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John W. Dwinelle

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Dwinelle Hall is the largest classroom building on the University of California, Berkeley, campus, known best, perhaps, for its rather bewildering floor plan. Among those who daily wander its corridors, doubtless only a few will know that the building is named after John W. Dwinelle, a prominent nineteenth-century California lawyer, and one of the founders of the University of California. Very few, one would guess, will be aware that this same John Dwinelle, in 1874, brought a lawsuit on behalf of African American plaintiffs challenging the maintenance of separate schools for black and white children in San Francisco, one of the first cases to ground an attack on segregation on the then recently-adopted Fourteenth Amendment to the U.S. Constitution. (A dozen years earlier, Dwinelle and his law partner had represented Chinese litigants in a major attack on discriminatory tax legislation passed by California.)

Dwinelle’s sponsorship of the 1868 legislation that established the University of California and his decisive actions on the institution’s behalf at its founding and in its early years when he sat on its governing board would be enough to earn him a respectable place in any chronicle of California history. But, as the above examples illustrate, Dwinelle’s impact on the state’s affairs went well beyond the field of higher edu-

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1I wish to thank Christian Fritz for very helpful comments on an earlier draft of this text. I wish also to acknowledge, with gratitude, the archival assistance of Katherine Collett, archivist, Hamilton College; Patricia Keats, director of the library and archives, Society of California Pioneers, San Francisco; and the reference staff at the Bancroft Library, University of California, Berkeley. Finally, I thank Kony Kim for her valuable research assistance.

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cation. Dwinelle practiced law for over three decades, arguing cases of considerable importance in the state and federal courts, several of very large financial consequence to the city of San Francisco. He was also a bar leader and spokesman, who played a role in shaping California's lawyering landscape. He was, finally, a very visible figure in the state's public square, weighing in often in print on large issues of the day, such as Reconstruction, the relations between capital and labor, and a miscellany of other subjects, including history and literature. (Dwinelle fancied himself something of a man of letters.) Somewhat surprisingly, he has attracted very little attention from historians.  

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**EARLY LIFE IN NEW YORK**

*Education and Law Practice*

John W. Dwinelle was born in Cazenovia, Madison County, New York, a small town in the central part of the state, on September 9, 1816, the son of Justin Dwinelle, a local lawyer who would later serve as a Republican congressman and then as presiding judge of the county's Court of Common Pleas. His father was of Huguenot refugee stock. His mother, Louise Whipple, was a descendant of William Whipple, one of the signers of the Declaration of Independence. Little is known of Dwinelle's very early life, other than that for a time he attended Cazenovia Seminary, a Methodist Episcopal school in the town, registered under his given name, Jeremiah, a name he seems to have used throughout his youth.

In 1830, at age fourteen, he enrolled in Hamilton College, some thirty miles away, graduating in 1834. Hamilton's curriculum was heavy on classical languages, but with a decent sprinkling of courses in math, science, philosophy, and economics. Dwinelle's years at the college left a lasting imprint on him, it seems. For one thing, it gave him a lifelong interest in Latin and Greek and in languages generally (he came to know several). It may also have given him a strong belief in the value of a liberal education, a belief that would manifest itself in efforts to promote higher education as a Californian. In 1871,  

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2 The only publication I am aware of is Peter T. Conmy, *John W. Dwinelle: Mayor of Oakland and Father of the University of California* (Oakland, 1971).
Dwinelle's years at Hamilton College, pictured in this 1847 engraving, made a lasting impression on him. (Courtesy of Hamilton College Library Archives)

the school would confer an honorary doctorate on its by-then-distinguished alumnus.³

After graduation, Dwinelle studied law in his father's office and in 1837 was admitted to the New York Bar, under the name of Jeremiah. Two years later he moved to Rochester, New York, to establish his own law practice. Around this time or shortly afterward he changed his name to John, the change requiring a new admission to the New York Bar. He appears to have prospered in Rochester, achieving sufficient reputation to be named city attorney in 1844, a post he would hold until 1849. It is probable that he would have lived out his professional career in that city had news of events on the other side of the continent not caused him to make a radical change in life plan.⁴

The Lure of Gold

Reports of James Marshall's discovery of gold on California's American River in January 1848 began to receive coverage

³For Dwinelle's freshman listing at Hamilton College, see Hamilton College Catalog for 1830-31, http://contentdm6.hamilton.edu/edm/ref/collection/arc-pub/id/101. Decades after graduation, Dwinelle wrote to a former Hamilton teacher, asking for clarification of a point of Greek grammar. In the letter he informed the teacher that it was his habit to review his Greek and Latin textbooks each year. Dwinelle to Dr. A.C. Kendrick, June 10, 1880, John W. Dwinelle Papers, folder 4, Society of California Pioneers, Alice Phelan Sullivan Library, San Francisco.

⁴The two separate bar admissions, in 1837 and 1841, are documented in John W. Dwinelle Papers, folder 6, Society of California Pioneers.
on the East Coast that summer, although the coverage was tinged with some skepticism. President James Polk’s message to Congress in December, stating that federal officers had independently confirmed the accuracy of the reports and had estimated that the supply of gold to be found in the area was extremely large, ended all doubt in the matter. As the historian J.S. Holliday notes, “skepticism gave way to unrestrained enthusiasm.” Nowhere in the eastern states was this truer than in New York. A month later the New York Herald was reporting, “[T]he spirit of emigration which is carrying off thousands to California . . . increases and expands every day.” It went on, “Men of property and means are advertising their possessions for sale, in order to furnish them with means to reach the golden land. . . . [P]oets, philosophers and lawyers all are feeling the impulse.”

Among the lawyers was John Dwinelle. Exactly what motivated him to abandon his law practice and his presumably comfortable life and leave New York for California in mid-August 1849 we will never know, although evidence strongly suggests he had not planned to stay there permanently. In an 1866 address he gave to the Society of California Pioneers, a San Francisco historical society, he spoke of those, like himself, who crossed the continent in 1849 in pursuit of gold as men who planned “to gather our share of the mineral treasures of the land, and then return to the homes of our youth, there to spend the remainder of our lives.”

Dwinelle chose to take the so-called Panama route to California, rather than the longer one around Cape Horn. This meant traveling by ship to the east coast of Panama, crossing the swamps and jungles of the Isthmus of Panama to Panama City on the Pacific side and taking a steamer from there to San Francisco. He kept a diary the whole time, entries running from August 16, the day he left New York harbor, to October 31, three weeks after he arrived in California. The trip was a miserable affair. He was bothered by dysentery during both legs of the sea voyage. While in Panama he caught something he calls “Isthmus fever,” most probably a type of malaria endemic to Panama. He also encountered financial problems. Travel across the Isthmus cost him much more than he had bargained for, and he found his


6 John W. Dwinelle, “Address on the Acquisition of California by the United States delivered before the Society of California Pioneers, September 10, 1866” (San Francisco, 1866), 31.
funds so depleted that he had to borrow money to book passage to San Francisco.\(^7\)

The preponderance of Dwinelle’s diary entries concern his own physical condition and state of mind during the trip, but he was at times moved to record observations about others. This was especially true of the time spent in Panama. One thing that struck him forcefully was the confident and independent demeanor of the free blacks with whom he came into contact there. “I find,” he wrote, “that one does not retain his prejudices against the negro when he comes into contact with him such as a state of political freedom and equality has made him, even in a very imperfect condition of civilization.” In them, he went on, he found entirely wanting what he called the “furtive, thievish expression which I have often noticed among negroes, and especially among slaves in the United States.”\(^8\)

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**FIRST YEARS IN THE GOLDEN STATE**

*Choosing the Law over the Mines*

Dwinelle was still suffering from dysentery and other ailments and was nearly broke when he arrived in San Francisco harbor on October 10. He was immediately enthralled by the city, a busy, raucous place where it was clear that money was being made and spent freely. “San Francisco is a most wonderful town,” he wrote, “sprung up, as it were, by magic.” He complained about the ubiquitous gambling he saw but was pleased to note that the “business classes” did not participate. He was put off, too, by the prevalence of disease in the city, and worried that it might not be the healthiest place for him to live. However, he soon felt completely recovered from his illnesses and concluded that he had done the place an injustice.\(^9\)

Dwinelle discovered he had acquaintances in San Francisco, who urged him to abandon the gold fields for the field of law, one of them telling him that “his diggings were here.” It did not take him long to be persuaded or to set to work. In a diary

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\(^7\)John W. Dwinelle, “Diary, New York–San Francisco, 1849,” Bancroft Library, University of California, Berkeley, 29, 41. References to dysentery are scattered throughout the diary.

\(^8\)Ibid., 31.

