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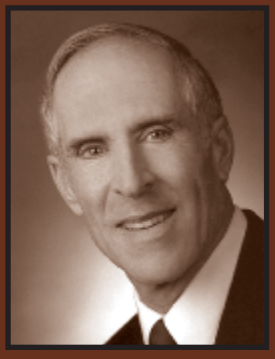

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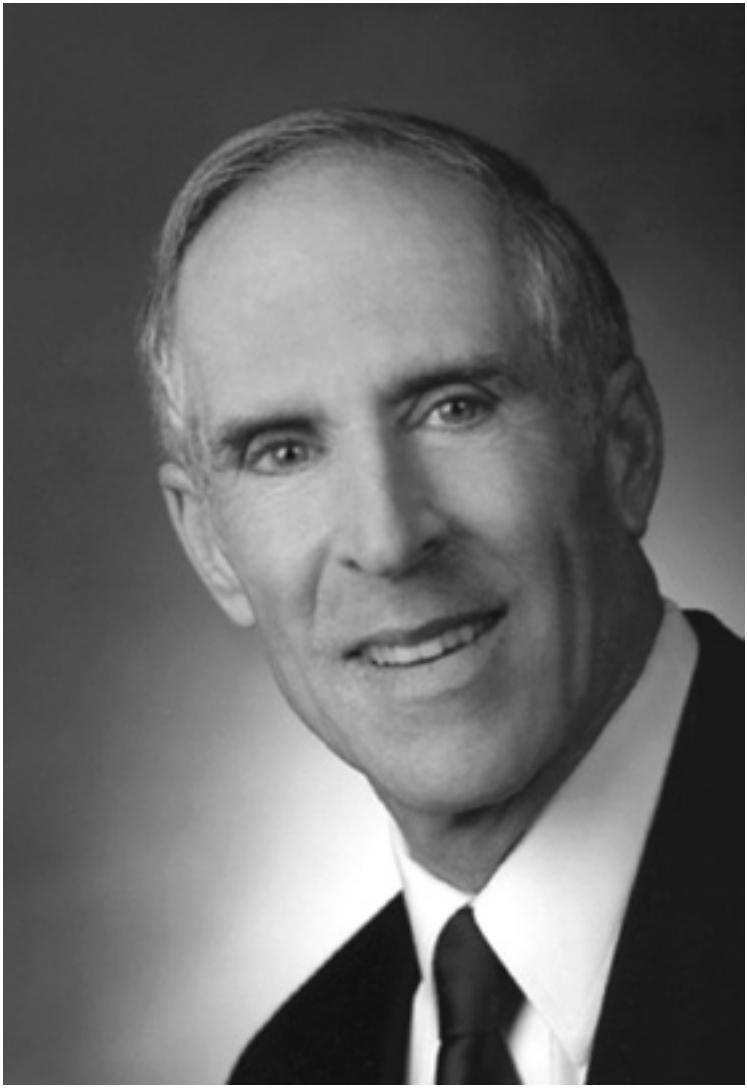

RICHARD M. MOSK
ASSOCIATE JUSTICE, CALIFORNIA COURT OF APPEAL

Oral History of

JUSTICE RICHARD M. MOSK

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Oral History of

JUSTICE RICHARD M. MOSK

INTRODUCTION

ARTHUR GILBERT*

I have known Richard Mosk for more than forty years. We met in the early 1970s when Richard represented a large conglomerate corporation and I represented a manufacturer of motor homes, a company that his client had acquired. Our mutual clients were involved in a contract dispute that resulted in a lawsuit. Although the litigation was particularly contentious, Richard and I maintained a high level of civility toward one another from which a friendship developed.

We flew together to Detroit to take depositions at the Chrysler motor car factory. On that flight, I gained insight into Richard Mosk, the person. We were adversaries on the case, but friendly travelers. The flight attendant (in those days, the "stewardess") spilled a large drink on Richard. He handled the incident with aplomb. This led me to rightly predict that, despite our clients' rancor, Richard and I would develop a strategy to produce a beneficial settlement for them.

The compelling oral history you are about to read reveals the enduring qualities of Justice Mosk, the distinguished jurist and human being. He is the man who worked on the Warren Commission, the man who chaired

* Presiding Justice, California Court of Appeal, Second District, Division Six.

the Motion Picture Association rating system, the man who met world leaders and politicians, the judge who sat on the Iran–U.S. Claims Tribunal at The Hague.

In this brief introduction to the oral history, I will reveal a few of Richard's unique characteristics to demonstrate that even people of profound talent and ability, like Richard, are like all of us, profoundly human.

These days the phrase "eating healthy," whatever its grammatical deficiencies, is de rigueur, as Richard counsels his grandchildren in his oral history. Richard has embraced this practice with such ardor and passion that, in comparison, the most famous diet gurus of the day seem like dilettantes. Trial lawyers will learn much about their craft by joining Richard for a meal at a restaurant. His incisive cross-examination of the waiter about the menu will reveal in exacting detail specifically what the waiter does and does not know about ingredients and preparation. And what the waiter does not know, I can assure you he will, before the bill is paid.

A few years ago, Richard and his wife Sandy persuaded my wife Barbara and me to join them and others on a trip around the world in a private jet. The night before we left, Barbara and I went out for dinner. Seated at an adjacent table was past Secretary of State Warren Christopher, a close friend of Richard's. I greeted Mr. Christopher, and told him about our pending trip. A look of apprehension formed on his face, an emotion I suspect he had to mask during international crises. He took hold of my arm and said in a tone he never would have used with difficult foreign leaders, "I hope the chef will be able to accommodate Richard."

Richard's keen interest in healthy food does not detract from his generosity. The foods Richard and I cherish were not always available in far parts of the world, but were for the resourceful Richard. I think it was in Tibet that he miraculously secured bananas and almonds and surreptitiously slipped me half his booty.

He is not sentimental, but it is obvious he is trying to fix up the Goddess of Health and Father Time. If they marry, he would like them to adopt him.

The following oral history is a slow page turner. Slow, because it is engrossing. You will savor the stories Richard relates about his remarkable life and will want to linger on the page. In an engaging style, he reminisces about his friendships and acquaintances with presidents, governors, and ambassadors. He reveals canny political astuteness. He discusses his many

successes with candor and humility. He modestly ascribes to chance many of his accomplishments. If chance has favored Richard on occasion, it was his keen intelligence and extraordinary ability that brought chance encounters to a notable achievement.

After I read this oral history, I called Richard to tell him it was captivating and that I could not put it down. He murmured a barely audible "thanks" and changed the subject.

But on the subject of Richard Mosk, one can say without qualification that he is one of our most respected appellate justices. His opinions are beautifully crafted and shine with lucidity. His style is powerful, yet appropriately restrained. His sense of justice is apparent.

I am fortunate to have known Richard for more than four decades. I admire him for his wit, intelligence, and integrity. For those of you who do not know Justice Mosk, you will get to know him well after you finish the final page of this absorbing oral history.

* * *

Oral History of
JUSTICE RICHARD M. MOSK

INTERVIEW BY MATTHEW MOSK*

Q: Do you have any recollection of your earliest days?

A: I was born in 1939. My parents were living in Sacramento, but my mother took the train to Los Angeles, where I was born. In 1938, my father had been a young campaign worker for Culbert Olson, a state senator, who was a candidate for governor of California, and Olson won. In the campaign, my father worked closely with Phil Gibson, his law school professor and a top advisor to Olson (later chief justice of California). My father went up to Sacramento initially to be the clemency secretary, and then he became executive secretary, i.e., the chief deputy to the governor. I vaguely recall living in Sacramento. Lore has it that from time to time I crawled around the governor's office in the Capitol. Then we moved back to Los Angeles after my father had been appointed to the Los Angeles Superior Court. My father was the youngest Superior Court judge in California history. Because he was young and therefore politically vulnerable as a judge, several candidates ran against him in 1944. I recall his reelection campaign. I used

* Justice Mosk thanks his son, Matthew Mosk, an Emmy-winning investigative reporter and producer for ABC News, for conducting this oral history interview in November 2011.

to have to lick stamps to put on the envelopes. It was very stressful for him, because in the primary he did not get a majority, and that was ominous for an incumbent. But he went on to prevail in the final election by a large margin.

My grandmother, my father's mother, Minna, who was a wonderful lady, ended up owning a bookstore in Los Angeles. I don't remember her husband Paul very well. He died relatively young of tuberculosis and other ailments.

Q: Do you remember during his campaigns what that was like? Do you remember seeing his name on billboards or campaign rallies or anything like that?

A: I remember some of the literature. He ran on a ticket with Franklin Roosevelt, as a Democrat — even though he had Republican support.

Q: Did he ever bring you with him? Did you ever go up on the riser with him and your mother?

A: I don't recall him doing so. As to my mother's side of the family, her parents lived in Los Angeles — Max and Katharine Mitchell. Max had owned a business, and he took me to visit his father, my great-grandfather, named Barish, who, I'm told, had been married a number of times without

Richard Mosk at the age of 2 in 1941 with (left to right): his father's mother, Minna; Minna's mother, Rolla Perl; and his father, Stanley Mosk.

getting divorced. I remember Katharine's parents, the Blonds, who lived in a modest apartment in Ocean Park.

Q: They were already also in the United States?

A: Yes. And Max had brought his entire family over from Europe. Some went from New York to Canada, where my mother was born, and then to Los Angeles.

Q: Did they speak English?

A: Yes. I don't remember if Barish did. I think he did speak some. The others did. Max could not write, even though he was running a business.

Q: Do you remember what it was like meeting them? Do you have any recollection of that?

A: No. At the time I suppose, as most grandchildren or great grandchildren, I was not particularly eager to go visit grandparents or great grandparents. But I did go to see them. Just like some of them, I find myself giving unwelcome advice to my grandchildren. I believe my mother and I either lived with them or saw a lot of them when my father enlisted in the Army. When my father was away then, we communicated with him by mail and by recorded phonograph records that were mailed.

Q: Do you want to talk about growing up and what you remember about the Warner Avenue house and what life was like there?

A: My father was sitting as a Superior Court judge (having been reappointed upon returning from the war), and we lived in Westwood on Warner Avenue. I started off at the University Elementary School, which was a lab school for UCLA. I think my father had helped get that funded and established there, probably for my benefit. Then the lab school moved over to UCLA, and Warner Avenue Elementary School was established on the Warner Avenue site, and I went there. I walked to school and played on the playground all the time, something not generally available to kids these days.

My father was quite a sports fan. He took me to the minor league baseball games at Gilmore Field — the Hollywood Stars in the Pacific Coast League — and at Wrigley Field — the Los Angeles Angels — also in the Pacific Coast League. We went to see the Los Angeles Rams and Los Angeles Dons play professional football in the Coliseum and the Los Angeles Bulldogs and Hollywood Bears — minor league football teams — at Gilmore

Stadium. I was a fanatic UCLA rooter. I remember listening to the games on the radio, especially the famous 1947 Rose Bowl. UCLA was undefeated, and wanted to play undefeated Army, but it couldn't because of an arrangement between the Pacific Coast Conference and the Big Ten Conference. So it got the second-rate Illinois team, which proceeded to beat UCLA 45 to 14. Because we did not have a television set, I used to listen to sports events on the radio. I listened to Joe Louis fights and football and baseball games. I heard the Bobby Thompson home run to win the pennant ("shot heard 'round the world") at a recess in Emerson Junior High School with my friend Dick Greene, now a prominent San Francisco attorney.

Q: And you and Stanley shared a lot of your time together through sports?

A: Yes, we went to many athletic and sporting events. He took me to all kinds of sporting events. I remember seeing a Sugar Ray Robinson fight at Wrigley Field, and he even took me to a Mr. America contest and a weightlifting event. We saw soccer, tennis, track and field, and polo — all kinds of sports activities. All this exposure is probably why I got into collecting sports memorabilia, particularly football programs. I also collected stamps and coins and, it seemed, everything else there was.

Q: Comic books.

A: Yes, comic books, which, unfortunately, my mother threw out. She didn't throw the programs away. Somehow they ended up in my uncle's garage, and I retrieved those years later. I continued to add to it, amassing 3,500 programs, some going back into the 1800s. I donated them to Stanford. They will be kept as a collection in the athletic facility under my name. The comic books would probably be valuable today. I read comic books, including classic comic books, which was an introduction to literature.

Q: You have listed here, "father in military." Was this World War II? Do you remember that?

A: Yes. I remember that during the early part of World War II, he was in the Coast Guard Reserve, and he would go out with his binoculars and look for Japanese submarines, or whatever. But as it turns out, I didn't realize it at the time, he desperately wanted to get into the active military because he felt awkward as a young male in public when most young males

PROTECTING CONSTITUTIONAL RIGHTS:

Justice Stanley Mosk

BY RICHARD M. MOSK

From: "The Storied Third Branch: Stories about judges, by judges," Duke Law Center for Judicial Studies (December 2012).[1]

My father, Justice Stanley Mosk, is well known for being the longest serving member of the California Supreme Court and for rendering landmark decisions, many of which are in law school textbooks. But prior to his appointment to the Supreme Court, he rendered decisions as a trial judge and as California attorney general that did much to advance civil rights.

Stanley Mosk, a top aide to the governor of California at age 26, was, at the age of 31, one of the youngest, if not the youngest, superior court judge in California history. A few years later, after having won a bruising campaign for reelection, he was faced with a significant case.

In 1947, Frank Drye, a decorated black veteran of two world wars, brought his family from Alabama to Los Angeles, where he purchased a house in an upscale community. Within several months of the Drye family moving into their house, the white neighbors began agitating about a Black family living in the neighborhood.

[1] Posted as "'Protecting Constitutional Rights': Supreme Court of California Associate Justice Stanley Mosk" (Dec. 2012) at http://law.duke.edu/judicialstudies/thirdbranch/.

The pastor of the local Presbyterian Church, who lived across the street from the Dryes, led eight other white neighbors in filing an action to enforce a Caucasian-only deed restriction. Drye filed a demurrer to the complaint, and the matter came before the young Judge Stanley Mosk. This was before the United States Supreme Court held the enforcement of racially restrictive covenants unconstitutional and when California Supreme Court authority seemed to approve them.

