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8. GOLD RUSH, SUNDAY STYLE

Conflict and violent personality clashes served to alienate David S. Terry and Stephen J. Field, California legal pioneers and mutual antagonists.

Kentucky-born Terry joined the Texas Rangers and fought in the Mexican War before coming west, where he was named Chief Justice of the California Supreme Court.

Field, son of a Connecticut clergyman, crossed the borders of the Golden State in time to experience the rip-roaring saga of the gold rush. Like Terry, his legal skills were put to work in the California Supreme Court, where he was designated an associate justice.

When Terry resigned from the court in 1859 to duel on a San Francisco sand dune with David C. Broderick, United States Senator from California, Field was promoted to chief justice. Senator Broderick, a friend of Field, gambled his life on a foolhardy gesture and lost. Antagonism between Terry and Field flared with the death of Broderick. Flames of searing hatred burst into the open thirty years later. The drama of the Field-Terry confrontations was like something out of a dime novel except that both were almost bigger-than-life people, and in the midst of their personal turmoils they crossed swords on the matter of coerced Sunday observance.

David S. Terry, a former Texas Ranger, engineered a religious-liberty plank in the California Democratic party platform.
CALIFORNIA HISTORICAL SOCIETY, SAN FRANCISCO

[80]

[81] Field's legal skill took him to the bench of the United States

Supreme Court as an associate justice. Terry became a political power in California's Democratic party.

In 1882, Terry engineered a religious-liberty plank in the platform of the California Democratic Party which was credited with wresting political control from the grasp of the Republicans in November of that year. By the summer of 1884 Terry was making headlines in San Francisco as one of several attorneys representing Sarah Althea Hill in her divorce action against multimillionaire William Sharon – a sensational case that rocked Bay Area society with spicy rumors.

Sharon made his millions in Virginia City silver under the auspices of San Francisco's brilliant financier-banker, William Ralston. Remarkably successful in staking out his fortune, William Sharon enjoyed only minor success in creating enduring friendships. The public was less than sympathetic to Sharon's legal dilemma.

Prime issue in the case was whether William had ever entered into a valid and legal marriage with Sarah Althea Hill. If she could prove it, she had a sporting chance of digging into some of that Virginia City silver herself through community property division and alimony award. But Sharon was not about to admit a marriage that would expose his bullion to legal evaporation.

The court waded through wildly contrasting evidence and, to Sharon's chagrin, decided in favor of Sarah. In desperation Sharon raced to the Federal court for help. The United States Circuit Court later declared that the alleged marriage agreement was something less than legal, but the frustrated Sharon was not around to savor his victory. He had died a few.weeks earlier.

Two weeks later, on January 7, 1886, David Terry married Sarah at his home in Stockton.

[82] For two years Terry worked indefatigably in the California State Supreme Court, where the Sharon estate was suing for a reversal, and on January 31, 1888, the Supreme Court upheld the Superior Court, declaring the marriage contract legal and valid.

In this contest, which had now lasted over five years, the Terrys were leading by two victories in the state court over one defeat in the Federal court. Sharon's heirs now went back into the Federal Circuit Court asking that, with Sharon's death, the original verdict of fraud be revived.

Assigned to sit with two federal judges on the Circuit Court to rehear the evidence was United States Supreme Court Justice Stephen J. Field.*

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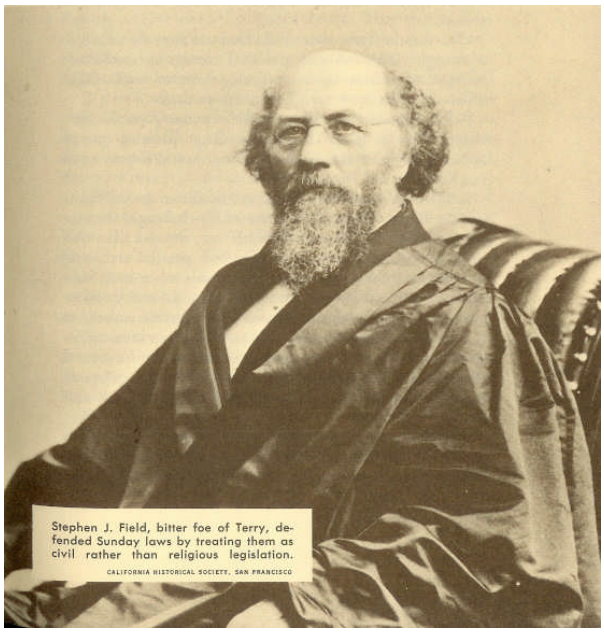
Trouble was in the wind, and it didn't take long for the breeze to blow through the Federal courtroom.


