

JUDGE HARRY PREGERSON'S QUEST FOR JUSTICE FOR ALL: PUBLIC LAW LITIGATION,
MANAGERIAL JUDGES, AND THE CENTURY FREEWAY CASE

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ABSTRACT

The late Judge Harry Pregerson played a central role in bringing the massive Century Freeway litigation to a successful conclusion. As a direct result of his dedicated work, a major freeway in the heart of Los Angeles was built. Moreover, the project, as constructed pursuant to a comprehensive consent decree, ensured affordable housing for displaced residents and fair access by people to well-paid construction jobs.

In directing the construction of what he affectionately called “the freeway with a heart,” Judge Pregerson committed himself to crafting justice for all. Based on the understanding that a judge should be an active participant rather than a passive observer in social change litigation, his approach provides a blueprint for federal judges, as well as for political leaders and policy makers, as the nation embarks on rebuilding its infrastructure.

Put simply, Judge Pregerson’s handiwork in the Century Freeway case exemplifies how a judge can bring about a just outcome in a complex piece of litigation that implicates many different, and at times divergent, community interests. At a most fundamental level, the Century Freeway case demonstrates that the right judge in social reform litigation can contribute to positive social outcomes.

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INTRODUCTION

Federal judges possess broad judicial powers. Over time, the nature of the litigation in which they wield those powers has significantly changed. The case of a single plaintiff suing a single defendant over a single claim has been transformed into massive actions affecting thousands of people with many legal claims against many defendants. In the new large-scale pieces of litigation dramatically affecting the greater good, judges exercise awesome judicial power, with the potential to have far-reaching social impacts.

A judge for decades, first at the trial court and later as an appeals judge, the late Harry Pregerson did not see the role of the judge as simply issuing orders and writing opinions. Rather, he was laser-focused on intervening as necessary to bring concrete improvements to ordinary peoples' lives.

The Century Freeway litigation exemplifies Judge Pregerson's deep and enduring commitment to justice for all. The freeway was slated for construction smack dab in the middle of Los Angeles, Pregerson's lifelong—and beloved—home.¹ Freeways and traffic are what

¹ For a snapshot of Judge Pregerson's illustrious career, see Christopher David Ruiz Cameron, *Harry Pregerson, The Real Mayor of Los Angeles*, 36 SW. U.L. REV. 311 (2007); Maura Dolan, *Judge Harry Pregerson Dies: One of Most Liberal on Federal Appeals Court*, S.F. CHRON. (Nov. 27, 2017), <https://www.sfgate.com/nation/article/Judge-Harry-Pregerson-dies-one-of-most-liberal-12387081.php>. A documentary film offers valuable perspectives about Judge Pregerson's fundamental desire to help people. See *9th Circuit Cowboy – The Long Good Fight of Judge Harry Pregerson* (Am. Film Found. 2021).

many visitors vividly remember about the greater Los Angeles area.² By providing a new route to the Los Angeles International Airport (LAX), the Century Freeway promised to add much-needed relief to the traffic gridlock often plaguing the city.

However, as Judge Pregerson fully understood, the construction of the freeway had impacts that went far beyond traffic congestion and mere transportation, important as those are to daily life in the city. Construction of the new freeway threatened working families of color of modest means with the loss of their homes. Moreover, the project held the promise of much-needed well-paid jobs for community members, posed risks to the health of the environment, and more. As a bona fide product of Los Angeles, Harry Pregerson understood the dramatic social impacts of the freeway project in ways that non-Angelenos simply could not fully appreciate. And his sense of justice in the case required that he weigh concerns far beyond simply those implicated by the mere construction of a freeway, which probably is how many judges would have approached the case.

Not averse to almost literally getting his hands dirty, Judge Pregerson for decades deeply immersed himself in the nuts-and-bolts of the Century Freeway litigation.³ He figuratively twisted arms, nudged attorneys, and at every juncture of the case shared his thoughts, ideas, and arguments. Taking the uncommon step of keeping the time-consuming case on his docket after being elevated from the federal district court to the U.S. Court of Appeals for the Ninth Circuit, Judge Pregerson refused to abandon the difficult and important work that remained to be done in the case. Although his approach to judging at times led to grumbling, it unquestionably obtained practical results. Today, the Century Freeway literally stands for all of us to see and experience on a drive to and from LAX. Perhaps more importantly, residents, workers, and the greater Los Angeles community benefitted from Judge Pregerson's tenacious judicial craft and unswerving commitment to justice for all in overseeing the freeway's construction.

