With your sketch prefixed the book will be valued by my friends.

But your sketch has been altered in several particulars. Much of its strong language of commendation has been omitted, and some of it has been modified.... Please look over the accompanying sheets and if you approve of the sketch in its present form it will be published, otherwise not. Whatever appears in print must have your sanction as it will bear your name as its author....Make such changes as you like bearing always in mind, if you will pardon me, that its language is already as eulogistic as justice will permit.

Pomeroy's encomiums of Field that survived this editorial process and appear in the book include the following:

I have arrived at the following conclusions, which I unhesitatingly submit as the most striking and distinctive elements of his judicial character and work ... [T]he qualities which have been held by, and which admit him to be ranked with the foremost class of jurists who have sat upon the English and American bench ... Marshall, Kent, Story...ample legal learning,...devotion to principle,...his *creative power*,...his fearlessness....There are other traits of his intellectual character and of his work, in themselves worthy of mention, such as his diligence, his capacity for continued labor, his rapidity of execution, and particularly his clear and accurate style of literary composition, which renders some of his more carefully prepared opinions models of judicial argumentation; but I pass them by....

* * *

The same high view...is exhibited in his interpretation of the XIVth Amendment....[I]t was Judge Field himself who first, in a dissenting opinion, gave to the amendment that broad, liberal and universal construction which renders it, as was intended, the

26. "Part One: Four Letters of Mr. Justice Field," in Graham, *Everyman's Constitution*, 101–3.

most perfect safeguard against the encroachments of state governmental action upon the private civil rights of all persons.²⁷

The book was published in April 1882,²⁸ well before the hearings in the *San Mateo* case in the circuit court. Despite Pomeroy's published commentary about Justice Field, no effort appears to have been made to disqualify him from presiding in a case where Pomeroy was lead counsel for the defendant and the issue was the Fourteenth Amendment. Another remarkable fact is that the only other signed essay in *Some Account*, "The Electoral Commission of 1877," was "prepared by...a distinguished member of the Bar of California," John T. Doyle.²⁹

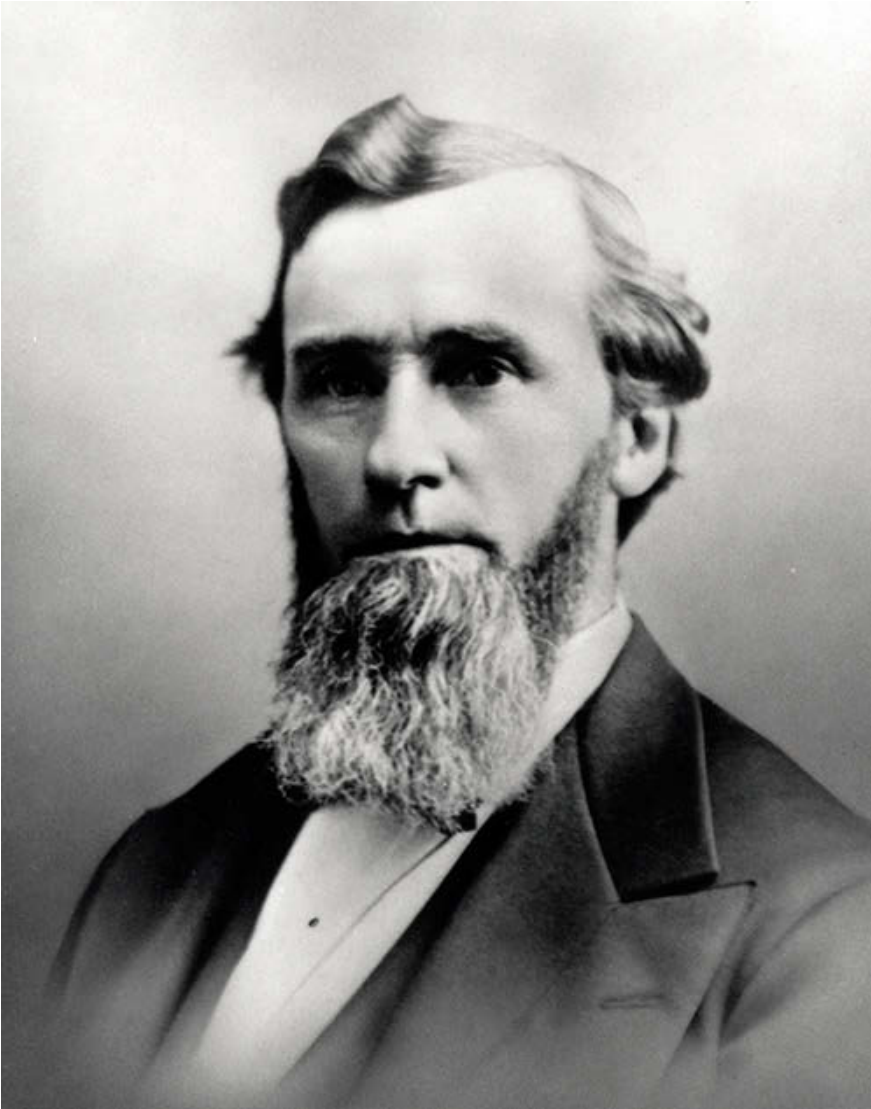
27. Pomeroy, *Some Account*, 29–33, 37, 54. Justice Field continued to seek comments about Pomeroy's essay from others. Judge Matthew Deady of the District of Oregon, with whom Justice Field held the circuit court, noted in his diary for December 29, 1881, that while he was in Washington, DC:

This evening called at Fields....In the afternoon I examined a sketch of Fields' life as a judge & legislator written by Pomeroy of the S F law school, and an accompanying analysis of many of his judicial opinions at his request with a view of getting my advice or rather opinion as to the propriety of publishing it. Pomeroy is a capital writer but he is a bit out of plumb on the subject of the common law—thinks it a relic of barbarism. I marked several passages for correction or modification."

(Malcolm Clark Jr. [ed.], *Pharisee Among Philistines: The Diary of Judge Matthew P. Deady 1871–1892* [Portland: Oregon Historical Society 1975], II, 374).

28. Graham, *Everyman's Constitution*, 104.

29. Pomeroy, *Some Account*, 411.



L. Rhodes, Associate and Chief Justice before the events in question.(photo courtesy of the California Supreme Court Historical Society)

B. In Washington 1882–1883

After reading their opinions from the bench, Justice Field and Judge Sawyer entered a stay of all undecided related cases pending a decision by the Supreme Court in the *San Mateo* case. The writ of error in that case was signed by Judge Sawyer on September 26, the day after the opinions of the court had been read. In mid-November, the Supreme Court granted expedited treatment to the case, which was orally argued beginning on December 9, 1882. A. L. Rhodes and A. L. Hart again argued for the county,

with Roscoe Conkling, a former United States senator from New York, George F. Edmunds, midway through his terms of service as United States senator from Vermont, and S. W. Sanderson, another former chief justice of California, arguing for the railroad. It was on this occasion that Conkling produced and distorted a hitherto unknown journal kept by the congressional joint committee that had drafted the Fourteenth Amendment.³⁰

In the meantime, John T. Doyle had also been busy. So affronted was he, as his unpublished account shows, by the financial arrangements between the county and the railroad and the stipulation of facts underlying the circuit court decision that he enlisted his political ally, publisher of the *San Francisco Chronicle*:

I could stand this palpable fraud no longer: I had seen too many illustrations of the truth that "*hard cases make bad law*" to be willing to trust even that tribunal with a case so important, carried up before them on a lying record like this. I wrote and published in the San Francisco "*Chronicle*" an expose of the true inwardness of the matter, the evident collusion between the parties, the falsehood of the pretended hardship of the case, which had so manifestly imposed upon poor Field, &c. Mr. deYoung [publisher of the *Chronicle*] told me that he sent a marked copy of the paper to each of the judges of the Supreme Court. I did not.

Doyle's complaints were published nationwide—a story from the *Chicago Tribune*.³¹

Railroad Tax-Dodging

John T. Doyle, a member of the original Transportation Commission of California, and now an independent candidate for Railroad Commissioner in that State, shows up the dodges of the Central Pacific to escape taxation. It had itself sued for taxes by the County of San Mateo, which is poor, and where the railroad influence is very strong. The taxes in question were State and County taxes.

The county complaisantly admitted the essential facts alleged by the railroad, which were not fact at all. The decision of the court was against the county, and it has appealed to the Supreme Court of the United States with its case in just the shape the railroad wants it. The railroad agreed with the county officials that, if they would do all this, the county taxes should be paid, no matter which way the suits should be decided by the Supreme Court. Accordingly, the day after the decision of the Circuit Court was made

30. Graham, *Everyman's Constitution*, 23–67 ("The 'Conspiracy Theory' of the Fourteenth Amendment: Part I").

31. *Chicago Tribune*, Nov. 6, 1882, 4.

and the appeal taken to the Supreme Court, the railroad handed over to the county authorities the sum of \$8,971.47, the amount of the county taxes.

By dicker of this sort the Central Pacific goes to the Supreme Court with the case of the public mangled and muddled. The point in issue is one of great importance, as it involves nothing less than settling whether in taxing the railroads of California the amount of their mortgage should be deducted from their taxable valuation. There will not be much left to the tax-gatherer if these roads are allowed to deduct the vast total of their swollen mortgage debts from their assessed valuation. The corporations that own almost the whole of the State will throw their shares of the public burdens on the poorer part of the community.

The means adopted by the road to obtain this unfair advantage in the presentation of its case at Washington are disreputable in the extreme. These corporations apparently regard their relations to the community which supports them as those of belligerents. They justify themselves in going to any length on the ground that everything is fair in love and war.

And so, according to Doyle's unpublished account:

After the lapse of time usually occupied in consultation the judges of the Supreme Court came into court, and announced that they had heard suggestions of collusion &c. in this case and that they would not decide it at present, but would defer doing so until some case, involving the question, which had been tried contradictorily, should come before them. I am not aware of any record of this announcement and give it as reported at the time.

In a second letter discovered by Graham, under date of March 28, 1883, Justice Field wrote to Pomeroy:

Some weeks ago, I wrote you with reference to the San Mateo tax case telling you that its decision would not be made until next term, and enclosing you also certain memoranda which had been handed me by two of the Judges. Have you ever received these? They were, of course, intended only for your eye, and I should be glad to know that they have come to your hands.

I shall leave here for San Francisco about the first of June....I shall be ready to take up any new tax cases as soon as I arrive, and I hope that in whatever case is tried all the facts relating to the mortgage upon the property of the Railroad Company will be shown and also the extent to which its property has been subject to taxation throughout the State.³²

32. Graham, *Everyman's Constitution*, 107. Unfortunately the memoranda to which Justice Field refers do not seem to have survived. Graham attributes the Supreme Court's refusal to decide the *San Mateo* case to the adoption in Justice Field's opinion of the railroad's valuation of its mortgage

Upon the opening of the circuit court in San Francisco on July 9, 1883, as reported in the press, Justice Field said:

Before any other business is taken up I desire to make a statement in regard to the several suits brought in behalf of the people against the railroads for uncollected taxes. A year ago there were forty cases, if I am not mistaken, on the calendar. I suggested to counsel to select some representative cases and try them. The cases were consequently selected and tried. One of these cases was that of the county of San Mateo vs. the Southern Pacific. Judgment was entered for the defendant and the case was taken to the Supreme Court. I suggested to counsel that it would be best to stay proceedings of all other cases until the Supreme Court had given its judgment in that case. Very soon after the case reached the Superior Court complaints came from this State that the record did not contain all the facts. There were so many complaints of that kind, although I am satisfied that every fact essential to either party was set forth, I myself requested the Court to postpone decision until other cases could be tried, where all the possible facts could be presented. The case consequently went over and the order staying proceedings, which I made just before adjournment of Court, is now vacated and all these cases on the calendar will come up as soon as counsel are ready.

Justice Field also informed the new attorney general of California, who was in court, "that there were no questions of law or fact which the Attorney-General could not master by next Monday."³³

Doyle's unpublished account contains details that did not appear in the news reports:

Justice Field returned to California and one day sent notice to all counsel engaged in the railroad tax cases to meet him in court at a time named. On their assembling he read to them a written memorandum, to the effect that to decide the pending actions the Supreme Court desired further instruction, as to certain facts, and questions involved, and suggesting a trial contradictorily of some of the cases in which could be developed the following questions: then followed a list of some half dozen or more queries, as to the imposition of the tax &c. It would be

at \$3000 per mile, *San Mateo*, 13 F. at 724, when in actuality it was more than \$40,000 per mile and its deduction from the assessed value would have eliminated any taxable property (*Everyman's Constitution*, 410, 570). In fairness to Justice Field, that was the figure the parties adopted by use of the demurrer on which the case was decided in the circuit court.