\(^9\)Ibid., 59, 66, 68.
entry dated October 13, he notes that he earned fifty dollars for three-quarters of an hour's legal work done in a banker's office. A "satisfactory" fee, he observes. Within a week, having in the meantime rented space in another lawyer's office, he had been retained in several important lawsuits, a couple of which he predicted would "pay well." It is not surprising that Dwinelle had no trouble finding clients. There were at the time a mere hundred lawyers in a city with a population approaching 25,000, and there were few lawyers at all outside that city. Dwinelle's older brother, Samuel, arrived in San Francisco several months later and joined him in law practice. There is no record of how long this partnership lasted. Samuel would himself go on to a distinguished legal career in California, eventually being appointed to a San Francisco trial court and holding that position for many years.

Dwinelle quickly rose to a position of some prominence in the state bar. And so we find his name appearing on a petition, dated January 17, 1850, asking the legislature to establish a municipal court for San Francisco. Two weeks later, his was the first name on a petition asking the legislature to make the continental European civil law, as opposed to the English common law, the rule of decision in major areas of California jurisprudence. This latter petition requires some comment.

In Support of the Civil Law

In his first message to the legislature, California's first governor, Peter Burnett, asked the body to adopt the Louisiana Civil Code and the Louisiana Code of Practice as California's law, retaining the English common law of crimes, evidence, and commerce. He cited both theoretical and practical reasons. California had an opportunity, he said, to "adopt the most improved and enlightened code of laws to be formed in any state." Louisiana's civil code had been compiled by the most able of jurists. It reflected the "most refined, enlarged, and enlightened principles of equity and justice." Furthermore, he noted, given the state's Spanish and Mexican heritage, a large proportion of cases to be decided in the future would have to be decided according to the principles of European civil law.  


11Peter Burnett, governor of California, Message of Gov. Peter Burnett to the California Assembly, Journals, California Legislature, 1850, 599-600.
A memorial in opposition to Burnett's proposal and reflecting the views of a majority of the San Francisco bar was soon submitted to the legislature. The petition submitted by Dwinelle and sixteen other San Francisco lawyers was meant to show that this was not a unanimous view. Not narrowly focused on Louisiana's codes, it spoke generally of the superior features of the European civil law tradition. Unlike the governor, the petition went out of its way to denigrate English common law, a system it characterized as needlessly technical and complex, the product of feudalism, a system favoring the landed interest over the interests of all other sectors of society. It was also a matter of justice to the Hispanic inhabitants of California, the signers said, that the legislature retain a system of law that "for centuries had formed a part of their well understood customs."

Dwinelle's petition had no impact. It was decisively rejected by the legislature, which in early 1850 adopted the common law of England as the rule of decision in all the courts of the state. What prompted Dwinelle, a man from a common-law state, with no prior experience of the civil law, to put his name to the petition may forever remain a mystery. Was this but the choice of one who, becoming acquainted with the civil law first hand, had become convinced of its superior merits? Throughout his life Dwinelle seems to have been a man of cosmopolitan outlook. He was conversant in foreign languages and open to new ideas, including ideas from abroad, but he had been in California a mere four months. This scenario therefore seems unlikely. Might adoption of the Louisiana codes have worked to the advantage of certain clients? There is no evidence on any of these points, and one is relegated to speculation.12

First California Supreme Court Cases

As noted earlier, Dwinelle was, for a time, associated with his brother and, on a separate occasion, with an attorney named Thomas Holt (this partnership dissolved in early

1851). From the outset, Dwinelle handled appeals. He is listed as counsel of record in a case appearing in the first volume of the state appellate reports, and he appears regularly in subsequent volumes. In several of these cases he represented the city of San Francisco. He must have seemed a logical choice, given his years of prior experience as city attorney for Rochester, New York. In one case, decided in 1851, he successfully defended a judgment for the city in a suit brought by a citizen who had been injured when city employees used force to stop him from removing planks from a public wharf. The court held that no more force had been used than was necessary. The other cases, much more important, grew out of a fire that occurred on Christmas Eve, 1849, one of a series of devastating fires that would rage through the largely wooden city between that date and the summer of 1851. (The fire of May 4, 1851, destroyed one-quarter of the city.)

To halt the spread of the Christmas Eve fire, John W. Geary, then the alcalde of San Francisco, in consultation with his ayuntamiento, or city council, had ordered numerous houses to be either torn down or dynamited. Some affected property owners brought suit against the city, arguing that this amounted to a taking of their property by the city, entitling them to compensation. Others filed suit against Geary in his individual capacity. Trials in several of the cases resulted in judgments for the property owners. Although there was no California law on the subject, the consensus among lawyers was that the city could not escape liability. Thomas Holt, the city attorney, consulted with his law partner, John Dwinelle, who disagreed, expressing confidence that an appeal might be successfully brought to the Supreme Court. Invoking an ordinance that permitted him to hire outside counsel to assist him, Holt hired Dwinelle to bring the appeals. At the time of his hiring, there were almost $500,000 in judgments or potential claims against the city.

Dwinelle was well placed to make the judgment that he did. As the former city attorney of Rochester, he doubtless would have known about and seen the relevance of the series of appellate cases that had arisen out of the great fire that had raged in New York City in December 1835. There, as in San Francisco, the mayor had ordered properties blown up to halt the fire's

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13The notice of dissolution, dated April 3, 1851, appears in the Daily Alta California, April 6, 1851.
14McFadden v. Jones, 1 Cal. 453 (1851).
15Daily Alta California, April 9, 1851. See also Roger Lotchin, San Francisco, 1846–1856: From Hamlet to City (New York, 1974), 155, 174–75.
spread. The cases had been distinctly unfavorable to the property owners' claims, even in the face of a New York statute that allowed for compensation in situations of this sort.

In Dwinelle's first appeal, *Dunbar v. The Alcalde and Ayuntamiento of San Francisco*, decided in December 1850, the California Supreme Court reversed a lower court decision in favor of a property owner but without addressing the takings claim on the merits. It held, rather, that since the lawsuit had been brought against the defendants in their corporate, i.e., official, capacity, the appellee's claim could prevail only if Mexican law had conferred on the mayor and his council members authority to take the decisions that they did (since the decisions had been taken before statehood, Mexican law applied) and that no such authority could be found. Another appeal, *Surocco v. Geary*, involved a suit against Geary in his individual or private capacity.

In a long brief, replete with references to Spanish and Mexican law, to English common law, to the New York cases, and to principles of natural equity, Dwinelle argued that individuals had always been privileged to do what Geary had ordered done. Although the suit was against Geary individually, the respondents had made an argument for compensation under the eminent domain clause of the state constitution. Dwinelle argued that there was no support in the law for such a claim. The destruction of property was not a taking within the meaning of the constitution, he contended. Furthermore, if there had been a taking it had been for a private or a local use, not for a public use within the meaning of the constitution.

In an opinion largely echoing Dwinelle's brief, chief justice Hugh Murray agreed. The "highest law of necessity," rooted in the natural law, Murray wrote, absolved individuals of liability who destroyed property in order to halt the spread of fire. The common law both of England and America agreed. Cases from New York and New Jersey had definitively settled the matter, he declared. He rejected the "takings" claim as well, concurring with Dwinelle's analysis, although sensing, perhaps, that the law as applied worked some unfairness; he expressed the hope that the legislature might in the future make some provision for compensation in circumstances such as these. The *Surocco* case has been a staple in the torts literature ever since, standing for the proposition that a person acting either in his

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16 *Dunbar v. The Alcalde and Ayuntamiento of San Francisco*, 1 Cal. 355 (1850).
18 *Surocco v. Geary*, 3 Cal. 69 (1853), at 73, 74.
individual or official capacity may destroy property to prevent the spread of fire or to avert some other looming disaster, and that in the absence of statute the owner of the property is not entitled to compensation.19

In the wake of the Dunbar decision, Dwinelle submitted a bill to the city for legal services for $29,000, a tidy sum, to say the least. It provoked some negative comment in the press, but the Daily Alta California came to his defense, noting that Dwinelle had agreed to take $25,000 in scrip (worth about $10,000) in full payment and that the Dunbar decision had saved the city a much larger amount of money. It was a bargain, in the paper's view: "Only ten thousand dollars for a year's hard work and for the saving the city a half million dollars!" Dwinelle eventually settled for less than this amount, although how much exactly is unclear. Nor is it clear how much he was paid for services rendered in connection with the Surocco case.20

NEW YORK INTERLUDE

In 1853, after the triumph in Surocco, Dwinelle's reputation as a lawyer must have stood high, yet later that year he left San Francisco and moved back to Rochester. There he would remain for the next eight years, practicing law and, after 1857, serving as president of the Bank of Rochester. The bank was then in a parlous state, half of its capital having been embezzled, but Dwinelle, in his own telling, carried it through its crisis and, as he put it, "turned it over to my successor in a solvent condition."

