September 1947

Dudley Odell McGovney

Roger J. Traynor

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38MJ5C

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
When the REVIEW decided to make this issue a tribute to Professor McGovney on the occasion of his retirement, colleagues and students, all of his friends, shared the wish that it would be given to him to continue his work for many years to come. We who spoke with him only a few days ago were confident that the wish would be granted. It was not, and we are saddened by our loss.

Let the tribute stand as if he were still with us, as he was when it was written. Let the reference to his work in progress stand; he has taught others well how to carry on work as he would have. Let the last paragraphs stand; it is fitting that they should be written in the present and future tenses, for Professor McGovney lives in our hearts and always will. Let us continue to look for men like him wherever we are in the world, and cherish them when we find them. We shall not find them often.

To those who know Professor McGovney the thought occurs that his influence will be greater than ever in the years to come. For the times are troubled, the need for men who are wise and experienced is great, and he is both. Scholar that he is, he has never been a cloistered one.

He interrupted his studies early to serve as corporal in a company of Indiana volunteers in the Spanish-American War. After he returned to the University of Indiana, he shook off the dust of the library often enough to become a star member of the football team, and in those rigorous days he proved his mettle on the playing field as he was later to prove it in the tough discipline of the law. Following graduation in 1901 he took his first teaching assignment in Manila at the Insular Normal School, and, typically, that assignment bore fruit in the pub-

*Associate Justice, Supreme Court of California.
lication of two books, *Civil Government in the Philippines* (1903) and *Stories of Long Ago in the Philippines* (1906).

Thereafter he received his A.M. degree in history at Harvard University in 1904 and his LL.B. degree at Columbia University in 1907. Then began a teaching career that took him up and down and across the country, cumulatively enriching his years and experience, deepening and disseminating his influence. As professor of law, and twice as dean, he educated law students to become lawyers—one year at the University of Illinois, six years at Tulane University, two years at the University of Missouri, nine years at the University of Iowa, twenty-two years at the University of California, and throughout those years one year as visiting professor at Yale University, and again as lecturer at summer sessions at the Universities of Columbia, Chicago, Wisconsin, and Michigan.

We former students remember how often Professor McGovney's classes ran past the hour, and how profitably. He refused to have a thought cut in half by the bells of the Campanile, and we learned early not to bring a train of thought to a premature conclusion. He had little patience with either the lazy-minded or those who conceived the search for truth to be a matter of rushing to the nearest source book and, in the words of James Stephens, eliciting pearls as with a pin. Yet his patience was infinite, and his encouragement a weapon in the hand, for those who sensed that wisdom lay beyond many mountains and who strove falteringly to ascend the first ones. Gradually under his guidance the ascent ceased to be faltering. The most ordinary student gained strength as he acquired something of his habit of relentless analysis, and learned that insight comes slowly, sometimes most slowly of all to those who rest on a quick perception of the outlines of a problem, not realizing how it catches light as it is turned this way and that.

Great teachers have many qualities in common, but each has also a unique combination of qualities, no more to be duplicated than a face or a fingerprint. Professor McGovney has taught his students to analyze a problem to its heart, but he has also made them understand that they are not qualified to do so unless they are educated beyond the boundaries of the particular problem. He has conveyed to them the distinction, firmly fixed in the French language, between education and mere instruction; he belongs to a generation of teachers at Boalt Hall that has imparted by its own example the meaning of an educated man. His students have had first of all to measure up to his
exacting standards of craftsmanship, to observe well the details of a problem and to seize the significant ones. But they could not rest at that: they have had also to bring to each problem an understanding that it can never be isolated from others, as in scientific experiment; that it is open to various solutions; and that the effects of each upon lives and property must not only be soundly thought out but deeply felt. Professor McGovney has developed in his students not only the ability to meet a challenge to the mind, but also that capacity for being troubled in spirit that distinguishes those who cherish the law as an institution from those who conceive it as a chess game.

Yet he has been able through the years also to write prodigiously, and invariably with the searching analysis and the imagination that has characterized his teaching. He carries his readers with him to deeply reasoned, vividly stated conclusions. His name is identified with constitutional law, but an early article, *Irrevocable Offers*,¹ bears witness that in any field, as here in the law of contracts, his contributions are original and constructive. He impaled the reasoning that had eluded the courts, for the results they had generally reached. His theory was incorporated in section 45 of the Restatement of Contracts, and the American Law Institute sought him out as an adviser in their deliberations on contracts, and again on corporations.

Characteristically, he has devoted himself to the law as it affects people, as is evident in nearly all of his writing. Thus in one forceful, dispassionate article after another he has considered the problems of aliens and minority races, and has done perhaps more than any other man in the country to quicken in lawyers an awareness and a conscience about these problems. Let us open our minds, he asks, to the fact that “The racial discrimination in our naturalization law is entirely out of harmony with the tenor of our law as a whole.”² In his view, to which he has consistently adhered whatever the pressures against it, intense pressures in times of stress, there is no rational justification for such discrimination in any law. It is an evil thing to which no thinking person can remain indifferent, insidiously evil, depriving the community of the best in all its people as it deprives individuals and groups of the opportunity to give of their best. Pains-takingly he substantiates this view, marshalling the details of restrictive laws, noting their effects, pondering historical analogies, aligning reasons against the prejudices of men.