Nevertheless, Judge Mosk sustained the demurrer without leave to amend. In his minute order, he wrote:

> There is no allegation, and no suggestion, that any of these defendants would not be law-abiding neighbors and citizens of the community. The only objection to them is their color and race. . . . We read in columns in the press each day about un-American activities. This court feels there is no more reprehensible un-American activity than to attempt to deprive persons of their own homes on a master race theory. . . . Our nation just fought against the Nazi race superiority doctrines. One of these defendants was in that war and is a Purple Heart veteran. This court would indeed be callous to his constitutional rights if it were now to permit him to be ousted from his own home by using 'race' as the measure of his worth as a citizen and a neighbor. . . .The alleged cause of action here is . . . inconsistent with the guarantees of the Fourteenth Amendment to the Constitution.[2]

A few years ago, one of the Drye children, a respected Los Angeles teacher, successfully supported the naming of a new Los Angeles elementary school after Stanley Mosk.

After Stanley Mosk won election as State attorney general by the largest margin of any contested election in the United States that year, he was introduced to a black golfer named Charlie Sifford. Mosk asked Sifford how he expected to do at a major Professional Golfers' Association (PGA) tournament in Los Angeles. When Sifford said that Blacks were not allowed to compete, General Mosk threatened to use existing laws to preclude PGA tournaments in California unless it dropped its racial exclusion bylaws. When the PGA indicated it would simply operate in other states,

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[2] *Los Angeles Sentinel*, Oct. 30, 1947: 1; *California Eagle*, Oct. 30, 1947: 6.

General Mosk contacted attorneys general of those states, who then similarly threatened the PGA. Accordingly, the PGA dropped its exclusionary policy. A few years later, when Charlie Sifford won the Los Angeles Open, he recognized the support he had received from a courageous Attorney General Stanley Mosk.

Also as Attorney General, Stanley Mosk opined that a local realty board could not exclude a qualified applicant on the basis of race; worked with state and federal agencies and private organizations to end discrimination on housing, lending and public accommodations; took steps to prevent voter suppression in Latino areas; precluded a public school district from segregating Blacks and Whites on a swim team even though the teams could have no place to train other than at a private club that barred Blacks; and actively recruited minorities and women for the California Department of Justice.

Stanley Mosk showed that appellate decisions are not the exclusive way to advance constitutional rights. He demonstrated that a trial judge and a law enforcement officer can be at the frontline of protecting the rights of the people.

* * *

JEFFERSON MEMORIAL LECTURE

SPRING 2012, UC BERKELEY

Kathryn Mickle Werdegar
Associate Justice, California Supreme Court

LIVING WITH DIRECT DEMOCRACY:

The California Supreme Court and the Initiative Power — 100 Years of Accommodation

SPRING 2012 JEFFERSON MEMORIAL LECTURE, UC BERKELEY

KATHRYN MICKLE WERDEGAR*

> *Justice Werdegar has been an eloquent and highly respected voice in the vital dialogue of recent years regarding constitutional principle and democratic governance. Her contributions both to scholarship and to the jurisprudence of California's high court are of enduring importance, and her lecture will deal with an issue — the initiative power in relation to the judicial role — which has been a key feature of conflicts over modern-day legal process in our state.*
>
> — Harry N. Scheiber

Thank you, Professor Scheiber and Chancellor Birgeneau, for your generous introductions. And good afternoon to all of you. I'm delighted to be with you today, back at my alma mater. And I'm deeply honored to have been invited to deliver the Spring 2012 Jefferson Memorial Lecture, as I'm aware of the many distinguished speakers who have preceded me.

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* Associate Justice, California Supreme Court. This article is a slightly revised version of the Jefferson Memorial Lecture delivered by Justice Werdegar on March 20, 2012, at the invitation of the Graduate Council of UC Berkeley. Introductions were delivered by Jefferson Lectures Committee chair Harry N. Scheiber, the Riesenfeld Professor of Law and History; and Robert Birgeneau, chancellor of UC Berkeley. [The article is styled in accordance with the California Style Manual published by the Supreme Court.]

Thomas Jefferson, although not a true proponent of direct democracy, is the founding father most frequently quoted by those who are. Thomas Cronin, in his book "Direct Democracy: The Politics of Initiative, Referendum, and Recall," tells us that Jefferson, more than most of the founding fathers, was willing to place his trust in the wisdom and goodness of the majority. As long as citizens were informed, he believed, as long as they had good schools and good newspapers, they could be entrusted with their own governance.[1] According to editor Horace Greeley, writing in 1838, the cardinal principle of Jeffersonian Democracy, the political theory that takes his name, was that "the People are the sole and safe depository of all power, principles and opinions which are to direct the Government."[2] This principle is echoed in our state Constitution, which declares, "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."[3]

As we know, the framers of the U.S. Constitution, wary of the potential excesses of direct democracy, in the end established a republic, that is, an indirect democracy, a representative democracy. James Madison, writing in the Federalist Papers in support of the Constitution, pushed strongly for a barrier between what he described as the passions of the popular will and sober governance of the nation through a legislative branch. Pure democracies, he wrote, "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."[4] There was nothing in direct democracy, he was concerned, "to check the inducements to sacrifice the weaker party or an obnoxious individual."[5] As Cronin puts it, "Even Jefferson's faith in the mass of the people was tempered," first by his recognition of a "natural

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[1] Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall (1989) page 40 (hereafter Cronin).

[2] Greeley, *Editorial,* The Jeffersonian (Feb. 17, 1838) page 287, quoted and cited in Wikipedia <http://en.wikipedia.org/wiki/Jeffersonian_democracy> (as of Mar. 20, 2012).

[3] California Constitution, article II, section 1.

[4] The Federalist No. 10, page 81 (James Madison) (Clinton Rossiter, ed. 1961).

[5] *Ibid.*

aristocracy" who would be best equipped to govern, and second by his concern that the "urban masses" would be easily corrupted.[6]

Yet an impulse toward direct democracy has been a part of our political history throughout. Some view direct democracy as complementary to our republican form of government, others see it as in direct conflict. But this question is not for the courts; more than a century ago the United States Supreme Court held that questions about the guaranty clause of the Constitution — the clause guaranteeing the states a republican form of government — are the province of politics, not law.[7]

The challenge for the courts, as I will discuss, is to effectuate the will of the people as expressed through direct democracy, while holding true to the fundamental principles of our Constitutions, federal and state. Hence the title of my speech: *Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation*.

In the next few minutes I would like to touch on the history of the initiative, the limits on the power, and how the California Supreme Court has responded to legal challenges to initiative measures. My comments, I should note, reflect my personal assessment only and should not be taken as speaking for the court, nor do they indicate in any way how the court — or I — would rule in any particular future case involving an initiative.

HISTORY

One hundred years ago, in a dramatic move toward direct democracy, the citizens of California approved a state constitutional amendment giving themselves the power of the initiative — the power of voters, on their own, to initiate laws and amend the Constitution independent of the Legislature. As is now familiar, the initiative and its attendant provisions were

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[6] Cronin, page 19.

[7] *Pacific Telephone Co. v. Oregon* (1912) 223 U.S. 118; see generally Miller, Direct Democracy and the Courts (2009) page 34 (hereafter Miller); Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution* (1998) 31 Loyola L.A. L.Rev. 1305, 1305–1306.

enacted as reforms in reaction to the stranglehold on California politics of the Southern Pacific Railway.[8]

California was not the first state to allow for voter initiatives. In the 1880's and '90's a strong populist movement emerged in the country, particularly in the West and Midwest, and with it a push for direct democracy or direct legislation by the people.[9] As Thomas Cronin tells us in his book, because direct democracy was initially promoted by groups regarded as cranks — groups such as socialists and single-issue groups — incumbent legislators tended to dismiss the measures as too radical, but by the late 1890's the numbers of converts were increasing throughout the West.[10] Proponents claimed direct democracy devices would diminish the impact of corrupt influence on the Legislature and would induce legislators to be more attentive to public opinion.[11] The initiative was viewed as a means to "increase government responsiveness to the will of the people and encourage greater citizen participation."[12]

Heeding the call, in 1898 the State of South Dakota became the first state in the country to incorporate the initiative process into its Constitution.[13]

But there was opposition. As a push for the initiative developed in California, the Los Angeles Times asserted that the " 'ignorance and caprice and irresponsibility of the multitude' would be substituted for the 'learning and judgment of the Legislature'; radical legislation would result, and business and property rights would be subject to constant turmoil at the hands of agitators."[14] In Colorado, the Denver Republican lamented, " 'The initiative and referendum both conflict directly with the representative principle, and to the extent to which they may be applied representative government will be overthrown. . . . Must [the people of Colorado] adopt every new fangled

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[8] See Comment, *Putting the "Single" Back in the Single Subject Rule: A Proposal for Initiative Reform in California* (1991) 24 U.C. Davis L.Rev. 879, 882 and footnote 16 (hereafter *Putting the "Single" Back*); see generally Broder, Democracy Derailed (2000) pages 38–41.

[9] Miller, page 24.

[10] Cronin, page 50.

[11] *Id.*, page 53.

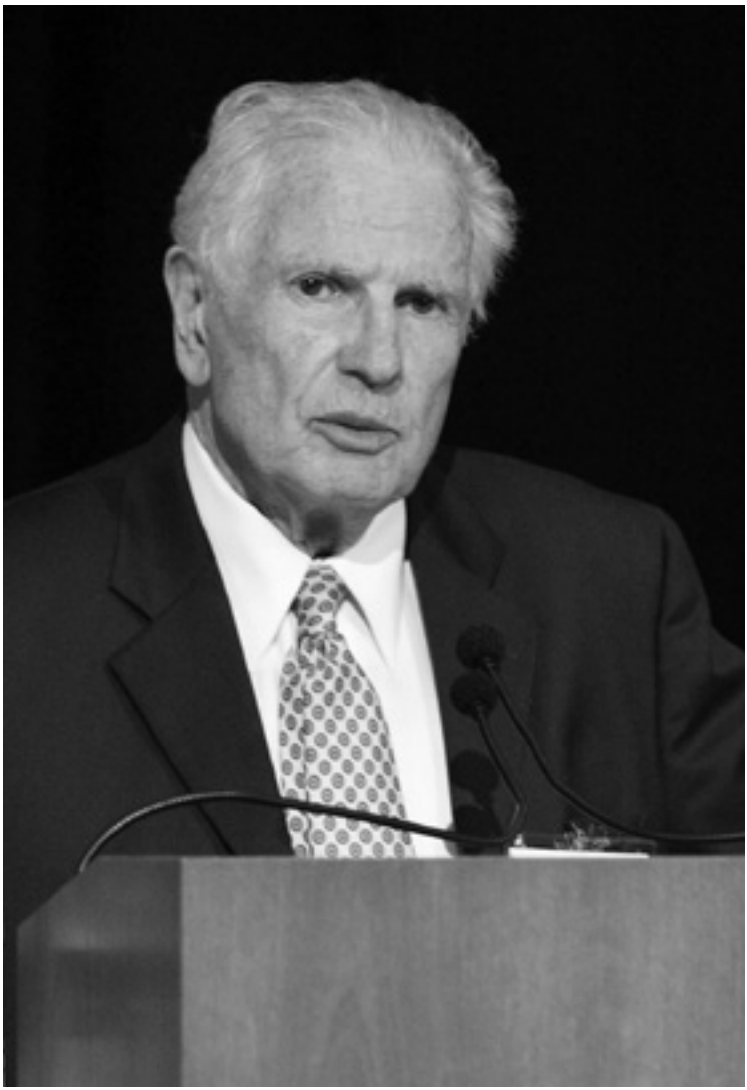
[12] *Putting the "Single" Back*, *supra*, 24 U.C. Davis L.Rev. at pages 881–882.

[13] Cronin, table 3.1, page 51; see generally Miller, page 25.

[14] Cronin, page 52.

SPECIAL BOOK SECTION

PREVIEW OF FORTHCOMING BOOK CHAPTER



JOSEPH R. GRODIN, ASSOCIATE JUSTICE,
CALIFORNIA SUPREME COURT, 1982–1987

DISTINGUISHED EMERITUS PROFESSOR,
UC HASTINGS COLLEGE OF THE LAW

Photo by Greg Verville

LIBERTY AND EQUALITY UNDER THE CALIFORNIA CONSTITUTION

JOSEPH R. GRODIN*

INTRODUCTION

This is the second in a series of essays written with a larger project in view: a book on rights and liberties under the California Constitution. The essays, as well as the projected book, have as their principal focus the ways in which the state Constitution, through differences in text or differences in interpretation by the courts, may provide California citizens with greater protection than is available under the federal Constitution.[1] Within

* Associate Justice of the California Supreme Court, 1982–1987; Distinguished Emeritus Professor, University of California, Hastings College of the Law; coauthor with Calvin Massey and Richard Cunningham of THE CALIFORNIA STATE CONSTITUTION (Oxford Univ. Press 2011) (1993). The author has published numerous articles on the subject of state constitutions, including *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 HASTINGS CONST. L.Q. 141 (2004). For more general treatment, with references to other books and articles about state constitutionalism nationwide, *see* ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (Oxford Univ. Press 2009).

[1] I write on the assumption that the reader is generally familiar with the proposition that state constitutions may provide broader protection than the federal Constitution, and with the argument (which I endorse) that state courts should look to their own constitutions before reaching federal constitutional claims. *See* Joseph R. Grodin, *The*

that focus, I attempt to provide historical context, both because it helps in understanding the dynamics of state constitutional development, and because it is interesting in itself. The first essay in the series, on freedom of expression, was previously published in these pages.[2] This second essay covers protection for other kinds of liberty interests and for the principle of equality. The subject of the state Constitution's religion clauses, which implicate both liberty and equality interests, is reserved for later treatment.

The concepts of "liberty" and "equality" are analytically distinct, the former arising from a claim that one has a constitutionally protected right to engage in certain activity, the latter from a claim that one has a constitutionally protected right to be treated the same as others similarly situated. Jurisprudentially, however, there is often an overlap — a claim that one has a right to engage in particular activity without interference may be buttressed by a claim that others are permitted to do so — and in some of the cases it is not entirely clear which claim forms the basis for a court's decision. To that extent, there is some unavoidable overlap in discussing the decisions.

