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The California Supreme Court and State Constitutional Rights—The Early Years

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"Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[1]

The proposition that the California Constitution is a source of rights independent of the federal Constitution was not new in 1974, when the state Constitution was amended to make that proposition explicit. Indeed, the framers of the state Constitution would have been astonished to learn otherwise. In 1849, when the delegates to the first state constitutional convention adopted as the first article of their enterprise a "Declaration of Rights," the United States Supreme Court had already made clear, in Barron v. Baltimore, that the federal Bill of Rights restricted only the national government, and did not limit state authority. Article I, section 10 of the federal Constitution prohibited states from enacting certain laws, including bills of attainder, ex post facto laws, and laws impairing the obligation of contract, and the high court held that certain state regulations in derogation of federal authority were impliedly prohibited, but otherwise the original federal Constitution provided little or no support for citizens claiming rights against their state. And while the 13th, 14th, and 15th Amendments to the federal Constitution clearly did apply to the states, the high court in the Slaughter-House Cases held only a few years after their adoption that they had only very limited scope, rendering them virtually meaningless outside the area of race discrimination.

And so, in 1879 when the delegates to the second state constitutional convention reiterated article I they, too, had to assume that, except within that limited area, the rights of state citizens against their government would be protected by the Constitution they were adopting, or not at all. Indeed, a proposal to add language declaring the United States Constitution to be "the great charter of our liberties" was met with denunciation and rejection: "We had state charters before there was any Constitution of the United States" observed one delegate; "The state constitution is as much or more the charter of our liberties" declared another; reliance on the federal Constitution as the principal author of liberties would be "a mistake historically, a mistake in law, and it is a blunder all around." The delegates contented themselves with a declaration that the "State of California is an inseparable part of the Union, and the United States Constitution is the supreme law of the land."

Joseph R. Grodin

It was not until the new century and *Lochner v. New York* that the high court established the proposition that the Due Process Clause of the 14th Amendment contained substantive protection against deprivation of economic liberty, and the broader incorporation of portions of the Bill of Rights into the 14th Amendment came later, and only bit by bit.[2] Meanwhile, with respect to actions by state government, the state Constitution was pretty much the only game in town.

Article I of the California Constitution, "Declaration of Rights," was the first substantive item on the

agenda of the 1849 constitutional convention. The original committee draft consisted of sixteen sections, based upon or copied from the constitutions of two other states, nine of them from New York's 1846 Constitution and seven from the Iowa Constitution of the same year.[3] The committee draft was supplemented by the addition of two provisions. One of these affirmed the principle of popular sovereignty: "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have a right at all times, to alter or reform the same whenever the public good may require it." The other incorporated natural law principles: "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." This latter provision, amended by addition of the right to "privacy," exists in the current state Constitution as article I, section 1.

Solomon Heydenfeldt

The 1849 Constitution provided for a supreme court consisting of a chief justice and two associate justices, initially appointed by the state Legislature for staggered terms of two, four, and six years, and thereafter elected for terms of six years. The early period of the court was characterized by considerable turnover in personnel. Of the total fifteen justices who served from 1850 to 1862 (when the Constitution was amended to increase the number of justices from three to five), only one (Hugh C. Murray) served out his term. Solomon Heydenfeldt, (incidentally the first Jewish member of the court), came close, resigning after five years. The others died or retired before their term expired.

In addition to the court's institutional instability, and the occasional instability of some of its justices, the court's work reflected an often rather casual attitude toward participation in decisions, and a lack of strong commitment regarding precedent, or even consistency. Often judgments would issue over the signature of only two justices, with no accounting for the views of the third. And often the court would depart from a prior holding without explanation, sometimes with the barest of reference.

Even so, the opinions provide a fascinating window into a turbulent time when the California justices found themselves on a jurisprudential frontier that was as rough and tumultuous as the controversies to which the opinions related. Required to make decisions with very little guidance, the justices received none from the court in Washington, D.C. Moreover, underlying the legal issues the justices were called upon to decide were controversies over interpretive methodology and the role of the courts that are with us to this day—issues such as the weight to be given constitutional language compared to what the judges knew, or thought they knew, about the intent of the framers; the role of precedent from other jurisdictions; how to distinguish between the legitimate and illegitimate use of legislative power; the distinction between finding and making law; and the role of the judges' personal philosophies about governance and society. The answers which the first California justices gave to these questions, explicitly or (more often) implicitly, seem at this distance in time and context often a bit naive, even opaque, and, it is perhaps true that little is to be learned from the opinions themselves concerning constitutional methodology that we do not already know. But there is a freshness to their work, and a pragmatism, which serves as a useful backdrop to what we think of as our more sophisticated modern theories of constitutional analysis.

Slavery and the Court

The delegates to the 1849 constitutional convention unanimously approved a proposal by one of the delegates, William Shannon, to prohibit slavery—a proposal which became article I, section 18 of the new Constitution. The motivation behind that proposal was as much pragmatic as idealistic. Shannon deplored slavery, but his constituency, mainly miners in a mining district along the Yuba River, deplored slave owners, not because they kept slaves, but because they located claims in the names of their slaves. Moreover, many delegates opposed slavery because they believed it would create ruinous competition for free white laborers. Clearly the delegates were not free from racism: a proposal to prohibit "free persons of color from immigrating to and settling in the State" was approved by the committee on article I, though it was defeated in the Committee of the Whole, perhaps due to fear that the provision would complicate California's admission as a state.

Despite the constitutional prohibition, the issue of slavery, and the broader issue of North versus South, continued to divide Californians. Indeed, from the time of California's admission as a state in 1850 to the time of the Civil War the state was deeply divided between pro-slavery and anti-slavery factions within the dominant Democratic party.