33. *San Francisco Chronicle*, July 10, 1883.

interesting to study out how the Judges of the Supreme Court came to think of these questions, if they did so and how Judge Field came to make such a request in their name if they did not, especially as none of the questions were federal questions. But there is not time for such enquiry here. I have a copy of the list of questions obtained from Mr. Delmas the leading counsel in some of the actions.³⁴

It is not known what copy of the list of questions Doyle had, but in the first volume at the Bancroft Library referenced above, the first document in the *Santa Clara* circuit court record, indexed as “Memoranda made by Judges of Supreme Court,” is a twenty-page handwritten memorandum in formal script—headed “Memoranda”³⁵ and unsigned—asking a series of questions about California tax policies and their application. Assuming that this is the document, Doyle is being disingenuous when he says that “none of the questions were federal questions.” They had everything to do with how railroads and other entities and types of property were taxed in California, sometimes with explicit reference to the Fourteenth Amendment. For example:

To hold that a power exists to discriminate in taxation according to the ownership of property would be, as justly said by Mr. Edmunds,³⁶ to sanction the very essence of tyranny and of arbitrary government.

Assuming that discrimination in the estimate of the value of property for taxation, or in the rate of taxation levied according to value, when such discrimination is made on account of ownership, would conflict with the equal protection of the laws as guaranteed by the 14th Amendment, is not such discrimination lawful by reason of the uses to which the property is subjected? In other words, may not property be classified for taxation by the uses to which it is applied, as well as by its distinctive character? And is not the property here, “franchise, roadway, roadbed, rails and rolling stock” of a railroad corporation thus classified; and if so, may not this property be subjected to a different mode of valuation from that of other

34. Nothing resembling this “written memorandum” can be located in the circuit court record of the *Santa Clara* case, housed at the National Archives branch in San Bruno, CA.

35. A transcription of those referred to as such is in Field’s March letter to Pomeroy. Graham, who seems not to have been aware of this “Memoranda” in the record of the *Santa Clara* case, treats Field’s transmission to Pomeroy as biased. See *Everyman’s Constitution*, 570.

36. Edmunds was one of the counsel for the railroad before the Supreme Court in the *San Mateo* case.

property covered by the same mortgage without conflict with the 14th Amendment?

II. *County of Santa Clara v. Southern Pacific Railroad Co.*

On April 13, 1883, the county of Santa Clara had filed suit against the Southern Pacific Railroad in the Superior Court for the Santa Clara County for \$8,065.11 in unpaid 1882 taxes plus another \$5,301.42 in interest and penalties. By mid-May, the railroad answered, asserting its constitutional and other arguments, and removed the case to the U.S. circuit court. On July 20, argument by the county in support of its demurrer was commenced by its lead counsel, Delphin Delmas³⁷ with the encouragement of Justice Field³⁸ but was quickly cut off because of the concern of the new attorney general, E. C. Marshall, that such a course could expose this case to the same sort of suspicions about its factual record as had been raised after the *San Mateo* decision.³⁹ In the end, the demurrer was withdrawn, the parties waived a jury trial, and the case was set for trial.

When trial began on July 25, in addition to the counsel already named, the county was also represented by former California Supreme Court chief

37. Born in France in 1844, Delphin Delmas and other family members joined his father in California in 1854. After attending Santa Clara College and Yale, Delmas began his legal career as district attorney for Santa Clara County. His most famous engagement was in New York City, where he represented Harry K. Thaw at his first trial for the murder of the architect Stanford White.

38. Justice Field said:

You can put in your demurrer. You can demur so much as lies in the Federal defense, and so much as lies on other matters. If there is anything inartistic in the drawing of the answer, we would not allow that to prejudice your case at all in any way whatever. As I understand it, the answer sets up three defenses. *First*—That the whole system of taxation—the system of taxation against railroad companies—is different from what it is in the assessment against other property. *Second*—That matters were included in the assessment that under no circumstances should have been included. That would be a defense under the State law, I suppose, if it is a defense at all. And then *Third*—That the corporation has received certain privileges and rights from the Federal Government, in consideration of which it is the agent of—the Government for certain postal and military services, and they were so received with the sanction of the State. Now you may demur to one or all. (*The Times*, July 22, 1883).

39. Information regarding the proceedings in the circuit court prior to the taking of evidence beginning July 25 comes from the newspaper articles in the first volume in the Bancroft Library.

justice David S. Terry—one of the drafters of the 1879 constitution. Justice Terry's life would be ended in 1889 by a deputy U.S. marshal as Terry assaulted Justice Field in the dining room of the Lathrop railroad station.⁴⁰ Santa Clara County was also represented by A. L. Rhodes, counsel for the county in the *San Mateo* case and another former chief justice of the California Supreme Court. Counsel for the Southern and Central Pacific Railroads were John Norton Pomeroy and several others, including Harvey S. Brown, who had run for the state Senate in 1855 on the same ticket with Lorenzo Sawyer, who was then running for a state judgeship and was later district attorney for San Francisco.⁴¹ Delmas offered the county's delinquency assessment list for 1882 taxes, which was received over numerous objections,⁴² and related documents. He then rested.⁴³

The Southern Pacific offered various federal and state statutes and its mortgage (which had also been attached to its answer) and related documents.⁴⁴ It also called one N. D. Rideout, identified as the owner of the Northern Railway, to prove that it was not assessed as a railroad owned by a railroad corporation.⁴⁵ The court allowed a company witness to testify that no deductions had been allowed the Southern Pacific for its mortgages, but it refused to allow Terry and Delmas to elicit that the shareholders of the Southern Pacific also owned the mortgages or that it in fact owned other, ostensibly independent railroads through dummy corporations. Similarly, Justice Field refused to allow Delmas to cross-examine its president, Charles Crocker, on financial reports by the Southern Pacific to prove that its true value was such that it would have still owed the taxes assessed had it been

40. Of Field's jurisprudence, Terry is reputed to have said, "Field is an intellectual phenomenon. He can give the most plausible reasons for a wrong decision of any person I ever knew. He was never known to decide a case against a corporation." A. E. Wagstaff (ed.), *Life of David S. Terry* (San Francisco: Continental Publishing Co., 1892), 294.

41. Brown reportedly argued in another case that the 1879 constitution of California was "conceived in communistic malice, was framed by unpardonable ignorance, adopted in frenzied malice, and was valuable only as a beacon to other states and peoples to avoid its principles and results." Stuart Daggett, *Chapters on the History of the Southern Pacific* (New York: Ronald Press, 1922), 188.

42. Transcript of hearing, 3–19, *Santa Clara* case file, No. 3074, filed August 15, 1883. National Archives, San Bruno, CA. The transcript covers only the proceedings at which evidence was taken.

43. Transcript of hearing, 27.

44. Transcript of hearing, 31–35.

45. However, Delmas established on cross-examination that the Northern Railway had no mortgage. (Transcript of hearing, 51–66).

allowed to deduct the mortgages, or to prove that when the constitution was adopted, the shareholders of the Southern Pacific owned all the mortgage bonds.

At this point, the parties rested, and the court tried the actions brought by the County of Sacramento against the Central Pacific Railroad for its 1881 and 1882 taxes, followed by the actions of the state of California against the Northern Railway, the Central Pacific Railroad, and the Southern Pacific Railroad. Tellingly, after failing to do so through the Secretary of the State Board of Equalization, the railroad elicited in the *County of Sacramento* case from a member of the board that he had included in its estimated value of their property the Central Pacific's mileage across the waters of San Francisco Bay and both railroads' fences along the roadbed.⁴⁶

After the taking of evidence in all the cases tried was completed,⁴⁷ two weeks of argument began. Over a three-day period, Delphin Delmas unhesitatingly argued that the *San Mateo* decision of the previous year by the same judges was unsupported by the authority their opinions relied upon and inconsistent with governing Supreme Court precedent. He derided the contention that a corporation was a "person" for Fourteenth Amendment purposes. He pointed out that by the terms of its mortgage, which was attached to its answer, the Southern Pacific had contractually bound itself to pay the taxes applicable to the mortgage, and that a hearing was both inconsistent with the ordinary processes of taxation and in any event available. John Norton Pomeroy responded to Delmas with an argument that took twice as long.⁴⁸ Other counsel on both sides also argued as well, ending with the argument of David S. Terry, supplemented by Delmas, each emphasizing Southern Pacific's contractual liability to pay the taxes imposed on the mortgage.

Predictably, the railroads won, in opinions rendered by Justice Field and Judge Sawyer on September 17, 1883, specific to the *Santa Clara* case but captioned as well in the other five cases tried. Justice Field did take note of the railroads' defenses that in assessing the railroads' property, the Board of Equalization had lumped all of its elements into a single total figure without any breakdown and had further included in that figure "property not properly appertaining to it," such as fences belonging to adjoining property owners and the four miles of San Francisco Bay over which the ferries of the Central Pacific passed. However, he said that the court did not "deem it important to pass upon these and other objections to the assessment, arising from an alleged disregard of the laws of the state" and would confine its

46. Transcript of hearing, 211–14, 230, 261–68.

47. Evidence admitted in any of the six cases was deemed admitted in all of them, to the extent relevant. (*San Francisco Chronicle*, July 27, 1883; *The Times*, July 28, 1883).

48. Both these arguments are printed, apparently in full.

consideration to the claims under the Fourteenth Amendment.⁴⁹ Nevertheless, among the findings subsequently entered by the circuit court on October 20, 1883, would appear No. XXIX—"Rules of Equality as Regards the System Adopted by the Board":

The State Board of Equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at \$300 per mile.

Rather, in his opinion, Justice Field reiterated his conclusions from the *San Mateo* case on the Fourteenth Amendment issues: that the taxation to the railroads of their mortgaged property was discriminatory and "prohibited by the amendment," which applied to corporations as much as to persons and also entitled them to notice and a hearing.⁵⁰ Judge Sawyer, concurring, singled out Delmas's argument for special criticism (while later effectively conceding its legal accuracy):

The assertion of counsel—which, for its positiveness, is extraordinary—that the court "finds no warrant whatever in the

49. *Santa Clara*, 18 F. at 389–90.

50. A word must be said about the opinions in the circuit court. In both the *San Mateo* and the *Santa Clara* cases, the version in the *Federal Reporter* replicates the text of a printed pamphlet in gray wrappers bearing a literary title: in the *San Mateo* case, the title is "State Taxation as Affected by Provisions of the Fourteenth Amendment to the Constitution," and in the *Santa Clara* case, the title is "The Taxation of Railroad Companies in California." Each of these pamphlets' title pages claim the contents are "[Printed from a Revised and Official Copy]," and two copies of the latter appear in the *Santa Clara* case file in San Bruno. The Doyle volume also contains pamphlets reproducing the opinions that lack both the wrapper and the legend. But there are differences in the texts of the opinions between the Doyle copies and the "revised and official" copy. With Justice Field's *San Mateo* opinion, the differences are occasional and formal except for the deletion throughout of section headings present in the first version, but in his *Santa Clara* opinion, they are far more extensive in changes of language, although not substantive. A possible explanation of this phenomenon appears in the Deady diaries. See Clark, *Pharisee*, 423–24. In September 1883, he traveled to San Francisco, dined with Justice Field on September 22 and "[r]ead a good portion of Delmas' argument in the Railway tax cases. It is vigorous, imaginative and sometimes convincing but more often fallacious...." On September 24, he noted: "Examined Fields opinion in the Railway tax cases this evening and suggested some verbal corrections."

books” for the views expressed in the *San Mateo Case*, that an opportunity to be heard before the property can be compulsorily taken from a person in the form of a general tax upon property, is an essential element in “due process of law,” may be attributed to the zeal of the advocate.⁵¹

III. Settlement Discussions Lead to Civil War

On October 20, 1883, the day the circuit court’s findings of fact were filed and its judgment entered, railroad counsel Creed Haymond wrote to Governor Stoneman, proposing to pay the 1880–1882 taxes outstanding at the 1882 (lower) valuations plus 10 percent for litigation and lawyer costs, as well as 60 percent of the amount to become due for 1883, without prejudice to the right of the state and counties to recover the balance. According to Haymond’s letter, this would provide the state with \$450,000, and the counties with \$650,000. The letter was simultaneously published in the *San Francisco Chronicle*, which, although an enemy of the railroads, supported this proposed settlement of the railroad tax litigation.

On November 8, Attorney General Edward C. Marshall wrote to the governor, stating that “the power to make the compromise suggested, or to accept any sum less than that demanded in the suits...does not exist in any or all of the departments of the State Government.” John P. Dunn, the state controller, weighed in with a letter of the same date, asserting that the railroads’ proposal would reduce the \$2,730,303.39 due for the four years by \$1,014,626.10. The governor responded to Haymond on November 8 that no state officer had the power to compromise the taxes due, as proposed by Haymond.