I. LIBERTY

As regards liberty, my goal in this essay is a modest one. The California Constitution, like the federal, contains numerous provisions protective of particular liberties — freedom of speech and press,[3] the right to assemble and petition,[4] freedom of religion,[5] and the rights of criminal defendants,[6] not to speak of the right to fish.[7] With some exceptions, I do not discuss these specific provisions here.[8] Rather, my focus is upon how California

California Supreme Court and State Constitutional Rights: The Early Years, 31 Hastings Const. L.Q. 141 (2004).

2 Joseph R. Grodin, *Freedom of Expression Under the California Constitution*, 6 Cal. Legal Hist. (Journal of the California Supreme Court Historical Society) 187 (2011).

3 Cal. Const. art. I, § 2.

4 Cal. Const. art. I, § 3.

5 Cal. Const. art. I, § 4.

6 *E.g.,* Cal. Const. art. I, § 12 (right to bail); § 13 (protection against unreasonable searches and seizures); § 15 (rights of defendants in criminal prosecutions).

7 Cal. Const. art. I, § 25.

8 An exception is the protection against unreasonable searches and seizures, which I discuss as part of the protection for privacy under the state Constitution.

courts have dealt with what in the federal arena would be called "unenumerated rights" — the sorts of rights which the federal courts have found to be supported by the general protection for "liberty" contained in the due process clauses of the fifth and fourteenth amendments.[9]

The California Constitution also contains a Due Process Clause with language virtually identical to the federal clauses,[10] but until 1974 it was buried in a provision dealing with criminal procedure, and with minor exceptions has never provided the doctrinal basis for judicial protection of a general liberty interest. Rather, that function has been served by article I, section 1 which, in its original form from 1849, read:

> All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.[11]

This language, similar to that contained in a number of state constitutions, reflects a natural law social contract philosophy prevalent at the time of the Declaration of Independence. It embodies the notion that people have certain rights which exist independent of the state, and that the ceding of authority to government implies limits on what the state can do.[12] This notion of implied limits forms the basis for early decisions by the California Supreme Court supporting judicial review of legislative action, usually regulation of property or business. To that extent, article I, section 1 has served much the same function, though with different contours, as federal substantive due process.

As will be seen, its use in striking down legislation during the *Lochner* era was on occasion supplemented by reliance on a prohibition against

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9 U.S. Const. amend. V; amend. XIV, § 1.

10 Cal. Const. art. I, § 7(a) (providing in part: "A person may not be deprived of life, liberty or property without due process of law . . . .").

11 Cal. Const. of 1849, art I, § 1.

12 For more in-depth discussion of the historical context of article I, section 1 and its implications, *see* Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 Hastings Const. L.Q. 1, 5–19 (1997). That article discusses also the potential for relying upon the language of the section as a basis for affirmative rights, *i.e.*, for finding obligation on the part of government to take affirmative action to meet certain needs of its citizens, so that they are able to survive and enjoy the liberties associated with a decent society. *Id.* at 29–33.

"special laws," reflecting an overlap between the liberty principle and notions of equality. Those cases are the focus of the first part of this essay.

Over a century after its first adoption, article I, section 1 was amended to substitute the word "people" for "men," and to add the word "privacy," so that the section in its present form reads:

> All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

It is the word "privacy" that has given rise to a body of doctrine, virtually unique to California, which protects not only privacy in the sense of private information, but also an area of autonomy of action against government, and to some extent private, interference. To that extent, article I, section 1 serves much the same function as the word "liberty" under more modern notions of substantive due process. Those cases are the focus of the second part of this section of the essay.

A. REVIEW OF ECONOMIC REGULATION

1. The Early California Cases

Early cases reflect controversy over whether the language of article I, section 1 is merely hortatory, intended as guidance for the legislative branch, or whether it provides a basis for judicial review of legislative action,[13] and if the latter, what the scope of that review is intended to be. At issue in *Billings v. Hall* was the constitutionality of the Settler Law of 1856.[14] That law arose out of controversies between landowners who claimed title through old Mexican land grants and pioneers who, either oblivious of or in disregard of legal ownership, settled on the land and built homes and other improvements. The law, which represented a legislative victory for the settlers, would have required the legal owner of the property, in an ejectment action, to reimburse the defendant for the value of improvements that the

[13] This controversy appears to have been resolved by an 1870 amendment, now article I, section 26, which provides: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

[14] Billings v. Hall, 7 Cal. 1 (1857).

CONFERENCE PANEL

CONFERENCE PANEL

THE GOLDEN LABORATORY:
Legal Innovation in Twentieth-Century California

EDITOR'S NOTE

For the first time, the Annual Meeting of the American Society for Legal History has included a panel of scholars sponsored by the California Supreme Court Historical Society and its journal, *California Legal History*. The 2012 Annual Meeting also appears to be the first at which a panel has been devoted specifically to legal history in California. This panel was one of 35 offered at this year's conference — held at the Four Seasons Hotel in St. Louis from November 8 to 10 — at which papers were presented by scholars from 46 U.S. and 12 foreign universities.

As indicated by its title, "The Golden Laboratory: Legal Innovation in Twentieth-Century California," the panel represents the continuing dedication by the CSCHS to the theme of California's leading role in American jurisprudence.[1] This panel also represents the first occasion on which we

[1] See, for example, the panel program presented by the CSCHS at the 2006 Annual Meeting of the California State Bar, "California — Laboratory of Legal Innovation," published in the CSCHS *Newsletter,* Autumn/Winter 2006, Supplement pages 1–4, available at http://www.cschs.org/images_features/cschs_2006-autumn-winter.pdf.

have brought California-directed legal research to the attention of an international scholarly audience at a venue outside of California.

Sponsorship of this panel furthers several of our objectives: encouraging emerging legal historians to undertake new research in the field of California legal history, giving prominence to scholars who do so, and making known the results of their work, both to their colleagues in person and to a broader readership in print and online. At my invitation, Professor Reuel Schiller of UC Hastings College of the Law, a member of the journal's Editorial Board, undertook with enthusiasm the role of chairing the panel and "shepherding" the project through the process of approval and presentation. Professor Lawrence Friedman of Stanford University, also a member of the journal's Editorial Board (and a past president of the ASLH), who had generously agreed to serve as the panel's commentator, was forced by a family medical emergency to leave the conference early and return to California. The three scholars selected for the panel — Mark Brilliant, S. Deborah Kang, and Felicia Kornbluh — who have already achieved recognition in the field of legal history, were thereby given the opportunity and the impetus to develop further the California aspects of their individual areas of interest, as demonstrated by their papers on the following pages.

— SELMA MOIDEL SMITH

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FROM INTEGRATING STUDENTS TO REDISTRIBUTING DOLLARS:

The Eclipse of School Desegregation by School Finance Equalization in 1970s California

MARK BRILLIANT*

My current book project examines the relationship between opposition to school desegregation through busing, school finance equalization litigation and reform, Proposition 13 and the tax revolt, and the increasing concentration of income and wealth in the hands of the nation's richest one percent that pundits, policy makers, and scholars have begun to refer to as America's new Gilded Age. In my paper, I want to explore a piece of this particular constellation of interrelated developments, namely, the connection between the rise of school busing to promote school desegregation and the rise of school finance litigation and reform, which scored its first major victory in the California Supreme Court in 1971 in the case of *Serrano v. Priest*.

Criticism of the largely property tax revenue basis for funding K–12 schools is almost as old as public schools themselves. Alluding to the

* Mark Brilliant is an associate professor in the Department of History and in the Program in American Studies at the University of California, Berkeley. He wishes to extend a special thanks to Reuel Schiller for his invitation to join the panel at the 2012 American Society for Legal History Annual Meeting from which this paper is drawn and for commenting so thoughtfully on its contents, as well as the California Supreme Court Historical Society for sponsoring the panel. The author requests that this paper be read as a slightly expanded version of his conference paper and as a work-in-progress.

inequalities in per pupil expenditures between local school districts rooted in their differing property values, no less than Horace Mann himself denounced the notion that "mere circumstance of local residence" should shape a child's access to equality of educational opportunity.[1] Mann's concern anticipated similar reservations voiced by northern members of Congress during Reconstruction and the Gilded Age, Populists, Progressives, and New Dealers, and found expression, almost verbatim, in the California Supreme Court's *Serrano* decision, which rejected the state's school financing scheme for making "the quality of a child's education a function of the wealth of his parents and neighbors."[2]

Given this longstanding criticism, why did it take until the 1970s before school finance reform gained traction, beginning in California and then spreading across the country? The answer, I contend, can be found in the combination of two contemporaneous developments: opposition to school busing to promote desegregation and the burgeoning tax revolt over rising property taxes. The former spurred support for school finance reform whose proponents — from both the left and right — often expressed preference for the redistribution of property tax dollars over the redistribution of students through busing, while the latter prompted efforts to search for alternative sources of revenue for financing public schools.

On January 16, 1970, Daniel Patrick Moynihan delivered a soon-to-become infamous memorandum to President Richard Nixon. "The time may have come when the issue of race could benefit from a period of 'benign neglect,'" Moynihan wrote. By "race," Moynihan meant the "position of Negroes" — "*the* central domestic political issue."[3] And at the center of

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[1] Mann quoted in Robert A. Gross and John Esty, "The Spirit of Concord," *Education Week*, October 5, 1994.

[2] Goodwin Liu, "Education, Equality, and National Citizenship," *Yale Law Journal* 116:2 (2006): 331–411; Charles Postel, *The Populist Vision* (New York: Oxford University Press, 2007); David Tyack, Robert Lowe, and Elisabeth Hansot, *Public Schools in Hard Times: The Great Depression and Recent Years* (Cambridge: Harvard University Press, 1987); *Serrano v. Priest*, L.A. No. 29820, 5 Cal. 3d 584, August 31, 1971.

[3] "Memorandum for the President from Daniel P. Moynihan," January 16, 1970, John D. Ehrlichman Papers, Box 30, Folder Committee for Educational Quality [2 of 2], Richard Nixon Presidential Library (hereafter, RN).

the race issue in the early 1970s was busing, which Nixon would describe in 1971 as "by far the hottest" domestic issue.[4]

California turned up the heat on the busing controversy less than a month after Moynihan's memorandum. On February 11, 1970, Los Angeles County Superior Court judge Alfred Gitelson ruled in the case of *Crawford v. Board of Education of the City of Los Angeles*. "Negro and Mexican children suffer serious harm when their education takes place in public schools which are racially segregated, whatever the source of such segregation may be," Gitelson announced. His decision drew no distinction between "segregation not compelled by law (allegedly *de facto*)" and segregation "compelled by law (allegedly *de jure*)."[5] Moreover, in the sprawling city of Los Angeles, it required extensive busing to implement. Little wonder, then, that the *Los Angeles Times* described *Crawford* as "the most significant court decision on racial segregation outside the South."[6]

California governor Ronald Reagan was more blunt. He denounced the decision as "utterly ridiculous . . . shatter[ing] the concept of the neighborhood school as the cornerstone of our educational system."[7] Later that year, Reagan reiterated his vigorous opposition to "forced busing," insisting instead that "quality education must be provided for every child" within his or her neighborhood school.[8] Caspar Weinberger, Reagan's director of finance, had suggested how to help make this happen the year before when he called for property taxes — which he described as "one of the most regressive" — to be reduced and replaced with increased income, commercial real estate, and sales taxes. In turn, these taxes, "which are directly related to ability to pay," Weinberger maintained, would support 80 percent of public school costs.[9] Similarly, a Reagan Administration "Issue Paper"

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[4] White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

[5] *Crawford v. Board of Education of the City of Los Angeles*, "Minute Order of Court's Intended Findings of Fact, Conclusions of Law, Judgment, and for Preemptory Writ of Mandate," February 11, 1970.

[6] "L.A. Schools Given Integration Order," *Los Angeles Times*, February 12, 1970.

[7] "Press Release #101," February 17, 1970, Box GO 74, Folder Busing — General, 1970 (2/3), Ronald Reagan Governor's Papers, Ronald Reagan Library (hereafter, RR).

[8] Ronald Reagan, speech to the California Real Estate Association, October 5, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

[9] Caspar Weinberger, press release, July 22, 1969, Box GO 160, Folder Education-Finance-K-14 (1970), RR.

on education called for property tax reform and greater support for "less affluent" school districts in March 1970, just one day before Reagan vowed to "take all legal steps possible to oppose mandatory student busing."[10]

Richard Nixon concurred with his fellow California Republican's busing diagnosis and school finance prescription. Indeed, if Nixon's *opposition* to school desegregation through busing, represented the "neglect" half of Moynihan's "benign neglect" advice, his *support* for school finance reform represented the "benign" half.[11] In a nationally televised address on busing delivered on March 24, 1970, Nixon blasted *Crawford* as the "most extreme" desegregation decree issued by any court to date owing to its failure to distinguish between unconstitutional de jure segregation and "undesirable" (but not unconstitutional) de facto segregation. Where de facto segregation existed, rooted in "residential housing patterns," Nixon maintained, it was better to employ "limited financial resources for the improvement of education . . . rather than buying buses, tires and gasoline to transport young children miles away from their neighborhood schools."[12]

Nixon's preference was to redistribute those "limited financial resources" to improve education — to desegregate dollars, rather than desegregate students. He spelled this out just a few weeks earlier in a "Message on Education Reform" in which he denounced the absence of "equal educational opportunity in America." This absence was felt most in school districts with a "low [property] tax base," which "find it difficult or impossible to provide adequate support to their schools." Declaring school finance inequality a "national concern," Nixon called for "narrowing the gap" between "rich and poor states and rich and poor school districts."[13]

To this end, he issued Executive Order 11513, establishing "The President's Commission on School Finance," chaired by Neil McElroy, formerly secretary of defense during the Eisenhower Administration. Nixon's action

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[10] Issue Paper No. 1 (Education), March 2, 1970, Box GO 160, Folder Education-Finance-K-14 (1970), RR; Draft of form letter to constituents, March 3, 1970, GO 74, Folder Busing — General, 1970 (2/3), RR.

[11] White House Tape Collection, December 7, 1971, Conversation 631-8, RN.

[12] Richard Nixon, "Statement by the President on Elementary and Secondary School Desegregation," March 24, 1970, Daniel Patrick Moynihan Papers, Box 23, Folder Desegregation, RN.

[13] Richard Nixon, "Message on Education," March 3, 1970, Daniel Patrick Moynihan Papers, Box 20, Folder Commission on School Finance [1 of 7], RN.