Dwinelle did maintain ties with the Golden State while in Rochester. He traveled to San Francisco at least once, advertising in the New York Times in early 1854 that he would be in the city for a few months and was prepared to take care of any law business New Yorkers might have. In November 1859, he delivered an oration at a memorial held in New York City for California senator David Broderick, who had been killed in a duel with the state's chief justice, David Terry, two months earlier. In it he spoke warmly of his


20Daily Alta California, April 16, 1851. References to Dwinelle's bill for services in connection with the fire cases and recommendations by city officials for or against payment can be found in the Daily Alta California, April 22, May 1, and June 21, 1851, and September 16, 1852.
relations with Broderick, even while acknowledging political differences, praising him in particular for his steadfast opposition to slavery. He condemned the custom of dueling, but defended Broderick's decision to accept Terry's challenge, saying it was unavoidable.  

**RETURN TO CALIFORNIA: MAJOR LAW CASES**

In the Broderick oration, Dwinelle described himself as "one who was formerly a citizen of California," but in February 1861, he left New York and returned to San Francisco, this time, as it would turn out, to stay. He linked up there with H.P. Hepburn, an established local attorney, forming a partnership that lasted for a number of years. The firm handled a large range of mainly civil cases, a fair number of which went up on appeal, one of considerable significance in the history of immigration law.

*Lin Sing v. Washburn*

In April 1862, the California legislature passed an act captioned "An act to protect free white labor against competition with Chinese coolie labor and to discourage the immigration of the Chinese into California." The measure imposed a tax of $2.50 per month on all Chinese living in the state, exempting those who had taken out business or mining licenses and those involved in the production of sugar, rice, coffee, or tea. Employers were made liable for the payment of the tax due from their employees. The Chinese determined to test the law. To set up a challenge, a San Francisco Chinese merchant paid the tax assessed against an employee under protest and sued for a refund. A lower court ruled against him, and the case was appealed to the state supreme court, the firm of Hepburn and Dwinelle representing the merchant.

The crux of the appellant's argument in *Lin Sing v. Washburn* was simple and straightforward. California, in seeking to discourage Chinese immigration in this indirect fashion, was trenching on an exclusive federal power. The high court agreed, holding that foreign immigration was part of foreign commerce, a subject of interest to the entire country and one

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22Dwinelle, *Funeral Oration*, 12.

2320 Cal. 534 (1862).
which Congress alone could regulate. Since at the time no appeal lay to the U.S. Supreme Court from a state high court decision striking down a law on U.S. constitutional grounds, the court's ruling was final. It did not, however, prevent the state or its municipalities from passing numerous other laws aimed at discouraging Chinese immigration. The appellant's brief was filed under the firm name, Hepburn and Dwindle, so one cannot say exactly how much Dwinelle contributed to its drafting, but, given his extensive appeals experience, it is hard to believe that he would not have had a substantial hand in it. One final comment on the case: Lin Sing was a significant victory for the Chinese, the outcome in no small part due to the very capable brief submitted by Dwinelle's firm. But, as will become clear, Dwinelle would prove to be no special friend of that ethnic minority.

Pueblo Land Litigation

Dwinelle was involved in two other notable pieces of litigation during the Civil War years (the second commencing the month after conclusion of hostilities but arising out of the conflict). In the first he was retained by the city of San Francisco to represent it in an important land title case pending in the federal courts. In 1851, Congress set up an elaborate system for ascertaining the validity of title to land in California claimed by individuals by virtue of grants from the Spanish or Mexican governments. Claims were to be submitted to a board of land commissioners for approval or disapproval, its decisions subject to review in the federal courts. Cities and towns claiming land by virtue of Spanish or Mexican law were subject to the same requirements. On July 2, 1852, San Francisco submitted a claim for four square leagues of land, roughly six and three-quarters square miles, to the commissioners, basing its claim on Spanish and Mexican law, which entitled cities and towns recognized as pueblos, to four square leagues of contiguous land. The federal government opposed the city, claiming the land in question as property of the United States. San Francisco's claim affected the rights of many private landowners. During both the Mexican and American periods, local authorities had granted lots within the four square leagues to numerous private

Exactly what motivated John Dwinelle to abandon his law practice in New York and go to California in 1849 is unknown, although evidence strongly suggests he believed it would be only a temporary move. (Courtesy of the Bancroft Library, University of California, Berkeley)
individuals. The validity of these grants depended on the approval of the city's claim.

On December 31, 1854, the commissioners confirmed San Francisco's right to part of the land but rejected its claim for the balance. Both the city and the United States government filed appeals in the United States District Court in San Francisco. The litigation would linger in the federal courts, first in the district court, later in the circuit court, for many years and would go through many convoluted twists and turns before it was finally decided in San Francisco's favor in 1864.

In 1862, San Francisco hired Dwinelle as special counsel to weigh in in support of its claim to pueblo status and to the full complement of land attached to it. To call the brief he submitted compendious would be an understatement. With appendices running to more than two hundred pages, it amounted to no less than a richly detailed history of San Francisco during the Spanish and Mexican periods, "with documents of the greatest importance in the history of California land titles," as a leading historian of California land claims, W.W. Robinson, observed. The brief was not crucial to the decision Justice Stephen Field handed down in 1864, vindicating all of San Francisco's claims. The United States had already given up opposition to parts of the city's case. And Field relied as much on the reasoning in a recent California Supreme Court decision as he did on Dwinelle's arguments. But Dwinelle's "able and exhaustive brief," he declared, had eliminated any doubt that remained. In 1863, Dwinelle published the argument separately as a book, under the title The Colonial History of San Francisco. It went through several editions and is still in print today.


27 San Francisco v. United States, 21 F. Cas. 365, 368 [Circ. Ct., N.D. Calif., 1864]. The California case was Hart v. Burnett, 15 Cal. 530 (1860). The technical question there was whether certain land claimed by the city as part of its pueblo status could be levied upon in execution of a judgment against it. In deciding the issue the court was compelled to go into the origin of the city's rights in the property. This decision, of course, was not binding on the federal courts. On the maneuvering Justice Field went through to see that he, as opposed to District Court Judge Ogden Hoffman, wrote the opinion for the court, see Christian G. Fritz, Federal Justice in California: The Court of Ogden Hoffman, 1851-1891 [Lincoln, NE, 1991], 197.

The Hogg Case

In May 1864 a Confederate naval officer and his subordinates were ordered to purchase passage on a commercial steamer in the port of Panama, and once at sea to seize the vessel, arm her, and use her to prey on Union shipping in the Pacific. They proceeded to Panama, but the plot had been discovered earlier; shortly after leaving port and before the plotters could effect their design, the vessel they had boarded was intercepted by a Union warship, and they were taken prisoner. They were transported to San Francisco and, on May 24, 1865, were arraigned before a military commission and charged with violating the laws and usages of war; the offense consisted of boarding the steamer in the guise of civilian passengers, with no military insignia and with the intention of seizing her by force of arms when she reached the high seas.29

As might be imagined, barely a month after the conclusion of the Civil War, with vengeful feelings against the rebellion running high, the defendants did not have an easy time finding counsel (at least one attorney flatly refused the invitation), but three eminent lawyers proved willing to represent them: Frank Pixley, former attorney general of California, John Dwinelle and his law partner, E.L. Goold.

Proceedings got under way on May 24, with Pixley serving as trial counsel. A little over a month later the commission found the defendants guilty of all charges and sentenced them to be hanged. The sentence was subject to mandatory review by General Irvin McDowell, commanding officer of the Department of the Pacific, and Dwinelle and Goold submitted a brief on the defendants’ behalf, addressing the legal issues raised by the case. Given the evidence, they faced a steep uphill task. In their brief they argued that stratagem and deceit were permissible in the conduct of war and that what the defendants had done was an allowable kind of deceit. Only treacherous or perfidious stratagems were forbidden by the laws of war, and their plans did not rise to the level of perfidy. Furthermore, they had been captured before they could put their plan into execution and so they had committed no overt act, something necessary to constitute an offense. McDowell rejected these arguments but, citing the fact that the defendants had not succeeded in their aims, did reduce the sentence of the ringleader, T.E. Hogg, to life imprisonment, and of his subordinates to ten-year terms. (Dwinelle and Goold had analogized the defendants’ failed

29 The incident is more fully described in Aurora Hunt, The Army of the Pacific [Mechanicsburg, PA, 2004]; see the chapter “The Pacific Squadron of 1861–1866.”
effort to an attempt to commit a crime not characterized in the law, they said, with the same heinousness as a crime actually committed.\textsuperscript{30}

\section*{The University of California}

\textit{Dwinelle and the Founding of the University}

After the Civil War, Dwinelle embarked on what would turn out to be a rather brief career in elective politics. In 1866, he was elected for a one-year term as mayor of Oakland, the city where he lived, commuting to work in San Francisco by ferry every day. In November 1867 he was elected as a Republican to the state assembly and served a single term in that body. [Dwinelle had entered California politics as a Democrat but by the 1860s had become a staunch Republican.] He was a busy legislator, taking an active part in debates and introducing more than twenty bills, several of which passed into law. One would prove to be of immense moment for the future of the state.\textsuperscript{31}

The establishment of a public university is contemplated in California’s original constitution, adopted in 1849. It required the legislature to use land granted the state by the United States and others as the basis for creating a permanent fund for the eventual founding of a university.\textsuperscript{32} But it would take two decades before this commitment, if so it can be styled, was brought to fruition.