In the meantime, the railroads stymied a prompt disposition by the Supreme Court. The appeal in the *Santa Clara* case was perfected on October 22, 1883, and Judge Rhodes moved for an expedited hearing for the county in the Supreme Court. However, the railroads opposed this on the grounds that the other railroad cases tried in the circuit court at the same term should be heard together by the Supreme Court, which then denied the County of Santa Clara’s application. Delphin Delmas explained in a newspaper interview, responding to the question of whether the railroads wished to have the cases heard this term at the Supreme Court:

No; I am convinced they did not and that they deliberately and purposely used every means in their power to prevent a hearing. I firmly believe they were convinced that the decision of the Supreme Court would be adverse to them, and therefore sought to delay the appeal in order to work out their scheme of compromise. You will remember that the propositions of compromise came thick and fast as soon as the appeal was

51. *Santa Clara*, 18 F. at 422.

perfected. As the Court here had decided that the company was in no way liable for the tax, but that it should be borne by the bondholders, it is very strange if they had any hope of the affirmance of that decision that they should offer to pay the principal of the tax, as they now do.⁵²

Haymond did not accept the rejection of his settlement proposal lying down. Claiming that “[f]rom the beginning of the litigation between the Railroad Company and the State every effort has been made by the Company to have the litigation determined as speedily as possible,” he insisted:

The Company, although advised by eminent counsel that the new Constitution virtually exempted its property from taxation, has at all times been willing, notwithstanding that exemption, to contribute its fair and just proportion to the support of the Government of the State, and the various counties through which the road runs. We have not sought to compromise any legal claims, for, in our judgment, no such claims exist.

Early in 1884, talk of the November settlement proposal once again engendered opposing positions among the counsel and the local press. On February 6, a letter by Haymond was published, indicating both a willingness to pay the amount of the tax due without interest, penalties, costs, or counsel fees, and the fact that counsel for the state had shown a readiness to accept the proposal in early December. Haymond renewed the offer as well to any county that might choose to accept it.

At this point, open warfare erupted in the newspapers between the governor and the attorney general. The attorney general took the position that it was legal to accept a payment of taxes in full without insisting on interest, counsel fees, and penalties, that the state’s depleted finances necessitated it, and that the only alternative was to convene a special session of the legislature. This, in turn, was met by a lengthy statement by Delmas and Rhodes—as well as by an opinion letter to the same effect to the governor and a statement apparently to the public at large in which David S. Terry joined—arguing that the state was entitled to the interest, counsel fees, and penalties as well, and that the attorney general had no

52. Delmas was also dismissive of the need to bring up all the cases: Because the federal questions in *Santa Clara* were “common to all these cases, why go to the expense of taking half a dozen appeals when one would present fully the whole controversy?” Baggett, another of the counsel for the county of San Mateo, blamed the initial delay in the decision on the merits by the Supreme Court on the urgings “of the *Chronicle* and Mr. Doyle and others that the people would certainly lose the case because of a stipulation made by Judge Rhodes, which eliminated from the record the full text of the mortgage contract.”

right to settle without requiring their payment. That was followed by a lengthy letter dated February 12, 1884 from the governor to the attorney general opposing acceptance of any such offer, accompanied by a letter of similar tenor from State Controller Dunn. Dunn's letter was supported by a financial analysis showing that Haymond's most recent offer was worth only \$21,108 more than the one in October.

At this point, the attorney general sent a brief reply, dated February 14, to the governor. It was dripping with sarcasm:

I am deeply grateful, also, to the several gentlemen who have contributed so much valuable legal, statistical, and rhetorical matter. But the grave and serious regret and disappointment which I desire to express is, that the question I did address to your Excellency was not answered. I believe the only adequate remedy for the evil of the situation—the only effective opposition to the railroad wrongs—is to be found in an extra session of the Legislature. Neither Mr. Dunn's figures of arithmetic, nor Mr. Delmas' figures of rhetoric are likely to give any relief beyond a transient gratification.

The attorney general agreed to postpone action for a "reasonable time" to allow the legislature to be summoned. A few days later, a different set of outside counsel for the state, retained by the controller, commenced litigation against the Central Pacific, the Southern Pacific, and four other California railroads for delinquent 1883 taxes payable to the state and its counties.

On the evening of February 27, Delmas announced that, having been authorized by Governor Stoneman to take every step he could to prevent any compromise for one cent less than the amount claimed from the railroads, he had brought a suit in the governor's name against Attorney General Marshall in the Superior Court for Monterey County. Alleging that Marshall claimed the right to manage and compromise the tax lawsuits against the Southern Pacific Railroad and that he had entered into a settlement agreement, the complaint sought an injunction against his settling for less than the total amount due, said in the press to include \$1 million in penalties, counsel fees, interest, and costs. A "writ of injunction" issued and was served on Marshall outside the circuit courtroom.

In the publicity that followed, the attorney general acknowledged that he had agreed to the compromise of full payment of taxes—without interest, penalties, etc., but without prejudice to further efforts to collect them—as discussed in his correspondence earlier that month with the governor and that that judgment accordingly had been entered in the circuit court. His rationale was very simple:

If we litigate further those cases may not be reached for a year or two. Already, under the fullest and most careful arguments, the railroad company has two decisions against the validity of the tax, and if they should be finally affirmed the State would not

only lose these precious penalties, but the whole amount of the taxes. On the other hand, if the State wins these cases the penalties will still be a matter of doubt which will have to be litigated....I don't feel disposed, for my part, to risk the whole amount of the taxes for the chance of collecting these penalties at the end of years of costly litigation.

Delmas, of course, thought the opposite: "Why, then, not fight the present battle out? What is to be gained by postponement of the struggle? The State, at some point, must wage the contest of supremacy to the bitter end."

In the circuit court proceedings the next morning, Marshall was at first hesitant to proceed:

I must suggest that I am laboring under the advantage, or disadvantage as the case may be, of having had an injunction served upon me. Now, what ever may be my disposition as to how much respect I should show for this injunction, and however much I may think it is an unusual proceeding, nevertheless, it has been served upon me, and I am not disposed to go through the contempt proceedings.

However, testy exchanges between Delmas and Marshall, muzzled by Judge Sawyer's admonition to observe decorum, nerved Marshall to "take the injunction by the horns," as he put it, and sign the stipulations with the railroad.

As a result, Delmas and Rhodes were recognized as in charge of four of the pending cases, including San Mateo and Santa Clara. With respect to the rest of the other forty-one pending cases, Judge Sawyer recognized the attorney general as in charge, and thus the cases were settled. Judgment was entered for the railroad on the basis of "the evidence received in the preceding cases," and then set aside,⁵³ with a new judgment entered in favor of the state or county plaintiff in the amount of the original tax claim, with the right to appeal the denial of interest, costs, etc., preserved.

53. "The above entitled actions having been tried upon the merits, and the Court having announced its decision in favor of the defendants in each of said actions, and the defendants in each of said actions, notwithstanding the fact that the taxes therein sued for have been declared invalid, being minded to pay portions of the sums claimed; therefore, defendants agree that, notwithstanding the decision aforesaid, judgments in favor of the plaintiff may be entered in said actions, as follows: In action No. 2755, above mentioned, in the gross sum of \$14,216.64; and that of said gross sum the sum of \$6,298.30 is for the use and benefit of the county of Fresno, and the balance, \$7,918.34 is for the use and benefit of the State of California," etc. It appears that a more abbreviated form of stipulation, to the same effect, may have been entered into the following day.

Condemning the action of the attorney general, the governor did call a special session of the legislature, solely to address railroad legislation. John T. Doyle was active behind the scenes, drafting legislation that would have exerted some control over the railroads' monopoly power.⁵⁴ This bill and another passed the House of Representatives easily, but they were thwarted by conservatives in the Senate and never became law.⁵⁵

As a result of the settlements, the railroads paid more than \$470,475.08 in overdue taxes. Although the controller, who had opposed the settlements, instructed the county plaintiffs not to accept their shares of it, all but three of them did, leaving the attorney general with \$141,435.20 of the settlement on hand.⁵⁶ An appeal was promptly taken in one of the cases—*County of San Bernardino v. Southern Pacific Railroad Co.*—to test the validity of this settlement procedure.⁵⁷

54. R. Hal Williams, *The Democratic Party and California Politics, 1880–1896* (Stanford: Stanford University Press, 1975), 42–43n.31, characterizes Doyle as “a prominent lawyer, a former state commissioner of transportation, and an expert on railroad affairs.”

55. Williams, 40–47; White, 170–71. In his *Report of the Attorney-General 1883–1884* (1884), 6, Attorney General Marshall described the Legislature’s investigation of his settlement with the railroads, as follows:

An investigation was ordered by the Legislature, and prosecuted before the Judiciary Committee of the house of representatives. A majority of the committee reported that the interests of the State had been protected by an appeal properly taken. A minority of the committee reported exactly the reverse, and, following the spirit of the executive message, pronounced the Attorney-General guilty of effecting a compromise of the dues to the State of many hundreds of thousands of dollars. The house of representatives rejected the report of the majority and approved the report of the minority, and by a vote of forty-seven to fifteen, pronounced a censure, of which the brutal cruelty was only to be excused by its brutal ignorance.

56. “After a long drawn-out controversy between the controller and the attorney-general, the supreme court, in the case of *San Mateo County v. D. J. Oullahan, State Treasurer*, 69 Cal. 647 (Cal. 1886), decided that, since the money paid by the railroads was public revenue, the state officers had to receive it” (William C. Fankhauser, *A Financial History of California: Public Revenues, Debts, and Expenditures*, vol. 3 [Berkeley: University of California Publications in Economics, 1913], 101, 305).

57. Fankhauser, *Financial History*.

IV. Events Before the Argument

A. The 1884 California Democratic Convention

In mid-June, not long after the proceedings in the *Santa Clara* and related cases had concluded in the circuit court in April 1884, the California Democratic Convention for the presidential election convened in Stockton. The railroad tax decisions had created political animosity against some of the participants. The fifth resolution of the party platform singled out for condemnation Attorney General Marshall, “who violated his solemn pledge, taken at San Jose, that in the collection of revenues there should be no compromises.” The convention formally expelled Marshall from the Democratic Party. But the best was saved for the last resolution:

That the Democracy of California unanimously repudiates the presidential aspirations of Stephen J. Field, and that we hereby pledge ourselves to vote for no man as a delegate to the National Convention of July 8, 1884, who will not before this convention pledge himself to us his earnest endeavors to defeat those aspirations.

A motion was made to strike this last resolution and supported by the argument of Francis G. Newlands, a son-in-law of Senator William Sharon, whose tangled marital affairs loomed large at a point in Field’s judicial career and, ultimately, his confrontation with Terry in the railroad station in Lathrop. When Newlands had finished, the next to speak was Delphin Delmas, who praised Newlands for his gallantry in defending Justice Field and then spoke his own mind, concluding:

When the people of this state undertook to collect from corporations their share of the revenue under the constitution, who was it that brought the state to the pitiful pass that it must beg such beggarly pittances as they were minded to pay? Stephen J. Field. We have been told that, in all these decisions, the learned justice followed the dictates of his own conscience. If the conscience of Stephen J. Field is so constituted that he believes that the people have no rights, and can form no laws that are binding on the railroads, is that a reason why the people should select him as their standard-bearer? When the Democratic party still holds to the doctrine that it is the people, and not the railroads, that own this state, will it accept that as a reason for accepting Stephen J. Field as its standard-bearer? I have seen this commonwealth, in her legislative halls being overwhelmed by corruption; but may I never see her in the attitude that some Democrats would have placed her in, licking

the hand that smites her and accepting from the railroad corporation their chosen candidate, Stephen J. Field. The proposal to strike the resolution failed 453 to 19.⁵⁸

B. Positioning the Record

As noted, one of the cases pursuant to a stipulation and payment by the railroad of the relevant tax bill went to the Supreme Court on the application of the attorney general—*County of San Bernardino v. Southern Pacific Railway*, No. 2757. An explanatory stipulation, reproduced in the Supreme Court's opinion, was filed in the circuit court on December 8, 1885. The parties agreed that the outcome for the other forty cases would be governed by the record and the result in the Supreme Court in the *San Bernardino* case, in which a stipulated judgment with a bill of exceptions paralleling the findings in the *Santa Clara* case had been entered on March 20, 1884.⁵⁹

The *San Mateo* case was still pending decision in the Supreme Court, and according to its outside counsel, A. L. Rhodes, the railroad had tried to settle the case by offering to pay all amounts claimed. Rhodes refused to settle on the grounds that the *San Mateo* case was a test case and that an adjudication was needed to resolve the issues in dispute between the parties. So in December 1885 also, the Southern Pacific succeeded in getting rid of the *San Mateo* case by going around counsel directly to the County Board of Supervisors, which without reservation accepted payment of all outstanding amounts due. The county requested its outside counsel in the case, Rhodes & Barstow, to dismiss the writ, but they refused to do so. The supervisors then fired Rhodes & Barstow and retained special counsel before the Supreme Court to move to dismiss the appeal as moot, a motion that was opposed by Rhodes & Barstow, who were supported by the governor, the attorney general and the controller. But the Supreme Court granted the motion on December 21, 1885, the month before the arguments in the *Santa Clara* case.⁶⁰

58. Swisher, *Stephen J. Field*, 303–07.

59. These findings included Finding XXVIII, which repeated the finding of the *Santa Clara* case of the State Board's inclusion in its valuation of fences along beside the roadbed.