The slavery issue reached the court in relation to fugitive slaves. In 1852 the State Legislature enacted a statute, patterned after the federal Fugitive Slave Law, which provided that slaves who had been voluntarily

introduced into the state before the adoption of the Constitution, and who refused, upon the demand of their owner, to return to the state where they "owed labor," should be deemed fugitives and, upon petition by their owner, returned to the owner's custody. Two former slaves, Carter and Robert Perkins, brought to California by their master before adoption of the first state Constitution, had asserted their freedom, and for some months were engaged in business themselves; but when the 1852 statute was enacted they were arrested on the claim of the master. They petitioned for a writ of habeas corpus contending, among other things, that the statute was invalid because of conflict with article I, section 18. The supreme court concluded otherwise, characterizing the provisions of section 18 as "directory only," requiring legislation for their implementation.

Six years later, however, in 1858, the court confronted another fugitive slave case, and this time the court's response was a bit different. Charles Stovall, who resided in Mississippi, came to California in 1857—"for his health" he asserted, intending to return within eighteen months—and brought with him Archy Lee, a "family negro servant" (otherwise described in the opinion as a slave) who was nineteen years of age. Arriving in Sacramento, he hired Archy out for "upwards of a month" while Stovall taught at a private school. After two months, Stovall placed Archy on a river steamer bound for San Francisco, with the intention of sending him, in charge of an "agent," back to Mississippi, but Archy escaped from the boat. Stovall applied to a justice of the peace for an arrest warrant, which was issued. Archy was apprehended and held in the city prison of Sacramento, but the local police chief declined to turn him over to Stovall, so Stovall sought a writ of habeas corpus pursuant to the state Fugitive Slave Law. Two justices of the supreme court considered the case: David Terry (who had become chief justice) and Peter Burnett, the state's first governor and a pro-slavery Democrat. Stephen Field, appointed to the supreme court the previous year, was on leave from the court, and out of the state at the time Archy's case was decided. As frequently occurred during this period, the decision was a two-justice opinion.

Peter H. Burnett

As described by Justice Burnett, the "case has excited much interest and feeling, and gives rise to many questions of great delicacy [not so much because of] the rights of the parties immediately concerned in this particular case, as the bearing of the decision upon our future relations with our sister States" meaning, of course, the states in the South. After considerable and not altogether consistent wandering through the thickets of precedent concerning the right of slave-owning citizens to bring their slaves with them when traveling to a state in which slavery is not permitted, Justice Burnett arrived at the following principle: a "mere visitor [who] comes only for pleasure or health, and who engages in no business while here, and remains only for a reasonable time" is permitted to bring his personal attendant, even if that be a slave, but "if the party engages in any business himself, or employ his slave in any business, except as mere personal attendant upon himself, or family, then the character of visitor is lost, and the slave is entitled to freedom." And, said Justice Burnett, the prohibition of slavery contained in article I, section 18 is self-executing, and requires no legislation for its implementation, the statement to the contrary in Perkins notwithstanding.

By this reasoning, Stovall should have lost his case—and would have, said Justice Burnett, but for the circumstances and the consideration that he presumably had some reason to believe, from the opinions in Perkins, that the constitutional provision would have no immediate operation. Declaring the court's intent to apply the rules strictly in the future, Justice Burnett decided that the rule announced in Archy's case should not apply to Archy, and that he should be returned to his master. Chief Justice Terry concurred.

In anti-slavery circles, the court's opinion was not well received. San Francisco's Daily Alta California (which was owned at the time by David Broderick, later killed in a duel by Justice Terry) criticized Justice Burnett's opinion for "setting forth a rule and then not follow it," and characterized it as a "crowning absurdity and the greatest mass of legal contradictions that has ever come under our notice." Both justices, the newspaper proclaimed, "have not only disgraced themselves but have brought odium on the state by this decision, and rendered the Supreme Bench of California a laughing stock in the eyes of the world." Joseph G. Baldwin, who succeeded Burnett on the court, sarcastically summarized the case as holding that the Constitution does not apply to young men traveling for their health; that it does not apply for the first time, and that the decisions of the supreme court are not to be taken as precedents. Even Justice Field, who did not participate in the decision, made known his disagreement with the court's ruling.

There was a surprising and gratifying (if somewhat confusing) sequel to the case. Following the supreme court's decision, Archy, after again escaping and being recaptured, was put on a boat to San Francisco for transport back to Mississippi, but in San Francisco a

friend of Archy's sought a second writ of habeas corpus, this time for the release of Archy on the ground he was a slave. That case came to be heard before a state judge in San Francisco, but while it was pending Stovall invoked the jurisdiction of U.S. Commissioner George Pen Johnson on the ground (inconsistent with Stovall's previous declarations) that Archy had escaped from Mississippi, and at the request of Stovall's lawyers, Archy was turned over to the custody of Commissioner Johnson. On April 14, 1858, Johnson decided that Archy was not a fugitive slave after all, and discharged him from custody.

Title Holders vs. Settlers

In addition to the slavery issue, California was split over a second fault line, created by the huge influx of population following the discovery of gold in 1850, and the uncertainty of land ownership, particularly in the Sacramento Valley. Landowners who claimed title through the old Mexican land grants came into collision with settlers who, either oblivious to or in disregard of legal ownership, settled on the land and built homes and other improvements. Battles between these two groups reached the early California Legislature, which enacted legislation tending to favor the settlers at the expense of the title owners.

The most controversial piece of legislation was the Settler Law of 1856, which required the plaintiff in an ejectment action to pay the defendant the value of improvement that the defendant had made to the land. The constitutionality of that legislation came before the supreme court in *Billings v. Hall*. The plaintiff, Billings, had purchased certain lots in the city of Sacramento and sought to eject the defendant, Hall, who was occupying the land and had constructed certain improvements with a value approximating the value of the land. Hall invoked a claim of adverse possession and, in the alternative, the Settler Law of 1856. A jury found for Hall on both defenses, and Billings appealed.

