

Celebration of the

**150th Anniversary
of the Supreme Court**

February 8, 2000
Sacramento, California

PROFESSOR BARBARA BABCOCK:

Mr. Chief Justice and Associate Justices—I am honored to be here today.

A hundred and fifty years ago, the first California Legislature selected the first Supreme Court. One year later, the Legislature provided for California lawyers: “Any white male citizen of the age of twenty-one years, of good moral character, and who possesses the necessary qualifications of learning and ability” could be admitted to practice after a “strict examination.” For the next 39 years, only white males were eligible for the California bar.

Then in 1878, women activists, led by an obscure San Jose housewife, lobbied a “Woman Lawyer’s Bill” through the Legislature. Fearing repeal by some future Legislature, the same women placed their right to practice law in the 1879 Constitution, where it still appears today: “No Person shall on account of sex be disqualified from entering upon or pursuing any lawful business, vocation, or profession.”¹

Clara Shortridge Foltz was the housewife who led the lobbying effort. She then used “her bill” to become California’s first woman lawyer: The Portia of the Pacific, as the nationwide press coverage dubbed her. A year later she was the first woman lawyer to argue before the California Supreme Court. That is the story I offer today in celebration of the sesquicentennial of this great court.²

The story opens in “the terrible seventies” a decade of crop, bank, and moral failures; of unemployed working men, despised Asians, silver kings, and railroad barons; all on the edge of class and race war fueled by an unrestrained press and flamboyantly manipulative politicians. Almost overnight, the radical Workingmen’s Party of California sprang up, with a program of redistributing wealth and eliminating Chinese labor. Despite the racism, and initial tendencies toward mob action, the WPC gained increasing

middle-class support. By 1879, Karl Marx himself was impressed. “Nowhere else has the upheaval most shamelessly caused by capitalist concentration taken place with such speed,” he wrote.

Instead of Marxian revolution, however, Californians, including the Workingmen’s Party, turned to constitution-making as their change agent. The campaign for a new constitution had the qualities of a moral crusade. Reform was not enough; the people wanted rebirth.

Though women are not usually mentioned in the accounts of this period, they were very much in the fray. With their male allies, they pressed for the three great goals of their movement: suffrage, jury service, and access to the professions—especially the legal profession. The women, like everyone else, believed that they would at last find their rightful place in the re-constituted California.

One woman, Laura DeForce Gordon, actually ran for delegate to the Constitutional Convention, aided by her friend Clara Foltz. No woman could vote for her, but no law prevented her from serving. After a spirited campaign, Gordon lost to a man, of course. David Terry was the man. Terry had been on the California Supreme Court before the Civil War, had resigned to duel with United States Senator David Broderick, and fled the state after killing him. By the late 1870’s, Terry was back practicing law in Stockton, and a forgiving, or perhaps forgetful, public elected him as a delegate to the convention.

At the convention he became the unofficial leader of the Workingmen—and a friend to the women’s cause. The convention started in September 1878, the same month Clara Foltz became a lawyer, and also the same month that the first law school opened in California. Hastings College of the Law was established with a grant from Serranus Clinton Hastings, the first Chief Justice of the California Supreme Court.

The first woman lawyer greatly desired to study at the first law school in order to improve herself and better serve her clients. Having eloped at age 15, and borne five children, Foltz had little previous opportunity for formal education. She and Laura Gordon (who was to become California’s second woman lawyer) signed up for the January term and paid the \$10 tuition. But after three days, they were expelled. No reason was given, but unofficially they learned that the rustling of their skirts bothered the other students.

When all their efforts to negotiate failed, Foltz and Gordon sued the Hastings Board of Directors, the cream of the bar, which included a former

justice of the Supreme Court, W.W. Cope, and a future justice, J.R. Sharpstein. Though their opponents had all the prestige, Foltz and Gordon had all the good arguments. Hastings was part of the University of California, coeducational from its founding. And the recent passage of the Woman Lawyer's Bill enabled Foltz to scoff at the idea that California would be a state where women might practice law but not learn it.

The case was assigned to Judge Robert Morrison, of the San Francisco District Court, who within the year would be elected Chief Justice of the Supreme Court under the new Constitution. After a dramatic and highly publicized courtroom hearing, while Morrison was considering the case, the convention passed the women's employment clause and added another, providing that that all departments of the University of California should be officially open to women. This was partly a consolation prize for the narrow defeat of suffrage, and partly David Terry's behind-the-scenes efforts to help the women.³

Foltz said of Judge Morrison that though "he did not believe in women lawyers, he did believe in the law." Citing the Woman Lawyer's Bill, "pending at the same time as the bill to establish Hastings," and the constitutional clauses, Morrison issued a writ of mandamus ordering the women's admission. But to Foltz's dismay, he stayed the writ pending appeal.