IMPLEMENTATION:

How the Borderlands Redefined Federal Immigration Law and Policy in California, Arizona, and Texas, 1917–1924

S. DEBORAH KANG*

> *Implementation is worth studying precisely because it is a struggle over the realizing of ideas. It is the analytical equivalent of original sin; there is no escape from implementation and its attendant responsibilities. What has policy wrought? Having tasted of the fruit of the tree of knowledge, the implementer can only answer, and with conviction, it depends . . . .*
>
> — Jeffrey L. Pressman and Aaron Wildavsky[1]

In their classic study, *Implementation: How Great Expectations in Washington are Dashed in Oakland*, political scientists Jeffrey L. Pressman

* S. Deborah Kang is an assistant professor in the History Department at California State University, San Marcos. An earlier version of portions of this article appeared in "Crossing the Line: The INS and the Federal Regulation of the Mexican Border," in *Bridging National Borders in North America,* edited by Andrew Graybill and Benjamin Heber Johnson (Durham: Duke University Press, 2010). Kang thanks Reuel Schiller, Selma Moidel Smith, and the audience at the 2012 meeting of the American Society for Legal History for their generous comments and suggestions.

[1] Jeffrey L. Pressman and Aaron Wildavsky, *Implementation: How Great Expectations in Washington are Dashed in Oakland; or, Why It's Amazing that Federal Programs Work at All, This Being a Saga of the Economic Development Administration as Told By Two Sympathetic Observers Who Seek to Build Morals on a Foundation of Ruined Hopes,* 3rd ed. (Berkeley: University of California Press, 1984), 180.

and Aaron Wildavsky stress that we cannot understand public policies without examining their implementation. Pressman and Wildavsky's own focused exploration of one federal agency — the Oakland office of the Economic Development Administration (EDA) — not only reveals the weaknesses of the policy-making process (as suggested by the subtitle of the book, "Why It's Amazing that Federal Programs Work at All") — but also provides important insights into policy formation itself. Implementation, its failures, successes, and everything in-between, informs the shaping and reshaping of public policy; as Pressman and Wildavsky observe, implementation "reformulate[s] as well as [carries] out policy."[2]

While Pressman and Wildavsky focus specifically on EDA implementation of public works and small business projects during the 1960s, their findings provide a powerful analytical framework for understanding implementation in a variety of policy arenas. Since the late nineteenth century, American immigration policy, I will argue, was very much a product of its implementation by the Bureau of Immigration on the U.S.–Mexico border. This article will focus on the policy innovations that developed as a result of the Bureau's efforts to enforce the Immigration Act of 1917 and the Passport Act of 1918 on the nation's southern boundary. As southwestern immigration officials began administering these new laws, their efforts were hampered by a lack of money, manpower, and materiel as well as enormous opposition from border residents (whether Asian, European, Mexican, or American) who were accustomed to crossing the international boundary without restriction.[3]

In response to these enforcement challenges, southwestern immigration officials often waived the rules or created new ones that made their lives and the lives of border residents much easier. The most prominent of these was the wartime labor importation program, initiated to overcome the objections of southwestern industries to the restrictive provisions of the Immigration Act of 1917 and the Passport Act of 1918.[4] In addition, the agency

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[2] Ibid., 180.

[3] George J. Harris, Acting Supervising Inspector, El Paso, to Commissioner General, November 28, 1917, file 54152/1E, RG 85, National Archives. See also Dr. Cleofas Calleros, interview by Oscar J. Martínez, September 14, 1952, interview 157, transcript, Institute of Oral History, University of Texas at El Paso.

[4] Mark Reisler, *By the Sweat of Their Brow: Mexican Immigrant Labor in the United States, 1900–1940* (Westport: Greenwood Press, 1976).

modified the new regulations for ordinary border residents as well as the rich and powerful. When thousands of locals complained about the literacy test provisions of the Immigration Act of 1917, the Bureau created what I will refer to as "border waivers" for illiterate Mexican nationals who lived on both sides of the border. As the administrators of the Passport Act of 1918, southwestern immigration officials devised additional exemptions, specifically a border crossing card program for local residents. Although the border crossing card primarily assisted Mexican nationals and Mexican Americans, it also benefited Americans and Europeans, as well as Asian, Asian-American, and Asian-Mexican merchants. Together, these policy innovations — to the chagrin of anti-immigration advocates — sustained the transnational character of the borderlands.

All of this is not to deny the Bureau's vigorous efforts to bar Mexican, Asian, and European nationals from admission for permanent residence or to expel unwanted illegal immigrants in this period. Instead, this study demonstrates that, during World War I and well into the 1920s, the Bureau was concerned not only with the restriction of immigrants but also with the regulation of the local border population. While immigration historians have provided extensive accounts of those migrants seeking entry for permanent residence (formally referred to as "immigrants" by the Bureau of Immigration), this paper shifts the focus of attention from immigrants to border crossers (categorized as "non-immigrants"). This population typically included laborers, tourists, local residents, dignitaries, and businessmen who crossed and re-crossed the border on a regular basis for short periods of time. In a stunning departure from the exclusionary intent underlying the Immigration Act of 1917 and the Passport Act of 1918, Bureau of Immigration officials effectively nullified provisions of these laws in order to craft a series of border crossing policies for these border residents and businesses.

This examination of the Bureau's policy innovations challenges a major scholarly and popular conception that the normative function of the nation's immigration policy (and, in turn, the Bureau of Immigration) was to maintain the dividing lines between desirable and undesirable peoples, legal and illegal immigrants, and Americans and non-Americans. Proceeding from this notion, scholars have produced two competing interpretations of the agency's history. On the one hand, some scholars emphasize the

ways in which the Bureau of Immigration and the Border Patrol, during the Progressive Era, succeeded in implementing the nation's restrictive immigration laws, thereby closing the nation's borders to the entry of unwanted immigrants.[5] On the other hand, some studies highlight the contingencies and weaknesses of border enforcement. In his recent study of the Bureau of Immigration, Patrick Ettinger argues that Asian and European immigrants routinely evaded the immigration laws and confounded the Bureau's enforcement efforts between 1891 and 1930.[6] While both sets of scholars have enriched our understanding of the Bureau of Immigration, they describe immigration law enforcement in bipolar terms — as "strong" or "weak," or as "hard" or "contingent." In so doing, they neglect to consider whether the Bureau's operations might be described in more complex and dynamic terms. On this latter point, Pressman and Wildavsky's study is significant because it demonstrates that agencies don't simply succeed or fail; instead, agencies, as I will argue, create new ideas, new policies, and new laws.

This study further departs from the current literature by demonstrating how local, transnational, and even global concerns frequently overrode national imperatives in shaping immigration laws and policies for the borderlands. Thus, whereas current accounts of immigration policy history assume an alignment between Bureau officials in the Southwest, their supervisors in Washington, D.C., and nativist forces in Congress,[7] this essay reveals the conflicts between local and federal agency officials, and the competing demands faced by immigration inspectors in the borderlands. More specifically, this article focuses on agency officials stationed in California, Arizona, and Texas — a region long distinguished by its cultural diversity, transnational infrastructure, global trading partners, world-

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[5] See for example, Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004); Kelly Lytle-Hernandez, *Migra! A History of the U.S. Border Patrol* (Berkeley: University of California Press, 2010).

[6] Patrick Ettinger, *Imaginary Lines: Border Enforcement and the Origins of Undocumented Immigration, 1882–1930* (Austin: University of Texas Press, 2010). See also, Daniel Tichenor, *Dividing Lines: The Politics of Immigration Control in America* (Princeton: Princeton University Press, 2002); Keith Fitzgerald, *The Face of the Nation: Immigration, the State, and the National Identity* (Stanford: Stanford University Press, 1996).

[7] See for example, Ngai, *Impossible Subjects;* Lytle-Hernandez, *Migra!;* and Ettinger, *Imaginary Lines.*

TURNING BACK THE CLOCK:

California Constitutionalists, Hearthstone Originalism, and Brown v. Board

FELICIA KORNBLUH*

In 1953, when they were asked by the Supreme Court to reargue *Brown v. Board of Education*, the attorneys of the NAACP Legal Defense and Educational Fund turned to the writings of a blind professor from the Speech Department at UC Berkeley and a deaf librarian from Los Angeles.[1]

* Felicia Kornbluh, Ph.D., is director of the Women's and Gender Studies Program, and associate professor of history, at the University of Vermont. This article is drawn from ongoing research into the lives and work of Jacobus tenBroek and Howard Jay Graham and the transformation of equal protection in the decade after World War II. Kornbluh is the author of *The Battle for Welfare Rights* (U. of Penn., 2007), and many articles, and is writing a book tentatively entitled *Constant Craving: Economic Justice in American Politics, 1945 to the Present*. She is one of sixteen members of the Vermont Commission on Women and the editor for North America of the book series, "The Global History of Social Movements" from Palgrave–MacMillan Publishers. Kornbluh acknowledges the excellent comments of Reuel Schiller and Sarah Gordon, and the audience at the 2011 and 2012 meetings of the American Society for Legal History, as well as colleagues who heard early versions of some of this material at the Center for the Study of Law and Society, Boalt Hall, UC Berkeley, and the Political Science Department, Brooklyn College, City University of New York.

[1] I refer to Graham as "deaf" rather than "Deaf" to indicate his physical impairment as well as his lack of participation in a cultural or linguistic community of other hearing-impaired people. Graham did not communicate in American Sign Language and did not attend any schools that catered to deaf students.

Thurgood Marshall and his team utilized the work of historians such as John Hope Franklin and C. Vann Woodward. However, to answer the critical question of the original meaning of the Fourteenth Amendment — the key question the Court had put to them in its request for re-argument — they built most directly upon the scholarship of Jacobus tenBroek and Howard Jay Graham.[2] These two scholar-activists had been collaborating since the middle 1940s, when both were in Berkeley, on research about the origins of the Reconstruction Amendments. They were the first to argue that the ultimate source of the language in Section One of the Fourteenth Amendment was the antebellum movement for the abolition of slavery. Therefore, they claimed, segregated education violated the Fourteenth Amendment's proscription against states' depriving citizens of "equal protection of the laws."

TenBroek was a scholar, teacher, and advocate who began his career on the far banks of the mainstream but eventually earned a national reputation. He co-authored a now-classic essay in 1949 that predicted and promoted the central role of the Equal Protection Clause in postwar movements for social change. He argued presciently that the Equal Protection Clause was being revivified in the postwar years. TenBroek and his collaborator were responsible for the Venn diagrams that illustrate forms of discrimination under the Equal Protection Clause that are constitutionally prohibited because they are "under-" or "over-inclusive." More ambitious, if less influential, was their argument for a doctrine of "substantive equal protection" that would acknowledge the need for affirmative government action to realize equality.[3] In 1940, tenBroek founded and began to lead the National Federation of the Blind (NFB), the first national group in U.S. history dedicated to blind people's advocacy on their own behalf. The NFB became the most effective organization by and for disabled people and public assistance recipients between World War II and the coalescence of mass

[2] Richard Kluger writes that "[t]he two experts probably most deeply versed in the subject [of the Fourteenth Amendment] shared a pair of traits," that they were Californians and disabled. Kluger, *Simple Justice: The History of Brown v. Board of Education, the Epochal Supreme Court Decision that Outlawed Segregation, and of Black America's Century-Long Struggle For Equality Under Law* (New York: Vintage, 1975), 625.

[3] Joseph Tussman and Jacobus tenBroek, "The Equal Protection of the Laws," *California Law Review* 37:3 (September, 1949): 341–381. Graham also argued for substantive equal protection.

movements for disability and welfare rights in the 1960s and 1970s. In a relatively short but productive career, tenBroek wrote field-defining essays on disability rights, income-based discrimination, and the right to travel, and was lead author of the first book-length critique of the Supreme Court and Roosevelt Administration *vis-à-vis* Japanese internment.[4] He chaired the State Social Welfare Board under Governor Edmond ("Pat") Brown, and taught in the Speech and Political Science Departments at Berkeley for almost thirty years.[5] His (zealous) former students included California Supreme Court Justice Joseph Grodin and activist lawyer Michael Tigar, and his colleagues and friends included Chief Justice Roger Traynor.[6]

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[4] Jacobus tenBroek, *The Constitution and the Right of Free Movement* (pamphlet, National Travelers' Aid Association, 1955); tenBroek, "California's Dual System of Family Law: Its Origins, Development, and Present Status," Part I, *Stanford Law Review* 16 (March, 1964): 257–357, Part II, *Stanford Law Review* 17 (July, 1964): 900–981; and Part III, *Stanford Law Review* 17 (April, 1965): 614–682; tenBroek, "The Right to Live In the World: The Disabled in the Law of Torts," *California Law Review* 54:2 (May, 1966): 841–919; tenBroek, Edward Barnhart, and Floyd Matson, *Prejudice, War, and the Constitution* (Berkeley and Los Angeles: University of California Press, 1954). On public assistance and disability, see also, tenBroek and Matson, *Hope Deferred: Public Welfare and the Blind* (University of California Press, 1959), and see discussions in Felicia Kornbluh, *The Battle for Welfare Rights: Poverty and Politics in Modern America* (Philadelphia: University of Pennsylvania Press, 2007), 30; Martha Davis, *Brutal Need: Lawyers and the Welfare Rights Movement, 1960–1973* (New Haven: Yale University Press, 1993), 20–21, 36; and Matson, *Blind Justice: Jacobus tenBroek and the Vision of Equality* (Washington, D.C.: Library of Congress/Friends of Libraries for the Blind, 2005), 129–148 (on Japanese American project), 171–179 (on theorizing poverty and social welfare).

[5] Adrienne Asch, "Jacobus Tenbroek [sic], Uc [sic] Berkeley's Pioneer in Civil Rights Theory and Action," remarks at the symposium, *Intersections of Civil Rights and Social Movements; Putting Disability in its Place*, held at UC Berkeley, November 3, 2000 and made available via the Regional Oral History Office, Bancroft Library (Bancroft), Berkeley, CA, 2004, http://content.cdlib.org/view?docId=hb5r29n7w0;NAAN=13030&doc.view=frames&chunk.id=div00019&toc.id=0&brand=calisphere [accessed November 26, 2012]; Unsigned tenBroek obituary, *San Francisco Chronicle*, March 28, 1968, and other materials, special issue of *The Braille Monitor*, voice of the National Federation of the Blind, Inkprint edition, Berkeley, July, 1968 devoted to memorializing Jacobus tenBroek, Bancroft. See also Matson, *Blind Justice*, 195, 210.