\textsuperscript{30}\textit{United States v. T.E. Hoag [sic] et al., “Argument of E.L. Goold and John W. Dwinelle for the Defendants” (San Francisco, 186?)}, Bancroft Library, University of California, Berkeley. The document is also accessible through the Hathitrust. For Gen. McDowell’s order, see \textit{Daily Alta California}, July 7, 1865. In their brief, Dwinelle and Goold acknowledged that the defendants’ alleged crimes were “revolting to patriotism,” but insisted that it was their duty as lawyers to conduct their defense as well as it could be conducted. Brief, pp. 4–5. Frank Pixley, the third lawyer on the case, was excoriated by many for the vigorousness of his advocacy. See \textit{Daily Alta California}, June 12, 1865.

\textsuperscript{31}In 1852 Dwinelle served as a delegate to the Democratic state convention. See \textit{Daily Alta California}, March 15, 1852. One legislative measure introduced by Dwinelle was a bill to repeal a law passed during the Civil War that allowed litigants in civil actions to force their opponents to take an oath of loyalty. Attorneys were required to take the same oath in order to practice in the courts. Several other repeal bills were introduced during the session. One emanating from the Senate was eventually adopted. On Dwinelle’s introduction of the bill and ensuing discussion, see \textit{Sacramento Daily Union}, Dec. 11, 1867.

\textsuperscript{32}California Constitution (1849), art. 9, sec. 4.
Dwinelle Hall, the largest classroom building on the University of California, Berkeley, campus, is named for John W. Dwinelle, one of the founders of the University of California. (Courtesy of the author)

The legislature in the 1860s did take steps in the direction of establishing an institution of higher education. In 1866, it passed legislation authorizing establishment of an agricultural, mining, and mechanical arts college. But the real ancestor of what would become the University of California was a private college chartered in 1855, the College of California. Founded by Protestant missionaries and modeled on liberal arts colleges founded in the East, it aimed at providing a liberal and (Protestant) Christian education to the state's young men. One of its first trustees was John W. Dwinelle.

The college took in its first class in 1860 and had some initial success, but by the mid-1860s it had become clear that lack of funds made it unlikely that it would ever be able to realize its ambitions fully. Accordingly, at a meeting on October 9, 1867, a committee of trustees, chaired by Dwinelle, passed a resolution offering a parcel of land in what would later be the city of Berkeley to the state's fledgling Agricultural, Mining and Mechanical Arts College, expressing the hope that this would lay the groundwork for the creation of a true university, and authorizing the trustees to disincorporate the college when
this happened. (A month later the directors of the state school would accept the offer.) On the same day, a committee consisting of Dwinelle and three others was given the job of drafting legislation to create the institution envisioned.

Reverend James Eells, a Presbyterian minister, wrote a first and, it appears, rather sketchy draft of a proposal, but it was left to Dwinelle to fill in the numerous details and to write a full, final version, one that would stand a good chance of winning approval when submitted to the legislature. In doing this, he faced a major challenge. Himsel the product of a classical, liberal arts education, he was clearly a person who believed in the value of the liberal arts. His support for the College of California is evidence of this belief. He had spoken publicly about the need for California to develop what he called "aesthetic culture" and "the cultivation of the arts," which would be reflected, among other ways, in the founding of schools and colleges. At the same time, as the first historian of the University of California observed, he was aware that there was "a certain popular jealousy of classical culture" in the frontier state and that the proposed university would need to speak to the demand for practical education as well.

The bill that Dwinelle drafted and introduced in the legislature on March 5, 1868, sought to balance these competing interests. The new university was to provide education in all the departments of science, literature, and the arts, and specialized professional education in fields like agriculture, mining, engineering, law and commerce. (Significantly, a college of agriculture was to be the first created.) Running to over ten closely printed pages, it included detailed provisions about organization and financing. It constituted the regents as a separate corporation (the actual articles of incorporation would be filed in June), with full authority to govern the university and with the obligation to manage gifts strictly according to the terms of the donation. Though generally well-drafted, probably because of the need to satisfy the different interests, it had parts that were not as clear as they might have been. The measure met with only slight opposition and was approved and signed by the governor on March 23.


34 William Carey Jones, Illustrated History of the University of California, rev. ed. (Berkeley, 1901), 43.

35 In an article published some years later, Dwinelle explained the rationale for structuring the university the way it was. Daily Evening Bulletin, March 26, 1876.
Role in Recruitment of First Faculty

The law chartering the University of California—the Organic Act, as it came to be known—vested ultimate authority over the institution in a board of regents, twenty-two in number, eight of whom were to be nominated by the governor and approved by the state senate. Dwinelle was one of those appointed in May by then-Governor Henry Haight to the first board, and he would remain on it until 1874. He was also appointed to a regents committee, charged with taking the first steps toward implementing the law's provisions. A high priority was obviously the recruitment of faculty, and Dwinelle would become a key player in this effort.

As it happened, two men of national renown were interested in positions. The brothers Joseph and John LeConte were then both teaching at the University of South Carolina. Joseph taught geology and natural history, having trained at Harvard under the eminent geologist Louis Agassiz. John taught physics and chemistry. During the war John had served as superintendent of the Confederate Niter and Mining Bureau, which was in charge of supplying armaments materiel to Confederate forces. Joseph had worked under him as a chemist. Each of the LeConte brothers viewed his prospects as dim under the Reconstruction government of South Carolina. Neither, given their significant involvement in the Confederate war effort, harbored any hope of finding a university position in the North.

Agassiz had written to Joseph, informing him of plans to establish the University of California and urging him to apply for a position. Sometime during the winter of 1867-68, Joseph wrote to Benjamin Silliman, the noted Yale chemist, inquiring about the university and stating that he and his brother would be interested in faculty positions, and Silliman showed the letter to Dwinelle. In June 1868, a friend of the LeContes, General Barton Alexander, wrote John that he had sounded out Dwinelle about his and his brother's interest and, according to an account by Joseph's daughter, had been assured that their politics would in no way interfere with their candidacies.

In August, Joseph wrote to Dwinelle, formally applying for faculty posts for himself in geology and his brother in physics. Dwinelle responded quickly, a letter reaching Joseph on September 19 stating that he had been chosen for a faculty chair. But the offer was for a chair in physics! The same day Joseph wrote back saying he was sure that he and his brother were being confused, something that happened often, he said, and asking for clarification. That came soon enough. John was officially appointed to the chair in physics in mid-November, the first faculty member hired by the new university. Joseph got notice of his appointment to the chair in geology, botany, and natural history two
weeks later. Both would go on to have long and distinguished research and teaching careers at the University of California. (The eminent historian of the state, Kevin Starr, calls Joseph LeConte "California's single most influential teacher.") John would also serve as president of the university from 1876 to 1881.36

The recruitment of the LeContes was not wholly the work of Dwinelle, but he surely deserves principal credit. He was the main point of contact with the two, recognized the heft they could bring to the new institution, and seems to have been primarily responsible for moving their appointments so rapidly through the regents. Decades later, Robert Gordon Sproul, the university's longest-serving and possibly greatest chief executive, reflected on the far-reaching effect the LeContes had had on the growth and development of the university and said Dwinelle should be given special thanks for their "splendid selection."37

The Carr Controversy and Dwinelle's Resignation from the Regents

The university opened in September 1869 in Oakland, in buildings it had received from the College of California (it would move to Berkeley in 1873). It had some forty students and ten faculty. Its early years would be attended with great controversy—controversy in which Dwinelle became enmeshed and which would eventually cause him to leave the Board of Regents prematurely. The controversy's roots lay in competing visions of the university's mission.

From the university's inception, complaints could be heard from groups like the California State Grange and organizations representing workers in the skilled crafts that the institution was devoting too many resources to theoretical pursuits (initial appointments had been overwhelmingly in the sciences and liberal arts) and not enough to education in agriculture and the mechanic arts, supposedly a priority. This emphasis, they contended, ran counter to the Organic Act and to the requirements of the federal land grant legislation, the Morrill Act, under whose terms the university had received substantial valuable acreage. Some said, too, that it reflected a class bias, the university catering primarily to the wants of the children of the well off. Similar criticisms came from within the university community. Most prominent among these critics was Ezra

36Starr, Americans and the California Dream, 425.
37Sproul to W.F. Chipman, July 20, 1931. Sproul was thanking Chipman, Dwinelle's stepson, for his donation of the Dwinelle Papers. John W. Dwinelle Papers, Bancroft Library, University of California, Berkeley.
Carr, a professor of agriculture, who publicly charged that the university was being faithless to its original mandate.