In many respects, Judge Harry Pregerson was no less than the ideal judge to preside over the Century Freeway litigation, with all its far-reaching economic, social, and cultural ramifications. And his view on the propriety of using all the powers of a federal judge at his disposal to craft justice for the people of Los Angeles, deeply influenced the case at every twist and turn. Importantly, Judge Pregerson insisted that the parties to the litigation fully address the many diverse, and at times competing, interests implicated by the freeway's construction, from the availability of affordable housing for communities of color displaced by the freeway to meaningful access to construction jobs for minority workers to protection of the environment. As a federal judge, he assumed the extraordinary role of directly overseeing the construction through closely—and personally--monitoring compliance with the comprehensive consent decree for decades. (Recall that, as this symposium celebrates, the litigation commenced in 1972.). Put simply, Judge Pregerson was not a mere bystander but the lead actor in the full-length drama that was the Century Freeway litigation and is Los Angeles.

Part I of this article considers modern social change litigation, with many parties, claims, and interests at stake and far-reaching social impacts, as well as concerns with judicial activism

² See generally PAUL HADDAD, *FREEWAYTOPIA: HOW FREEWAYS SHAPED LOS ANGELES* (2021) (exploring the social, economic, political, and cultural demands that influenced the construction of the amazing web of freeways in Los Angeles).

³ See *infra* Part II B.

and overreach. Part II briefly offers some background about Judge Pregerson that helps explain his judicial philosophy and approach to the management of the Century Freeway litigation. It shows how his approach fits with theories of the judicial function in complex social change litigation popular at a time of great social upheaval and strident demands for change. As we shall see, Judge Pregerson presided over an ideal case for his hands-on practical approach to forge a just resolution of the dispute. In overseeing the construction of a freeway, his goal at every step of the way was to bring a semblance of justice to all the people of his hometown. And, in the end, he did just that.

The Century Freeway case ultimately represents a textbook example of a successful piece of large-scale social impact litigation. Judge Pregerson secured a full and fair resolution of the dispute through effective management of the litigation and insistence that, in fashioning a comprehensive consent decree, all voices were heard, interests—including these of the greater community—considered, and contingencies fully addressed. As the nation proceeds to revamp its infrastructure with a federal spending package,⁴ his approach offers valuable lessons about how community interests may be appropriately weighed in fashioning infrastructure projects with far-reaching social impacts.

I. MODERN SOCIAL CHANGE LITIGATION

Litigation in the pursuit of social change flourished in the 1960s and 1970s, a time of incredible social ferment in the United States. The era perhaps will be most remembered for its mass protests and clarion call for change. Large cases seeking institutional reform—including the radical restructuring of institutions—became a regular part of the federal court docket. Many parties with many claims against many defendants made the Century Freeway litigation a prototypical example of what legal scholars today refer to as public law litigation. Such litigation flourished with growing use of class actions under Federal Rule of Civil Procedure 23 after its overhaul in 1966,⁵ which made it far easier for classes of persons to challenge the actions of governments and other large institutions in desegregation, prison reform, employment discrimination, environmental, mass tort, and other cases.⁶ It became fashionable for courts to act in ways similar to legislative bodies in the effort to bring justice in complex disputes

⁴ See Infrastructure Investment and Jobs Act, Pub L. No. 117-58, 135 Stat. 429 (2021).

⁵ See Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 577 (1997) (“The partnership between class actions and civil rights has grown to such an extent that the Advisory Committee revising Rule 23 noted that, ‘subdivision (b)(2) has cemented the role of class actions in enforcing a wide array of civil rights claims.’”); Benjamin Kaplan, *Continuing Work of the Civil Committee: 1996 Amendments of the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 389 (1967) (explaining that Rule 23(b)(2), which authorizes class actions seeking injunctive relief, was built “on experience mainly, but not exclusively, in the civil rights field”). See generally Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325 (2017) (analyzing the civil rights foundations of the 1966 amendments to Rule 23); Arthur R. Miller, *The American Class Action: From Birth to Maturity*, 19 THEORETICAL INQ. 1 (2018) (reviewing the evolution of Rule 23 class actions).

⁶ Two contemporary examples are *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) (reviewing application of Rule 23 requirements in a massive gender discrimination class action against Wal-Mart) and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (reviewing the settlement of a asbestos mass tort class action providing compensation and other relief to persons who suffered asbestos-related disease).

involving the rights and interests of thousands of people, including many not even technically parties before the court.