[6] Joseph Grodin, personal communication with the author, January 30, 2012; Michael Tigar, "Jacobus ten Broek. In Memoriam," *California Law Review* 56:3 (May, 1968): 573–574; Jacobus tenBroek to Howard Jay Graham, July 22, 1947; Antislavery Origins of the Fourteenth Amendment, 1946–1964; Books, Writings, 1931–1967; the Jacobus tenBroek personal papers; Jacobus tenBroek Library, National Federation of the Blind,

TenBroek's collaborator for a decade was Howard Jay Graham.[7] Graham never held a position in a university. Nonetheless, he served as an in-house constitutional historian for the NAACP during the summer of 1953 and a consultant in the fall of 1953, and wrote a substantial portion of the final brief to the Court in *Brown*. In the second volume of his biography of Thurgood Marshall, Mark Tushnet demonstrates that Graham's contribution to the NAACP's effort to prepare for the re-argument of *Brown* was more consequential than C. Vann Woodward's.[8] In a reversal of the traditional understanding of physically disabled adults as the "vulnerable," Judge Robert Carter, in an interview with *Brown v. Board* chronicler Richard Kluger, remembered Graham as one upon whom able-bodied attorneys leaned: Without Howard Jay Graham as an advisor on constitutional history during the preparation of their brief for the reargument of *Brown*, Carter recalled, "'we would have felt very vulnerable.'"[9] Graham laid the groundwork for his NAACP work with influential essays he published between the late 1930s and early 1950s. These undercut the post–Civil War doctrine of corporate personhood; attacked what he called the "conspiracy

Jernigan Institute, Baltimore, MD: "Had a chat with Traynor the other night . . . was provoked by his tie-up of you and Stephen Field to tell an interesting story about the latter. When he was Dean of the Law School, Sproul's administrative ass't called him up one day to ask about hanging a picture of Field in Boalt. Traynor replied immediately that he 'wouldn't hang a picture of that old son-of-a-bitch in a farmer's back house.' He then hung up the phone and began to think about the difference between Roger J. Traynor, Professor, talking to a law student in the basement of Boalt Hall and Roger J. Traynor, Dean, talking to the University administration. Five minutes later he called up the President's office to say that he would be delighted to hang a picture of Mr. Justice Field. He characterized Field as one of the worst judges ever to occupy the supreme bench, intellectually crooked, a man who gave the best reasons for the worst decisions. He said I could repeat the story to you but obviously wouldn't want it spread any further."

7 In addition to my own work, Matson explores their collaboration in *Blind Justice*, 119–127.

8 Mark V. Tushnet, *Making Civil Rights Law: Thurgood Marshall and the Supreme Court, 1936–1961* (New York and Oxford: Oxford University Press, 1994), 197, describes three research papers that "became the center of the NAACP brief," by Howard Jay Graham, John Hope Franklin and constitutional historian Alfred Kelly of Wayne State, and attorney William Coleman (and collaborators).

9 Richard Carter, quoted in Kluger, *Simple Justice*, 625. Feminist legal theorist Martha Fineman has made the idea of vulnerability the center of her approach to gender, disability, and difference. See Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism*, 20:1 (2008): 1–23.

HISTORICAL DOCUMENTS

PRESERVING LEGAL HISTORY IN STATE TRIAL COURT RECORDS:

Institutional Opportunities and the Stanford Law School Library Collection

RACHAEL G. SAMBERG*

> *[County court] records show human hopes, strivings, speculations, and frolics: the successes and the failures. Researchers can observe the misdemeanors and the crimes, the full range of wrongs to person and property, and the offenses against the peace and dignity of the state. Pioneers become the human beings that they actually were — good, bad, and in-between. The circumstances — fortunate and unfortunate, in high places and low — under which they actually lived become real.*[1]
>
> — W. N. Davis, Jr., Chief of Archives, California State Archives (1973)

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[1] W. N. Davis, Jr., *Research Uses of County Court Records, 1850–1879: And Incidental Glimpses of California Life and Society, Part I,* 52 Cal. Hist. Q. 241, 242 (1973).

Introduction

State trial court records illuminate a prism of life and legal history.[2] With voyeuristic precision, they chronicle the dissolution of business partnerships or marriages gone sour.[3] When aggregated, they offer insights into matters of legal heritage — like the defense of slaves against criminal prosecution,[4] the demography of adoptions and probate administration,[5] or the evolution of terminology used to classify crimes.[6] For all of their research value, however, collections of historical trial court records can be tricky to find.[7] Limited records management budgets and chockablock storage facilities can leave county clerks few options but to discard files once statutory retention periods expire. This is actually sound records management, but it constrains historical research. Certain files (particularly pre–twentieth century records) may be transferred to official state archives, but these archives — whether by statute or custom — often focus on collecting only appellate-level materials. As a result, researchers seeking particular trial court files, or to develop data sets for empirical research, can face difficulties determining even where to start.[8]

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[2] *Id. See also,* William E. Nelson, Americanization of the Common Law: The impact of legal change on Massachusetts society, 1760–1830 (1975) (using trial court records to trace common law development).

[3] *See*, *e.g.*, "Complaint," Glinka v. Wundsch, No. 10472 (Alameda Super. Ct. Oct. 18, 1894) (business dispute); "Complaint for Maintenance," Heringer v. Heringer, No. 10431 (Alameda Super. Ct. Oct. 3, 1894) (divorce). Both files are available in the Stanford Law School Library collection, described *infra*.

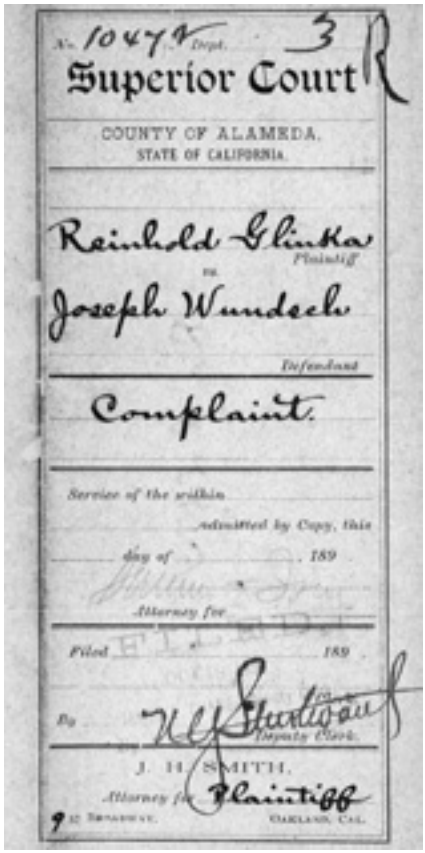
[4] *See*, *e.g.*, Jenni Parrish, *A Guide to American Legal History Methodology With an Example of Research in Progress*, 86 L. Lib. J. 105 (1994).

[5] *See*, *e.g.*, Jamil S. Zainaldin, *Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 Nw. U. L. Rev. 1038 (1979) (using court records for tracing adoption social characteristics); Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 U. Balt. L. Rev. 54 (1986) (probate demography).

[6] Davis, *supra* note 1, at 242–43 (explaining the crime of "cheating or swindling," often applied to the theft of gold dust); Thomas R. Phillips, *Justice in the New State Capital*, 74 Tex. B. J. 195 (2012) (describing a crime for "marking an unmarked hog without the consent of the owner").

[7] *See generally* Rodd E. Cheit, *The Elusive Record: On Researching High-Profile 1980s Sexual Abuse Cases*, 28 Just. Sys. J. 79 (2007) (addressing difficulty of finding and accessing state trial court documents).

[8] *See*, *e.g.*, David H. Flaherty, *The Use of Early American Court Records in Historical Research*, 69 L. Lib. J. 342, 344 (describing search "odyssey").


No. 10474 Dept. 3

Superior Court

COUNTY OF ALAMEDA,
STATE OF CALIFORNIA.

Reinhold Glinka
Plaintiff
vs.
Joseph Wundeck
Defendant

Complaint.

Service of the within
admitted by Copy, this
day of , 189
Attorney for

Filed , 189
By , Deputy Clerk.

J. H. SMITH,
Attorney for Plaintiff
OAKLAND, CAL.

Recognizing trial court records' research value and vulnerability, states have increasingly sought to protect them. Archives like those in Vermont and Utah have obtained grants to preserve such files *en masse*.[9] In 2011, Texas overhauled its preservation laws when a task force reported that scores of county court files — including the trials of John Wesley Hardin and Bonnie and Clyde — were in jeopardy of deterioration or destruction.[10] In 2012, a historian's inability to locate a nineteenth-century murder file led the Missouri secretary of state to establish a "Local Records Preservation Project" for organizing and preserving that state's trial records.[11]

These preservation efforts suggest increased opportunities to use historical trial court records in scholarship. Yet, what are the mechanics of accessing the records? What conditions and rules shape their availability for research — particularly

[9] *See Vermont State Archives Awarded Grant to Preserve Court Records*, VSARA's Quarterly Newsletter (August 2011), http://vermont-archives.org/publications/records/Fall2011/Fall2011_news_grant.html; *see also District Court Records*, Utah Division of Archives and Records Services (May 13, 2008), http://archives.utah.gov/research/guides/courts-district.html (last visited Oct. 5, 2012).

[10] Bill Kroger, *A History of Texas in 21 State Court Records*, 74 Tex. Bar J. 190 (2012); Ken Wise, *The Trial of John Wesley Hardin*, 74 Tex. B. J. 202 (2012); James Holmes, State of Texas v. Frank Hardy *and the Bonnie and Clyde Murders*, 74 Tex. B. J. 214 (2012).

[11] Stephanie Claytor, *Truman Students Help Preserve County Court Records*, Heartland Connection (Apr. 18, 2012), http://www.heartlandconnection.com/news/story.aspx?id=743744#.UEUBSsFlQmw (last visited Oct. 5, 2012).

beyond the courthouse, as in local universities, museums, or libraries? And by what processes or means have such third-party institutions developed their trial court records collections? This article probes the underexplored mechanics of conducting research with historical state trial court files. First, it examines factors shaping record availability, then discusses interstate variations in applicable preservation rules. Next, it describes the evolution of institutions' right to collect California trial court files. Finally, it provides an overview of the Stanford Law School Library's collection, using a 1905 dispute between oyster barons to reveal the types of research questions inherent within nearly every file.

I. STATE TRIAL COURT RECORDS PRESERVATION ISSUES

For more than a century, court clerks have bemoaned the volume and condition of the files they oversee.[12] Their stories are eerily similar, and go something like this: Old records are piled floor to ceiling under leaky water pipes, or stacked against furnaces; they are left unorganized in musty basements where documents dampen and mold, or in sweltering attics where records grow brittle and crack.[13] One 1912 Iowa court clerk described his records as having been filed in "pigeon holes," heaped among "boxes, maps, brooms, and sweepings left by the charwoman."[14] As a result, he concluded that, "No investigator could work to advantage with the [court records] in their present condition. It would first require an archaeologist, in the sense of an excavator, to dig them out of the dirt they are in!"[15]

Retention standards for paper files certainly have changed in the past hundred years. Yet, even modern-day historians can wade fruitlessly through boxes at the courthouse, unable to obtain confirmation that the sought-after files still exist.[16] Fault lies not with the clerks, but in the size of

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12 Edwin G. Surrency et al., *Legal History and Rare Books*, 59 L. Lib. J. 71, 73 (1966).

13 *Id.*; *see also* Texas Court Records Preservation Task Force, *Report on the Preservation of Historical Texas State Court Records* (hereinafter *Texas Report*), Supreme Court of Texas, at 3, 30–31, 51 (Aug. 31, 2011), http://www.supreme.courts.state.tx.us/crptf/docs/TaskForceReport.pdf (last visited Oct. 5, 2012).

14 Surrency et al., *supra* note 12, at 73.

15 *Id.*

16 *See also Texas Report*, *supra* note 13, at 30–31.

STUDENT SYMPOSIUM

STUDENT SYMPOSIUM

CALIFORNIA ASPECTS OF THE RISE AND FALL OF LEGAL LIBERALISM

UC Hastings College of the Law

INTRODUCTION:

Examining Legal Liberalism in California

REUEL SCHILLER*

Modern American liberalism is capacious, embodying a vast panoply of political beliefs and policy prescriptions. At its core, however, are two characteristics: a commitment to mildly redistributive economic policies within a capitalist economic system, and a belief in the value of cultural pluralism. These basic principles have manifested themselves through a variety of laws and legal institutions that developed in the United States since the 1930s. Redistributive principles have been fostered by programs such as Social Security, unemployment insurance, minimum wage laws, and laws supporting the right of workers to form unions. The commitment to cultural pluralism was most famously advanced by the United States Supreme Court in its decisions holding the various manifestations of racial discrimination unconstitutional. These cases were, of course, just the tip of the iceberg. In the years following the Second World War, legislative,

* Professor of Law, University of California, Hastings College of the Law.

judicial, and administrative actions promoted the rights of racial, religious and ethnic minorities, political dissenters, and women.

As the twentieth century progressed, these two strands of liberalism met with different fates. Liberalism's defense of cultural pluralism has grown more robust. The law now seeks to protect the rights of other formerly marginalized groups, including gays, lesbians, and the disabled. While debates over issues such as affirmative action and marriage equality indicate that pluralist beliefs are still contested, even the most cursory comparison between the rights afforded women and racial, religious, and ethnic minorities in 1945 and those afforded them at the end of the twentieth century demonstrates that, to use David Hollinger's evocative phrase, we have expanded "the circle of we."[1]

Liberalism's attempt to promote economic egalitarianism, on the other hand, was considerably less successful. During the last third of the twentieth century, the various mechanisms that sought to further modest redistribution of wealth have been dismantled: taxation has become less progressive, social programs starved of resources or eliminated, the right of workers to join unions eviscerated, the regulatory state weakened by deregulation. The result has been a dramatic increase in income inequality within the United States.