The chorus of complaints reached a high pitch during the administration of the university's fourth president, Daniel Coit Gilman (in office 1872–74), a man with a broad vision of the university's future and with little sympathy for what he probably saw as the overwhelmingly vocational vision favored by the grangers. Eventually, the grangers and their allies submitted a memorial to the legislature, calling for the abolition of the independent Board of Regents and its replacement by a new board, the majority of whose members should be popularly elected. No doubt to forestall any action on these suggestions, the regents invited the legislature to investigate their management of affairs, an invitation that was accepted. After a month-long inquiry, in March 1874 a legislative committee gave the regents essentially a clean bill of health, finding their management to be reasonably sound and rejecting criticisms of the direction in which they were taking the institution.

Dwinelle had a mixed reaction to the committee report. In a letter to Gilman in April, he expressed satisfaction that the regents' management had been vindicated, but he said the whole affair had left him pessimistic about the university's future. Indeed, he said he thought it was doomed to fail. The problem, as he saw it, was that the institution would always be prey to legislative interference. "From some popular quarter or another," he wrote, "the university will always be the object of legislative attack." The regents had successfully defended themselves in the recently concluded legislative investigation, but many more such inquiries could be anticipated (he predicted that the grangers and mechanics would control the next legislative session), and those might not have such happy outcomes.

Dwinelle certainly shared President Gilman's broad view of the university's mission. He was, however, more attuned than Gilman to political realities. Although he had no great love for the granger and mechanics organizations, he recognized that the university needed the support of the constituencies and the concerns they represented if it was to succeed over the long

38Gilman did recognize that the university had been created in part to meet the practical needs of the state. This he made clear in his inaugural address. He spoke there of the university as an institution "organized to advance the arts and sciences of every sort." But, he stressed, the new university was not to be a copy of Yale or the University of Berlin. It needed to be adapted to the people of California, "to their peculiar geographical position, to the requirements of their new society and their undeveloped resources." Stadtman, The University of California, 64.

39Dwinelle to Gilman, April 1, 1874. Daniel Coit Gilman Papers, Milton S. Eisenhower Library, Johns Hopkins University.
term. As noted earlier, these concerns were addressed, to some extent, in the university's founding statute, which he had had such a large hand in drafting. And in 1870, in an appearance before the Academic Senate, he had spoken forcefully of the need for the faculty to "popularize" the university, and had urged it to establish a preparatory (pre-college) course of instruction and to sponsor lectures on practical subjects at the San Francisco Mechanics Institute. Both suggestions were (grudgingly, it appears) accepted.

In the months following the legislative investigation, tensions between Ezra Carr, the agriculture professor, and the regents and administration heated up. He and Gilman were particularly at odds. In August 1874, when he refused a request from Gilman to resign, the regents unceremoniously dismissed him. In the wake of his dismissal, Carr published a pamphlet, revealing, among other things, that during the investigation Dwinelle had given a pledge to a legislative leader that, no matter what the outcome, Carr would suffer no ill consequences. Once this news became public, Dwinelle resigned from the board. He wrote Gilman that he thought he had no other choice. He regretted having given the pledge, he said, and having not been able to deliver on it, although he understood his fellow regents' refusal to honor it. [In December, Gilman himself resigned to take the presidency of Johns Hopkins University.] The coda on this episode and indeed on Dwinelle's tenure as regent, written by historian of the university Verne Stadtman, seems apt. "He had been, on the whole," Stadtman writes, "one of the most thoughtful and articulate members of the Board. If Gilman had understood the University as a doctor might understand a patient, Dwinelle had understood it as a father might understand a son. Even the desperate act that brought about his resignation was one of loyalty to the institution that his pen and his advocacy had brought into being six years earlier." 42

Dwinelle continued to take an interest in university affairs after leaving the board. In 1876 he published an article in the San Francisco Evening Bulletin, railing against proposals in the

40Stadtman, The University of California, 55.
41Dwinelle to Gilman, October 15, 1874. Daniel Coit Gilman Papers.
42Stadtman, The University of California, 78. In a letter to Dwinelle written some years later, Gilman spoke of the "paternal affection" with which Dwinelle had watched over the university's affairs during its formative years. Gilman to Dwinelle, March 20, 1878. Daniel Coit Gilman Papers. The legislative investigation and the Carr affair are chronicled in Stadtman, The University of California, 71-78. See also John Aubrey Douglass, "Creating a Fourth Branch of State Government: The University of California and the Constitutional Convention of 1879," History of Education Quarterly 32:1 [1992].
legislature to abolish the Board of Regents or submit it to more political control. (He claimed later that the piece helped pull the rug out from under them.) In 1878 he received overtures about resuming his seat, but he rebuffed them. In a letter to Gilman he explained that he didn’t think the regents had the stomach for the battles they would have to continue to fight against those who wished to convert the university, as he put it, “into a machine shop, or into a cowyard, presided over by Dr. Carr.” His only hope for the long-term future of the institution, he declared, was that someday the constitution might be amended to turn it into a “close, self-perpetuating” corporation. In the end, something like that happened. The 1879 state constitution constitutionalized the university’s status as set forth in the Organic Act and declared that it should forever be free of “all political or sectarian influence.”

LIFE AFTER THE BOARD OF REGENTS: THE 1870S

Political Writings

Dwinelle’s tenure as regent ran from May 1868 to September 1874. Needless to say, the university and its travails were not the only thing occupying his time. These were, in fact, very busy years. He had, of course, a demanding law practice. In addition, he wrote prolifically, contributing regularly to the San Francisco Evening Bulletin on subjects ranging from history and politics to literature, to his travels overseas. Apart from these columns, in 1870 he published, in London and Paris, a long essay on the dispute between Britain and the United States arising out of the former’s outfitting of the Confederate raider, the Alabama. In it he sought as well to give an overview of the American political system, a subject about which he claimed Europeans harbored grave misconceptions. In 1871, a pamphlet entitled “The Republican Party and the Rights of Labor” appeared. It was based on a speech he had given in August of that year and has a contemporary resonance.

Dwinelle observed that there was a growing perception on the part of many that the relationship between capital and labor was not a just one, that while the rich were getting richer,
the poor were getting poorer. He had sympathy for this belief, he said, pointing to the examples of what he called “stock-jobbing millionaires” like Vanderbilt and Fisk on the one hand, and the able-bodied men who struggled to find a decent job on the other. But capital was a necessary element in the economy, he contended, and there was no necessary conflict between capital and labor. Each had its task to perform. But labor could perform its role only if it were organized and educated. “Educated labor can stand face to face with capital,” he declared. So the Republican Party believed in compulsory education. It also believed that the relations between capital and labor were legitimate subjects of regulation. Thus it had supported the eight-hour day at both the national and state levels. In his essay on “The Alabama Claims,” in a section captioned “the rights of labour,” Dwinelle had sounded a similar theme. “[L]ike all other powers, if left unchecked,” he wrote, “capital becomes tyranny. The proposition that competition will regulate the relations of labour and capital, was long accepted in theory, but in practice has proved to be wholly deceptive. It therefore requires other checks from public opinion and from legislation, as a protection of the productive classes.” Whatever else he was, Dwinelle was no advocate of the unregulated market.

The Commission to Examine the Codes

In June 1873 Dwinelle received a prestigious appointment—a sign, no doubt, of his standing in the legal community. He was asked by Governor Newton Booth to join Stephen Field, associate justice of the U.S. Supreme Court, and Jackson Temple, former justice of the California Supreme Court, on a commission whose job it was to examine California’s four new law codes—the Civil Code, Code of Civil Procedure, the Penal Code, and the Political Code—and propose any amendments that seemed necessary. These codes, adopted in 1872, were the first ever enacted by the state and aimed to order and collect in one place (or, to be more exact, in four places) the scattered provisions of these main bodies of substantive and procedural law, eliminating redundancies, resolving inconsistencies, clarifying language that was ambiguous or imprecise. The commission met from June to December 1873, taking input from judges, lawyers, and members of the public, and submitted slates of proposed amendments to the four codes, most of which were later adopted by the legislature. Since the commission kept no record

of its proceedings, it is impossible to parcel out credit among the commissioners for the work done, but it seems safe to conclude that one proposed amendment emanated from Dwinelle.