Hugh C. Murray

The court at that time was comprised of Hugh C. Murray as chief justice, and Peter Burnett and David Terry as associate justices. All three justices agreed that the defendant was not entitled to adverse possession, the time prescribed by statute not having run. The issue dividing the court was the constitutionality of the Settler Law and on that issue the court held, 2-1, with all three justices writing separately, that the law was unconstitutional.

Chief Justice Murray's opinion, by far the most elaborate, rejected plaintiff's contention that the Settler Act was law impairing the obligations of contracts in violation of the federal Constitution, but concluded nevertheless that the Settler Act violated the state Constitution. His analysis began with article I, section 1, and its broad statement of the right to acquire, possess, and protect property. The chief justice declared:

> This principle is as old as the Magna Carta. It lies at the foundation of every constitutional government, and is necessary to the existence of civil liberty and free institutions. It was not lightly incorporated into the Constitution of this State as one of those political dogmas designed to tickle the popular ear, and conveying no substantial meaning or idea; but as one of those fundamental principles of enlightened government, without a rigorous observance of which there could be neither liberty nor safety to the citizen.
>
> If, then, one of the primary objects of government is to enable the citizens to acquire, possess, and defend property, and this right has been guaranteed by the Constitution, how can it be impaired by legislation?

The answer, it turned out, was that it could not, for:

> If a law which imposes upon a party, as a condition of the recovery of his property, payment for the improvements which were his already, or denies him the rents and profits of the land, can be upheld, then an Act which divests the right entirely could be maintained, as we see no difference in the principle between taking a part and taking the whole.

Justice Terry dissented, rejecting the natural law position of the majority and insisting upon the prerogatives of the legislative branch. Article I, section 1 of the California Constitution, he insisted, was: "a mere reiteration of a truism which is as old as constitutional government. A similar declaration is contained in the Constitutions of most of the States of the Union, but, I think, has never been construed as a limitation on the power of the government."[4] In language echoing the opinions of today's "strict constructionists," Justice Terry insisted that "we cannot declare a legislative act void because it conflicts with our opinion of policy, expediency, or justice. We are not guardians of the rights of the people of the State, unless they are secured by some constitutional provision which comes within our judicial cognizance."

The Sunday Closing Law Cases: *Newman* and *Andrews*

It was in a constitutional case involving article I that Justices Terry and Field first disagreed in a published opinion. The case was Ex Parte Newman, the year was 1858, and the issue was the validity of a Sunday Closing Law which had been adopted earlier that year by the state Legislature. The statute, entitled "An Act to Provide for the better observance of the Sabbath," made it a crime, punishable by $50 fine plus $20 for the costs of prosecution, to engage in business on a Sunday.

David S. Terry

Earlier proposals for such a Sunday closing law had been supported in the Legislature by arguments of a brazenly anti-Semitic nature and the 1857 statute was challenged by a Jewish merchant, the owner of a Sacramento clothing store, who was arrested after he persisted in keeping his store open on Sundays. Newman's attorney sought a writ of habeas corpus from the California Supreme Court and was joined in the briefs and the argument by Solomon Heydenfeldt, who had resigned from the court earlier that year.

Newman's lawyers argued that the statute was unconstitutional on two grounds: that it constituted an interference with the right to acquire property in violation of article I, section 1, and that it constituted religious discrimination prohibited by article I, section 4, which then provided:

> the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall be forever allowed in this state… the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of this state.[5]

A majority of the court, consisting of Justice Terry (now chief justice) and Justice Burnett, agreed with both arguments, making California probably the first state in which a Sunday closing law was struck down. Terry wrote the opinion.

Terry was not prepared to accept a non-religious explanation for the statute. He had no doubt that the law was intended "for the benefit of religion," and to "enforce, as a religious institution the observance of a day held sacred by the followers of one faith, and entirely disregarded by all the other denominations within the State." It was, therefore, in violation of article I, section 4, which in Terry's view was meant not merely to guarantee "toleration," but to assure "a complete separation between Church and State, and a perfect equality without distinction between all religious sects."

Terry went on to argue that even if viewed as a "civil regulation" the statute was invalid under article I, section 1, because "without necessity, it infringes upon the liberty of the citizen, by restraining his right to acquire property." The argument is straight out of John Locke, and leads in the direction of Lochner: "Men have a natural right to do anything which their inclinations may suggest, if it be not evil in itself, and in no way impairs the rights of others." The Legislature may restrain individual conduct so as to protect others "from every species of danger to person, health, and property," but this statute could not be justified on those grounds:

> Now, when we come to inquire what reason can be given for the claim of power to enact a Sunday law, we are told, looking at it in its purely civil aspect, that it is absolutely necessary for the benefit of his [sic] health and the restoration of his [sic] powers, and in aid of this great social necessity, the Legislature may, for the general convenience, set apart a particular day of rest, and require its observance by all.
>
> This argument is founded on the assumption that mankind are in the habit of working too much, and thereby entailing evil upon society, and that without compulsion they will not seek the necessary repose which their exhausted natures demand. This is to us a new theory, and is contradicted by the history of the past and the observations of the present. We have heard, in all ages, of declamations and reproaches against the vice of indolence, but we have yet to learn that there has ever been any general complaint of an intemperate, vicious, unhealthy, or morbid industry.
>
> As well might the Legislature fix the days and hours of work, and enforce their observance by an unbending rule which shall be visited alike upon the weak and strong. Whenever such attempts are made, the law-making power leaves its legitimate sphere, and makes an incursion in the realms of physiology, and its enactments, like the sumptuary laws of the ancients, which prescribe the mode and texture of people's clothing, or similar laws which might prescribe and limit our food and drink, must be regarded as an invasion, without reason or necessity, of the natural rights of the citizen, which are guaranteed by the fundamental law.