60. In his *Biennial Report of the State Controller for the 36th Fiscal Year ending June 30, 1885, and the 37th Fiscal Year ending June 30, 1886* (1886), 27–29, Dunn accused the railroads of duplicity:

“They constantly declared their anxiety for an early decision, and just as constantly interposed every possible obstacle against a decision being rendered. They used every endeavor to have the case dismissed, failing in which, they drove the attorneys for the State—Messrs. Rhodes and Barstow—out of the case.”

V. The Disposition of the *Santa Clara* and *San Bernardino* Cases by the Supreme Court

These two cases were argued for four days in the last week of January 1886 by Delmas and Rhodes for Santa Clara County, by Attorney General Marshall for the other California counties and for the state; and, for the railroads, by S. W. Sanderson, George Edmunds, and, replacing Roscoe Conkling, William M. Evarts, the leader of the New York bar. Both cases were decided on May 10, 1886.

He then turned his fire on the San Mateo county officials, to whom he ascribed "virulent hostility...to the State officials...in abetting the railroad company," and after setting out in full their affidavit, made at the behest of Creed Haymond and sent to the Supreme Court, acknowledging the full payment of the taxes owed by the Southern Pacific Railroad, asserted that his review of the county officers records did not disclose that any such tax payments had been paid. John T. Doyle's unpublished note takes a dramatic tone, and perhaps some poetic license, in recounting his version of this incident:

Finally one day the judges announced that they were prepared to decide the San Mateo case, and named a day for hearing judgment. Then at once arose new trouble. It was like Lochinvar's elopement:

"There was mounting mang Grames of the Netherby clan, Fosters, Fenwicks and Musgraves they rode and they ran. There was racing and chasing on Canoby lea."

The San Mateo Supervisors were suddenly convoked in extraordinary session and voted they did not want any decision, but directed their counsel to Nol. Pros. the writ of error. This self-denying resolve was telegraphed to Rhodes at Washington. He refused to obey, and the supervisors voted to cancel his contract and dismiss him from the case; it was placed in the hands of a Mr. Ross, of Washington, whom, I believe, none of them had any acquaintance with. [H]e went into court to dismiss the case backed of course by the counsel of the railroad company, but opposed by Rhodes, who by this time must have begun to find out that he had been used by his amiable friends, the enemy, and put in the position of a catspaw. He objected on the ground that the case had been argued as a typical one to obtain the determination of an important constitutional question and the Court should not allow it to be withdrawn at the caprice of the plaintiffs. *He did not object on the ground of his contractual interest in the action.* Ross claimed the right to dismiss absolutely. The Court after some little discussion, enquired whether the Federal question was not also present in the Santa Clara County case, which was not yet argued, and being informed by both sides that it did [sic], felt relieved from the need of considering Rhodes' suggestion, and dismissed the writ of error, leaving the federal question to be presented and passed on in the suit of Santa Clara County.

Although counsel argued at length the Fourteenth Amendment issues that Justice Field and Judge Sawyer had addressed in the circuit court, the railroads had sown the record with a state law issue that those judges had intentionally disregarded: whether the State Board of Equalization had included in its all-in single-figure assessment of the total value of the railroad an element that was not includable under California law—specifically, fences separating the roadway from the neighboring property. Finding XXIX of the circuit court in the *Santa Clara* case recited that the State Board of Equalization had “knowingly and designedly” included fences at \$300 per mile in their assessment, and the same language appeared in the Southern Pacific’s bill of exceptions to the judgment in the *San Bernardino* case.

In the brief Judge Sanderson had filed for the Southern Pacific Railroad in the Supreme Court in the *San Bernardino* appeal, of the nine issues argued, the taxability of fences was the second point; that corporations were “persons” under the Fourteenth Amendment was fifth, and the due process issues under the Fourteenth Amendment were last. Delmas, however, carelessly dismissed the issue in less than a page of his *Santa Clara* argument before the Supreme Court, ending with the self-confident assertion:

I have never been able to grasp the proposition that fences are no part of the railroad which they enclose. If the defendant made a conveyance of “its railroad from San Francisco to San Jose,” would not the fences pass by the deed? Clearly as much so as a sale of my garden would convey the fence which encloses the garden.⁶¹

In each of the two groups of cases, the Supreme Court never reached the Fourteenth Amendment due process issues, resolving the cases on the basis that the tax assessment included the fences, an element that did not belong in the state board’s assessment⁶² and the value of which could not be isolated by the court, with the result that the entire assessment was illegal and could not form the basis for the tax. In each case, the stipulated

61. *San Bernardino*, 118 U.S. at 396–97. In his *Speeches and Addresses* (San Francisco: Robertson, 1901), Delmas devotes fifty pages to a reproduction of his Supreme Court argument but omits the portion reproduced in the Supreme Court reports as his argument “[o]n the points on which the decision turned.”

62. “It seems to the court that the fences in question are not, within the meaning of the local law, a part of the roadway for purposes of taxation; but are ‘improvements’ assessable by local authorities of the proper county, and, therefore, were improperly included by the State Board in its valuation of the property of the defendants.” (*Santa Clara*, 118 U.S. at 414. Accord, *San Bernardino*, 118 U.S. at 421.)

judgments in favor of the state and the counties, to the extent consented to for tax liability by the railroads, were affirmed, but the interest, penalties, attorneys fees, and costs for which the state and counties had appealed to the Supreme Court were denied. To achieve this result, the railroads first had to get rid of the *San Mateo* case, which had come up on a record without this escape-hatch finding.

Justice Field filed a concurring opinion in the *San Bernardino* case,⁶³ expressing his approval of the course followed in the circuit court by the attorney general and his regret that the Supreme Court had not “deemed [it] consistent with its duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the Circuit Court.” Judge Sawyer put it more bluntly later, when testifying before a Committee on the Judiciary of the California State Assembly in 1889: “Nobody was more chagrined than I was that after we had taken all the trouble we did, that the Supreme Court should turn it off on a point that we didn’t care anything about.”⁶⁴

Moreover, while preventing any recovery, the railroads won their constitutional point, for when the Supreme Court’s opinion in the *Santa Clara* case was officially reported, it began with this introductory statement, attributed to Chief Justice Waite:

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 any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.⁶⁵

That single *ipse dixit*, not part of the court’s opinion, was promptly elevated by Justice Field to the status of a holding by the court that corporations were entitled to the protections of the Fourteenth Amendment.⁶⁶

The practice of entering stipulated judgments in related cases without trial was to continue past the 1882 tax year involved in the *San Mateo* and *San Bernardino* cases while those cases loitered in the Supreme Court, leading to the wiping out of railroad taxation in later years on the erroneous inclusion of values for minor property elements in the all-in tax single-number tax

63. *San Bernardino*, 118 U.S. at 422.

64. “Proceedings of the Committee on Judiciary Regarding Railroad Tax Suits, etc.,” Appendix to the *Journals of the Senate and Assembly of the Twenty-Eighth Session of the Legislature of the State of California (Assembly)*, vol. 8 (1889), 191, 192.

65. *Santa Clara*, 118 U.S. at 396.

66. *Minneapolis & St. Louis Railway v. Beckwith*, 129 U.S. 26, 28 (1889). The correspondence between Chief Justice Waite and the reporter is set out and commented on in Graham, *Everyman’s Constitution*, 566–69.

assessment.⁶⁷ The frustration of Controller Dunn with Attorney General Marshall and the railroads led to the legislative hearing in 1889, after Marshall's term was up, at which Dunn vented his spleen, Marshall having had the good sense to send a doctor's certificate rather than attending in person. Judge Sawyer appeared with some of his case files in a fruitless endeavor to explain how these same toxic fact findings had been stipulated into appellate records where Dunn contended they did not belong, in several instances physically pasted in. The hearing record closed with the text of a letter Dunn had written to Marshall in June 1886, a month after the Supreme Court decisions in the *Santa Clara* and *San Bernardino* cases:

I was mortified and astounded that the Attorney-General of this State would deliberately assert that there is no law under which the railroads of the State can be assessed, as, in the decision rendered, the real issue at stake was not passed upon, and nothing involved in it except the shadowy issue of the assessment of fences. By this interview you have become the authority for the idea that the assessments for 1883, 1884 and 1885 have, like those of the cases decided, included the fences, and that the taxes for these years are thereby lost. . . .

For several years these railroad companies have loudly proclaimed that the methods of assessment under our State Constitution were in violation of the Federal Constitution, and therefore void, and that they were anxious to have them heard and decided by the United States Supreme Court upon that issue. Yet, as evinced by their action but a short time since in the *San Mateo* case, supplemented by the false record made up in these cases, it must be evident to all that they are by every means within their power evading that very issue.⁶⁸

In his 1886 report quoted earlier, Controller Dunn concluded his discussion with the assertion that "I have no doubt that if the law department of the State government had been in accord with yourself [the governor] and myself, every dollar of taxes owed by the railroad company would long since have been paid."⁶⁹ To the contrary, however, the resolution of these cases shows that it was Marshall's controversial decision to accept the railroads' ultimate compromise—to pay the face amount of the taxes due and litigate over the interest and penalties for the failure to pay them timely—that led to the best outcome available to the state and the counties in the *San Bernardino* group of cases that he handled. Had he persisted in litigating the cases in their entirety, as demanded by Controller Dunn and

67. E.g., *State of California v. Central Pacific Railroad Co.*, 127 U.S. 1 (1888).

68. "Proceedings of the Committee," 251–52.

69. Dunn, Biennial Report, 29.

his lawyer, Delphin Delmas, in the end, those governmental entities would have gotten nothing at all.



Annette Abbott Adams." *Library of Congress*. 19 Oct. 1914.



Annette Adams, Presiding Justice of the Court of Appeal Third Appellate District"
California Courts. 1942



By Andrea Sheridan Ordin, Esq.*

Remembering Annette Abbott Adams

Sacramento, Calif. [1956] (AP)—Annette Abbott Adams, who retired in 1951 as presiding Justice of California's Third District court of appeal, and the first woman Assistant Attorney General of the U.S., serving under President Wilson, died Friday.

The notification of the October 26, 1956, death of Annette Abbott Adams in California by the Associated Press was brief, but it was carried by newspapers throughout the country, from the *South Bend [Ind.] Tribune* to the *New York Times*.¹

So, who was Annette Abbott Adams? A leading Northern California newspaper, the *San Francisco Examiner*, told more of the story: Adams, a native of Northern California's Prattville, in Plumas County, was one of the first women to obtain a law degree from the University of California, the first woman to serve as a United States Attorney (in 1918), the first woman to be an Assistant Attorney General of the United States, and the first woman to be appointed to the California District Courts of Appeals.²

This modest notification of the death of a professional woman in the 1950s gives little hint of Adams's extraordinary forty-year legal career, from 1912 to 1952—a career that deserved celebration by any measure but also one that was almost unimaginable for a woman of her day. In the first decade of the twentieth century, most law schools excluded women, and the percentage of women lawyers in the country hovered between .05 percent

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1. "Obituaries," *South Bend Tribune* (IN), Oct. 26, 1956; "Obituaries," *New York Times*, Oct. 26, 1956.

2. *San Francisco Examiner*, Oct. 27, 1956.

and 1.0 percent.³ For any woman to have held the national positions that Judge Adams did deserves more than a historical footnote.⁴

Early Years

Born in the last quarter of the nineteenth century, Annette Grace Abbott grew up in a small town in Plumas County in the Sierra Nevada Mountains, surrounded first by the legal books of her father, a justice of the peace, and then, after her father died, by the accounting books that her mother kept for the family store.⁵ An 1897 graduate of Chico State Normal School, a teachers college, with majors in economics and history, Adams went on to teach high school for six years. The first record of her interest in the legal profession was her move in 1903 to Berkeley, California, and to the University of California, where she earned a bachelor of law degree in 1904. Rather than proceeding to Boalt Hall for her J.D., which would have permitted her to practice law, she headed to Alturas in Modoc County, near her home, and became one of the first female high school principals in California. While in Modoc County, Annette Grace Abbott became Mrs. Annette Abbott Adams in 1907. A few years later, she and her husband separated for reasons that she kept private.⁶

A prominent leader in the community as a high school principal, Adams was encouraged by the former Modoc District Attorney and then Modoc County Superior Court Judge John Raker to go back to Berkeley to complete her legal education. She returned and completed her degree in 1912. But unable to find a position practicing law in the Bay Area, Adams went back to Modoc with the intention of either resuming her academic career or practicing law there. Again Raker, now a Congressman for California, intervened. He counseled her to go back to San Francisco,

3. Louise Eleanor Steiner, "Annette Abbott Adams: California's First Lady of Law" (master's thesis, Sacramento State College, 1965).

4. I first learned of the remarkable Adams in 1977 when, with some fanfare, President Jimmy Carter appointed four women as United States Attorneys: Virginia McCarty, Andrea Sheridan Ordin, Roxanne Conlin, and Joan Kessler. For a brief twenty-four hours in 1977, Virginia McCarty, Southern District of Indiana, was celebrated as the first woman in the nation to be appointed a United States Attorney until the Department of Justice belatedly announced that Annette Abbott Adams had been appointed in 1918. Virginia McCarty was the second woman appointed in history, fifty-nine years later, and the first to serve a full term of four years.