The rise in public law litigation raised fundamental questions about the appropriate role of unelected and politically unaccountable judges presiding over mammoth cases with great social impacts. Critically analyzing the role of judges in modern complex public law litigation,⁷ civil procedure and complex litigation scholars have questioned the legitimacy of so-called activist judges in big, if not at times unwieldy, cases.⁸

A. *Public Law Litigation*

In a classic article “The Role of the Judge in Public Law Litigation” in the *Harvard Law Review*, Professor Abram Chayes in 1970 identified the critical features of what he referred to as public law litigation:

The party structure is sprawling and amorphous, subject to change over the course of the litigation. The traditional adversary relationship is suffused and intermixed with negotiating and mediating processes at every point. *The judge is the dominant figure in organizing and guiding the case, and he draws for support not only on the parties and their counsel, but on a wide range of outsiders—masters, experts, and oversight personnel. Most important, the trial judge has increasingly become the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court and require the judge’s continuing involvement in administration and implementation.* School desegregation, employment discrimination, and prisoners’ or inmates’ rights cases come readily to mind as avatars of this new form of litigation. But it would be mistaken to suppose that it is confined to these areas. Antitrust, securities fraud and other aspects of the conduct of corporate business, bankruptcy, and reorganizations, union governance, consumer fraud, housing discrimination, electoral reapportionment, environmental management—cases in all these fields display in varying degrees the features of public law litigation.⁹

As identified by Professor Chayes, public law litigation contrasted sharply with the traditional conception of the litigation of private disputes between private parties involving private interests and private remedies. Proponents of public law litigation saw the law, litigation, and the courts as an appropriate means to pursue social change for the common good through injunctions, consent decrees, and other procedural devices.

Professor Chayes positively portrayed public law litigation and the exercise of broad power by judges in those cases. As he put it, “[i]n my view, judicial action only achieves . . .

⁷ See, e.g., KEVIN R. JOHNSON, CATHERINE A. ROGERS & JOHN VALERY WHITE, *COMPLEX LITIGATION: CASES AND MATERIALS ON LITIGATING FOR SOCIAL CHANGE* (2009) (compiling materials to teach complex litigation through focusing on cases directed at achieving social change).

⁸ See *infra* Part I.B.

⁹ Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1970) (emphasis added); see Owen M. Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121, 122-25 (1982) (distinguishing between the “dispute resolution” and the “structural reform” models of litigation); see also Richard L. Marcus, *Public Law Litigation and Legal Scholarship*, 21 U. MICH. J.L. REF. 647 (1988) (analyzing the broad influence of Professor Chayes’ article on legal scholarship).

legitimacy by responding to, indeed by stirring, the deep and durable demand for justice in our society.”¹⁰ In Professor Chayes’ vision of public law litigation, judges could legitimately lead the charge for institutional reform.

In a time of great demand for social change, public law litigation held the promise of bringing about that change. Litigation became a way other than through the political branches for change agents to seek to secure reform and pursue social justice.

B. *Managerial Judges*

When the Century Freeway litigation was in its early stages, Professor Judith Resnik, then a Professor at the University of Southern California (not far from what today is the Century Freeway), in 1982 published an article in the *Harvard Law Review* entitled “Managerial Judges.”¹¹ By sheer coincidence, an editor of the law review, Christopher David Ruiz Cameron, who later clerked for Judge Pregerson in the U.S. Court of Appeals for the Ninth Circuit (and helped organize this symposium), was the lead editor of the article.¹² In what was an instant classic, the article offered a powerful counterpoint to Professor Chayes’ overall positive assessment of the expansive exercise of power by judges in modern litigation and questioned the use of that power. Most fundamentally, Professor Resnik’s article looked skeptically at the awesome power being wielded by the federal judiciary in modern-day complex litigation.

“The phrase ‘managerial judges’ was coined by Judith Resnik in her *classic 1982 article, and her terminology has become a standard part of civil procedure vocabulary*. She uses the phrase managerial judge to describe a judge’s hands-on supervision of cases from the outset, using various procedural tools to speed the process of dispute resolution and encourage settlement.”¹³ Offering a cautionary tale on the possible excesses of judicial power, Professor Resnik in *Managerial Judges* observes that “[t]ransforming the judge from adjudicator to manager substantially expands the opportunities for judges to use—or abuse—their power.”¹⁴ Identifying the dangers of the abuse of judicial power in public law litigation, she critically analyzes the impacts of a managerial judge working to pressure, if not force, settlements, holding separate meetings with the adversaries, challenging the arguments of the attorneys as an opposing counsel does in the case, and otherwise intervening in the litigation.¹⁵

It is self-evident that managerial judges in complex cases, in fact, can abuse their authority. Closing, not opening, the courthouse doors to litigants is one particularly troubling use of judicial power. Aggressive reliance on summary judgment and other devices to take cases from juries, dismissing claims before being they are decided on the merits, and otherwise limiting access to the courts, are the kinds of concerns that generate palpable fears of the

¹⁰ Chayes, *supra* note 9, at 1316.