The articles in this symposium examine the legal aspects of the rise and fall of liberalism. Each article explores a component of legal liberalism in California.[2] In some cases the story is one of the ascension and triumph of liberal legal principles. In other cases, the story is mixed, as legal liberalism falters in the face of hostile social and political forces, or struggles against its own internal contradictions. Whatever their differences, however, each article demonstrates that California legal history provides a rich source of material about the contours of twentieth-century American liberalism.

The first article, Jeremy Zeitlin's exploration of the demise of Sunday closing laws in California, shows that some of the earliest rumblings of cultural pluralism in the state were felt in the nineteenth century. Zeitlin begins his piece with a description of the California Supreme Court's

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[1] David A. Hollinger, "How Wide the Circle of We? American Intellectuals and the Problem of Ethnos Since World War II," 98 *American Historical Review* 317 (1993).

[2] Laura Kalman coined the phrase "legal liberalism." See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

surprising 1858 decision that held the state's Sunday closing law to be unconstitutional. Within three years the Court backed away from its initial hostility toward the law, upholding a newly-passed law by giving it a secular justification. The explicitly Christian rationale for the law evolved into a religiously neutral defense of the workingman's right to a day of rest. By the end of the century, however, Californians rejected this justification, viewing it as an unfair burden on religious minorities within the state, thereby incrementally increasing the rights of those minorities.

If Zeitlin's piece illustrates the pre-history of legal liberalism in California, Catherine Davidson's contribution to this symposium takes us into prime time: the years following World War II. She also introduces us to one of legal liberalism's most famous practitioners: California Supreme Court Justice Roger Traynor. Davidson chronicles the rise of no-fault divorce in California, locating its origins in the 1953 California Supreme Court case, *DeBurgh v. DeBurgh*. Traynor's opinion in *DeBurgh* abolished the doctrine of recrimination in California divorce law, thereby making it easier for women to leave failed marriages. Davidson places the *DeBurgh* opinion in the context of two of postwar liberalism's most salient features: women's entry into the work force and the rise of egalitarian feminist ideology. She also describes how Traynor made these changes in the law, while nevertheless adhering to the modest judicial role dictated by the principle of *stare decisis*. Traynor's genius, Davidson argues, was his ability to bring the law into harmony with the liberal sentiments of the age without asserting an excess of judicial power.

The next two articles in this symposium describe policy areas in which legal liberalism's successes have been more muted than those illustrated by Zeitlin and Davidson. David Willhoite places an ironic spin on one of legal liberalism's triumphs: the passage of California's Agricultural Labor Relations Act (ALRA). Passed in 1975, the ALRA guaranteed the right of California farm workers to form labor unions and required employers to bargain with such unions. The law, which stemmed from the economic and political organizing of Cesar Chavez's National Farm Workers Association, was one of the most pro-union laws in the country. Yet Willhoite demonstrates that channeling disputes between farm workers and agricultural employers into legal forums (as well as Chavez's increasingly erratic behavior) sapped the movement of the grassroots political activism that had sustained it. What

should have been a legislative milestone of legal liberalism had become, by the 1980s, a dead letter — unenforced and ineffective.

Elaine Kuo's examination of California environmental law reveals an outcome that, if not as dismal as the ALRA's, is at least ambiguous. Kuo demonstrates how the state's attempts to preserve its water resources and control its air pollution interacted with the equally powerful commitment to the automobile and to exploiting the state's water resources to promote development. Legal protection of the environment is another significant manifestation of legal liberalism, but, as Kuo demonstrates, countervailing economic and cultural impulses have blunted this facet of postwar liberal ideology. The irony of California's environmental legal history is the simultaneous urge to both preserve the state's resources and to exploit them.

The final piece in this symposium, Jennie Stephens-Romero's article on pregnancy discrimination and family medical leave laws, recounts another of legal liberalism's successes: the passage of state and federal laws that prohibited discrimination against pregnant women and that required employers to grant family medical leave to their employees. Stephens-Romero recounts the complicated interaction of state and federal law and politics that resulted in the passage of these laws. In doing so, she highlights divisions within postwar feminism. Egalitarian feminists believed that any law recognizing differences between men and women would undermine women's equality. Other women's rights advocates thought it was crucial for the law to recognize the specific needs of women, even if it meant giving them benefits, such as pregnancy leave, that men could not have. Stephens-Romero's article thus illustrates divisions within liberalism, focusing on its internal complexity and the effect this complexity had on the development of the law.

Taken together, these five articles demonstrate a range of approaches to studying legal liberalism. First, scholars can identify and describe the legal manifestations of liberalism, and explain how they came into being. Second, they can examine how social forces interacted with legal liberalism, imposing constraints on it and preventing the law from fulfilling liberalism's political desires. Finally, scholars can look at the conflicts within legal liberalism, exploring how different aspects of liberal ideology interacted with one another, shaping and limiting the law and legal institutions

that furthered liberal policy goals. As these articles reveal, the complex legal order of postwar California provides an excellent medium for studying the laws and legal institutions that have shaped contemporary society both in this state and nationally.

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EDITOR'S NOTE

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and give exposure to new research in the field. Publication of the following "Student Symposium" furthers both of these goals.

Professor Reuel Schiller, whose course offerings at UC Hastings include a seminar on American Legal History, devoted his spring 2012 course to "The Rise and Fall of Legal Liberalism." Professor Schiller — who is also a member of the journal's Editorial Board — graciously agreed to propose to his seminar students that they consider writing on California aspects of legal liberalism with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Schiller, I have selected the five that appear on the following pages as our first presentation of a Student Symposium in the field of legal history in California.[1]

— SELMA MOIDEL SMITH

[1] The papers provided by Professor Schiller also included the one that appears here by Jeremy Zeitlin, which was written for Professor Joseph Grodin (another member of the journal's Editorial Board).

WHAT'S SUNDAY ALL ABOUT?

The Rise and Fall of California's Sunday Closing Law

JEREMY ZEITLIN*

One Sunday in April 1858, Morris Newman decided to keep his tailor shop, located at 100 J Street in Sacramento, open for business.[1] Soon after, Newman was arrested, tried, and convicted for violating the California law known as "An Act for the better observance of the Sabbath."[2] Newman's actions had been plainly illegal under this statute. By selling his wares on a Sunday, Newman had violated the law's requirement "that no person shall, on the Christian Sabbath, or Sunday, keep open any store, warehouse, mechanic-shop, work-shop, banking-house, manufacturing establishment" or sell "any goods, wares, or merchandise on that day . . . ."[3] As a result of this conviction the trial court imposed a fine of twenty-five

* Jeremy Zeitlin received his J.D. in May 2012 from UC Hastings College of the Law. He expresses his gratitude to Professor Joseph Grodin for both introducing him to the study of California legal history and for his guidance throughout this project. He would also like to thank Vincent Moyer and Professor Reuel Schiller for their generous help. As always the author sends his special love to his family.

[1] *Ex Parte* Newman, 9 Cal. 502, 504 (1858); William M. Kramer, Jewish-Activist Lawyers of Pioneer California 5 (1990).

[2] *Newman*, 9 Cal. at 503.

[3] *Id.* at 519 (Field, J., dissenting).

dollars on Newman. When he failed to pay, the judge ordered Newman imprisoned for thirty-five days.[4]

Newman's desire to break California's Sunday closing law stemmed from his religious affiliation. As an observant Jew, Newman followed his faith's tradition and celebrated the Sabbath on Saturday.[5] Because Newman's religion required him to refrain from work on Saturday, he chose to flaunt the Sunday closing law and keep his shop open on the day of rest demanded by the state.[6]

Newman emphasized this law's burden on his religious exercise when he subsequently challenged the constitutionality of the act before the California Supreme Court. In the case of *Ex Parte Newman*, he contended that the Sunday closing law conflicted with California Constitution article I, section 4's guarantee that individual rights to "the free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever allowed in the state."[7]

Ex Parte Newman was the first volley in the almost quarter-century-long debate over the state's Sunday closing law. This contest played out in both the legal and political realms of nineteenth-century California. Opponents of the law believed that the state was granting an impermissible benefit to a particular religious outlook when it declared all must rest on the traditional Christian Sabbath. Those in favor of the Sunday closing did not focus on the law's effect on religious exercise. These Californians considered the law to be a legitimate extension of the state's police power. In the nineteenth-century understanding of this doctrine, the police power conferred to the states included broad constitutional authority to regulate the people's health, welfare, and morals in order to promote the public good.[8] Because the act's only actual prohibition was on the time period

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[4] *Id.* at 504.

[5] Kramer, *supra* note 1, at 5.

[6] *Newman*, 9 Cal. at 504.

[7] Cal Const. art. I, § 4 (amended 1879). Newman also argued that a law totally banning business activity on any day of the week, even if devoid of religious effect, violated California Constitution article I, section 1's protection of property rights. *Newman*, 9 Cal. at 503.

[8] *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 572–77 (1868).

Californians could work, supporters of the law characterized it as a simple labor regulation born from the state's traditionally broad police powers.

Ex Parte Newman rejected this police power rationale for the Sunday closing and instead held that the act violated article I, section 4's guarantee of individual religious rights.[9] *Ex Parte Newman's* precedential value was, however, quite minimal.[10] Three years later the California Supreme Court reversed course and found that the Sunday closing did not unconstitutionally interfere with religious rights. The Court now held that the law was "purely a civil regulation, and spends its whole force upon matters of civil economy."[11] Over the next two decades the California Supreme Court pushed questions of religious preference to the sideline as it repeatedly affirmed that the Sunday closing law was rooted in the state's police power.[12] By 1882 the judiciary's comfort with this interpretation was so complete that the California Supreme Court did not feel it necessary to discuss the law's effect on individual religious exercise when it again upheld the statute.[13]

Although California's judges had come to a consensus concerning this law, popular opinion of the ban on Sunday work was decidedly mixed. Indeed, the people of California never wholly adopted the Court's opinion of the Sunday closing law. While civil issues of labor regulation, public morals and temperance did seep into the people's understanding of the law, many Californians continued to view the prohibition on Sunday work as primarily concerning spiritual matters.

In the nineteenth century, the opinion of California's judges and of its people diverged. In decision after decision, the California Supreme Court sustained the Sunday closing law as a reflection of the state's police power to legislate for the general welfare. A conflicting view of the Sunday closing law held sway among the people. Throughout the second half of the

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9 *Newman*, 9 Cal. at 506.

10 *Ex Parte Newman* appears to be the only instance in which a state supreme court struck down a Sunday closing law. Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 Journal of Church and State 13, 16 (1994).

11 *Ex Parte* Andrews, 18 Cal. 678, 685 (1861).

12 *Ex Parte* Burke, 59 Cal. 6, 19 (1881); *Ex Parte* Koser, 60 Cal. 177, 189 (1882).

13 *Koser,* 60 Cal. at 189.

nineteenth century the people of California clung to a belief that their state's Sunday closing law was inextricably tied to religion.

In the United States, laws banning Sunday work date back to the colonial era.[14] In 1610 the Virginia Colony enacted a law commanding attendance at religious services on Sunday.[15] Forty years later, the Plymouth Colony followed suit and passed a law forbidding its citizens to participate in servile work, unnecessary travels, and selling alcoholic beverages on Sunday.[16] By the time of the Revolutionary War essentially all the colonies had a Sunday closing law.[17] This trend continued after independence when the new states both adopted their own constitutions guaranteeing some form of religious freedom, and also passed statutes banning Sunday work.[18]

Throughout the states there were many challenges to the constitutionality of local Sunday closing laws.[19] Each one of these failed.[20] Prior to

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[14] David N. Laband & Deborah Hendry Heinbuch, Blue laws: the history, economics, and politics of Sunday-closing laws 29 (1987). The Sunday closing laws, like many aspects of Anglo-American culture, has biblical roots. "Remember the Sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work: but the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore, the Lord blessed the Sabbath day, and hallowed it." Exodus 20: 8–11.

[15] *Id.* at 29 (Virginia modeled this law after an English act passed by the twenty-ninth Parliament of Charles II).

[16] McGowan v. State of Md., 366 U.S. 420, 433 (1961).

[17] Laband, *supra* at note 34, 30–37.

[18] Andrew King, *Sunday Law in the Nineteenth Century*, 64 Alb. L. Rev. 675, 685 (2000). During the early republic era, the states repealed statutes providing for mandatory church attendance. Virginia acted first in 1776. Connecticut, however, had a statute requiring Sunday church attendance as late as 1838. Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 Harv. L. Rev. 729, 746 (1960).

[19] At this time, the substantive rights within the United States Constitution's Bill of Rights did not bind the actions of the state governments. Barron v. Baltimore, 32 U.S. 243, 247 (1833). Not until the 1947 case, *Everson v. Bd. of Education*, were the protections of religion within the First Amendment of the United States Constitution incorporated against the states. 330 U.S. 1, 16 (1947).

[20] Early nineteenth-century decisions defended Sunday closing laws as a legitimate means to encourage religious practice. In 1811, for example, New York's highest court stated that bans on Sunday work served to "consecrate the first day of the week, as

ALL THE OTHER DAISYS:

Roger Traynor, Recrimination, and the Demise of At-Fault Divorce

CATHERINE DAVIDSON*

> *Novel legal problems need not take [a judge] by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops, ostensibly from the cases that formalize their quarrels, but under the surface and over the years, from the values that formalize their aspirations.*[1] — Roger Traynor

I. INTRODUCTION

In 1949, Mrs. Daisy DeBurgh filed suit for a divorce from her husband, Albert, claiming the grounds of cruelty.[2] She alleged that her husband was

* This paper was awarded first place in the California Supreme Court Historical Society's 2012 Student Writing Competition. Catherine Davidson expects to receive her J.D. in May 2013 from UC Hastings College of the Law. She would like to acknowledge UC Hastings Professor Reuel Schiller for his immeasurable support and assistance in every aspect of this paper's evolution. She would also like to thank her mother, Elizabeth Livingston Davidson, for teaching her how to write in the first place.

[1] Roger Traynor, *Better Days in Court For a New Day's Problems,* 17 VAND. L. REV. 109 (1963–1964).