Stephen J. Field, bitter foe of Terry, defended Sunday laws by treating them as civil rather than religious legislation.
CALIFORNIA HISTORICAL SOCIETY, SAN FRANCISCO

When it appeared that the prior Federal court reasoning would be confirmed, Sarah shattered courtroom decorum and launched an outraged verbal blast at Field, accusing him of selling out to the opposition. Field promptly ordered Sarah evicted from the room, and Terry, now a man in his sixties, objected vehemently, with fists flying.

When the dust had settled, David S. Terry found himself confined to a jail cell for six months. Sarah was awarded a shorter term behind bars – thanks to a contempt of court sentence pronounced by Field. It seemed an exorbitant penalty and something less than pure impartiality, at least in the minds of Mr. and Mrs. Terry.

The next confrontation between the Terrys and Justice Field reared up like something out of a bad dream.

In the summer of 1889, Stephen Field returned to California to sit again on the United States Circuit Court. Humiliated by prison confinement at the hands of Field, the Terrys had stepped back into the California sunshine only to find that the California Supreme Court had reversed the prior holding of the state court and ruled that no valid marriage had existed as between Sarah Althea Hill and William Sharon. **[83]** The air was heavy with trouble when Field boarded the San Francisco-bound passenger train out of Los Angeles accompanied by a bodyguard, Deputy Marshal David Naegle.

It might have been just another routine train ride, except that the Terrys came aboard in Fresno. When the entourage stopped for breakfast at a town called Lathrop, the Terrys and Justice Field met face to face in the dining room.

[84] Mrs. Terry slipped quickly into the background, and icy glares melted to physical action as the elderly but agile Terry turned on Field with fists of frustration. When Naegle thought Terry might be reaching for his bowie knife, he reacted by pumping two pistol shots into Terry's chest.

Bitter rivalry between formidable opponents ended tragically with Terry lying face up at Field's feet, unseeing eyes staring blankly into space. Sarah said it was murder! Both David Naegle and Stephen Field had to face the charge, but both successfully pleaded self-defense and were cleared of criminal conduct.

However, the Terry versus Field feud was more than a physical struggle. The two men cherished contrasting intellectual ideologies, as is shown by their opposing views on Sunday legislation more than thirty years before Terry's death.

Field's spiritual antecedents could be traced to Puritan-oriented New England Congregationalism, spawning ground for North American blue laws. Terry represented frontier stock from Kentucky and Texas.

In 1858, Field and Terry had sat side by side on the California Supreme Court. When a case arose which challenged the constitutionality of a California “Sabbath” act, the two men took opposing sides. In a sense, they were both pioneers and made legal history by their statements. At a time when most state supreme courts nonchalantly accepted enforced Sunday observance as realistic religious establishment, Terry had the audacity to rule that the California Sunday law was not only an unjustifiable intrusion upon legitimate property interests, but also constituted a denial of religious freedom. This was the first time in history that a state supreme court had been bold enough to break with tradition.

Field rose to the occasion and displayed some audacity of his own. Aware that Sunday laws rested on shaky grounds if justification was tied to religious purposes, Field dissented from the Terry opinion and refined a creative approach to enforced Sunday observance. **[85]** The Field doctrine offered constitutional refuge to blue laws by treating them as civil rather than religious legislation. A couple of other state courts had previously tried this plan, but Field was the architect of its refinement and perpetuation.

T'he first “Sabbath” act in California had been accompanied by spirited legislative debate in the 1850 California legislature. The gold rush atmosphere of early California was brash and bawdy. Certain conscientious political leaders determined to legislate religion into an irreligious society. They sensed, however, that the public would greet such coercion with ridicule rather than enthusiasm. Therefore they characterized the statute as “An Act to Provide for the Better Observance of the Sabbath.”

A Jewish merchant living in Sacramento, preferring a Sabbath observed on the seventh day of the week, made no effort to conceal the peddling of his wares on Sunday. An early victim of the long fingers of the California “moralists”, Newman spent thirty-five days in jail for his disobedience.

California court dockets were not crowded in those days, and it was not long before Newman had occasion to lay his troubles before the supreme court. He thought the “Sabbath” act violated the California State Constitution on at least two points. Chief Justice Terry and Associate Justice Burnett agreed.

Terry[1] frowned on the act both as a religious establishment and as a violation of the “inalienable” right to acquire property.

Reminiscent of James Madison's recognition of time as property, Terry saw time as an opportunity to acquire property. Since this right was inalienable by constitutional declaration, the legislature had no right to tamper.