The Political Code contained a chapter on the University of California, reenacting most of the provisions of the 1868 Organic Act but making one major change. The original statute, as noted above, in giving the regents the power in their separate corporate capacity to accept donations of property or moneys, bound them to manage such gifts according to the terms of the donations. The Political Code elided the distinction between the state and the regents and contained no such obligation. The proposed amendment, later passed, restored the distinction and the obligation.

Dwinelle believed that the university would always have to depend for its financial well-being on donations from private individuals, and that such donations would be forthcoming only if benefactors were convinced that their donations would be used for the purposes for which they were given. They would have some assurance of that, Dwinelle thought, if the regents maintained their separate corporate existence.

Dwinelle's belief that the university would depend heavily on private funding for its operations was by no means unusual. There appears to have been no expectation in these early years that the state would be the main, or even a regular, source of financial support for the university. The expectation was, rather, that the university would support itself from income on its endowments, including proceeds from the sale of federal and state land grants, with the state stepping in from time to time to fund select capital projects or to cover unexpected deficits. The state would not commit itself to regular funding until 1887, when the legislature, responding to pressure from faculty and administrators, enacted a tax earmarked for university purposes and designed to be permanent.

46Section 1415, 1872 California Political Code. Acts Amendatory to the Codes, 20th sess., 1873–74, sec. 57, amending sec. 1415. The amended section of the Political Code makes clearer than does the Organic Act that the state and the regents are distinct corporate entities. For Dwinelle's views on funding, see Dwinelle to Gilman, April 1, 1874, and March 8, 1878, Daniel Coit Gilman Papers.

47The act levied an annual tax of one cent on each one hundred dollars of taxable property in the state. "An Act to Provide for the Permanent Support and Improvement of the University of California," 1887 Stats. of California [Extra Session of the 1885–86 Legislature], 2–3. For the history of its enactment, see Stadtman, The University of California, 112–14. Commenting on the earlier period, Stadtman writes, "Most Californians believed that the endowments being amassed with the proceeds of federal and state land grants would, in due course, sustain the University comfortably." Stadtman, 107.
A MAJOR CHALLENGE TO SEGREGATION: WARD V. FLOOD

Background

As was the case with most lawyers at the time, Dwinelle’s law practice was varied, with an assortment of both criminal and civil cases on the docket. In April 1872 he would take on what, in retrospect, can be seen as his most historically significant, if not most consequential, case: a challenge to racial segregation in the San Francisco public schools.

Discrimination against African Americans in California dates back to the founding of the state. The original state constitution limited the franchise to white males. And two of its earliest statutes forbade blacks to testify against whites in criminal proceedings or to be witnesses in civil cases where whites were parties. The Fifteenth Amendment to the U.S. Constitution and Reconstruction-era civil rights legislation effectively voided these measures. But this did not put an end to the passage of racially discriminatory laws.48

In April 1870 a law was passed requiring that children of African and American Indian descent be educated in separate schools. Before that, school boards had had the authority under certain circumstances to admit such children to white schools.49 Soon thereafter, school boards in several cities, San Francisco included, established separate colored schools. California’s small but politically alert and active African American community reacted angrily to the new law and, the following year, began to mobilize to repeal it. In November 1871 a convention of African American citizens was held in Stockton for the purpose of deciding on a course of action (dubbed the Stockton Educational Convention). One result was the adoption of a resolution that a petition be sent to the legisla-

48California Constitution (1849) art. 2, sec. 1; 1850 Cal. Stat. 229, 230; 1851 Cal. Stat. 51, 114. The Fifteenth Amendment stated that the right of citizens to vote should not be abridged on account of race. The Civil Rights Act of 1870, 16 Stat. 140, reaffirmed the right to vote free of racial discrimination, imposing penalties on those who interfered with the right; it also guaranteed nonwhites the same rights to testify as white citizens.

ture praying that the words “children of African descent” be stricken from the new law and that these children “be allowed educational facilities with other children.” Another resolution empowered the convention’s executive committee to challenge the law in court and to collect money throughout the state to cover litigation expenses. 50

Notwithstanding the freshness on the books of the segregation law, hopes for change through the California political process were by no means chimerical. The fall elections had returned a Republican governor and a more Republican state legislature. And in the months following the Stockton convention, there appeared to be concrete basis for hope. In his inaugural address, delivered in December, Governor Booth called for an end to segregation in the schools. “All badges of distinction that are relics of the slaveholding era should pass away,” he said. “The doors of our schools should be open to all, without prejudice of caste.” When the new legislature convened, bills were introduced in both houses to amend the 1870 law and abolish segregation. But these hopes proved short lived. There was substantial Democratic opposition in the body, and neither measure could be pushed through to enactment. It was clear then that if change were to come, it would have to come through the courts. In April 1872 black leaders announced at a community meeting that they had interviewed several prominent attorneys and had settled on John W. Dwinelle as the man to bring their test case. 51

Dwinelle’s Views on Black Rights

Dwinelle was a logical choice. He was an experienced and highly regarded member of the bar. He was a sitting regent of the university and, since his days as a trustee of the College of California, had long been associated with the field of education. More to the point, perhaps, he had publicly voiced his support for black aspirations on more than one occasion, each time singling out black Californians for special mention.

In an address delivered after an Independence Day parade in San Francisco in 1865, one in which a delegation of African Americans had participated, Dwinelle spoke of the four mil-

50 San Francisco Chronicle, Nov. 21, 1871.
51 Newton Booth, governor of California, “Inaugural Address,” Dec. 8, 1871, http://governors.library.ca.gov/addresses/11-Booth.html. There is an account of the legislative proposals and Dwinelle’s hiring in the black newspaper, the Elevator, April 27, 1872. Black leaders told the meeting that they expected that the litigation would cost between $1,000 and $1,500 and appointed a committee to supervise fundraising.
lion slaves recently liberated by the Civil War. He had no fear, he said, of this population. They had "the germs of the same intellect" as Caucasians, as many examples could show. He instanced Frederick Douglass, a gentleman, orator, and scholar who was, in his words, his equal and the equal of any of his hearers. To be sure, blacks had been debased by slavery, and it might take several generations to lift them from that degraded state. But the experiment was worth the try. That free blacks could sustain themselves was shown by the examples of Jamaica, Barbados, and Liberia. The example of the African Americans who had taken part in the day's parade in San Francisco gave cause for optimism as well. If the liberated slaves of the South should rise to the level of these "sober, well conducted and intelligent colored men," he declaimed, who should say "that they are not worthy of freedom, and able to endure its burdens."52

In a speech Dwinelle gave in Oakland in October 1868 before the Grant and Colfax Club, an organization founded to support the presidential campaign of Ulysses Grant and his running mate, Schuyler Colfax, he expanded more fully on his racial views. The speech was delivered in response to one given two months earlier by Eugene Casserly, the Democratic senator-elect from California, which was a sustained attack on the Republican Reconstruction program in general and on the grant of the franchise to Southern blacks in particular. Casserly flatly denied that blacks were capable of intelligent participation in the political process.53

Dwinelle began his address with a long harangue against Casserly's Democratic Party, a party which, he said, before the Civil War had always bowed to the interests of Southern slave owners. He defended Reconstruction generally and, unlike Casserly, showed no sympathy for the complaints of Southern whites about its allegedly oppressive character. "If the South prefers military rule to the peaceful government of the United States," he declared, "let her have it." One thing the region should be clear about was that the North would "never desert nor betray the colored races of the South." He praised laws such as the Civil Rights Act of 1866, which gave blacks the same contractual rights as whites (why shouldn't they have such rights, Dwinelle asked) and invalidated the so-called Black Codes passed by white Southern legislatures. These laws,

52Daily Evening Bulletin, July 5, 1865. These remarks were printed in The Liberator, the famous magazine published by abolitionist William Lloyd Garrison and a publication widely distributed in the black community. The Liberator, Aug. 18, 1865.

53Daily Alta California, Aug. 20, 1868.
he argued, which, among other things, criminalized vagrancy and breaches of employment contracts, were little more than disguised attempts to reintroduce slavery.

Dwinelle described the grant of the franchise to Southern blacks as the only way to keep white secessionists from regaining power. It was primarily a matter of expediency, he seemed to be saying, though, at least in the case of the blacks who had fought for the Union, a matter of right as well. Casserly had spoken of the ignorance of the freedmen as a bar to their voting, but, Dwinelle asked, what about the ignorance of many whites? "Judging from the colored people of California," he said, "we may safely infer that the negro is quite as capable of exercising the elective franchise as the poor ignorant white trash of the South, or the howling mob of Horatio Seymour's 'friends' in the city of New York." At the same time, Dwinelle went out of his way to make clear that he did not equate political or civil rights with "social" rights. The grant of the franchise and other civil rights to blacks did not make them the "social" equals of whites, he stressed. Sentiments like these may grate on modern sensibilities, but one should remember that they were by no means uncommon among white supporters of black civil rights in the nineteenth century.