[2] *See generally* DeBurgh v. DeBurgh, 39 Cal. 2d 858 (1952).

a philandering drunk; that he was jealous and cheap; and that he had beaten her on several occasions, once so severely she had attempted suicide by way of sleeping pills.[3] Albert, for his part, countersued, claiming that Daisy had ruined his reputation by sending vicious letters to his business associates alleging that Albert was a homosexual.[4] Clearly their marriage was a failure, and yet the trial court refused to grant them a divorce. At that time, California was one of a vast majority of states refusing to grant a divorce where both parties were at fault for the destruction of the marriage relationship. Known as the doctrine of recrimination, it was a complete bar to recovery in divorce actions. However, the DeBurghs appealed to the California Supreme Court and they won their case. That decision, which took the air out of recrimination doctrine and led the way to California's becoming the first state to have a no-fault divorce system, sent shockwaves through American society. This paper will examine the case and its context, and will attempt to answer the questions: why then, why California?

In 1970, California became the first state in the nation to change from a fault system of divorce to a no-fault system.[5] The California no-fault divorce statute "removed consideration of marital fault from the grounds for divorce, from the award of spousal support, and from the division of property."[6] Before the switch to a no-fault system, the law simply did not recognize consensual divorce involving an agreement between spouses to end their legal marriage relationship.[7] Rather, historically, divorce was only granted as a privilege to an "innocent spouse."[8] In order to obtain a divorce, the plaintiff would have to file a lawsuit against his or her spouse, the defendant, and proceed to allege and then prove "grounds" for the divorce[9] such as adultery, cruelty, or desertion.[10] That is, the plaintiff would

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3 *Id.* at 871.

4 *Id.* at 871–72.

5 Herma Hill, *An Appraisal of California's No-Fault Divorce Law*, 75 Cal. L. Rev. 291, 291 (1987).

6 *Id.*

7 Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective,* 63 Or. L. Rev. 649, 653 (1984).

8 *Id.*

9 *Id.*

10 Barbara Armstrong, *The California Law of Marriage and Divorce: A Survey,* 19 J. St. B. of Cal. 160, 174 (1944).

need to show the defendant was at fault. Further, under the doctrine of recrimination, if the defendant could show that the plaintiff had also been at fault, the divorce would be automatically denied.[11]

These state divorce systems were generally statutory, and purposefully inefficient, in order to serve as "compromises between two genuine social demands, which were in hopeless conflict. One was a demand that the law lend moral and physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations."[12] Divorce law has historically been awkward and complex because it has so many different meanings and consequences for both the families involved and for society as a whole. Divorce "has economic meaning and economic consequences"[13] in that it "consists of the rearrangement of claims to property and other valued goods. But it also has moral and symbolic meaning. It touches on the basics: sex, romance, family, children, love, and hate."[14]

Divorce, and specifically divorce law, is controversial because it is a deeply personal, frequently devastating and almost always unfortunate event that involves the government in citizens' most private lives. Californians (and Americans in general) had, long before 1970, begun to find ways to circumvent the fault system, encumbered as it was by moral judgments and fraught with procedural hoop-jumping.[15] They had been using every conceivable method to separate themselves from unwanted spouses, even where neither was legally at fault. For example, in California, where one of the more popular grounds was cruelty, the plaintiff would often merely claim the defendant was "'cold and indifferent,'" the defendant would not even bother to show up in court to contest the suit, and the judge would simply rubber stamp the divorce.[16] In the end, no-fault divorce "statutes were a delayed ratification of a system largely in place; a

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[11] George D. Basye, *Retreat From Recrimination — DeBurgh v. DeBurgh,* 41 Cal. L. Rev. 320, 320 (1953).

[12] Friedman, *supra* note 7, at 653.

[13] *Id.* at 651.

[14] *Id.*

[15] *See* Hill, *supra* note 2, at 297–98.

[16] Elayne Carol Berg, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions,* 7 Loy. L.A. L. Rev. 453, 454 (1974).

system that was expensive, dirty, and distasteful, perhaps, but a system that more or less worked."[17]

California Supreme Court Justice Roger Traynor paved the way for California's change to no-fault divorce with his 1952 majority opinion in *DeBurgh v. DeBurgh*.[18] In that case, the Court did away with one of the major bulwarks of the at-fault system: the defense of recrimination.[19] In pruning away what he saw as an outdated and often unjust doctrine, Traynor's decision confronted the reality of a growing divorce rate brought on in large part by changing gender roles following the Second World War. He acted on his own judicial instincts that led him in this case and many others to make what he believed was a thoughtful, well-timed, and necessary modification to the common law in order to meet the challenges of a rapidly changing society. Traynor's hallmark as a judge was his endeavor to make a reasoned and careful decision to initiate a change, and then to craft his opinion in a way that made his thought process clear to lower courts as well as to the legal community at large.[20] While some have accused Traynor of being an activist, he likened himself more to the tortoise than the hare.[21] Far from autocratically transforming the law from the highest bench in the state, Traynor's decision in *DeBurgh* only articulated in the common law that which already existed in practice.

II. *DeBURGH V. DeBURGH*

Plaintiff, Daisy DeBurgh, and Defendant, Albert DeBurgh, moved to California together in 1944.[22] They were living together in Manhattan Beach and were married on October 27, 1946.[23] They separated on February 13, 1949,[24]

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17 Friedman, *supra* note 7, at 666.

18 39 Cal. 2d 858.

19 *See generally id.*

20 *See, e.g.,* Roger Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 230 (1962).

21 Roger Traynor, *The Well-Tempered Judicial Decision,* 21 Ark. L. Rev. 287, 291 (1967).

22 Brief for Appellant at 4, DeBurgh v. DeBurgh, 240 P.2d 625 (1952) (Civ. 18581) [hereinafter *Brief for Appellant*].

23 *Id.*

24 *Id.*

THE STORY OF THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT:

How Cesar Chavez Won the Best Labor Law in the Country and Lost the Union

DAVID WILLHOITE*

After many months of political wrangling, and after Governor Jerry Brown had staked his first year in office on bringing peace to the historically violent struggle for workers' rights in California agriculture, the Alatorre–Zenovich–Dunlop–Berman Agricultural Labor Relations Act was signed into law in the first week of June, 1975.[1] One would be hard

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[1] For contemporary reports of the event immediately preceding passage, *see*: *California Farm Bill Backed By Panel as Unionists Fight*, United Press International, May 14, 1975; Leo Stammer, *Farm Labor Bill OKd by Assembly Panel*, L.A. Times, May 13, 1975; *Parade Here Backs Efforts by Chavez To Unionize Farms*, N.Y. Times, May 11, 1975; Harry Bernstein, *McCarthy Joins Unions in Seeking Farm Bill Change*, L.A. Times, May 15, 1975; —, Pact on Farm Bill Rejected by Teamsters, L.A. Times, May 17, 1975; *2,800 Rally at Capitol to Back Farm Measure*, L.A. Times, May 19, 1975; Harry Bernstein, *Agreement Reached on Farm Labor Bill*, L.A. Times, May 20, 1975; —, *Farm Labor Accord Sets Stage for Special Session*, L.A. Times, May 20, 1975; *Teamsters Back Farm Labor Accord*, N.Y. Times, May 21, 1975; Jerry Gilliam, *Farm Bill Clears Senate Panel 4–1, Faces One More,* L.A. Times, May 22, 1975; —, *Senate Passes Farm Labor Bill*, L.A. Times, May 27, 1975; —, *Farm Labor Bill Moves Quickly Toward Passage*, L.A. Times, May 28, 1975; —, *Assembly Sends Farm Bill to Brown for Signing*, L.A. Times, May 30, 1975.

pressed to overestimate the significance of this legislation, which remains the only state law in the nation to govern the rights of farm workers to act collectively and engage in union activity.[2] In 1975, few could have predicted that this new legal order would lead to the disintegration of the farm worker movement in California.

Ever since the Delano grape strike a decade earlier, Cesar Chavez had grasped and utilized a national mood of social and legal transformation taking place across the country. This was, of course, a period of great social turmoil, including racial violence, police repression and armed military intervention that culminated in the passage of landmark legislation, massive student and youth activism, a War on Poverty, and what many have argued to be the high-water mark of judicial liberalism in America.

Chavez was a keen student of the civil rights movement and King's and Gandhi's incorporation of religion and nonviolence as a means of organizing. As an alumnus of the Community Service Organization started by Saul Alinsky and trained by the famous organizer Fred Ross, Sr., he had worked across California and Arizona to register hundreds of thousands of Hispanic voters and witnessed citizens of all races coming together to fight injustice. As the urban movements to register voters, oppose unconstitutional laws, and challenge stereotypes and bigotry expanded across the country, it became more difficult to separate issues of race and class. Claims of racial injustice in America became enmeshed with claims of economic justice. The federal government started initiatives addressed to poverty; Catholics and Jews, once excluded from the middle class, turned to help the entre of others; and young people began to focus on these issues in their own communities. By uniting the issues of fair pay and fair treatment in a demand for dignity, Chavez and his farm worker movement focused the nation's attention on some of the most invisible and vulnerable workers in the country.

However, Chavez's effort was not solely directed at consciousness-raising or the repeal of racist laws or even gaining legislative protection; he and the countless others who dedicated themselves to this struggle aimed to empower workers to form a union and bargain collectively with their employers for better wages and working conditions. These two goals, creating a farm

[2] Hawaii's state labor code includes agricultural workers along with the rest of the state's employees, but the code extends no special provisions to this sector of work.

worker union and creating a social movement focused on issues of the working poor, proved difficult to hold aloft simultaneously. Competing social and legal strategies had also led to conflict within the civil rights movement between the efforts of the NAACP and more radical groups like the Student Non-violent Coordinating Committee or Malcolm X's Nation of Islam.[3]

John Lewis, president of the SNCC and a future congressional leader, spoke at the March on Washington for Freedom and Jobs alongside Martin Luther King, Jr. and United Auto Workers president, Walter Reuther, among others.[4] March organizers excised several phrases from his controversial speech including one about the proposed Civil Rights Act introduced by President Kennedy: "The revolution is a serious one. Mr. Kennedy is trying to take the revolution out of the streets and put it into the courts."[5] This conflict between a revolution and a legal order, between gaining public support and gaining legislative victories, between organizing a union and organizing a social movement would prove to be a defining one for Chavez and the UFW.

In this article, I will address the tension between a movement for social justice and a legal regime designed to deliver that justice as manifested in the efforts to organize California farm workers and the passage and subsequent administration of the Agricultural Labor Relations Act (ALRA). I will describe how balancing the needs and priorities of maintaining a broad social movement for the vulnerable and dispossessed and a focused legal fight for good contracts and union rights ultimately led to the collapse of the United Farm Workers' organizing efforts. Ironically, winning the strongest, most protective labor law in the country produced new organizing victories at the same time it exacerbated the internal conflict between these two missions.

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Although the events leading to the passage of the ALRA started with the "Great Delano Grape Strike" and the signing of the first contract with

[3] *See* Doug McAdam, Political Process and the Development of Black Insurgency, 1940–1970 (1999).

[4] It is interesting in this context to note that the name of the march at which Dr. King gave his most famous speech nodded at this dual goal of economic and racial justice and that the speakers included civil rights and union leaders.

[5] John Lewis, Walking With the Wind (1998).

DiGiorgio, farm worker organizing in California had begun almost a century earlier. From the 1890s to 1960, there were several waves of farm worker organizing, all involving some admixture of ethnic workers' groups, traditional AFL-style unionism, and radical elements such as the International Workers of the World (IWW).[6] Large-scale farming in California is nearly as old as the state itself. Ranchers and farming interests received large parcels of land in as much as 35 million acre "bonanza farms" because of exemption from the Homestead Act. With the new railroad and investments in irrigation, farming soon became more lucrative than ranching. Beginning with the hiring of thousands of Chinese, unemployed after the completion of the transcontinental railroad, the history of field labor in California agriculture can be told through various immigrant groups.[7] In the end, several salient factors led to the failure of farm workers to successfully form a union or win lasting contracts: the transience and vulnerability of an immigrant workforce, the exclusion of agricultural workers from the National Labor Relations Act (NLRA), the introduction of the *Bracero* program, and the general unfamiliarity with and lack of interest in the agricultural sector by traditional AFL-CIO unionism — all set against a backdrop of employer violence and hostility toward organizing efforts backed by law enforcement, judges and politicians.

Field labor in California was initially performed by Asian immigrants, followed by Mexican and Filipino workers, with a brief interlude of white workers during the Depression. Early on, growers learned to recruit a workforce of non-citizen, newly-arrived immigrants who were often barred from other sectors of employment.[8] But in 1882, with the passage of the Chinese Exclusion Act, huge tracts of newly irrigated land lay fallow,

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[6] Marshall Ganz, Why David Sometimes Wins 23 (2009). For the summary of California farm worker organizing, I have used the following sources: Carey McWilliams, Factories in the Field: The Story of Migratory Farm Labor in California (1939); Stuart Marshall Jamieson, Labor Unionism in American Agriculture, Bulletin 836 (Bureau of Labor Statistics, U.S. Department of Labor; reprint 1975); Juan Gomez-Quiñones, Mexican American Labor, 1790–1990 (1994); Majka & Majka, Farm Workers, Agribusiness and the State (1983). Although there are many others of high quality, these provide a concise account of the activity of the time and are sufficient for this survey.

[7] McWilliams, *supra* note 6, at 66–67.

[8] Ganz, *supra* note 6, at 24.

CALIFORNIA v. CALIFORNIA:

Law, Landscape, & the Foundational Fantasies of the Golden State

ELAINE KUO*

According to the venerable Wikipedia, there are approximately 900 popular songs about California (including at least 76 simply titled "California").[1] There are, perhaps, just as many — and frequently contradicting — cultural perceptions about this Golden State.

For some, there is Jack Kerouac's (and Dean Moriarty's) California: "wild, sweaty, important, the land of lonely and exiled and eccentric lovers come to forgather like birds, and the land where everybody somehow looked like broken-down, handsome, decadent movie actors."[2]

For others, there is Mark Twain's California, full of a "splendid population":

> [F]or all the slow, sleepy, sluggish-brained sloths stayed at home — you never find that sort of people among pioneers — you can-

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[1] *List of Songs About California*, Wikipedia, http://en.wikipedia.org/wiki/List_of_songs_about_California (last visited May 5, 2012).

[2] Jack Kerouac, On the Road 168 (1976).