David Terry warned that legislative usurpation of a nonexistent power, once allowed, “is without limit.” Once the legislature arbitrarily designated a specific “time of compulsory rest,” there would be no barrier to further legislation which, left to its wildest whim, could lead to a “prohibition of all occupations at all times.” **[86]** He scoffed at the implication that citizens needed the state to take them by the hand and force them to “seek the necessary repose which their exhausted natures demand,” any more than they needed to be fed, ordered to sleep, or compelled to find relief from pain. The chief justice declared that any citizen of California had personal “instincts and necessities” which could meet these needs without the aid of government's long arm.

The “Sabbath” act, like the “laws of the ancients, which prescribed the mode and texture of people's clothing, or similar laws which might prescribe and limit our food and drink, must be regarded as an invasion, without reason or necessity, of the natural rights of the citizen” enacted by government beyond its legitimate sphere of power.

Although the state could legitimately exercise police power to regulate tanneries, slaughterhouses, and the sale of drugs and poisons, the Terry opinion disputed the “civil aspect” arguments of Sabbath-law proponents who sought the same cloak of respectability for enforced Sunday observance. He sliced through the civil regulation assertions and exposed the act as “a purely religious idea” where the “aid of the law to enforce its observance has been given, under the pretense of a civil, municipal, or police regulation.”

Terry believed that the act intended “to enforce, as a religious institution, the observance of a day held sacred by the followers of one faith.” Other state high courts took a similar view, but where other courts accepted Sunday laws as acceptable religious establishments, Terry took a new tack, declaring the “Sabbath” act to be at cross purposes with California's constitutional guarantee of “free exercise and enjoyment of religious professions and worship, without discrimination or preference.”

The constitutional mandate was not met by bland assurances to the Jew or seventh-day Christian that after all, “your conscience is not constrained, you are not compelled to worship or to perform religious rites on that day, nor forbidden to keep holy the day which you esteem as a Sabbath.”

[87] Such an approach, however, indicates mere toleration and revocable privilege in contrast to the inalienable rights inherent in complete

religious liberty. The achievement of that ideal requires "a complete separation between church and state, and a perfect equality without distinction between all religious sects."

The chief justice pooh-poohed attempts to wink at the "Sabbath" act as a civil rule and, in a slap at the Field dissent, discarded such attempts as mere judicial assertion.

Associate justice Burnett,[2] a Roman Catholic, concurred with Terry in a separate statement of opinion. Like Terry, he objected to the act because it established "a compulsory religious observance."

To Burnett, religious freedom encompassed a broad principle for all – the believer and unbeliever alike. The Sunday law violated "as much the religious freedom of the Christian as the Jew. Because the conscientious views of the Christian compel him to keep Sunday as a Sabbath, he has the right to object, when the Legislature invades his freedom of religious worship, and assumes the power to compel him to that which he has the right to omit if he pleases." Burnett saw the California Constitution as a barrier to legislative enforcement of any religious observance whatever.

The associate justice hammered away at the lack of legislative power to toy with inalienable rights. In his analysis, compulsory power did not exist for the State of California to "compel the citizen to do that which the constitution leaves him free to do or omit, at his election. . . . The Legislature cannot pass any act, the legitimate effect of which is *forcibly* to establish any merely religious truth, or enforce any merely religious observance.

And even if enforced, Sunday observance could be labeled "civil" only by way of judicial semantics. **[88]** Burnett rejected this approach. It was definitely beyond the scope of even legitimate police power. "If the Legislature could prescribe the days of rest" for Californians, "it would seem that the same power could prescribe the hours to work, rest, and eat."

And after all, said Burnett, "It is the individual that is intended to be protected. The principle is the same, whether the many or the few are concerned."

Writing on a day when the ugly stain of human slavery was about to split a nation from one end of the Mason-Dixon line to the other, Burnett observed that compulsory Sunday rest in a slave state might make sense as a civil measure to protect "the slave against the inhumanity of the master in not allowing sufficient rest" or if "confined to infants or persons bound by law to obey others."

But in California's golden hills "every man is a free agent, competent and able to protect himself, and no one is bound by law to labor for any particular person. Free agents must be left free, as to themselves. . . . If we cannot trust free agents to regulate their own labor, its times and quantity, it is difficult to trust them to make their own contracts."

The free agent argument, coupled with the declaration that the legislature "cannot prohibit the proper use of the means of acquiring property, except the peace and safety of the State require it," was used by the court majority to strike down the California "Sabbath" act even as a purely civil regulation. The right to acquire property was inalienable, and the blue law had trampled that right. On this both Burnett and Chief Justice Terry agreed. If the act was outside the scope of the legitimate peace and safety interests of the state, it certainly was, as a purely religious issue, outside constitutional limits.