¹¹ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

¹² I served as an editor of the *Harvard Law Review* with Professor Cameron on volumes 95-96 (1981-83). See KEVIN R. JOHNSON, HOW DID YOU GET TO BE MEXICAN? A WHITE/BROWN MAN’S SEARCH FOR IDENTITY 38-46 (1999).

¹³ Elizabeth G. Thornburg, *The Managerial Judge Goes to Trial*, 44 U. RICH. L. REV. 1261, 1267 (2010) (emphasis added); see, e.g., Maximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835, 836 n.2 (2005) (referring to Professor Resnik’s *Managerial Judges* article as the “classic description of managerial judging in U.S. civil procedure”).

¹⁴ Resnik, *supra* note 11, at 425.

¹⁵ See *id.*

overzealous managerial judge.¹⁶ “Criticisms of managerial judging have tended to focus on the practice’s costs for managed cases, particularly the risk that judges will abuse their power to prematurely terminate potentially meritorious lawsuits.”¹⁷ The same potential for judicial abuse of power, of course, exists in the run-of-the-mill private case with a single claim brought by a single plaintiff against a single defendant.

Although the stakes to the greater community may be higher in public law litigation than in the ordinary piece of private litigation, the character and ideology of the judge presiding over the case, and her rulings in and management of the litigation, invariably influences whether justice ultimately is served. For that reason, the U.S. Senate carefully scrutinizes the appointment of federal judges, and the ideology and competence of the nominees, in the confirmation process.

From roughly the 1960s through the 1980s, federal judges exercised considerable power and authority in a time of social upheaval and rapid change in U.S. society. Judges increasingly took active roles in cases to bring justice to the litigants. For example, in a time when dismantling Jim Crow was a societal imperative, judges, as exemplified by the much-revered decision in *Brown v. Board of Education*,¹⁸ ordered the desegregation of public institutions and carefully monitored compliance with desegregation orders.¹⁹ Judge Pregerson himself put into place a remedial integration plan in a case challenging the segregation of Black and Latinx public elementary school students in Oxnard, a suburb of Los Angeles.²⁰ Similarly, judges approved detailed settlements in employment discrimination litigation, with continuing judicial oversight to ensure compliance.²¹ Mass tort cases have been resolved with extensive judicial involvement, including approval of the terms of the settlements.²²

Although the resolution of public law litigation can be criticized in certain respects as pushing the limits of judicial power and not always fully redressing legal wrongs, judges for the most part took seriously the commitment to seek justice in resolving cases implicating important social interests. In many of these instances, these courts could be said to have behaved as

¹⁶ Professor Arthur Miller has written extensively on the growing use of procedural devices to dispose of cases and deny juries the opportunity to decide the merits of claims. See generally Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis” and Efficiencies Clichés Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. REV. 982 (2003) (reviewing various tools used by courts to dispose of cases before trial); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Reformation of Civil Procedure*, 88 N.Y.U. L. REV. 286 (2013) (to the same general effect).

¹⁷ Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1491-92 (2021) (footnote omitted).

¹⁸ 347 U.S. 483 (1954).

¹⁹ See generally Doug Rendleman, *Brown II’s “All Deliberate Speed” at Fifty: A Golden Anniversary of a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575 (2004) (evaluating the success of injunctions in facilitating the desegregation of the public schools mandated by *Brown v. Board of Education* and its progeny). The failure of the courts to fashion remedies that in fact integrated the public schools led some observers to question the ability of courts to bring about social change. See, e.g., GERALD N. ROSENBERG, *THE HOLLOW HOPE: THE COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008).

²⁰ See *Soria v. Oxnard Sch. Dist. Bd. of Trustees*, 386 F. Supp. 539 (C.D. Cal. 1974) (finding evidence that the school district had engaged in intentional de jure racial segregation of African American and Latinx students and approving a remedial integration plan).

²¹ See *supra* note 6 (citing cases).

²² See *id.*

dispute resolution mechanisms of last resort. Put differently, absent judicial intervention, change for the good would not have been likely.