The inconsistency between Terry's defense of judicial activism based on natural justice principles and judicial activism in Newman and his earlier rejection of those principles in Billings was of course obvious to all participants. Indeed, the state attorney general, in oral argument, quoted extensively from Terry's opinion in Billings, to which Terry responded, "That was not the opinion of the Court," and in his Newman opinion he defended the switch by bowing humbly to precedent, stating, "The doctrine announced in Billings, having received the sanction of the majority of the Court, has become the rule of decision, and it is the duty of the Court to see it is uniformly enforced, and that its application is not confined to a particular class of cases."

Stephen J. Field

Justice Field, in dissent, complained in now familiar terms that the opinions of his colleagues "appear to me to assert a power in the judiciary never contemplated by the Constitution." As to section 4, Field insisted it was improper to delve into the motives of the Legislature. Since the law on its face did not allude to the subject of religious profession or worship, it was appropriate to consider it as establishing a rule of civil conduct "founded in experience and sustained by science," and in any event immune from judicial interference.

It was "no answer," Justice Field insisted, to say that people do not need protection against over-work, and he reasoned:

> The relations of superior and subordinate, master and servant, principal and clerk, always have and always will exist. Labor is in a great degree dependent upon capital, and unless the exercise of the power which capital affords is restrained, those who are obliged to labor will not possess the freedom for rest which they would otherwise exercise. . . . It is idle to talk of a man's freedom to rest when his wife and children are looking to his daily labor for their daily support.

The authority of *Ex Parte Newman* was of brief duration. Three years later, in 1861, the Legislature again enacted a Sunday closing law, virtually identical to the one declared unconstitutional in *Newman*. By that time the composition of the court had changed; Justices Burnett and Terry had left, replaced by Justices Baldwin and Cope, and Field was now chief justice. Perhaps the Legislature anticipated that a differently composed supreme court would come to a different conclusion, and if so they were right. With only an allusion to Newman, and without explicitly overruling it, the court upheld the law.

Justice Baldwin's opinion, joined by both other justices, dismissed article I, section 1 in language that might have been used by Justice Holmes in his Lochner dissent, or by the United States Supreme Court in the late 1930s. Observing that the right of "acquiring property" does not deprive the Legislature of the "power of prescribing the mode of acquisition or of regulating the conduct and relations of the members of the society in respect to property rights," the opinion declared that the Legislature may "repress whatever is hurtful to the general good," and that the Legislature "must generally be the exclusive judge of what is or is not hurtful including 'moral' as well as 'physical' harms." The Legislature might have believed that the law provides "indirectly protection against oppression to employees, women, apprentices and servants," and the court held:

> These are considerations for the lawgiver and do not come within our province. We merely allude to them to show that the Legislature may consider and give effect to them; for it is impossible for us to see why that department may not protect and regulate labor and the relations of the different members of society so that one class may not injure a dependent class—the master the apprentice—the husband the wife—the parent the child—or why, if it be the interest of the whole society that no labor not necessary should be done on a given day, it may not prohibit it on that day.

As to article I, section 4, the *Andrews* court observed that the statute "requires no man to profess or support any school or system of religious faith, or even to have any religion at all; it does not require him to contribute money to any sect, or to attend any church or meeting," and "does not discriminate in favor of any sect, system, or school in the matter of their religion." The title of the statute ("For the Observance of the Sabbath") does not establish a religious motive on the part of the Legislature, and so long as the law is aimed at secular interests, that it may also "promote piety" is no objection. The opinion refers the reader to Justice Field's dissent in Newman for further enlightenment.

Early Approaches to the Requirement for Uniformity

The 1849 Constitution contained a requirement, in article I, section 11, that "all laws of a general nature shall have a uniform operation," and a requirement in article XI, section 13 that "taxation shall be equal and uniform throughout the State." From the outset, the

California Supreme Court read both these provisions with considerable deference to legislative judgment.

Article XI, section 13 came before the court in *People v. Naglee,* involving the validity under both federal and state constitutions of a statute requiring "foreigners" to procure a license for the privilege of mining. The court upheld the statute against all challenges, finding article XI, section 13 inapplicable on the ground that it applied only to a "direct tax on property."

Several years later, in *People v. Coleman,* the court reached the same conclusion, rejecting an article XI, section 13 challenge to the 1853 Revenue Act, which imposed a tax of 60 cents on every 100 dollars worth of goods brought into the state from any other state or foreign country, and sold in California. Instead of simply relying upon Naglee for that proposition, however, the court embarked upon an inquiry into the legislative history of the constitutional language and upon its pre-1849 interpretation by the courts of New York, from which the language was derived. The court said:

> It is a safe rule of construction that, when framing the organic law of this State, the Convention thought proper to borrow provisions from the Constitutions of other States, which provisions had already received a judicial construction, [and] they adopted the provisions of such construction and acquiesced in their construction.

In subsequent cases, the court rendered article I, section 11 virtually meaningless by insisting that it applied only to "general" laws and not to "special" laws. This rather reductionist reasoning led the court in *Smith v. Judge of the Twelfth District* to uphold an act of the Legislature which changed the venue for the trial of one Homer Smith for the murder of Samuel T. Newell from San Francisco, where the murder occurred, to Auburn where, according to the legislative findings, both the accused and the deceased and most of the relevant witnesses resided. The trial court in San Francisco declined to comply with the Legislature's directive, considering it a violation of both the requirement for uniformity of legislation and the prerogatives of the judiciary.

Joseph G. Baldwin

The supreme court, in an opinion by Justice Baldwin, rejected both arguments; the first on the ground that the law was "special" and therefore not subject to the requirements of article I, section 11, and the second on the (rather disingenuous) reasoning that while the Legislature could not dictate to a court how to decide a particular case, it could, and did, enact a law which the court was bound to follow. Justice Field concurred only in the judgment.