The third member of the court, Associate Justice Stephen J. Field, dissented vehemently. While admitting the possible religious motivation of some legislators in adopting the "Sabbath" act, Field searched for some possible secular purpose that would validate the measure under the police power of the state. **[89]** This he found in the health and welfare benefits that might come through regular weekly rest, despite the fact that the choice of the day was not left to the individual. Encouraged by a similar innovation used by the Pennsylvania Court in 1848 and the Ohio Court in 1853, Field rejected the "free agent" and "right to acquire property" arguments. Although Field was a minority of one in 1858, he had the last word with Terry in this split of judicial theory.

When Terry left the California Supreme Court in 1859, Stephen J. Field was elevated to the vacated chair of the chief justice. And from that spot in 1861, Field had the satisfaction of seeing the Terry holding in *Ex Parte Newman* repudiated, and his own theories elevated to the majority status in the case of *Ex Parte Andrews*:[3] More than that, Field lived to see the day when he could write his "civil regulation" and "police power" belief into an opinion of the United States Supreme Court.

But the Terry opinion in *Ex Parte Newman* was right for the horde of migrants who invaded the Sierras, leaving a trail of gold and silver dust from San Francisco to Virginia City. America was a melting pot of world nationalities; cosmopolitan California became a melting pot of America. The Terry opinion pioneered a new dimension in human liberty and shook off the shackles of a tradition which was obsolete where church and state were separate.

California adventurers welcomed this new dimension. Men and women who had scrambled through narrow Sierra trails, fought the fevers of the Panama jungle, and sailed the rough waters of the Cape needed no paternalistic hand to lead them to their day of rest. The numbing cold and backaches from labor in the Mother Lode country provided adequate incentive.

Merchants like Newman of Sacramento didn't need to be told when to rest. **[90]** A miner or rancher in quest of supplies was as likely to arrive in

town on Sunday as on any other day. Free enterprisers felt individually capable of determining how best to serve the need of the customer – and how to rest.

The public accepted Field's medicine for a time. But when the "Sabbath" act was succeeded by similar legislative experiments and the Field theory achieved high court acceptance, public resentment boiled over into the political arena in 1882.

Fired by legislative and judicial triumphs, religious forces pushed fanatically for more rigid enforcement of these legal achievements. The Ministerial Union of San Francisco pressured public officials to crack down on those who disobeyed the demands of the blue law. Police Chief Crowley obliged by promising arrests "of persons who may violate this law next Sunday."[4]

Crowley and his force moved in with strong arms, and in less than a month's time the San Francisco dragnet flushed out nearly 1,600 lawbreakers and flooded the court dockets. Rigid enforcement created such a bottleneck in the courts that San Francisco police were forced to ease up.[5]

Most Californians disliked the looks of blue laws on paper, but the effect of enforcement aroused them to real action. With the statewide election scheduled for November, politicians in 1882 had their ears to the ground. What they heard was the ominous sound of resentment. The Democrats responded to the voice of a League of Freedom that was out to destroy the blue laws.

The Republicans listened to church representatives who warned political parties to "be careful of their platform in this direction. Any yielding or temporizing on this and kindred subjects will be resented by the better class of our citizens, who, in all cases, are the power in the land." Republicans had carried California by a 20,319 vote majority in 1878 and had no intention of losing four years later.

[91] Accordingly, when the GOP convention met in 1882, they proposed a platform plank supporting Sunday laws. J. W. Shaeffer of the League of Freedom and Mr. Wagner of the Religious Liberty Association publicly opposed its adoption. But plank number five endorsed "preserving one day in seven as a day of rest from labor" to protect the laboring classes. The Republicans announced: "We are in favor of observing Sunday as a day of rest and recreation, and while we expressly disavow the right or the wish to place any class of citizens [under compulsion] to spend that day in a particular manner, we do favor the maintenance of the present Sunday laws, or similar laws, providing for the suspension of all unnecessary business on that day."[7]

Democrats in San Jose the previous June had also faced up to the Sunday-law issue. Sitting at the head chair of the convention committee

considering the blue law was David S. Terry. When the smoke cleared, the committee voted eight to one to include the following plank in the Democratic platform:

> That the Democratic Party, inheriting the doctrine of Jefferson and Jackson, hereby declares its unqualified enmity to all sumptuary legislation, regarding all such exercise of the law-making power as against the just objects of free govemment, and that all laws intended to restrain or direct a free and full exercise by any citizen of his own religious and political opinion, so long as he leaves others to enjoy their rights unmolested, are antidemocratic and hostile to the principles and traditions of the party, create unnecessary antagonism, cannot be enforced, and are a violation of the spirit of the republican government; and we will oppose the enactment of all such laws and demand the repeal of those now existing.[8]

A few delegates expressed apprehension and suggested that the plank might rob them of the church vote, warning "that its adoption would result in the party's defeat in November."