5. Steiner, "Annette Abbott Adams."

6. Ibid.; Joan M. Jensen, "Annette Adams, Politician," *Pacific Historical Review* 35, no. 2 (1966): 185–201.

become active in politics, and work for Woodrow Wilson, a candidate for President of the United States.

San Francisco: Lawyer and Political Activist

Adams returned to San Francisco, became the president of the Women's State Democratic Club of San Francisco, and worked toward the election of Woodrow Wilson, even though she did not yet have the right to vote for a candidate in a national election. When the national political campaign culminated in the inauguration of President Woodrow Wilson in 1913, Adams opened the first women-owned private practice law firm in San Francisco along with a former classmate, Marguerite Ogden. Their varied practice included probate, family law, and criminal defense. The idea of two women practicing law together in 1914 was deemed newsworthy and was occasionally the object of ridicule, as in the following cartoon:



Shades of Blackstone, Gaze on Portia! Pretty Lawyers Do Needlework in Office—Waiting for Something to Turn Up." *San Francisco Examiner*, Jun. 13, 1913.

To the surprise of the caricaturists, many cases did in fact "turn up" for both Adams and Ogden. Adams's particular strength was her courtroom

ability. Early in her private practice, she represented a criminal defendant in a case personally prosecuted by James Preston, the United States Attorney of the Northern District of California. As reported in the *Feather River Bulletin*, her trial performance on behalf of her client was outstanding. Although her client was convicted, the *Bulletin* reported on her skilled argument at the time of sentencing:

Mrs. Adams addressed the court in the frankest fashion on behalf of her client. She did not attempt to give him a lilly-white [*sic*] reputation or to exhibit his angel wings just sprouting where such wings are expected to grow. She didn't quibble or quiver over the question; there was no evasion or evanescing—just facts.⁷

At the conclusion of her argument, the judge was lenient and sentenced her client to mere months, stating that Adams's argument had won "the court's clemency." Before the argument, the judge said, "it had been in the mind of the court to make the sentence a term of years."⁸

The newspaper reported that U.S. Attorney Preston "not only congratulated Mrs. Adams, but began a cross-examination of her that went something like this:

Preston: "Where'd you get your law?"

Adams: "University of California."

Preston: "Experience?"

Adams: "About two years."

Preston: "Want to be Assistant United States Attorney?"

Adams: "Certainly."

Preston: "Place is yours"⁹

Department of Justice Career: 1913–1921

Although the *Feather River Bulletin* interview between Attorney Preston and Adams may have been imagined, the offer was not. United States Attorney Preston was impressed by her trial performance, and after she obtained glowing recommendations from her law professors, Adams's name was submitted to Washington for appointment as the first woman in the

7. "A Portia in the Federal Court—Mrs. Annette Abbott Adams, a Native of This Country, First Woman to Hold Federal Prosecuting Position," *Feather River Bulletin* (Quincy, CA), Feb. 11, 1915.

8. *Ibid.*

9. *Ibid.*

nation to serve as an Assistant United States Attorney. The *Feather River Bulletin* set out portions of the recommendations:

"She is one in a thousand, whether regarded from the point of view of a woman or of a lawyer. For industry, for thoroughness, for accuracy, for clearness and finish in presentation of her work, Mrs. Adams is distinguished," wrote one professor

"Mrs. Adams has an excellent legal mind and is a competent lawyer. She has always impressed me as having great practical sense, in addition to her legal ability," was the statement of a third professor.

But the most interesting statement of support was in the closing sentences of Mr. Preston's formal recommendation to the Attorney General at Washington. He wrote:

"I am of the opinion that being a woman will not handicap her in the least in the discharge of any of the duties of the office that may be assigned her. I might add that in recommending Mrs. Adams I have chosen her in spite of her womanhood and not on account thereof."¹⁰

Nevertheless, the academic recommendations and the editorial praise that was put forth for the appointment of a woman were not sufficient for the United States Attorney General James Clark McReynolds and the Department of Justice in Washington, whose approval was necessary for budgeting an appointment. After a month of waiting for word from Washington, two men whose appointments had been sent forward at the same time as Adams's received commissions from the Department of Justice, but Adams did not receive one.

The *Feather River Bulletin* reported that prominent women of the time expressed outrage. Dr. Katherine Howard, director of the State Civic League, stated:

"This whole affair is simply following the policy against women. It is strictly in accord with the anti-suffrage feeling in the Democratic Party...They have turned Mrs. Adams down because she is a woman. For no other reason."¹¹

Alice Doherty, State Secretary of Native Daughters of the Golden West, said:

10. Ibid.

11. "Women Stir Soup in Adams Case—And It's a Nice Kettle That's Simmering over Held-up Appointment," *Feather River Bulletin* (Quincy, CA), March 19, 1914.

"The time is coming when such arbitrary action against a woman just as a woman will not be possible. I certainly feel it keenly that so able a woman should have been given this shabby treatment. Mrs. Adams had not only the support of the leading women of the state, but of the leading men as well."¹²

When asked by the press for her comments, Adams responded gently:

"I have nothing to say at this time. I have the utmost confidence in Mr. Preston's attitude in this matter... If I lose it, my confidence in the good-will of my friends and in the good judgment of my party will not be shaken."¹³

She did not have to wait long to have her confidence and her diplomacy rewarded. Attorney General James Clark McReynolds was later appointed by President Wilson to the United States Supreme Court, in 1914. He was replaced by Attorney General Thomas Watt Gregory, who quickly confirmed her appointment. Several years later, Adams candidly addressed the delay in her appointment as Assistant United States Attorney:

"But Justice McReynolds, who was then Attorney General, could not understand that a woman could occupy a public position. He is a Southerner and a bachelor. He explained to Mr. Preston that a law office was not a woman's place.

"But Mr. Preston had confidence in me, and when Justice McReynolds received his appointment to the Supreme Court, Mr. Preston obtained Attorney General Gregory's confirmation of my appointment. But there was still the prejudice because I was a woman, and though called upon to do a man's work, I was given \$1,800 salary at first, but at the end of the year the Attorney General wrote me a letter stating that on Mr. Preston's recommendation my salary was raised to equal the men assistants."¹⁴

Early in her days as a prosecutor, she saw that preconceptions about her gender were not limited to Washington, D.C. In the Northern District of California, opposing defense lawyers at voir dire would ask prospective jurors if Adams's being a woman would have any prejudicial effect against the defense. After several voir dire examinations in which she failed to object, Adams decided to respond:

A White Slave case had been assigned to me. Two very youthful lawyers were appearing for the defendant. Each one he asked this question, each word spoken hesitatingly. "Will it prejudice my

12. Ibid.

13. Ibid.

14. "Portia's Dream of Years Is Realized, Crowning Achievement as Prosecutor," *San Francisco Examiner*, Jan. 8, 1917, 3.

client's case on account of the government prosecutor being a woman—if I am obligated to ask the witnesses some nasty questions?”

I was thunderstruck. I determined once and for all to put a stop to this attitude of attorneys. I started to examine the fifth juror. I made a dramatic pause. Then very impressively I said to him: “Mr. Smith, I want to know, from you and the other jurors I have previously examined, one very important thing. Will it prejudice the government's case considering the great youth of the counsel on the other side, during this prosecution if I am obligated to ask the witnesses some very ‘nasty’ questions?” I have not been bothered since then by attorneys referring to my sex.

As one of five Assistant U.S. Attorneys in the Northern District, she was first assigned to a variety of routine federal investigations and trials. She then was chosen as second chair in the two most challenging and complex cases of U.S. Attorney Preston's term, *United States v. Bopp, Von Schack and Von Brincken et al.* and *United States v. Hizar*, known as the “Hindu Conspiracy” case.

In *Bopp et al.* she was primarily responsible for drafting and defending indictments of alleged German spies for violating the Neutrality Act, including acts of planned violence. The indictments also included novel violations of the Sherman Antitrust Act, which required complex and seminal briefing. Hilary Gaudiani Ley's *Stanford Law student research* paper analyzes in depth the *Bopp* case and cites the analysis of the cases by antitrust scholars Richard M. Steuer and Peter A. Barile III:

The use of the Sherman Act in the charging of German spies was both a novel and an aggressive tactic. The Sherman Anti-Trust Act of 1890, 15 U.S.C.A. § 1, made “agreements in restraint of trade...with foreign nations’ illegal and subject to both civil and criminal penalties. Despite the Act's broad language, employing it as a tool to combat violent wartime conspiracies was likely outside the scope of what the legislature intended when it passed measures to protect consumers, workers and suppliers from the evils of monopolization. In fact, scholars have described the criminal antitrust prosecutions of the late 1910s as ‘the most direct application of the antitrust laws in the history of warfare.’”¹⁵

The indictments were challenged but eventually upheld by the district court after extensive briefing.¹⁶ The trial was widely covered daily for more

15. Hilary Gaudiani Ley, “Annette Abbott Adams: The Emergence of a Public Servant and Legal Advocate (student research paper, Stanford Law School, 2007).

16. *U.S. v. Bopp* 237 Fed. 283 (1916).

than five weeks. Adams's closing argument was headlined: "Woman Stirs Court in Plea Against Bopp."¹⁷ The defendants were found guilty in two hours for the charged scheme to violate the neutrality of the United States, including promotion of attempts to dynamite American ships, and were subsequently sentenced to the maximum by statute.

Adams received accolades in several media outlets. The *New York Tribune* was entranced both by the Bopp case and by Adams's performance, as were the *Boston Post* and the *Washington Herald*. The *New York Tribune* reported:

This is the story of a Portia of the Pines, the story of American feminism triumphing over a blistering, sputtering trio of Prussians, skeptical to the last as to feminine intellect in any country. The United States Court in the San Francisco Post Office Building was packed to the doors when Dr. Annette Abbott Adams rose to sum up the case for the United States Government....The slender young woman patted her wavy brown hair and quietly rose to address the jury. She began in a calm, well modulated voice, fixing her attention upon the jury. One San Francisco reporter said that her attitude was that of a schoolma'am talking to a class of twelve attentive pupils.¹⁸

The *Boston Post* wrote when her name had been floated for vice president in the summer of 1920:

She became nationally known in connection with the famous case of the government against Franz Bopp, former German consul-general at San Francisco, who was convicted, in company with other defendants, of setting on foot a military expedition against Canada and of conspiracy to violate the Sherman act in plotting to dynamite ships and trains carrying ammunition to the allies. It was the first time in the history of jurisprudence that a woman had summed up a case of such importance before a jury.¹⁹

Almost immediately after Adams's successful trial in *Bopp*, in February 1918 she proceeded to try the so-called Hindu Conspiracy case against multiple defendants for violations of the Neutrality Act and the Sherman Act. She and U.S. Attorney Preston won convictions of twenty-nine

17. *San Francisco Examiner*, Jan. 9, 1917, 3

18. "Prussia, and the Schoolma'am of Plumas," *New York Tribune*, Feb. 11, 1917, 37.

19. "A Woman Boomed for Next Vice-President—Mrs. Annette Abbott Adams, Who Has Been Mentioned for the Office, Is a Fine Cook," *Boston Post*, June 20, 1920, 37.

defendants, and their work in the courtroom received daily coverage. On the final day of trial, as reported by the *San Francisco Examiner*, a revolver was smuggled in to one of the defendants, Ram Chandra, who first shot one of the other defendants and then continued to fire before he was shot and killed by U.S. Marshal James B. Holohan. Fortunately no further deaths or injuries occurred, although it was reported that "Mrs. Annette Adams, Assistant United States Attorney in the case with Preston, was within range as was Attorney Theodore Roche....They got under cover, as did many others in the courtroom."²⁰



Annette Abbott Adams, Assistant US District Attorney" *The San Francisco News-Call Bulletin* Archive. Bancroft Library. 1940s.

Later that year, U.S. Attorney Preston was called to Washington, D.C., and he recommended that Adams replace him. She was appointed by President Wilson, confirmed by the Senate without controversy, and was sworn in on July 25, 1918. As U.S. Attorney she continued to try cases and handle appeals personally, while performing all the regular duties of the office. She was a wartime United States Attorney enforcing all the laws of the time, including alien sedition cases.

20. "Hindu Plot Case Goes to Jury Following Tragedy," *San Francisco Examiner*, April 24, 1918. (The bullet indentations are still visible in Courtroom One in what is now the James R. Browning U.S. Court of Appeals building in San Francisco, CA.)

After the war, Attorney General Mitchell Palmer invited her to become an Assistant Attorney General in Washington, D.C. She took the oath in June 1920, the first woman to hold such a position.

Preston's recommendation proved to be an excellent one. The *Washington Herald*, in an article entitled "'Thundering Good Lawyer' Is Woman U.S. Attorney," wrote:

Mrs. Annette Abbot [sic] Adams, . . . is a thundering good lawyer, and...her appointment was a fine tribute to the big suffrage state, and, coming at this time, certainly made a hit with the lady voters all over the country... Still apparently in her thirties, Mrs. Adams is a slim, youngish-looking woman, who, while not handsome or smart, in appearance, has one of the most interesting faces I ever looked into. Reserved and quiet in her manner, she radiates poise and self-reliance and efficiency, and as she modestly replies to questions put to her does not seem to be at all impressed with her own importance.²¹

As Assistant Attorney General, she was responsible for the enforcement of tax and customs laws, the War Risk Insurance Act for shipping vessels, pure food, quarantine, and the Adamson Act, which established an eight-hour workday for railroad workers. She argued five cases in the United States Supreme Court, preparing the brief and arguing *Dillon v. Gloss*, 256 U.S. 368 (1921), successfully defending the Eighteenth Amendment against constitutional challenge.