Mounting of the Case

On July 23, 1872, the San Francisco Chronicle reported that several African American parents had sought to enroll their children at four different elementary schools in San Francisco, all without success. It noted that legal proceedings, aimed at reversing these decisions, could be expected to commence shortly, and that John W. Dwinelle would be the attorney handling the case. One of the children who was refused admission, in this case to the Broadway Grammar School, was Mary Frances Ward, eleven-year-old daughter of Mr. and Mrs. A.J. Ward, and Dwinelle chose her to be the plaintiff, represented by her father, acting as guardian ad litem. In September Dwinelle filed an application for a writ of mandate in the California Supreme Court, asking the court to order the school principal, Noah Flood, to admit her. The application was accompanied by an affidavit from Mrs. Ward, describing her effort to enroll her daughter and Flood's refusal of the request, assigning as his only reason the fact that the child

54 The full text of Dwinelle's "Grant and Colfax" speech can be found in Dwinelle, "Scrapbook: entitled some of my own sins," 126–37. Bancroft Library, University of California, Berkeley.
"was a colored person" and the school board policy on separate schools for colored children. The attorney for the school board defended its policy on the grounds that the two separate schools were staffed by able teachers and afforded colored pupils equal advantages with white children. As further ground for the refusal to admit, he also claimed that Mary Ward had not completed sufficient instruction to enter the lowest grade of the Broadway school. Both sides submitted briefs, and the case was submitted on the pleadings and the briefs.55

Existing Case Law Precedents

Segregation of pupils by color was the norm in most northern states at the time. The practice had been subjected to legal challenge in several states in preceding years with mixed results. The leading case on the subject was undoubtedly Roberts v. The City of Boston, an 1850 opinion by the eminent antebellum jurist Lemuel Shaw. The parents of a black child in Boston challenged a school board policy that assigned black students to separate schools, basing their case on a provision of the Massachusetts state constitution that said, "[A]ll men, without distinction of color or race, are equal before the law." Charles Sumner, representing the parents, argued that the school policy inflicted upon blacks "the stigma of caste," creating a feeling of degradation in blacks and prejudice in whites and, as such, violated the constitution. But Shaw, writing for the court, ruled that the school board was exercising a reasonable discretion and that the existence of race prejudice in the population could not be attributed to the law—the law, in Shaw's view, being powerless to affect racial attitudes.56

A couple of pre-Civil War Ohio cases had upheld school segregation against legal attack,57 but more recent post-Civil War...
opinions from Iowa (1868) and Michigan (1869), the latter by the noted nineteenth-century jurist Thomas Cooley, had gone the other way, invalidating school segregation on the basis of either the state constitution or state law.\(^{58}\)

Closer to home and more proximate in time was an opinion that had issued from the Nevada Supreme Court just months before Dwinelle filed his case. There, in a somewhat ambiguous decision, the court had ordered a local school board to admit a black student to a school in the district where he lived. It held that a statute barring “Negroes, Mongolians and Indians” from admission to the public schools was inconsistent with the arrangement set up by the Nevada Constitution for the organization and funding of public education. At the same time, it said that it would be within the power of trustees to establish separate schools for blacks. In oral argument, counsel for the petitioner had contended that the statute was in violation of the Fourteenth Amendment “privileges or immunities” clause, but the court emphatically refused to address this argument.\(^{59}\)

**Dwinelle’s Argument in the California Supreme Court**

The argument that Dwinelle submitted to the California Supreme Court in the fall of 1872, in the case that went up under the name *Ward v. Flood*, paralleled that of Charles Sumner in the *Roberts* case, although in *Ward* it was founded on the Fourteenth Amendment to the U.S. Constitution.\(^{60}\) The amendment was only four years old and was completely without authoritative judicial interpretation. Thus Dwinelle was venturing into uncharted territory. His contention was that the amendment had, for the first time, unequivocally affirmed the citizenship of blacks and placed them on a plane of perfect political equality with white citizens. This “political right,” as he styled it, was fatally compromised by mandatory segregation. “The political right to attend the public schools, resides in the mode in which it is to be exercised,” he declared. “When it is limited to be enjoyed only by wearing a degrading badge of

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\(^{58}\)Clark v. Board of Directors, 24 Iowa 267 (1868); People v. Board of Education of Detroit, 18 Mich. 401 (1869).

\(^{59}\)State ex rel. Stoutmeyer v. Duffy, 7 Nevada 342 (1872).

\(^{60}\)Specifically on section one of the amendment, which reads, “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”
an 'odious distinction of caste,' founded in a deep-rooted prejudice in public opinion, then the equal political right ceases to exist." Dwinelle cited the Fourteenth Amendment generally, but parsing his argument, one might see it more as bottomed on a melding of the amendment's "citizenship," "privileges or immunities," and "equal protection" clauses. The amendment had conferred the right of equal citizenship on blacks, and segregation infringed on that right.61

The brief surveyed the case law on segregation, including the precedents mentioned above. Dwinelle noted that they had, with one exception—the Nevada case—been decided before the adoption of the Fourteenth Amendment and were thus not in any sense dispositive, although he thought the Michigan and Iowa cases apposite, inasmuch as they stood for the proposition that the equal right to attend public schools, affirmed in either the constitution or statutes of those states, was not secured by the establishment of separate colored schools. He devoted considerable space to Justice Shaw's opinion in the Roberts case, dismissing it as a political decision, a pandering to the public sentiments of the time. As to Shaw's argument that segregation did not stamp the segregated classes with any odious distinction, he asked the court to imagine the result if a state were to pass a law segregating Irish people or Jews. He substituted these ethnicities for African American or colored in the Shaw text, in an effort to show what he said was its absurdity.62

Opinion of the California Supreme Court

Although arguments in the case had been completed by the end of 1872, the case lingered in the California high court for over a year thereafter, a delay that occasioned consternation and criticism in the San Francisco African American community.63 The opinion, when it did come down in February 1874, was a disappointment to that community. Chief Justice William Wallace, writing for the court, first agreed that it would be enough to deny the mandamus writ on the grounds, offered

61Ibid. As of this time, the U.S. Supreme Court had issued no interpretation of the section's spacious terms.


63Pacific Appeal, Nov. 30, 1872; San Francisco Chronicle. Nov. 27, 1873. The California Supreme Court may have been awaiting the decision of the U.S. Supreme Court in The Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873), then pending in that tribunal. These Louisiana cases put the meaning of the newly adopted Fourteenth Amendment squarely before the U.S. high court.
by the defendant, that the plaintiff child had not sufficient education to enter the lowest grade of the Broadway Grammar School, but he refused to put its decision on that basis. The court would assume, said the chief justice, that African descent was the sole reason for denying the child's admission and would address Dwinelle's Fourteenth Amendment claims. It discussed each of the amendment's operative clauses. It dismissed the "due process" claim out of hand. The "privileges or immunities" clause it rejected as well on the ground that the privilege of attending school was not one of the privileges of U.S. citizenship and therefore could not be infringed by state action. That left the "equal protection" clause. Stating that that clause could be assimilated to the "free and equal" clause of the Massachusetts Constitution, Wallace adopted the reasoning and large chunks of the language of Chief Justice Shaw in Roberts v. The City of Boston. The requirement of equality was met if the separate school facilities were substantially equal. Segregation, by itself, did not impose any mark of degradation on blacks.

The opinion concluded with what might be seen as a nod in the direction of Dwinelle's argument. Chief Justice Wallace stated emphatically that if separate schools were not in fact maintained, black children would have the same right as white children to attend any schools in their district for which they were academically prepared. This was a significant statement. The law as it stood was categorical and admitted of no exception. It said that school districts were to segregate children by color, tout court. But by clear implication, the court here was giving school authorities the option of operating a non-segregated school system. In doing so, the court was in a sense rec-

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64 The U.S. Supreme Court decision in The Slaughter-House Cases came down in April 1873. The court gave an extremely narrow interpretation to the "privileges or immunities" clause of the Fourteenth Amendment, holding that it only protected individuals against state infringement on rights that they had qua citizens of the United States, a rather narrow and insignificant set of rights, and did not protect them against state infringement on any rights that might be considered fundamental. The California court's holding was consistent with this decision.