Smith, and subsequent decisions following its distinction between general and special laws led to a provision in the Constitution of 1879 limiting "special legislation."[6]

Meanwhile the court had occasion to consider an 1861 statute which amended the statute upheld in Naglee to provide that "all foreigners not eligible to become citizens of the United States [read "Chinese"] residing in any mining district in this State, shall be considered miners under the provisions of this Act." In other words, Chinese living in a mining district were to pay the tax whether miners or not. Ah Pong was unquestionably not a miner but a washerman; but, under the terms of the statute the tax was imposed, and Ah Pong, being unable to pay, was conscripted to work on the public roads a sufficient number of days to exhaust the sum due. When he refused, and was sent to jail, he filed a petition for writ of habeas corpus with the supreme court.

Though 1861 was the year the court decided Andrews and Smith, both containing broad declarations of deference to legislative judgment, the court in Ah Pong's case granted the writ, apparently holding the statute unconstitutional, though on what ground is not clear. In a cryptic one-sentence opinion, Justice Baldwin, for a unanimous court (which included Justices Field and Cope) declared: "If the Act is to be construed as imposing this tax, it cannot be supported, any more than could a law be sustained which imposed upon every man residing in a given section of the State a license as a merchant, whatever his occupation." From a modern perspective the case looks like an early application of substantive due process, or perhaps the conclusive presumption branch of procedural due process, but Justice Baldwin found no need to refer to any constitutional provision in support of the court's holding. Perhaps it was Stephen Field's bid for a seat on the United States Supreme Court, or perhaps it presaged a broader scope for the equal protection principle which the court had previously rejected.

Conclusion

Most of what the California Supreme Court had to say during the pre-Civil War period about rights under the state Constitution is no longer of substantive interest. Slavery ceased to be an issue after the war; battles over the power of the Legislature to define property rights have (for the most part) moved beyond debates over natural rights; the kinds

of constitutional questions raised by Sunday closing laws have become subject to more sophisticated (if not more helpful) analysis; and the arguments over the meaning of the "uniformity" requirement in the 1849 Constitution have been rendered largely moot by subsequent constitutional changes.

The contemporary significance of the early opinions, apart from their colorful eccentricities, lies in their power to remind us of the meaning of state constitutional independence during a period in which the federal Bill of Rights was still awaiting judicial development. As the years went by, the situation changed. The adoption of the 13th, 14th, and 15th Amendments after the Civil War, the U.S. Supreme Court's expansive interpretation of the 14th Amendment's Due Process Clause in Lochner, and the court's subsequent utilization of the Due Process Clause as a vehicle for applying against states the protections which citizens have under most of the Bill of Rights—all of this dramatically altered the relationship between states and the federal government in the arena of constitutional rights. None of these changes deprived the states of the power of their own constitutions to protect rights independently of the federal Constitution; they merely established a floor of federal protection. Nonetheless, as the high court began to ascribe meaning to federally protected rights, state courts, including the California Supreme Court, began to rely increasingly on federal constitutional analysis, and to relegate state constitutional rights to a secondary, almost forgotten, position.

The 1970s brought a revival of interest in state constitutions, marked in California by the 1974 declaration, in article I, section 24, of the independence of state constitutional rights; and in recent years the California Supreme Court has come to take state constitutional claims, and its obligation to examine them independently, more seriously. In performing that obligation, however, the court has at times displayed what I would characterize as inappropriate modesty, both by relying upon the federal Constitution without considering the state Constitution, and by deferring unnecessarily to federal constitutional interpretation as a starting point for interpreting like language in the state Constitution. The modesty is inappropriate, I would argue, both as a matter of theory and as a matter of practicality, but those arguments must await a further article, focusing upon the current court and its state constitutional jurisprudence. Meanwhile, the early history of the California court and its treatment of state constitutional claims provide useful insight into the historical meaning of state constitutional independence.

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This is a condensed version of an article that first appeared in 31 Hastings Constitutional Law Quarterly *141 (2004), from which it is reprinted with permission, and where the full text of the 82 endnotes may be found. A few of the notes most pertinent to independent state constitutional rights appear below.*

Endnotes

1. Cal. Const. art. I, § 24.

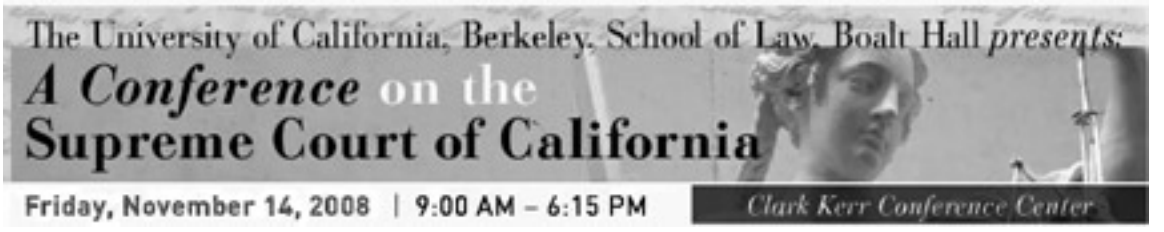
2. In *Twining v. New Jersey,* 211 U.S. 78, 99 (1908) the high court acknowledged the "possibility that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law," but it was not until *Palko v. Connecticut,* 302 U.S. 319 (1937) that the court set forth a theory of selective incorporation.

3. For the background of the 1849 Constitution, see Grodin, Massey and Cunningham, *The California Constitution, A Reference Guide* 3-9 (1993); Christian Fritz, "More Than Shreds and Patches: California's First Bill of Rights," 13 *Hastings Const. L.Q.* 17 (1989).

4. *Billings,* 7 Cal. at 19. In this, Justice Terry happened to be wrong. See Joseph P. Grodin, "Rediscovering the State Constitutional Right to Happiness and Safety," 25 *Hastings Const. L.Q.* 1 (1997).