Adams's historic service as the first woman Assistant Attorney General was cut short by the election of Republican president Warren Harding, which prompted her resignation in 1921 and a return to politics and private practice in San Francisco.

Civil Litigation: San Francisco and Los Angeles

Adams followed her historic career in the Department of Justice with two decades of intense and complex civil practice in San Francisco and Los Angeles while still participating in local and national Democratic politics. Most prominent in her civil litigation were the more than two years she spent litigating on behalf of the United States against Standard Oil over the ownership of mineral-rich land in California. She and John Preston, who had retired from the California Supreme Court, were appointed as Special Counsel for the United States. At stake was property valued in 1940 at more

22. "'Thundering Good Lawyer' Is Woman U.S. Attorney," *Washington Herald*, July 11, 1920, 26.

than \$6,200,000.²² The U.S. Court of Appeals for the Ninth Circuit affirmed the multimillion-dollar judgment for the United States.²³

Abbott's statewide reputation as an outstanding litigator and writer was rewarded in 1942. Governor Culbert Olson of California appointed her soon after her sixty-fifth birthday as the Presiding Justice of the California Court of Appeals. She was the first woman to be appointed to California's Court of Appeals. At a dinner with appellate judges celebrating her appointment, John Preston, Adams's longtime ally, friend, and co-counsel, said, "I've been telling you fellows, Mrs. Adams has been the best lawyer in the State for 25 years."²⁴

In her ten years as Presiding Justice, the Court of Appeals issued more than 375 decisions. On the occasion of the California Supreme Court's one hundredth anniversary, Adams was asked to sit pro tempore for a single case, the first woman to sit on the Supreme Court. After retiring at age seventy-five, she lived quietly in Sacramento until her death in 1956.

After her death, in an interview, her colleague Justice Paul Peek, later a California Supreme Court justice, described Adams as "an indefatigable worker who spent long hours at her work....Outwardly she was blunt and gruff, but underneath it all, she was a sentimentalist of the first order, gentle, gracious, and really interested in people." Colleagues considered her a perfectionist "who never did anything halfway." "She went first-class in everything."

Indeed, when we consider the newspapers of the day that chronicled her early career, the pleadings she authored, and the opinions she wrote, "first-class in everything" seems entirely fitting. It is noteworthy that Adams was consistently the first woman to hold each of her prominent positions, but of more consequence is the fact that her performance in each of those positions was uniformly described as outstanding. She was acutely aware of being the first woman and equally aware that she did not wish to be the last.

Early in her career, Adams was asked if she had any advice for the women of California. Although these words were spoken in 1922, soon after the successes of the suffragettes, they could not provide a more fitting answer to the question "Who was Annette Adams?"

Conviction, courage and co-operation should be our watchwords:
conviction in the justice of our cause, courage born of that
conviction and a growing consciousness of our power, and, above
all, co-operation in order that our combined forces may

22. Adjusted for inflation, \$6.2 million in 1940 is the equivalent of roughly \$114 million in 2020.

23. *Standard Oil Co. of California v. United States*, 107 F.2d 402 (9th Cir. 1940).

24. Steiner, "Annette Abbott Adams"; *San Francisco Chronicle*, June 6, 1942.

constitute an influence worthy to be reckoned with. Do not misunderstand me to deprecate the idea that women should strive to work along with men; that is our ultimate aim; but until women have learned to work together as men, through their age-long experience have learned to do, they cannot hope to be taken into the inner counsels. We cannot learn by working with men—we are still on the outside looking in: and we shall not be given the opportunity until we have demonstrated our power and our fitness, not alone as individuals but as a group....

Politicians have been wont to say, tossing off the remark lightly as if the contingency were amusing but impossible, that if women would stick together they could rule the world. The experience that women have gained in their long fight for suffrage has convinced them of the truth of this assertion, and they propose to show that the contingency is no longer remote....

Our feet are set upon the path but until we shall have disabused the world of the presumption that still abides, that the work of the mind and the hand of woman is inferior because of the incident of sex alone, and have shifted the burden of proof from the sex to the individual, we shall not have arrived.²⁵



Ms. Annette Adams, Attorney, Radio Murder Trial"
San Francisco Examiner. Bancroft Library. Oct. 1930.

25. "Annette Abbott Adams," *Who's Who Among the Women of California* (1922), 12–13, <http://www.calarchives4u.com/women/whotxt/3-24/htm>.



*Judge Robert S. Lasnik**

GO EAST, YOUNG WOMAN: BREAKING THE SUPREME COURT CLERK GENDER BARRIER

The First Woman on the United States Supreme Court, Sandra Day O'Connor, came from a western background. Raised on a cattle ranch in southeastern Arizona, she attended college and law school at Stanford University before her appointment to the Supreme Court in 1981. Justice O'Connor is someone we all admire, and we take pride in her western roots. Few people, however, know of an earlier first at the Supreme Court, a woman with her own deep connection to the west. Thirty-seven years before Justice O'Connor smashed the glass ceiling for justices, Lucile Lomen became the first woman to serve as a Supreme Court law clerk, in the 1944–1945 term for Justice William O. Douglas, himself a westerner.

* Judge Robert S. Lasnik has been a leader in the state and federal judiciary in his 30 years on the bench. He was appointed to the United States District Court by President Bill Clinton in 1998 and served as Chief Judge of the Western District of Washington from 2004–011. In 2011 Chief Justice Roberts appointed Judge Lasnik to the seven-person Executive Committee which sets policy for the federal judiciary.



Lucile Lomen (Image Courtesy Lucile Lomen collection (SC0776). Special Collections & University Archives, Stanford University, Stanford, Calif.)

Her fascinating life story begins with her birth in Nome, Alaska, in 1920. Nome in those days was still feeling the highs and lows in the aftermath of the Alaska gold rush (1897–1909). The Lomen family had arrived from Minnesota in 1903 and quickly established themselves as a family with great influence, with several commercial establishments, including a pharmacy, a photography studio¹ and the Lomen Reindeer Corporation. Lucile's uncle Carl Lomen was known as "The Reindeer King of Alaska."

But the last thing Helen Lucile Lomen, wanted was to go into the reindeer business—or any of the other commercial ventures her family had started. She admired her grandfather Gutbrand J. Lomen, a lawyer and vice counsel for Norway. Gutbrand was appointed to the Alaska Territorial Court by President Coolidge in 1925 and reappointed by President Hoover in 1930.² As Lomen described it, the decision-making process that led her to the law was atypical: "My mother was always telling me to go out and play.

1. Lucile's uncle Alfred was the photographer in the family studio. His remarkable collection of photographs of Native Alaskans and gold rush adventurers are housed in the University of Washington's Special Collection, which can be accessed at speccoll@uw.edu.

2. David J. Danowski, "Lucile Lomen: The First Woman to Clerk at the U.S. Supreme Court," *Journal of Supreme Court History* 24 (2011): 43–44.

And I hated to go out to play. What I observed from my grandfather, he would sit in his chair with a book as long as he wanted to and nobody would tell him to go out and play. So, I thought to myself, lawyers can just sit and read, and I am going to be a lawyer.”³

Life in Nome in the 1920s was challenging, to say the least: no running water, no garbage pickup, no way in or out from October, when the freeze arrived, until June, when it thawed. The average high temperature in January was 13 degrees Fahrenheit, making it perhaps unsurprising that Lucile (she never used Helen and was known mostly as Lucy or Lu) was not enthusiastic about going outside to play. But despite the challenges of living in Nome, Lucy did not want to leave the town and was very unhappy when her father announced that the family was moving to Seattle so that she and her older brother could finish high school.

The family moved in 1934, when Lucy was a sophomore. The original plan was to spend the winter of 1934–35 in Seattle, then leave Lu and her brother to continue their education in Seattle while the rest of the family headed back to Nome. Three weeks after the move, a devastating fire decimated much of Nome.⁴ She never lived there again.

Seattle in 1934 was a city of more than 200,000, and it was daunting to fourteen-year-old Lucy Lomen. She felt excluded at Queen Anne High School, with its 2,500 students (more than double the entire population of Nome), but she got along very well with her teachers, who encouraged her studies by recommending books for her to read.

After graduating from high school, Lomen was expected to go to the University of Washington—a state school where tuition for state residents was \$100 per year. But a presentation at the high school by a speaker from Whitman College changed her mind. He spoke about scholarships that were available to cover tuition at the Walla Walla liberal arts college, which had a solid academic reputation. Lucile applied and was granted the scholarship. The decision to attend Whitman College rather than the University of Washington was her first move east, and it would turn out to be instrumental to her later and more consequential move and career path. Justice William O. Douglas was a Whitman alum, having graduated the year Lomen was born. He had also attended on an academic scholarship, after graduating from high school in Yakima, Washington.

Lomen flourished academically and socially in the small (550 students) and collegial atmosphere of Whitman College. She graduated in 1941 with honors, having been admitted to Phi Beta Kappa. Decades later, she would return to Walla Walla for college events. Her next stop was the

3. Lucile Lomen, interview by Marilyn Sparks, May 20, 1991, transcript, Whitman College and Northwest Archives, Penrose Library, Walla Walla, Wash.

4. Sparks interview.

University of Washington School of Law back in Seattle. She did not consider applying to Harvard Law School, because it did not admit women in those days.

The University of Washington School of Law was different. One of the largest state law schools in the country, it had been a leader in accepting women from its inception in 1899. Lomen entered the law school as one of six women in a class of one hundred in 1941. She would eventually graduate number one in her class and be elected president of the law review. In her first year of law school, the Japanese attacked Pearl Harbor, and that changed everything. From December 7, 1941, to 1944, most of the male students either left law school for service in the military or joined the armed forces immediately upon graduation. As in other areas of American life, women were suddenly tasked with doing jobs that had never been open to them before. The iconic image of Rosie the Riveter represented how women were stepping up in factories and shipyards to work at jobs previously held exclusively by men. While there was no corresponding impact in the practice of law generally, it was at this historical moment that Justice William O. Douglas started to consider hiring a woman as a law clerk—but only if he could find one who was good enough.⁵

Justice Douglas had been appointed in 1939 by President Franklin D. Roosevelt. In 1944, the United States Supreme Court assigned only one law clerk to each of the associate justices and two to the chief justice. The salary of a clerk was \$3,000 per year (about \$43,300 in today's dollars). In his book *The Court Years*, Justice Douglas discussed how he selected his law clerks, how he utilized them, and how he felt about having law clerks on the Court. As the designated circuit justice for the Ninth Circuit, Justice Douglas came to the conclusion that the graduates of law schools within the Ninth Circuit were being routinely ignored by his colleagues on the Supreme Court, who tended to select Ivy League graduates. Douglas himself had attended Columbia Law School, and he was under pressure from his alma mater to choose his law clerk from among its graduates. But he also had a relationship with University of Washington Law School dean Judson Falknor, who had previously sent the Justice law clerk candidates who had done a fine job clerking for him. Now Dean Falknor was recommending Lucile Lomen to be the first woman Supreme Court law clerk. But was Justice Douglas ready to accept that recommendation?

Here a confluence of events came together in a remarkable way to produce a noteworthy first. The sudden dearth of qualified men caused by World War II, the Whitman College connection, the pipeline from University of Washington School of Law Dean Falknor to the chambers of Justice Douglas, and Justice Douglas's decision to focus on law schools within the

5. William O. Douglas, *The Court Years, 1939–1975* (New York: Random House, 1981), 171.

Ninth Circuit all combined to bring Lucile Lomen to the Justice's attention. But it was her remarkable intellect and scholarship that ultimately sealed the deal.

Even when she was an undergraduate, Lomen's writing skills and her analysis of difficult legal issues were impressive. Her powerful thesis, "Legal Restraints on the President,"⁶ made an impression on her adviser Chester Maxey, who described her as "one of the most outstanding major students I have ever had...not only exceptional in native mental ability, but also [in her] prodigious capacity for exhaustive and detailed labor."⁷ Lomen's law school career was even more impressive. She worked thirty hours per week as a secretary for Dean Falknor, who, in addition to his law school duties, had a position as War Production Board compliance commissioner. Her work on many projects for Dean Falknor gave her the opportunity to demonstrate the full range of her legal abilities. The dean observed that, despite her heavy work schedule outside classes, Lomen led her class scholastically "by a very substantial margin."⁸ She was the only member of her law school class to be named "Honor Graduate in Law" and a member of the Order of the Coif. She also found time to serve as vice president of the law review board, to write two significant law review articles, and author two comments.⁹

Dean Falknor encouraged Lomen to apply to be in Justice Douglas's chambers upon graduation in 1944. He was honest about her prospects, noting that her gender might be a "fly in the ointment,"¹⁰ but he offered his full support and recommendation. Justice Douglas, while open to the idea of having a woman as a law clerk, had to be convinced that Lomen could handle the position. He reached out to both Dean Falknor and Professor Maxey (whom Justice Douglas knew from his time at Whitman College), and

6. Lucile Lomen, "Legal Restraints on the President" (A.B. thesis, Whitman College, 1941), Lucile Lomen Collection, Department of Special Collections and University Archives, Stanford University Libraries.