65 Ward, 48 Cal. 36 at 52-57 (1874).

66 Ward, 48 Cal. 36 (1874). The black community was disheartened by the court's failure to declare segregation ipso facto incompatible with equality. But it was not crushed by the decision. Some saw it as a partial victory. The African American weekly, the Elevator, stressed the court's affirmation of a right to equal educational facilities. It urged black citizens to test the boundaries of this concept. "Wherever there is no separate school or where said school is deficient in instruction [emphasis added]" parents should send their children to the nearest school in their district. Elevator, March 7, 1874.
ognizing facts on the ground. In May 1872 the Oakland school board had voted to do away with segregation. Sacramento had done the same thing in early 1873. Both of these decisions were technically in contravention of state law, but the California high court was now sanctioning them, *nunc pro tunc*, as lawyers might put it. San Francisco would soon follow those examples. According to the historian Hugh Davis, black parents in San Francisco, in the wake of the court ruling, launched a boycott of the city's black schools. This and the great expense involved in maintaining separate schools caused the city board of education to revisit its policies. On August 3, 1875, it voted 7-4 to abolish separate schools for African American children.

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**Dwinelle's Last Years**

*Public Policy Interventions, Last Political Writings*

Dwinelle continued to maintain a busy law practice through the rest of the decade of the seventies, handling several major cases, though none as important as *Ward v. Flood*. He continued to weigh in on public issues as well. In 1875 he published a long essay entitled *The History of the Rise and Fall of the Independent Party of 1873, in California*. The Independent Party was a reform group, organized in 1873, made up of disaffected Republicans and Democrats, that presented itself as an alternative to the two major parties and that had some modest electoral success before disappearing from the scene. Its stated aims, among others, were to drive out corruption at the national and state level and to curb the power of the railroads. Though bipartisan in its targets, its main barbs were aimed

67 Pacific Appeal, May 11, 1872; Daily Alta California, Feb. 15, 1873.

68 A month after the decision, the California legislature passed an amendment to the school law that essentially echoed Wallace's ruling. It reaffirmed the segregation of African and Native American children but said that school districts were obliged to admit these children to white schools if they failed to provide separate schools. Acts Amendatory of the Codes, 20th Session of the Legislature, 1873–74, 97.

at the Republican administration in Washington. Many of its adherents thought, too, that radical Reconstruction had gone too far.

In the essay, Dwinelle described his involvement in and support for the party at its founding, and his later disillusionment with it and decision to return to the regular Republican fold. The disillusionment stemmed in part from his perception that the party itself had become corrupt and had fallen into the hands of an autocratic leader. Another reason, equally important, was a change of opinion about the Grant administration and the condition of things in the South. In the wake of Democratic successes in the 1874 congressional elections (the party had taken control of the House from the Republicans), he had heard southerners say, "Now we'll burst the thirteenth, fourteenth and fifteenth amendments like a row of buttons on an old coat." Comments like these made it clear to him that if the black population of the South was to be protected, it was necessary to have a Republican administration in control in Washington. He reaffirmed his firm support for the post-Civil War amendments and hoped they would be implemented by appropriate legislation. 70

If Dwinelle's essay confirmed a continuing concern for the rights of African Americans, he would shortly show that he entertained no such sympathy for another minority group. In 1876 a congressional committee visited San Francisco for the purpose of gathering testimony on Chinese immigration, then a burning issue in California. A parade of witnesses testified before the committee, most extremely hostile to the Chinese. John Dwinelle was among their number. He denounced Chinese immigration in no uncertain terms, claiming that it degraded white labor and that the massive employment of Chinese in intensive farming of certain crops was ruining California agriculture. He said that the Chinese were incapable of assimilation and had no interest at all in American institutions, a statement flatly contradicted, of course, by the experience of his own firm some dozen years earlier in the Lin Sing litigation. He had, in fact, not a single positive thing to say about them. 71

In 1877, whether for financial or other reasons, Dwinelle put his entire personal library out at auction. Comprising over one

71 U.S. Senate, Report of the Joint Special Committee to Investigate Chinese Immigration," 44th Cong., 2nd sess., 1877, S. Rept. 689, 1067-78, testimony of John W. Dwinelle; the statement concerning alleged lack of interest in American institutions is at 1070.
thousand volumes, it was described by the San Francisco auction house responsible for the sale as the largest collection ever offered in that city. (Dwinelle had earlier donated much of his collection of Latin and Greek classics to the University of California.) A look at the auction catalog reveals a man of wide and catholic reading tastes. In addition to a large selection of the works of classical, English, and American authors, it included works in French, a selection of foreign-language dictionaries, and some unusual items, e.g., a complete collection of Byzantine historians and an Australian grammar. That same year he married Catherine Elizabeth Chipman. It was his second marriage, his first wife, Cornelia Stearns, having died in 1873. In November, his life was touched by tragedy when his youngest son, Herman Dwinelle, passed away at the age of twenty-one.

Dwinelle continued to take an interest in Republican causes and candidates through the remainder of the decade but eschewed any interest in elective office himself, refusing nomination as a delegate to the 1878–79 California constitutional convention. The year 1880 would mark his last appearance in the California appellate reports, an intervention as amicus curiae in the case Ex parte Frazer, a challenge to a state medical licensing law. He died the following year in a bizarre accident. On January 28, 1881, while rushing to catch a ferry in Port Costa, California, he fell off the end of a pier and drowned. He had either not heard or disregarded a shouted warning that the boat had already left the dock. His body was recovered from the waters of the Carquinez Strait some three weeks later.

Dwinelle in Perspective

“One of California’s ablest and most widely known citizens has lost his life in a lamentable accident,” the Daily Alta said in a story published a few days after his death. “The practice of law was his profession,” it went on, “and his legal knowledge was so wide and profound that but few of our lawyers ranked as highly as he.” The same day the faculty of the University of California adopted a resolution, expressing its deep sorrow at the news. It praised Dwinelle for his long record of service to the university, “as the legislator who shaped and introduced the Organic Act, as an active and valued Regent in the first

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72 A copy of the catalog can be found in folder 7, John W. Dwinelle Papers, Society of California Pioneers.

73 Regarding his refusal of the nomination, see Daily Alta California, June 8, 1878; Ex parte Frazer, 54 Cal. 94 (1880). For accounts of his death see Daily Alta California, Feb. 2, 1881, and San Francisco Chronicle, Feb. 2, 1881.
years of its career, and as wise counselor and friend to the Institution to the end of his life.”

A few days later the Bar Association of San Francisco weighed in with a long and effusive tribute to Dwinelle, one of its founders and first trustees. It described him as a “bold adventurer” who had abandoned a comfortable situation in the East to set out on an untried path in the West. It praised his lawyerly skills, although perhaps with the slightest hint of criticism (“he discarded the technical details of practice for the broader investigations of the jurist”), commending him in particular for his role in the pueblo land litigation. His efforts, the memorial declared, had “aided largely in bringing the whole system of land ownership in San Francisco into harmony and order.” Acknowledging his high public profile and efforts outside the law (it heaped praise on his efforts on behalf of the university), he was, it said, a “public man” who had “exercised a commanding influence” over the early history of his community.74

Neither the bar association memorial nor any of the newspaper obituaries said anything about the Ward case or Dwinelle’s public support for the civil rights of blacks. At a time in California when few could be heard saying the sorts of things Dwinelle had said, he certainly stands out for his outspokenness on the issue. He was representative, in that respect, of a certain class of Republicans who supported Reconstruction, even when it was under siege, and who consistently expressed support for legislation to promote the civil rights of blacks.

Dwinelle was, by the standards of the time if not by modern standards, a racial progressive, at least when it came to blacks. His public pronouncements on the Chinese are another matter. His Sinophobia was certainly not unusual. Hostility toward the Chinese was an almost universally shared attitude among white Californians. What is disturbing about Dwinelle, as noted above, is the fact that his firm had once been paid by the Chinese to represent them. His harsh comments about Chinese immigrants must thus be considered a blemish on his record.

Dwinelle’s career spans most of the early history of the California legal profession, and its trajectory is typical of many who would eventually constitute the early California bar. These were men who traveled to California to search for gold in the Sierra foothills but who came to realize, as Dwinelle did, that their “diggings were elsewhere.” Some arrived at this realization gradually, usually after months of frustration in the gold fields. Dwinelle reached it almost immediately on arrival.

He was quick to perceive that, although this was a fractious, frontier community, it had a need for lawyers, and there were not many of them to fulfill this need—few, certainly, with the years of legal experience he carried in his baggage. The practice of law quickly became profitable, and he rose to a position of prominence in the local bar. (Why he made the decision to return to New York in 1853 is unclear.)

Several things set Dwinelle apart, however. One was, for lack of a better term, his bookishness (the bar association memorial called him a bibliophile, a scholar, and a man of letters) and, relatedly, his lifelong interest and highly consequential involvement in education. Another was the range and importance of the cases that he litigated. His frequent appearances in print on such a large range of subjects make him different from the average member of his profession. His involvement in the creation of the University of California, of course, sets him apart from all other members of the early California bar. It is exaggeration to say, as the bar association memorial did, that Dwinelle exercised a commanding influence over the early history of California, but that he had a significant impact on that history seems beyond doubt.