¹ (1914) 27 Harv. L. Rev. 644.
² *Race Discrimination in Naturalization* (1923) 8 Iowa L. Bull. 211, 241.
This year finds him still at that task (The Anti-Japanese Land Laws of California and Ten Other States), the long task begun in 1911 with the publication of American Citizenship in the Columbia Law Review. It was immediately apparent that the author of that article brought to a legal problem a knowledge of history and something more, an ability to consider a legal problem in its historical context and thus to arrive at an understanding of the meaning of alien, national, subject, citizen. The reader begins to perceive a method at work: in the same year in French Nationality Laws Imposing Nationality at Birth, an historical survey preceded and illuminated a digest and interpretation of the current French laws. Professor McGovney’s research has unearthed many clues as to the why of constitutional doctrines. At the very moment he is writing a book on a subject that has long preoccupied him: Our Eighteenth Century Heritage of Limited Democracy, sections of which have already appeared, namely, The British Origin of Judicial Review of Legislation, and The British Privy Council’s Power to Restrain the Legislatures of Colonial America; Power to Disallow Statutes; Power to Veto.

His interest in the nature of citizenship led him to reflect upon the clause in the Fourteenth Amendment that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” In Privileges or Immunities Clause: Fourteenth Amendment he demonstrates brilliantly that the Supreme Court practically read that provision out of the Constitution.

He is bound by his knowledge of history, and a habit of taking nothing for granted, to discern the absurdities in a line of reasoning, the artificialities in a legal theory, however tenaciously held. He made a devastating attack on A Supreme Court Fiction: Corporations In The Diverse Citizenship Jurisdiction of the Federal Courts in the Harvard Law Review. Here is an exhaustive inquiry into the fiction that all shareholders of a corporation are citizens of the state of incorporation and that therefore federal courts have jurisdiction over a controversy between corporations of different states or between a corporation of one state and a citizen of another, although only state law

---
9 (1943) 56 HARV. L. REV. 853, 1090, 1225.
is applicable. With convincing documentation and unanswerable logic, he demonstrated the artificiality of this fiction—those who know him can well imagine with what devilment in his eye and what earnest in his soul. Many will ask, as Professors Charles T. McCormick and James H. Chadbourn did in the preface to their casebook on federal courts, "Will the doctrine of corporate citizenship, hardly more deeply rooted than the doctrine of *Swift v. Tyson* and far more vulnerable in theory, succumb to the heavy artillery of Professor McGovney?"

He is undismayed and undeterred that gains are slowly made by those who would convince by reason. Patiently he has analyzed the chaotic condition of judicial review of administrative decisions in California, and proposed changes in accord with established procedure throughout the country: *Administrative Decisions and Court Review Thereof In California*;¹⁰ *The California Chaos in Court Review of the Decisions of State Administrative Agencies*;¹¹ *Court Review of Administrative Decisions in California: the Pending Constitutional Amendment.*¹² His views have yet to win over this state, but he would be the first to concede philosophically that it may be part of California's quality not to throw chaos lightly to the winds.

In the bibliography of Professor McGovney's writings following, compiled by the editors of the *Review*, each reader will find or rediscover selections of special interest to him. None will fail to note his *Cases on Constitutional Law*, now nearly twenty years in print, and, many students will add, in hard use in leading law schools throughout the country.¹³ It is a great casebook: there is in it rich material that can be found nowhere else, assembled with expertness and insight; and the practicing lawyer can turn to it time and again with profit. The cases illustrate not only the workings of the law but its development, and their sequence is an unfolding of constitutional history that has captured the imagination of scholars.

There is substance in Professor McGovney's learning in history and law, and there is humility. He scorns the affectations of those who would appear learned, notably that affectation of isolation from people

---

¹⁰ (1941) 29 Calif. L. Rev. 110.
¹² (1942) 30 Calif. L. Rev. 507.
¹³ Duke University School of Law; Golden Gate College of Law; Harvard Law School; Hastings College of the Law; McGeorge College of Law; Northwestern College of Law; University of California School of Jurisprudence; University of Idaho College of Law; University of Pennsylvania; University of Southern California; West Virginia University.
who have lacked either the opportunity or the leisure to acquaint themselves with the thoughts and aspirations of the great men of the past. For the obligation of the literate is not to hoard their knowledge or to display it pretentiously, but to communicate it, and this he has done. He writes as he speaks, in a forthright manner, and there is life in his words. His thought is not obscured by labored ornamentations; he rejects them as excesses that those who have something to say can ill afford.

What a man does over many years is a record of what he is, but all that he is can never be completely recorded. Yet those who know Professor McGovney can unite on a description by which to recognize him. You will look for a scholar with the bearing of a soldier. You may find him in the study or in a crowd of people, who interest him more than books, or out fishing under the changing skies of San Francisco Bay. You will know him by his courage, steadfast and yet lighthearted, as if there were nothing very exceptional about being courageous, as if it were an exhilarating as well as a grave responsibility to keep one's mind alert and open and one's spirit wholly free.