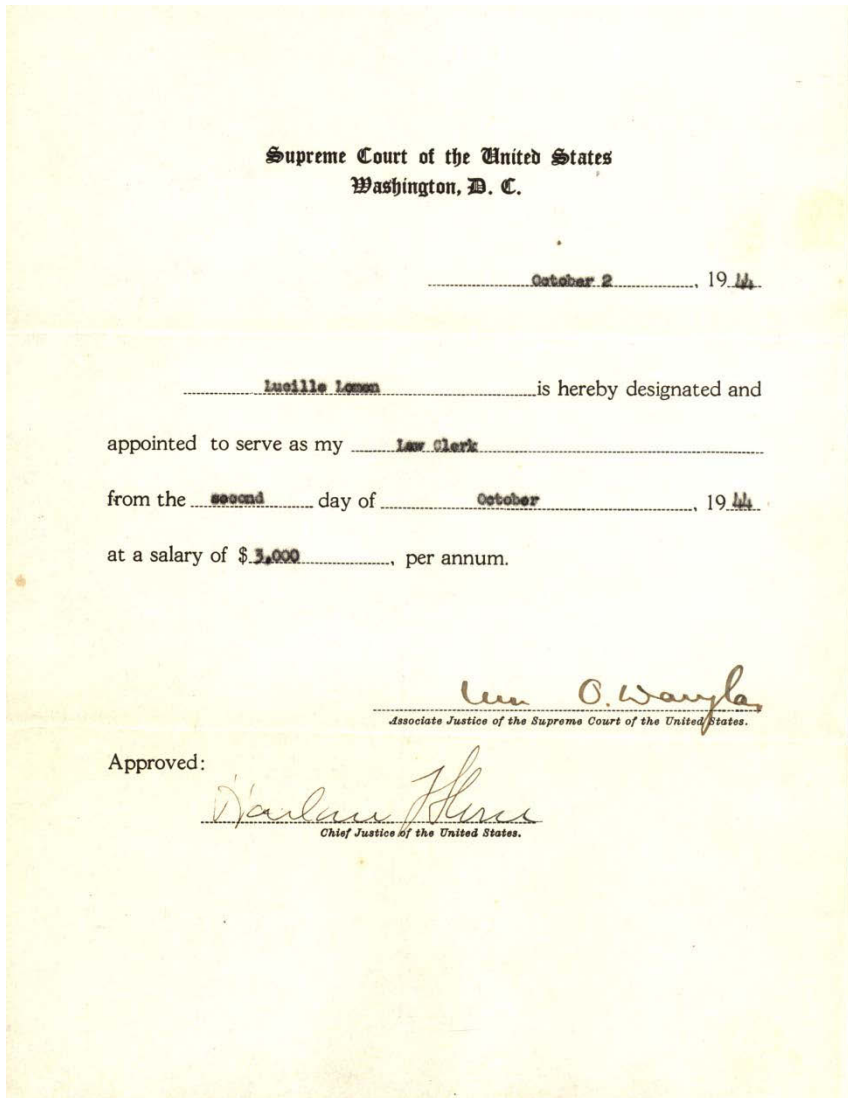
7. Chester Maxey to William O. Douglas, Jan. 4, 1944, William O. Douglas Papers, Manuscript Division, Library of Congress.

8. Judson F. Falknor to William O. Douglas, Dec. 20, 1943, William O. Douglas Papers, Manuscript Division, Library of Congress.

9. Lucile Lomen, "Privileges and Immunities Under the Fourteenth Amendment," *Wash. L. Rev. and State Bar J.* 18 (1943): 120; Lucile Lomen, "Union Security in War-Time," *Wash. L. Rev. and State Bar J.* 18 (1944): 133 and *Wash. L. Rev. and State Bar J.* 19 (1944): 188 (published in two parts); Lucile Lomen, "Recovery of Damages for Private Nuisance," *Wash. L. Rev. and State Bar J.* 18 (1943): 31; Lucile Lomen, "Resolving Ambiguities Against the Conditional Sale," *Wash. L. Rev. and State Bar J.* 20 (1945): 112.

10. Sparks interview.

both men provided glowing recommendations.¹¹ Justice Douglas then extended a job offer to Lomen. She accepted and started her one-year term in September 1944.



Lomen's Certificate of Appointment as Clerk (Image Courtesy Lucile Lomen collection (SC0776), Special Collections & University Archives, Stanford University, Stanford, Calif.)

11. Judson F. Falknor to William O. Douglas, Dec. 20, 1943, William O. Douglas Papers, Manuscript Division, Library of Congress; Chester Maxey to William O. Douglas, Jan. 4, 1944, William O. Douglas Papers, Manuscript Division, Library of Congress.

When Lucile Lomen talked about her year with Justice Douglas, it was with great gratitude for the opportunity and experience. But it was also a lot of hard work. "I never worked as many hours in my whole life as I did with this Court job," she said. "I was down at the Court maybe sixteen hours a day most of the time."¹² Years later, in conversation with my colleague Judge James L. Robart, a fellow Whitman graduate, she remarked that she felt it was her "duty" to be an excellent law clerk. She was aware that, when applying for positions in the legal profession, women had to overcome opposition based solely on their sex, and she was committed to hard work to prove that she belonged.

Being a woman was not Lomen's only distinguishing characteristic among the ten Supreme Court law clerks. All of her fellow clerks were easterners from Ivy League schools. When she arrived at the Court, she was told that another clerk was a westerner like her, a man "from Wisconsin."¹³ While Lomen at first found the comment preposterous, she came to realize that, "indeed, Cabot and I of the whole ten thought differently....They were all East Coast fellas."¹⁴ Lomen was also the youngest law clerk at the Supreme Court, having come straight from law school, unlike her colleagues, who had all clerked for circuit judges or worked in government agencies after graduation.

Nevertheless, Lomen was accepted as part of the law clerk group, earning the respect of her peers through her legal capabilities and work ethic. She was welcomed by other groups within the Supreme Court as well. She was embraced by the secretaries, all of whom were women, and felt looked after by the African American employees at the Court, who knew what it was like to be an outsider.

Justice Douglas was not an easy man to work for. He was demanding, at times demeaning, and known for using "salty language."¹⁵ Nor did he give praise readily. Lomen surmised that he "didn't see any occasion for using it," because none of the law clerks "did as well as he did, so there was no reason to praise anyone."¹⁶ When she mentioned to Professor Maxey that she had heard about the Justice's language but hadn't heard any, Professor Maxey wrote back that she must be "doing all right, then."¹⁷

It turned out that Justice Douglas was all business at work, offering no "Good mornings" or other pleasantries.¹⁸ He researched rapidly, was a

12. Sparks interview.

13. Ibid.

14. Ibid.

15. Ibid.

16. Ibid.

17. Ibid.

18. Ibid.

creative legal thinker, and did much of his own writing. On occasion, he invited Lomen to dinner with his family, and through those occasions she discovered that he could be very charming. At one such dinner she met a young congressman from Texas named Lyndon B. Johnson.

As she was the first woman to be a law clerk on the nation's highest court, the press was interested in her story. At the time, Lomen's attitude was that she was "just one of ten law clerks"¹⁹ and the fact that she was a woman was nothing special. "I was just a lawyer and that's all I wanted to be."²⁰ Like many women in the vanguard, she eschewed giving advice to other women, except to encourage them to work hard, be conscientious, and trust that "no avenue in the profession...is closed to a woman merely because she is a woman."²¹ Lomen was not only the first woman, but for a while was the only one. It would be twenty-one years before Justice Hugo Black hired Margaret J. Corcoran. As late as 1960, Justice Felix Frankfurter turned down a multitalented young law school graduate named Ruth Bader Ginsburg.²²

A Supreme Court clerkship has always been a springboard for a successful legal career. When Lomen left the Supreme Court in 1945, however, men were returning from World War II, and, despite her confidence in the fairness and objectivity of the profession, women were having difficulty competing for jobs.²³ Lomen wanted to return to the Northwest, and she obtained a position with the Washington Attorney General's Office. There she was assigned to handle the disposition of a cemetery that the federal government had taken and then attempted to return to the City of Richland when it created the Hanford Nuclear Reservation. Lomen later suspected that this assignment was an effort to push her out of the Attorney General's Office, but it ultimately benefited her. While she was working in the community near Hanford, she was introduced to the General Electric Company, and she applied for an in-house position there in the spring of 1948. She impressed her interviewer, but his supervisor back east had "had a couple of unfortunate experiences with women and would not even listen" to what the interviewer had to say about applicant Lomen. Luckily, she had friends and contacts. She obtained letters of recommendation from both Dean Falknor and Justice Douglas. She got the job, was promoted to the position of chief compensation and benefits counsel, and stayed with the company for

19. Ibid.

20. Ibid.

21. "Company Lawyer," *Mortar Board Quarterly* 165 (May 1950).

22. Linda Greenhouse, "Women Suddenly Scarce Among Justice's Clerks," *New York Times*, Aug. 30, 2006.

23. Sparks interview.

almost forty years. Upon her retirement in the mid-1980s, she returned to the Seattle area.

Lucile Lomen's was a groundbreaking and distinguished career. The force of her intellect and work ethic brought her from Nome, Alaska, to the pinnacle of American jurisprudence at a time when many law schools refused to accept women as students. One can only wonder what the remainder of her career would have looked like had she been born a few decades later.



Ms. Lomen later in life. (Image Courtesy of Whitman College)

Book Reviews

First: Sandra Day O'Connor, by Evan Thomas. NEW YORK: RANDOM HOUSE, 2019. 476 pp.; illustrations, notes, index; \$32.00, hardcover.

Judicial biographies pose many challenges. The daily lives of most judges, especially appellate judges, rarely make for page-turning excitement. And the subject's pre-judicial career and personal life, although they might be fascinating, have far less significance than the subject's judicial work. It is no surprise that many judicial biographies tend to fall flat.

No one would describe *First*, Evan Thomas's brilliant new study of Justice Sandra Day O'Connor, as flat. With a law degree from the University of Virginia, Thomas can easily handle the nuances of Supreme Court doctrine. As a journalist and the author of a number of successful biographies, he can deliver narrative verve with the best of them. And Thomas had an especially valuable resource: cooperation from his subject. Although this is not an authorized biography, Justice O'Connor gave interviews to Thomas and, most important, opened up her professional and private papers, which are otherwise unavailable to researchers. She also encouraged extensive participation from her former law clerks.

With this level of access, one would hope for some startling revelations, and Thomas more than delivers. Although it was widely known that O'Connor and Chief Justice William Rehnquist were law school classmates and had even gone on a few dates, Thomas uncovered what even their Supreme Court colleagues never knew. Their relationship was far more serious than that; indeed, Rehnquist had even offered an unsuccessful proposal of marriage. There are other similar fascinating details along the way, such as Justice Ginsburg's twice driving into Justice O'Connor's car in the Supreme Court's parking garage.

O'Connor's life is full of rich ore for a biographer to mine, and Thomas is particularly good in evoking O'Connor's childhood on the Lazy B Ranch, in New Mexico. With prose reminiscent of Robert Caro's description of the Texas Hill Country in *The Path to Power*, Thomas brings us into these vast open spaces, so different from the District of Columbia, where O'Connor would ultimately wield so much power. Indeed, Thomas's book makes a strong case that O'Connor is our most authentically western justice; other than a stint in Germany when her husband was in the military, she had lived entirely in New Mexico, Arizona, California, and Texas, and no farther east than El Paso, Texas, when she joined the Court.

Thomas effectively conveys O'Connor's Stanford years and her time in Phoenix, and is especially good at depicting O'Connor's deft maneuvering around numerous sexist and far less talented men in the Arizona legislature. Her relationship with her husband is carefully sketched, as are her significant social activities once she became a justice. Perhaps most

remarkable, the book manages to vividly capture Justice O'Connor's personality, from her commonsense practicality and incisive intelligence to her occasional tartness and brusqueness.

Thomas is for the most part careful and precise when describing O'Connor's work on the Court, focusing in particular on major areas of law, such as affirmative action, abortion, and religion, areas in which Justice O'Connor was often the pivotal fifth vote. He also provides a sensitive analysis of her judicial philosophy, encompassing case-by-case decisions and multifactor balancing tests rather than the bright-line rules favored by Justice Antonin Scalia.