The San Francisco Chronicle "hunted up S.C. Hastings to get his opinion about admitting Mrs. Foltz and Mrs. Gordon among a lot of innocent law students who had never seen a woman." Hastings said he thought Judge Morrison was right and opposed the appeal. His main concern was how to separate the sexes once women prevailed, as they inevitably would in the Supreme Court. The reporter had a lot of fun with this—imagining a gilt-edged balcony, or a simple pine platform in one corner, and noting that conception of "the details required a judicial intellect."⁴

Clara Foltz did not see any humor in the matter. Years later, she was still steaming at her opponents "who strove to defeat the letter of the law and to overcome its intent and spirit by arguments unworthy of the profession they adorned." Even though she was sure of victory in the end, the semester would be over before her case could be heard in the Supreme Court. She had spent the "scholarship" put together by family and friends, and never would again have the chance for study and reflection, freed from the interests of a client or a cause.

She returned to San Jose, and prepared to argue her case. Meanwhile, the Constitution was ratified by the people. It created a new seven-member

Supreme Court, but Clara Foltz's case came before the old institution in its last month of existence. Chief Justice Wallace said her argument was the best for a first argument that he had ever heard. She won without dissent.⁵

So ended the first appearance by a woman lawyer before the California Supreme Court. As to the characters and institutions, here is the rest of their story.

Clara Foltz and Laura Gordon practiced law and had many more firsts, though Foltz always thought of the Hastings case as her finest hour.

Hastings College of Law graduated its first woman, Mary McHenry, in 1882. She was chosen to give the graduation address and Foltz wrote to her: "You scored one for your sex [today]. As a sort of mother of the institution, I rejoice in your success that at the first public graduating exercises, a bright and beautiful young girl comes off with the honors of the class."

David Terry was killed in 1889 by a United States marshall who was protecting United States Supreme Court Justice Steven Field (also a former member of the California Supreme Court).

In 1888, the papers reported that Miss Alice Parker of Santa Cruz became the third lady lawyer admitted to practice by the Supreme Court. When, before the examination, Chief Justice Searls reminded the applicants they must be 21 years of age, she "blushed and smiled, and the Chief Justice with a merry twinkle in his eyes, relieved her embarrassment by stating that if they were not all twenty-one, they would be by the time the court finished with them."⁶

The women's employment clause of the Constitution was cited in an 1881 Supreme Court case allowing Mary Maguire to be a barmaid. It then fell into desuetude for almost a hundred years. In 1971, the old clause played a large part in one of the first legal victories of the renewed women's movement: the same movement that brought the first women to the bench of the California Supreme Court and many other courts as well; the same movement whose effects on the profession, on the polity, and on the culture are being written, even as we meet here today.⁷

(For a detailed account of the events portrayed here, see Babcock, *Clara Shortridge Foltz: Constitution-maker* (1991) 66 Ind. L.J. 849; Babcock, *Clara Shortridge Foltz: "First Woman"* (1994) 28 Val. U. L.Rev. 1231; Women's Legal History Biography Project, Clara Shortridge

Foltz (Summer 1998) Robert Crown Library, Stanford Law School
<<http://www.stanford.edu/group/WLHP>> [as of Feb. 18, 2000].)

1. California Constitution of 1879, article XX, section 18. In 1970, the wording was changed to, “A person may not be disqualified because of sex, from entering or pursuing a lawful business, vocation or profession.”

2. Foltz was not, however, the first woman to argue before the court. In 1878, Jeannette Frost, a temperance worker and anti-suffragist, argued in pro. per. in a property case before the court. Despite the fact that Frost was opposed to women’s rights generally, proponents of the Woman Lawyer’s Bill used her example to show that women have the capacity to be lawyers.

3. On Terry’s advice, Gordon filed her action directly in the Supreme Court, arguing that mandamus should issue in order to have a quick, conclusive decision on this issue “of great public interest.” At the same time, Foltz filed hers in the San Francisco District Court. The Supreme Court refused to hear Gordon’s action and it was joined with Foltz’s.

4. San Francisco Chronicle (Mar. 6, 1879) page 3.

5. *Foltz v. Hoge* (1879) 54 Cal. 28.

6. Daily Alta California (Sept. 5, 1888) page 2.

7. *Matter of Maguire* (1881) 57 Cal.604; *Sail’er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 485 P.2d 529.