[92] But Delegate Brady of Fresno urged "that a man ought to be allowed to worship God according to his dictates of conscience. . . . We cannot drive people to the worship of God, and it ought not to be done in that way."

The voice of David Terry came through loud and clear when he described the disputed matter as a "living issue." He appealed to all the delegates, declaring it was time to put at rest the charges which accused the Democratic Party of being too cowardly to meet the issue openly. He believed that the Sunday law violated both state and Federal principles and that the notion of it religious holiday" and "police regulation" foisted upon a freedom-loving public in an attempt to rationalize Sunday laws was a "parcel of nonsense put up by the judges."

David S. Terry no doubt recalled the words of his former colleague, Stephen J. Field, in making this homespun characterization.

A majority of delegates acclaimed the Terry view and adopted it as plank number five in the Democratic platform. The lines had been drawn for the political settlement of a religious issue.

The Methodist Conference of California met in San Francisco in September and resolved to throw its support behind a "civil Sabbath" and to reflect this dedication in a free ballot. Without naming the Republicans or Democrats specifically, the resolution suggested that "any attempt to abolish or change the day is an attempt to destroy the national life; that the civil Sabbath in the republican state depends upon the ballots of the citizens;

that it is the duty of the Christian citizen to cast his free ballot where it will best promote the highest interests of the Christian Sabbath."

The stage was set in November, 1882, for a political test unique in the history of blue laws. The people could speak. And they did – with a sweeping Democratic majority of 21,050, in a sharp reversal of the 1878 voter pattern. **[93]** The Democrats began a new year with General George Stoneman in the governor's mansion and a Democratic majority controlling the legislature.

In a message to the legislature early in 1883, the newly elected governor attacked the California Sunday law and declared it "unwise to cumber the statute books with an enactment which experience has proven cannot be enforced. The result of the late election by an emphatic endorsement of the attitude of the now dominant party on this important subject makes our duty in the premises perfectly clear." "The right to worship free from hindrance or molestation should always be carefully guarded."[10]

True to their platform pledge, the Democratic majority stripped the Sunday law from the California statutes almost as its first order of business in 1883. Shaken Republicans had taken a deep breath of political poison when they inhaled the blue-law atmosphere.

Oddly enough, when Sunday observance was no longer demanded by law, attendance at Sunday worship services in California increased. Sunday-law advocate W. F. Crafts, spokesman for the International Reform Bureau, admitted in an 1885 publication that "both laymen and ministers say that even in California the Sabbath is, on the whole, better observed, and Christian services better attended, than five years ago."[11]

Thus when an aroused electorate spoke in 1882, it backed the Terry plank in the Democratic platform and spurned the Field declaration. It was the first time in history that a state electorate had been so definitely heard at the polls on Sunday laws, and the voice of rejection sounded loud and clear.

Stephen J. Field seemed not to hear the California electorate speak. He was out of earshot in Washington, D.C., serving as an associate justice of the United States Supreme Court. What the voters in the gold-rush country had thrown out, Field was about to dredge up for the entire nation – the theory that coerced Sunday observance offered sufficient secular health and welfare benefits to justify its being forced on the public by legislative fiat. **[94]** The case which became the vehicle for this national premiere, like Field, came from California. The appellant was Soon Hing, a Chinese laundryman who had tried his hand at free enterprise in San Francisco.

The city by the Golden Gate acted to prevent labor in laundries after 10 p.m. at night as well as all day Sunday. In February of 1884, Police Chief Crowley, of Sunday-law enforcement fame, charged Soon Hing with working after 10 p.m. In 1885 the case landed in the United States Supreme Court, and Justice Field was there to write an opinion.

The facts of the case concerned night labor and the power of the city to control round-the-clock laundry work. Field couldn't resist extending the dictum of the case to include Sunday closing. For the first time the United States Supreme Court gave judicial recognition to the “civil regulation” premise as a means to justify blue laws.

Field's brilliant mind did more than repudiate Terry's progressive rationale and sidestep the expressed will of a California public! His was a judicial assertion that held the fancy of the United States Supreme Court in a grip that could not be broken even in the liberal climate of 1961.

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