There are a few minor mistakes. When four justices of the Supreme Court voted to invalidate the UC Davis Medical School admissions program in *Regents of the University of California v. Bakke*, it was not because they thought "racial preferences are on their face unconstitutional." (228) Rather, they voted solely on the basis of the Civil Rights Act, and they deliberately avoided any resolution of constitutional issues. Similarly, Thomas confuses the two chambers in the Capitol that housed the Court prior to the completion of its own building in 1935. (150) And *Korematsu v. United States* did not uphold the "Japanese internment"; it upheld the exclusion of Japanese-Americans from the West Coast. (364)

One omission is particularly regrettable. In 2000, Justice O'Connor was part of a five-justice majority in *United States v. Morrison* that held that the civil-suit provision of the Violence Against Women Act exceeded the scope of congressional power. This is one of the most significant federalism decisions of recent years, and it is of considerable interest that the first woman justice provided the key vote to invalidate the law. Yet Thomas does not mention the case (or many of the Court's other significant federalism decisions during O'Connor's tenure).

Although there is much more to be written about O'Connor's judicial work, this book will likely remain definitive with respect to O'Connor's prejudicial career and her family and personal life. It is an impressive achievement, fully deserving of the many accolades it has received.

Carlton F. W. Larson.

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Justice in Plain Sight: How a Small-Town Newspaper and Its Unlikely Lawyer Opened America's Courtrooms, by Dan Bernstein. LINCOLN: UNIVERSITY OF NEBRASKA PRESS, 2019. 280 pp.; 6 photographs, index; \$29.95, hardcover, paper, ebook.

In 1980 the California Supreme Court ruled that the voir dire of prospective jurors dealing with issues of the death penalty should be done “individually and in sequestration.” The purpose of the ruling was to avoid having jurors prejudiced before trial by hearing other jurors’ sentiments on the death penalty. California trial court judges began using this ruling to exclude the press from voir dire and preliminary hearings in capital cases. Three capital cases that arose in Riverside, California, in the 1980s raised the issue of the rights of the press to cover criminal trials versus the rights of the defendants to an untainted jury pool. The primary local Riverside newspaper, the *Press-Enterprise*, objected to the closure of voir dire and preliminary hearings in these capital cases. An unusual combination of a newspaper owner’s willingness to fund litigation over these issues and a small-town lawyer’s willingness to go to extraordinary lengths to appeal these issues led to the *Press-Enterprise’s* arguing two cases, which came to be known as *Press-Enterprise I* and *II*, before the Supreme Court. These cases established the paper’s First Amendment rights to cover voir dire and preliminary hearings in capital cases.

Dan Bernstein’s chronicle of the *Press-Enterprise’s* pursuit of First Amendment rights to cover the preliminary stages of capital cases focuses on the personalities behind this quest. Bernstein was himself a reporter for the *Press-Enterprise* and had extraordinary access to the individuals involved in appealing these cases. When local trial judges closed parts of the proceedings in three high-profile capital cases, Tim Hayes, the *Press-Enterprise’s* editor and publisher, objected. Hayes was a Harvard-trained lawyer who had never practiced law. He refused to allow the local court judges to deny his reporters access to important parts of the trial process of high-profile criminal cases.

Hayes’s lawyer, who vindicated these important constitutional rights, was Jim Ward, a partner in a local firm. Ward was not a constitutional law specialist, but he had represented the newspaper in the original California proceedings. Hayes gave Ward the higher-stakes job of appealing these cases to the U.S. Supreme Court, despite receiving pressure to turn the lawyering duties over to more experienced Supreme Court advocates. The result was a pair of cases that overturned the California courts’ practice of closing these proceedings and set precedents that would extend these open courthouse policies throughout the nation.

Bernstein’s account does an admirable job of bringing to life the personalities of the parties responsible for bringing these lawsuits. His

thumbnail sketches of reporters, editors, and lawyers illustrate an important aspect of our constitutional law system: individuals who are prepared to make and pursue claims can indeed change how the Constitution is applied. The *Press-Enterprise* under Hayes's direction committed the resources necessary to file three writs of certiorari and then pursue two of those granted through the briefing and oral argument stages. Ward was willing to pursue these cases even though his partners objected to the financial strain on the firm. From a twenty-first-century perspective of major law firms and legal advocacy groups dominating the Supreme Court docket, this is truly a refreshing story of how lower-profile citizens can claim constitutional rights and vindicate those rights.

Bernstein is an accomplished reporter. The book is an easy read, and the thumbnail sketches of the various players in this drama keep the reader interested. From a legal historian's point of view, Bernstein is not as successful at explaining how these cases fit into a larger study of American law and society. These cases were decided at the very beginning of what is now known as a period of mass incarceration. Over the following thirty years, the Court eroded many of the rights of criminal defendants that the Warren Court had established. Within this larger context, the question could be asked whether these cases should be interpreted as a victory for freedom of the press or a defeat of criminal defendants' rights. While Bernstein does make a compelling case that a secretive criminal justice system can be detrimental to the rights of criminal defendants, Ward himself represented the cases as a conflict between a defendant's Sixth Amendment rights and the public's First Amendment rights to attend all parts of the criminal proceeding. Bernstein's interesting micro-study does vividly give insight into how the Supreme Court was thinking about this conflict in the 1980s.

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American Indian History on Trial: Historical Expertise in Tribal Litigation, by E. Richard Hart. SALT LAKE CITY: UNIVERSITY OF UTAH PRESS, 2018. 339 pp.; notes, bibliography, index; \$29.00, paper.

An expert witness for decades, E. Richard Hart documents how the historian can support Indian tribes engaged in litigation and provides recommendations for those interested in undertaking such work. At the same time, he cautions that objectivity is essential. His most important message is that such work when undertaken can be never-ending.

Hart introduces his readers to four representative cases involving the Coeur d'Alene, Wenatchi, Amah Mutsun, and Hualapai tribes. He also gives a very brief explanation of his testimony in water-adjudication cases involving the Zuñi, Klamath, and Coeur d'Alene and directs his readers to a website where he has posted bibliographies for these cases as well as for his testimony in the Klamath case. Parts of this book have been previously published in *Western Legal History*.

In the early 1990s, Hart's research in the National Archives, regional archives in Seattle, and various university libraries generated nearly five hundred pages of testimony proving the Coeur d'Alene tribe's claim of ownership of the submerged beds and banks of the Coeur d'Alene Lake, which had been included in their 1873 executive order reservation established by President Ulysses S. Grant. Hart concluded, and the Supreme Court confirmed in 2001, that the tribe owned the southern third of the lake beds—an unwelcome decision for both sides, as the Indians and Idaho both claimed rights to the entire lake bed. However, this decision gave the Coeur d'Alene a greater role over the environmental cleanup of mining waste. To provide his readers with a better understanding of the efficacy of executive order reservations and the impact of the 1887 Dawes Act, which allotted reservation land in severalty to Indians as individuals rather than as members of tribes, Hart gives helpful background material on both subjects in chapter 3.

Although article 10 of the 1885 Yakima treaty guaranteed the Wenatchi their own reservation at the Wenatchapam Fishery, the government failed to set it aside for them. In part 2, Hart takes his readers through the histories of the fraudulent surveys, honest and dishonest agents, and moving boundaries encountered during his fifteen years of research as well as describing the activities of some of the Wenatchi who had remained at the fishery, even filing thirty homesteads under the 1875 Indian Homestead Act. To accommodate the arrival of the Great Northern Railway, officials moved the southern boundary of the reservation even farther up the mountain, miles away from the actual fishery. In 2010, Hart succeeded in having their fishing rights at the fishery affirmed by the U.S. Ninth Circuit Court of Appeals.

Hart's work on behalf of the Amah Mutsun of San Juan Baptista began in 2002 as he researched their history from the time of contact with Europeans to the present in order to facilitate their federal recognition. Consulting records from San Juan Bautista, especially the writings of Father Felipe Arroyo de la Cuesta; oral histories recorded by Ralph L. Milliken, a local resident; the papers of John Peabody Harrington, a trained anthropologist who resided with a Amah Mutsun leader for a time, and C. Hart Merriam, who conducted research with a Mutsun elder; California land claims commission records; and records of the California enrollment census, Hart proved that the Amah Mutsun had never abandoned their traditions or their homeland. Unfortunately, two decades after Hart began his research on their behalf, the Amah Mutsun still await recognition.

In 2006 Hart was hired by lawyers for the Hualapai of Arizona to determine the location of their northernmost boundary, which since 1883 they had claimed was in the middle of the Colorado River. The National Park Service, however, recognized the highwater mark on the river's south shore. Hart not only proved the Hualapai's claim but showed how central the river was to their creation myth and to all aspects of their lifestyle. Office of Indian Affairs correspondence, which provided the core for his report on the location of the Hualapai's western boundary, upheld their claim that it had been improperly located ten miles to the east. Hart even personally visited the northernmost monument originally created by the army surveying parties. Although the Hualapai would never regain their lost land, Hart writes: "It *was* tremendously important to have their tribal traditions independently corroborated." (178)

This informative, rigorous ride through the intricacies of historical research, which reveals how crucial the role of the expert historian is to the protection of Indian rights, will appeal not only to scholars of Indian history but to legal scholars as well.

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The INS on the Line: Making Immigration Law on the US-Mexico Border, 1917-1954,
BY S. DEBORAH KANG (Oxford University Press, 2017)¹

Of the many arresting photographs in Deborah Kang's insightful book, the depiction of the international boundary between Nogales, Arizona, and Nogales, in the Mexican state of Sonora, in the early twentieth is particularly striking. Here, the border is barely perceptible, the street separating the two countries looking like any main street with shops and houses on each side. In stark contrast to the apparent open border of the early twentieth century, concrete and steel structures, topped with barbed wire, divide the US-Mexican border today, making it difficult to see, much less pass through, to the other side. Kang analyzes the transformation of the Southwestern border, and of immigration policy more generally, in the first half of the twentieth century, highlighting especially the role that Immigration and Naturalization Service (INS) agents played in "making immigration law," as her subtitle suggests.

While the images of the border, yesterday and today, suggest a progression from open to closed borders, Kang argues that the border has always been simultaneously open and closed, responding to a panoply of competing interests mediated by the INS. Agricultural growers, the tourist industry, free trade advocates, and business owners and communities along the border all pressed for soft borders while anti-immigration forces and national security advocates demanded bigger and stronger walls to keep immigrants out. The INS and its enforcement wing, the Border Patrol, struggled to accommodate diverse interests, always hampered by a lack of money and staff, and, in its view, insufficient legal power as Congress consistently failed to clothe the agency with the powers it needed to do its job.

What power Congress failed to provide, the INS often took anyway. In one of the signal contributions of the book, Kang digs deeply into the bureaucratic archives to show how the administrative agency made law, often without much public awareness as much of the decision-making happened at the periphery, made by local INS and Border Patrol agents responding to concrete problems on the ground. Interpreting immigration laws broadly, agents used their substantial administrative discretion to both soften and strengthen immigration policies. When growers chafed against laws that made it more difficult for Mexican workers to enter the United States, for example, the INS waived literacy tests and created new processes, such as issuing border crossing cards, to circumvent legal requirements and ease workers' admission. After the Bracero Program was established, the INS at times served as a virtual employment agency for the growers. Southwestern

1. This book review was previously published in Volume 30. It is republished here to correct the error of having left off the name of the reviewer.

INS agents recruited workers for growers at the border in violation of the US-Mexican agreement, set wages low for Mexican laborers, kept workers at their job with threats of apprehension and deportation if they quit, and pioneered “adjustment of status” or legalization procedures for undocumented Mexicans drawn by employers’ incessant demands for labor.

Yet, easing the immigration of guest workers often went hand in hand with cracking down on unauthorized immigration, the Border Patrol of the INS persistently pushing the boundaries of its power well beyond the actual border. Defining “entry” broadly, the INS in the Southwest pursued immigrants into the interior, conducted warrantless searches and arrests, and launched massive raids, the most notorious being Operation Wetback in 1954 which resulted in the deportation of at least one million Mexicans. Hamstrung by insufficient funds, the INS devised the “voluntary departure” procedure to expedite deportations without the need to adhere to procedural protections.

What all of these INS policies amounted to, Kang argues, was “state-building from the margins” (6), a process that was often “reactive and chaotic” (7). Several of the innovations created by local INS agents at the Southwestern border eventually became institutionalized in national laws. In 1946, for example, Congress gave legal sanction to the INS practices of warrantless searches and arrests of undocumented immigrants and allowed the Border Patrol to conduct searches within 100 miles of the international boundary.

The early history of the INS casts a long shadow, indeed. Kang sees in the current immigration debates the same competing forces between open and closed borders and a resort to familiar solutions: legalization, restriction, guest workers, massive roundups and deportation. In Kang’s view, today’s immigration wars are different only in so far as Congress has dumped more money and resources than ever into militarizing the border and has reorganized the administrative agency to expand its enforcement machinery. Kang’s excellent book raises questions about the nature and impact of administrative policy-making, often hidden from public view and operating outside of democratic processes. But it also exposes the limits of Congressional law-making when it comes to immigration policy. Immigration laws often embody the divisive immigration debates, trying to address different constituencies but pleasing none of them and leaving administrative officials to sort out the mess. As Kang aptly concludes, immigration law and policy continue to defy “simplistic renderings.” (179)

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