5. Cal. Const. art. I, § 1, 4 (amended 1879). The 1879 Constitution expanded the separation of church and state in California by adding broad language (now contained in art. XVI, § 5), prohibiting public aid to religion or religious institutions and banning state aid to sectarian schools (now art. IX, § 8). Art. I, § 4 was itself strengthened by the 1879 Constitution to substitute "guaranteed" for the word "allowed." The present language of § 4, which prohibits any law "respecting an establishment of religion," was added in 1974.

6. Art. IV, § 25 of the 1879 Constitution provided that the Legislature shall not pass "local or special laws" in thirty-two enumerated areas, and "in all other cases where a general law can be made applicable." California courts came to rely upon that provision, in conjunction with art. I, § 11, as establishing an equal protection principle similar to that developed under the 14th Amendment, e.g. *Britton v. Bd. of Comm'rs,* 129 Cal. 337 (1900).



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The Supreme Court of California is recognized as a leading state high court, both in innovation and national influence. The conference will provide a unique forum for judges, government officials, scholars, and practitioners to discuss the work of the court and to learn more about legal issues affecting the judicial system in California.

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Dean Christopher Edley, Jr. (UC Berkeley School of Law), Jeffrey Bleich (former president, State Bar of California), Holly J. Fujie (president, State Bar of California)
Keynote Address: Pete Wilson, former governor of California

Plenary Session 1: Review of the Supreme Court of California's 2007-08 Term

Moderator: Katherine M. Werdegar, Associate Justice, Supreme Court of California
Panelists: Dean Kenneth W. Starr (Pepperdine University School of Law), Victoria J. De Goff, Esq., Prof. Gerald F. Uelmen (Santa Clara University School of Law)

Plenary Session 2: The Death Penalty and the Appellate Process

Moderator: Carol A. Corrigan, Associate Justice, Supreme Court of California
Panelists: John K. Van de Kamp, Esq., Dane R. Gillette, Esq., Michael Laurence, Esq.

Lunchtime Panel: Judicial Elections and Impartiality

Moderator: Jesse H. Choper, professor and former dean, UC Berkeley School of Law
Panelists: Hon. Thomas R. Phillips (former Chief Justice of Texas), Chief Justice Christine M. Durham (Utah), Chief Justice Thomas J. Moyer (Ohio)

Plenary Session 3: Arbitration and Private Judging

Moderator: Ming W. Chin, Associate Justice, Supreme Court of California
Panelists: Justice Dennis Aldrich, Court of Appeal; Prof. Deborah Hensler (Stanford Law School), Michael Rubin, Esq., Richard Chernick, Esq.

Plenary Session 4: Access to Justice in Family Court

Moderator: Marvin R. Baxter, Associate Justice, Supreme Court of California
Commentator: Prof. Richard R. Banks, Stanford Law School
Panelists: Justice Laurie D. Zelon, Court of Appeal; Bonnie R. Hough, Esq., M. Sue Talia, Esq.

Reception and Dinner

Special After-Dinner Address: Ronald M. George, Chief Justice of California

For information and registration, see http://www.law.berkeley.edu/sccjc_conference or contact Dana Gandhi at dgandhi@law.berkeley.edu or (510) 643-6732.
Fee including all meals: $275 ($175 for academic, government and non-profit)

History and the Law: The Forensic Historian in Court

BY DOUGLAS R. LITTLEFIELD

Douglas R. Littlefield

The practice of history in the legal arena is guided by rules and assumptions different from those characteristic of history in an academic environment. The following observations—drawn from personal background as an academic historian who has taught California history, environmental history, and the history of the American West, as well as from courtroom experience as a historian involved in litigation support—attempt to illustrate how history is discerned by many judges and lawyers, and how that perception shapes historical research and writing in a legal context.

The judicial process and its governing canons regarding evidence and testimony tend to be precise in order to protect the rights of opposing parties in litigation—at least more precise than the rules applicable to historical research and writing in academia. It is this exactness that shapes the utility of history to the legal system and determines the manner in which historical research must be done when undertaken for litigation support. It is also the relative precision of the law that mandates that historical research and writing for the courtroom must be more rigorous than historical research done for traditional scholarly purposes. An attention to detail in the extreme and a tendency toward redundancy in historical research undertaken for the judicial process, in turn, make that research appear more "objective" than history done for academia—a view that squares with one of the legal system's fundamental premises: that objective sets of facts underlie any courtroom judgment.

Thoroughness and the perception of objectivity have important implications for the utility of secondary sources in historical research done for litigation support. Judges and lawyers—indeed, many non-historians—generally think of history as an undisputed chain of events that happened sometime in the past, although they readily will concede that some elements of antiquity may not be known due to gaps in the documentary record. Nevertheless, the prevailing lay view is that history is factual, linear, and not interpretive. Such an attitude renders secondary sources less useful in the judicial process, since most scholarly historical studies offer interpretation in varying degrees. Interpretation as it is typically found in many published historical works, either as synthesis or to fill in blanks in the chronological record, appears little better than guessing or waffling to judges, lawyers, and many other non-academics. Therefore, because interpretation as practiced by scholarly historians can be seen as obfuscation in a legal setting, secondary sources have limited value in a system designed to determine fault, assess guilt, resolve questions of equity, or provide accurate meanings of contracts.

As a practical matter to a historian working in the legal arena, this means that secondary sources are used only as a last resort in testimony or as exhibits presented in court. Yet secondary sources are not ignored in research for litigation. Like research for academia, work on a project for courtroom use begins with what has been published, but only to establish the state of the literature and to critique its validity. Relying on secondary sources for some factual matter—while common practice for academic historians—is fraught with perils from the legal point of view: The author of a particular scholarly study may have missed contradicting documentary evidence, or, worse still, the broader interpretation of the events under study may be adverse to, or may modify, other historians' views. Both of these problems can thoroughly undermine an expert-witness historian's testimony in court if asked on cross-examination to explain the missing facts or to take a side in the scholarly debate.