**BIBLIOGRAPHY**

**Civil Government in the Philippines.** (Scott Foresman, 1903) 215 pp.


**Cases on Constitutional Law.**
- First edition (Bobbs-Merrill, 1930) xxix, 1803 pp.

**The American Suffrage Medley: The Need for a National Uniform Suffrage** (awaiting publication).

**Our Eighteenth Century Heritage of Limited Democracy** (in preparation).

**Constitutional Law: Alienage, Race, Citizenship**
- *Race Discrimination in Naturalisation* (1923) 8 Iowa L. Bull. 129-61, 211-44.
- *Our Non-Citizen Nationals; Who are They?* (1935) Legal Essays in Honor of Orrin Kipp McMurray 323-74.
Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional (1945) 33 Calif. L. Rev. 5-39.
The Anti-Japanese Land Laws of California and Ten Other States (1947) 35 Calif. L. Rev. 7-60.

CONSTITUTIONAL LAW: THE JUDICIARY AND ITS FUNCTIONS
A Supreme Court Fiction; Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts (1943) 56 Harv. L. Rev. 853-98, 1090-1124, 1225-60.
The British Privy Council's Power to Restrain the Legislatures of Colonial America; Power to Disallow Statutes; Power to Veto (1945) 94 U. of Pa. L. Rev. 59-93.

CONSTITUTIONAL LAW: GENERAL AND MISCELLANEOUS
Privileges or Immunities Clause; Fourteenth Amendment (1918) 4 Iowa L. Bull. 219-44.
(1938) 2 Selected Essays on Constitutional Law 402-424.
Is the Eighteenth Amendment Void Because of its Contents? (1920) 20 Col. L. Rev. 499-518.
Ineligibility of a United States Senator or Representative to Other Federal Office (1922) 7 Iowa L. Bull. 152-67.

ADMINISTRATIVE LAW
The Industrial Accident Commission's Dilemma and a Proposed Remedy (1939) 27 Calif. L. Rev. 266-85.

CONTRACTS
Irrevocable Offers (1914) 27 Harv. L. Rev. 644-63.
Contracts; Offer Backed up by Deposit (1915) 9 Law Series Mo. Bull. 43-7.
MISCELLANEOUS

The Navigation Acts as Applied to European Trade
(1904) 9 AM. HIST. REV. 725-34.

Self Criminating and Self Disgracing Testimony Code Revision Bill
(1920) 5 IOWA L. BULL. 174-99.

Executor of His Own Wrong
(1921) 6 IOWA L. BULL. 65-76.

Executor de son Tort Abolished
(1922) 7 IOWA L. BULL. 40-41.

BOOK REVIEWS

Edgington, The Monroe Doctrine
(1904) 4 Col. L. Rev. 609.

The Constitution and the Courts
(1924) 13 Calif. L. Rev. 86-8.

Maltbie, Theory and Practice of Public Utility Valuation
(1924) 13 Calif. L. Rev. 88-90.

Cooley, Treatise on Constitutional Limitations (8th ed.)
(1927) 15 Calif. L. Rev. 432-6.

McBain, The Living Constitution
(1927) 15 Calif. L. Rev. 437.

Mott, Due Process of Law

Patterson, The Insurance Commissioner in the United States
(1927) 15 Calif. L. Rev. 440-1.

Wood, Public Utility Law, State and Federal
(1927) 15 Calif. L. Rev. 442.

Green, Cases on the Law of Carriers
(1929) 18 Calif. L. Rev. 97-8.

Beck, May It Please the Court
(1930) 19 Calif. L. Rev. 102-4.

Loughran, Judicial Review of Federal Executive Action

Boudin, Government by Judiciary
(1932) 20 Calif. L. Rev. 668-74.


Clark, Deportation of Aliens from the United States to Europe
(1932) 21 Calif. L. Rev. 81-4.

Van Vleck, The Administrative Control of Aliens
(1932) 21 Calif. L. Rev. 84-6.

Carpenter, The Development of American Political Thought
(1932) 17 Iowa L. Rev. 436-8.
Dunn, *Protection of Nationals*  
(1933) 21 Calif. L. Rev. 530-1.

Haines, *The American Doctrine of Judicial Supremacy*  
(1933) 21 Calif. L. Rev. 637-41.

Seckler-Hudson, *Statelessness with Special Reference to the United States*  
(1934) 23 Calif. L. Rev. 126-7.

Field, *The Effect of an Unconstitutional Statute*  

Frankfurter and Davison, *Cases and Materials on Administrative Law*  

Doskow, *Historic Opinions of the United States Supreme Court*  
(1936) 24 Calif. L. Rev. 239-40.

Corwin, *The Commerce Power versus States Rights*  

*My Philosophy of Law*  
(1941) 30 Calif. L. Rev. 119-20.