> not build pioneers out of that sort of material. It was that population that gave to California a name for getting up astounding enterprises and rushing them through with a magnificent dash and daring and a recklessness of cost or consequences, which she bears unto this day — and when she projects a new surprise the grave world smiles as usual and says, "Well, that is California all over."[3]

Truman Capote, meanwhile, believed that "[i]t's a scientific fact that if you stay in California you lose one point of your IQ every year."[4]

There is the California embodied in the majestic mountains of Yosemite, and the notion of a state that is natural and free and part of the Wild West.[5] There is the California embodied in the box office, and the notion of a state that is all silicone and silicon. All of it is ultimately bound by and built by the same foundational fantasies of a state at the crossroads of backcountry and concrete. This paper explores those fantasies, and discusses the ways in which legal actions over seminal environmental issues of water, travel, and air both mirrored and made the California identity.

California becomes a place not quite as "west of the West" as Alaska, not always as rugged and rural as Washington and Oregon, and yet far

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[3] Mark Twain, Roughing It 282 (1976).

[4] *Truman Capote quotes*, ThinkExist.com, http://thinkexist.com/quotes/truman_capote/ (last visited May 5, 2012).

[5] John Muir's national park movement and Jack London's words on the will, struggle, and power of nature were seen as fighters against capitalist emasculation and the mechanization of modernity at the turn of the nineteenth century. This fight has persisted in San Francisco's resistance to development, and organizations and (grassroots) movements such as the Greenbelt Alliance and Save the Bay.

At the same time, this resistance is arguably an exercise in capitalism and (concentrated) wealth. As Richard Walker puts it, "rich people want a pretty view." But "wanting green space may have the detrimental effect of not making enough low-income housing to more people." *Forum: The History of Bay Area Environmentalism* (KQED radio broadcast Nov. 16, 2007), available at http://www.kqed.org/a/forum/R711161000.

Consider, too, the relationship between San Francisco and Lake Tahoe: industrial leisure under the guise of "outdoorsmanship" has resulted in lake sedimentation and algae fertilization. Contrast that, however, with the (somewhat unexpected) role of hunters and sportsmen (including Teddy Roosevelt) as early and ardent conservationists. *See generally* John F. Reiger, American Sportsmen and the Origins of Conservation (2000) (arguing that "gentlemen" hunters and anglers came together to lobby for laws regulating the taking of wildlife and wilderness preservation, both out of a desire to protect their hobbies and a nineteenth-century sportsman's code demanding that its followers take responsibility for the total environment).

out enough to be a place where "you can't run any farther without getting wet."[6] Perhaps like much of the West, California is a place and people trying to create community and history from scratch. It is as much fiction as it is fact: a place as carefully constructed in courtrooms as it has been by adjoining tectonic plates. Either way, California has more often than not been built by conquering and controlling nature.

> People were here for the jobs, here for their slice of the dream, and natural beauty gilded connections between the two. The Mediterranean climate churned out mild winters, low humidity and long "Indian" summers promoting outdoor life so convincingly, in fact, that many newcomers seemed to overlook the fact that they'd moved into earthquake country.[7]

In many ways, life here is only possible with the manipulation of water and air. So first came the golden climate; then came the Golden State; and then came the lawsuits.

Indeed, for all its perceived "chill surfer" character, contentious litigation underlies some of the most compelling stories of California: "it is also the place where the American Dream is pursued most fiercely, its spoils contested most brutally."[8]

Law acts as both a conscious reflector and a subconscious creator of culture.[9] And this analysis is not limited to abstract ruminations on an intangible ethos. This paper connects law and film, "two of contemporary society's dominant cultural formations, two prominent vehicles for the

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[6] Brian Gray, *American West*, class lecture at UC Hastings College of the Law (2012); *Neil Morgan quotes*, ThinkExist.com, http://thinkexist.com/quotation/california_is_where_you_can-t_run_any_farther/217039.html (last visited May 5, 2012).

[7] Chip Jacobs & William J. Kelly, Smogtown: The Lung-Burning History of Pollution in Los Angeles 24 (2008). Consider, too, UC Berkeley's decision to build its Memorial Stadium directly atop the Hayward Fault — against the wishes and warnings of geologists — because that was where the best view would be. It is currently undergoing a massive renovation and seismic retrofit, such that the fault line that runs "from goal post to goal post" will not literally split the stadium in two. *The Hayward Fault at UC Berkeley*, http://web.archive.org/web/20110716064610/http://seismo.berkeley.edu/seismo/hayward/ucb_campus.html (last visited Sep. 7, 2012). (NB: It is nevertheless this writer's opinion that it does make for the best view and is well worth it.)

[8] R.C. Lutz, *On the Road to Nowhere?: California's Car Culture*, 79 Cal. Hist. 50 (2000).

[9] *See generally* Lawrence M. Friedman, American Law in the 20th Century (2002).

chorus through which society narrates and creates itself."[10] Both law and film alike are "dominant players in the construction of concepts such as subject, community, identity, memory, gender roles, justice and truth; they each offer major socio-cultural arenas in which collective hopes, dreams, belief, anxieties and frustrations are publicly portrayed evaluated, and enacted."[11] Whether art has imitated life and the law in the Golden State or vice versa, lawsuits have built California based on a "double mystery" of erasure and positive reinvention: blessed by nature, yet having to battle against it in order to grow and flourish.[12]

Call it "California v. California."

WATER WARS

"Forget it, Jake — it's Chinatown."

First and foremost, the story of California is a story of water.[13] There are the ocean waves along California's 840 miles of coastline, from the seaside cliffs of Mendocino to the surf and sand of San Diego. There is the snow melting off of the Sierra Nevada. There is a flooded valley and an

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[10] Orit Kamir, *Why 'Law-and-Film' and What Does it Actually Mean?: A Perspective*, 19 CONTINUUM: J. OF MEDIA & CULTURAL STUD. 255, 256 (2005); *see also* JOHN DENVIR, LEGAL REELISM: MOVIES AS LEGAL TEXTS (1996). In fact, the entire fledgling field of "law-and-film" is arguably an exercise in Friedmanism.

In fact, much of American history has been shaped by popular fictions; the nation is built upon stories of "cowboys and Indians" and war. In the couple centuries of its existence, the United States has used these tales of absolute victory of its "Goodness and rosy plumpness" to justify its birth, its expansion, and, indeed, its empire. GORE VIDAL, IMPERIAL AMERICA 6 (2004); STANLEY CORKIN, COWBOYS AS COLD WARRIORS 3 (2004).

[11] Kamir, *supra* note 10, at 264.

[12] *See generally* CAREY MCWILLIAMS, CALIFORNIA: THE GREAT EXCEPTION (1999) ("Is there really a state called California or is all this boastful talk? [. . .] Like all exceptional realities, the image of California has been distorted in the mirror of the commonplace. It is hard to believe in this fair young land, whose knees the wild oats wrap in gold, whose tawny hills bleed their purple wine — because there has always been something about it that has incited hyperbole, that has made for exaggeration."); —, SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND (1946).

[13] The "history of California in the twentieth century is the story of a state inventing itself with water." WILLIAM L. KAHRL, WATER AND POWER 1 (1983). Simply put, California is a "hydraulic society." DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 53 (1994).

THE *CAL FED* CONTROVERSY:

Distinguishing California's Pregnancy Leave Law and the Family and Medical Leave Act

JENNIE STEPHENS-ROMERO*

In the modern history of the United States, the feminist movement has been marked by a great divide between those women favoring formal equality and those favoring substantive equality.[1] While supporters of formal equality believe that men and women should be treated the same, including under the law, supporters of substantive equality believe that where men and women are actually situated differently, different rules may be needed in order to achieve equal results.[2] The debate rose to a peak in the 1970s and 1980s in a national debate over pregnancy discrimination and benefits in the workplace.[3] After two devastating U.S. Supreme Court decisions in the 1970s, the divide appeared most prominently between

* Jennie Stephens-Romero received her J.D. in May 2012 from UC Hastings College of the Law. She would like to thank Professor Reuel Schiller, Professor Stephanie Bornstein, and Dean Shauna Marshall for their assistance and insightful comments.

[1] Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harvard C.R.-C.L. L. Rev. 415, 417–20 (2011).

[2] Katherine T. Bartlett & Deborah L. Rhode, Gender And Law: Theory, Doctrine, Commentary 1, 127 (5th Ed. 2010).

[3] Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. Contemp. Legal Issues 279 (1998). Williams also provides a comprehensive analysis of the theoretical debate between feminists in the different ideological camps.

California women's activists and those working on the national level. For the most part, California women's groups came out in support of a substantive approach to equality which provided leave specifically to pregnant women while not specifically mandating leave for other temporarily disabled employees.[4] On the other hand, national women's groups generally favored a formal approach where pregnant women would receive the same leave benefits as any other employee.[5]

In 1987, a Supreme Court case involving California's substantive approach to equality showcased the feminist debate to everyone in the country.[6] *California Federal Savings & Loan Association v. Guerra* truly illuminates the main figures in the leave debate and their beliefs on the issue.[7] But the debate was not over then — national women's groups worked in Washington to promote their formal view. The long-standing feud between supporters of formal and substantive equality can perhaps best be observed in the history of pregnancy and parental leave statutes in the U.S.

"IT NEVER OCCURRED TO ME THAT I MIGHT LOSE MY JOB BECAUSE I'D HAD A CHILD."[8]

In 1982 Lillian Garland, an employee at California Federal Savings & Loan Association (Cal Fed), took maternity leave to have a cesarean section.[9] When she returned to work, she had been replaced, and her job was no longer available.[10] Garland filed a complaint with the California Fair Employment and Housing Commission (FEHA) claiming that Cal Fed had violated California's Pregnancy Disability Leave Law.[11] She was among 300 other women who had filed complaints for violations of that law in

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4 *See, infra*, text associated with fns. 110–119, for more detail.

5 *Id.*

6 California Federal Sav. & Loan Ass'n v. Guerra (*Cal Fed*), 479 U.S. 272, 278 (1987).

7 *Id.*

8 Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. Times, Jul. 22, 1984, at F1 (quoting Lillian Garland).

9 Ronald D. Elving, Conflict and Compromise: How Congress Makes the Law 17 (1995).

10 *Id.*

11 *Cal Fed*, 479 U.S. at, 278.

1982.[12] Before the administrative hearing date with FEHA, Cal Fed filed suit in the Federal District Court for the Central District of California seeking a declaration that California's Pregnancy Disability Leave Law had been preempted by the federal Pregnancy Discrimination Act.[13] Cal Fed was joined by the Merchants and Manufacturers Association and the California Chamber of Commerce in what the business community saw as an opportunity to attack the leave law.[14]

In 1984, the District Court characterized the California law as requiring "preferential treatment" for pregnant employees, and agreed with Cal Fed that the Pregnancy Disability Leave Law was preempted by the Pregnancy Discrimination Act.[15] In his opinion, Judge Real not only invalidated a law aimed at helping women achieve equality, but he did so by using another law aimed at the same purpose.[16] The decision caused consternation among many women activists.[17]

"DEBATE OVER PREGNANCY LEAVE"[18]

Cal Fed wound its way through the courts and in October of 1986, the case reached the U.S. Supreme Court.[19] Amicus briefs were filed in support of various points of view — Cal Fed's stance was supported by business and commerce associations, California women's groups supported the Pregnancy Disability Leave Law, and national women's groups supported Lillian Garland's right to leave, but not the Pregnancy Disability Leave Law itself.[20] If the debate between different camps of feminist thought was not

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12 ELVING, *supra* note 9, at 18.

13 *Cal Fed*, 479 U.S. at 278–79.

14 *Id. See* ELVING, *supra* note 9, at 18.

15 *California Federal Sav. & Loan Ass'n v. Guerra*, 34 FAIR EMPL. PRAC. CAS. (BNA) 562, 1 (1984).

16 *Id.*

17 ANNE L. RADIGAN, CONCEPT & COMPROMISE: THE EVOLUTION OF FAMILY LEAVE LEGISLATION IN THE U.S. CONGRESS 6 (1988).

18 Title of a *New York Times* article describing *Cal Fed*. Tamar Lewin, *Debate Over Pregnancy Leave*, N.Y. TIMES, Feb. 3, 1986, at D1.

19 *Cal Fed*, 479 U.S. at 272.

20 *See, e.g.,* Brief for the Chamber of Commerce of the United States as Amicus Curiae in Support of the Petition, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Brief of Equal Rights Advocates, the California Teachers Ass'n, the Northwest Women's Law

clear before, Cal Fed's amici highlighted the internal dispute. While both California and national women's groups called for Lillian Garland's right to leave, they did so with significant differences.

First, California women activists pointed out that the Pregnancy Disability Leave Law was not inconsistent with Title VII and the Pregnancy Discrimination Act; in fact, they shared the same goals of ending discrimination against women in the workplace.[21] While Title VII preempted legislation which relied on stereotypical notions of women's proper roles, California's legislation simply recognized an objective difference between the sexes, namely pregnancy.[22] Accordingly, different policies are necessary to ensure equal opportunities for women.[23] For example, the Equal Rights Advocates Brief suggested comparing men who have engaged in reproductive behavior to pregnant women.[24] That way any difference in treatment between the two groups could be seen as manifestly unjust.[25] Title VII, their brief pointed out, prohibits facially neutral policies that result in adverse impacts on women, and that is what happens when pregnant women are treated the same as everyone else.[26] True to their ideological underpinnings, the California women's groups were not afraid to point out the differences between men and women, and they were not afraid to demand a right to equality while taking that difference into consideration.[27]

Center, the San Francisco Women Lawyers Alliance as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *Equal Rights Advocates Brief*]; Brief for the National Organization for Women, Now Legal Defense and Education Fund, National Bar Ass'n Women Lawyers' Division Washington Area Chapter, National Women's Legal Defense Fund as Amici Curiae in Support of Neither Party, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *NOW Brief*].

21 *Equal Rights Advocates Brief, supra* note 20.

22 *Id.*

23 Brief for California Women Lawyers, Child Care Law Center, Jessica McDowell, Lawyers Committee for Urban Affairs, Mexican American Legal Defense and Education Fund, Women Lawyers' Association of Los Angeles, and Women Lawyers of Sacramento as Amici Curiae in Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *California Women Lawyers Brief*].

24 *Equal Rights Advocates Brief, supra* note 20.

25 *Id.*

26 *Id.*

27 *See infra*, text associated with fns 110–119.

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