This is not to say that consulting historians do not interpret the past; rather, the interpretation of a historian who writes for litigation emerges directly from the primary sources upon which the historian relies. Unlike the legal system's bias against secondary materials, the nature of judicial proceedings leans strongly in favor of an over-reliance on primary sources—at least from the perspective of an academic historian. This prejudice creates a piece-by-piece microscopic approach to history that grows gradually from the ground up instead of a historical account that is portrayed in broad, bold strokes. The ground-up approach allows the documents to speak for themselves by permitting the historical actors to "testify," and with enough historical figures explaining their recollections of an event, the past unfolds along a line at which those views coin-

cide. It is in this manner that the consulting historian's own interpretation of the past materializes—an interpretation that conforms with the lay view that history is objective.

Legal rules reinforce the need for letting a large number of primary source documents tell the story. While a historian in the courtroom may have been called there as an expert in the history of a particular subject, what the historian can say and which documents can be discussed are determined by the lawyers and the judicial process. To be sure, by the time an expert-witness historian takes the stand to testify, he or she has already explained the complete history of the topic under study as exposed in primary sources—warts and all—to the attorney on his or her side. Yet, since an attorney is a participant in an adversarial system, he or she has no obligation to reveal documents that may be potentially damaging to his or her client unless required to do so under the rules of discovery. The historian as an expert witness, on the other hand, has a fundamental responsibility to be as truthful and objective as possible when questioned in court—indeed, the give and take of direct testimony and cross-examination fosters candid and impartial answers and ensures an extremely unpleasant experience for any witness who even seems to be biased. Unlike an expert witness, however, an attorney is an advocate, and it is his or her responsibility to ask all witnesses—including the historian—questions that will paint his or her client's picture as favorably as possible. For this reason, if several documents establish the same important fact in the historical record, the historian's attorney will choose the one least harmful in other areas because once admitted as evidence, everything in that exhibit is fair game for use by opposing counsel. Replication of key facts in the historical record, therefore, is essential to the work of a consulting historian to provide one's own attorney with the largest number of choices to develop a legal strategy, while still creating an accurate rendition of the past's occurrences.

The opposing lawyer has the duty to locate documents detrimental to the historian's side or to elicit information about such records by questioning the historian on cross-examination. But even without knowing which unrevealed records may be pernicious, opposing counsel must also try to block admission of documents that may be offered as exhibits during the historian's direct testimony, particularly when it becomes apparent to that lawyer how damning those records may be to his or her case. It is this reality of the legal process that reinforces the need for an overabundance of primary sources to prove any given historical point. Since opposing counsel may use different legal rules to obstruct the admissibility of key documents in court, large holes may be constructed in the overall historical record without a certain amount of redundancy in the research done by the historian. If opposing counsel is more competent or canny than the historian's attorney, and if the judge is cooperative, the lawyer on the opposite side eventually may be successful in excluding so many relevant documents that historical testimony may become almost meaningless. A few illustrations will demonstrate how a historian's testimony can be circumscribed on the stand without the insurance of a surfeit of records leading to the same historical conclusion.

A common technique to eliminate an offending document is to argue that it is, in legalese, "hearsay." In essence, this means that since opposing counsel cannot cross-examine the person or persons who wrote the document, it should not be admitted as evidence. For example, in one lawsuit in which twelve days of historical testimony was taken concerning a near-century-long dispute between two western states over the allocation of water from a river they share, the opposing lawyer asked the special master (judge) to preclude the use of any historical documents on the grounds they were *all* hearsay. With over two hundred historical exhibits planned, the attorneys who had retained the expert-witness historian countered that judicial rules

ELEPHANT BUTTE RESERVOIR —
the site at which New Mexico's deliveries of water to Texas under the Rio Grande Compact of 1938 are measured. The Compact is discussed in Littlefield's forthcoming book, Conflict on the Rio Grande: Water and the Law, 1879-1939.
Photo by James Hogan, courtesy of Southwest Hydrology.

allowing the use of "antiquities" overcame the hearsay objection. The presiding special master supported that argument, and opposing counsel was forced to use other tactics to try to bar each document individually.

Another means a lawyer may use to exclude a damaging historical document is to maintain that it is not the "best evidence." Such a legal argument could be made, for instance, if an expert-witness historian relied upon an unsigned carbon copy of an old letter to establish an important historical point—something commonly done by academic historians. The legal rationale for resisting the use of the carbon copy as an exhibit is that the original letter itself might be better proof since it will be signed and might have additional annotations not apparent on the carbon. The "best evidence" argument can be overcome, however, by having the historian testify that relying on carbon copies is "accepted practice" among scholarly historians because accepted practice is the standard used in court to establish the validity of methods used by any expert witness's profession.

"Relevance" can also be used to obstruct certain documents. A good example of how this tactic can be utilized can be seen in the case mentioned above involving the interstate river dispute. In that particular instance, the interpretation of a provision of an interstate compact governing the river's allocation was central to the conflict. The state authorities who originally had negotiated the compact in the 1940s had written an "official" record of their deliberations, which they jointly had approved. Naturally, they also had created other records revealing their points of view, but these were not part of the "official" record. The other documents included a verbatim transcript of the proceedings (which had been used to create the "official" record), memoranda, notes, reports, and other working papers. Opposing counsel contended that since the compact's negotiators had drafted an "official" record, all other historical evidence should be dismissed as irrelevant. While the legal basis for this argument is that a contract (such as an interstate compact) should be construed foremost from its own wording and any related "official" records, this logic appears absurd to an academic historian. To overcome this objection, the historian's attorney had to establish that the historian's use of the "unofficial" documents was consistent with standard practice by scholarly historians.

Yet another way to eliminate a bothersome historical exhibit is to assert that it is not a "certified" copy—meaning that it is not verified to be an exact replica (by an authoritative stamp or other notation) by the archive or agency where the original record is held. Without certification, a lawyer can argue that the document may have been altered or that it may be incomplete. The need to certify depends upon the degree to which both sides' attorneys are willing to accept ordinary copies and the judge's acquiescence in such mutual accommodation. From an academic point of view, certification of copies is unimportant since scholarly historians generally accept the integrity of documents used by their colleagues. Yet in the judicial arena, when certification is required, it can have major consequences for how many of the historical exhibits will be accepted by the court. This will have an impact on the effectiveness of the historical testimony. Nevertheless, an objection based on a lack of certification can be defeated by having the expert-witness historian testify as to the accuracy of the exhibit—assuming the judge agrees.

These illustrations of how opposing counsel may object to historical exhibits and testimony and how those protests can be overcome demonstrate why having a historian as an expert witness can be a particularly powerful weapon in litigation—a reality that growing numbers of lawyers are now beginning to understand. Simply put, the very fact that historians deal with the past and many of the past's actors are dead can persuade a court to allow a historian greater leeway in some areas of testimony and in the use of historical exhibits than another expert witness whose specialty is in a different discipline. This is because

ROOSEVELT DAM,
located on the Salt River, currently supplies much of metropolitan Phoenix, Arizona, with both water and hydroelectric power, and is often involved in litigation and negotiations with competing water interests.

Inset photo, bottom: Theodore Roosevelt speaking in 1911 at the dedication of Roosevelt Dam, the first major project to be completed under the U.S. Reclamation Act of 1902.

historians are trained specialists in their field of knowledge—mastery that gives them the ability to reconstruct and analyze the past so that others without similar background can understand and learn from it.

The expertise of a historian can be especially useful to an attorney when the issue at trial involves matters of intent. In litigation, determining the meaning behind certain provisions of legislation or an agreement (such as a contract or interstate compact) is generally considered the prerogative of the judge. The two opposing sides present facts through adversarial confrontation defined by legal rules; the truth emerges from this showdown; and the judge ascertains intent. Historians, however, routinely examine motivation in analyzing the historical record. So to the degree that the judge will allow, an expert-witness historian can offer his or her opinion on the intentions of contracting parties because *this is part of what historians are trained to do*. Most other types of expert witnesses might not be able to express an opinion on intent, since relatively few professions examine human motivation as part of their scholarly activity. It is because historians are taught to study the past that allows them to voice opinions on the motivations of historical actors and to move more freely through antiquity's sources—at least more so than non-historian expert-witnesses. Historians, therefore, can bring to the court information that might not be admissible under other circumstances, and this may have a significant impact on the outcome of the litigation.

DELTA-MENDOTA CANAL, *completed in 1951, transfers water from the Sacramento River to the San Joaquin Valley as part of the U.S. Bureau of Reclamation Central Valley Project in California, and has been the subject of recent court rulings involving endangered species.*

In short, academic historians who appear in court as consultants are not hired guns who defend the party line of those who are paying them; the legal process itself militates against such debasement. The legal system does have an impact on how historical research and writing is conducted for use in court, but if anything, it tends to make such historical work more detailed and thorough than it might be under other circumstances. Scholarly historians who work in litigation support, therefore, provide a valuable service to the judicial system by acting as what they are: experts in arbitrating the past.

A longer version of this article was originally written for non-lawyer historians. Copyright by the Western History Association. Reprinted by permission. The article first appeared as a Field Note, "The Forensic Historian: Clio in Court," Western Historical Quarterly *25 (Winter 1994): 507-512.*

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Ophelia Basgal was the top honoree in the Corporate Category at the Mexican American Community Services Agency's 2008 Red Carpet Gala Awards, which honored the most influential Latino men and women of the Silicon Valley. MACSA has been a leader for 44 years in providing services to the Latino community, emphasizing its core values of mutual respect and cultural appreciation.

Basgal is Pacific Gas and Electric Company's Vice President of Civic Partnership and Community Initiatives. She is directly responsible for managing the company's $18.7 million charitable contributions program, which includes the award-winning Solar Schools Education Program. She also oversees the employee volunteerism program for PG&E's 20,000 employees as well as community engagement programs and partnerships with community-based organizations. Previously, she served for 27 years as executive director of the Alameda County Housing Authority. She is currently vice president of the CSCHS.

Douglas R. Littlefield, Ph.D., has received the Excellence in Consulting Award for 2008 from the National Council on Public History, an organization representing professional historians who act as consultants, museum professionals, government historians, cultural resource managers, film and media producers, historical interpreters, policy advisors, and other professional historians.

Littlefield has taught and published in the fields of California and Western legal history, and provides historical consulting and expert witness services in relation to environmental matters, particularly in relation to land use and water rights issues—including testimony and depositions in two U.S. Supreme Court original jurisdiction lawsuits. Littlefield is a member of the CSCHS Board of Directors. An article by Littlefield appears on page 10.

Molly Selvin, Ph.D., has been appointed interim dean of the Pardee RAND Graduate School, a division of the RAND Corporation. She has been a faculty member of the school for nearly 25 years, teaching courses on the U.S. Constitution, the use of history in policy analysis and the role of the media in public policy. The Pardee RAND Graduate School is one of the nation's original graduate programs in public policy, awarding a Ph.D. in policy analysis.

Selvin was on the staff of the Los Angeles Times from 1990 until 2008, both as an editorial writer and as a business reporter. Previously, she spent 10 years at RAND, participating in research on asbestos litigation, jury behavior and civil case management. She is a member of the CSCHS Board of Directors.

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CALIFORNIA JUDICIAL CENTER AUDITORIUM, SAN FRANCISCO

INTRODUCTION: Chief Justice Ronald M. George

PANELISTS: Professor Joseph R. Grodin, Hastings College of the Law; Professor Charles J. McClain Jr., University of California, Berkeley; Professor Shirley Ann Moore, Sacramento State University

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