C. *Summary*

In important respects, Professors Chayes and Resnik carefully analyze the flip side of the same proverbial coin. Public law litigation emerged to achieve large-scale social reform. Like all disputes, it will not always be resolved successfully but, in the right circumstances—and with the right judge, it can be. Managerial judges exercise their powers to good effect, or not. As will be spelled out in Part II, the Century Freeway litigation represents a successful piece of public law litigation in which community voices were heard and competing interests and values were considered in fashioning a resolution of the case. The courthouse door was open to all persons affected. In unquestionably directing and shaping the litigation, Judge Harry Pregerson used all the judicial powers at his disposal to direct the litigation to its successful completion.

II. JUDGE PREGERSON'S QUEST FOR JUSTICE IN THE CENTURY FREEWAY LITIGATION

To understand fully the Century Freeway litigation, one first has to know a bit about Judge Harry Pregerson and his dedicated commitment to justice for all. The next section provides some background and is followed by analysis of Judge Pregerson's role in the Century Freeway case.

A. *Striving for Justice for All*

Harry Pregerson had a deep and enduring commitment to justice for all. His background helps explain why. The son of Ukrainian immigrants, he grew up experiencing the sting of anti-Semitism. Pregerson came from the gritty and multiracial East side of Los Angeles, not the posh and fashionable neighborhoods of Beverly Hills and the West side. Fighting for freedom in World War II, a young Pregerson suffered severe wounds in the Battle of Okinawa in the Pacific and nearly gave the ultimate sacrifice for the country that he so dearly loved.

With his background, it should not be too surprising that no social justice issue was too small for Harry Pregerson, who used all the authority of a federal judge to try to intervene to bring justice.²³ His commitment was not limited to his duties as a federal judge. Indeed, "Judge Pregerson pursued the same social agenda off the bench as on. He established homeless shelters and job training programs in Los Angeles, and he made helping veterans a priority."²⁴

²³ See, e.g., Martha Neil, *Still Active at 90, Federal Appeals Judge is Honored for Creating Group to Help Homeless Vets*, ABA J. (Nov. 11, 2013), https://www.abajournal.com/news/article/still_active_at_90_federal_appeals_judge_is_honored_for_creating_group; Kim Murphy, *Harry Pregerson: Justice for L.A.'s Homeless: Wide-Ranging Judge Opens One of First Federal Shelters*, L.A. TIMES (Jan. 4, 1988), <https://www.latimes.com/archives/la-xpm-1988-01-04-me-22244-story.html>.

²⁴ Sam Roberts, *Harry Pregerson, Judge Guided by Conscience, Dies at 94*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/obituaries/harry-pregerson-dead-ninth-circuit-judge-guided-by-conscience.html>.

When courts and the law denied justice to common people, he emphatically let us all know. As anybody who knew him can tell you, Judge Pregerson was not one to beat around the bush.

Consider a few of Judge Pregerson's stinging dissents in immigration cases. On a single day in 2007, he dissented in 60 unpublished memorandum dispositions, explaining that ordering the deportation of a noncitizen parent in those cases would necessarily result in the unconscionable and unlawful removal from the country of a U.S.-citizen child.²⁵ Similarly, in a 2015 dissent to a decision affirming the removal of the father of two U.S.-citizen children, Judge Pregerson protested: "[t]his de facto banishment . . . denies the children their constitutionally protected right to remain in the country of their birth with their family intact, in violation of due process."²⁶

In another immigration case, Judge Pregerson went much further in dissent and roundly condemned the "entire system of justice for immigrants":

Petitioners' allegations . . . tell the story of hundreds of immigrants that pass through our courts. We are familiar with [the] scheme of non-attorneys—notarios—who make big promises, charge exorbitant fees, file incomplete pleadings, and contract with untrustworthy attorneys who make unprepared appearances in the immigration courts. . . . The BIA's conclusion that the . . . representation "was adequate" and that counsel "conducted herself properly" . . . "mocks the meaning of what a lawyer is – a counselor and advocate knowledgeable of the matters on which he or she provides counsel and of the cause he or she represents." . . . Our entire system of justice for immigrants is complicit in a process that takes advantages of a vulnerable population and results in fundamentally unfair proceedings. . . . Until we refuse to accept the product of such unfair proceedings as meeting the minimum standards of "due process," this perverse system will not change and will continue to prey on vulnerable populations.²⁷

As his immigration dissents suggests, Judge Harry Pregerson, as he did in everything in life, put his heart and soul, as well as seemingly boundless energy, into the dogged pursuit of

²⁵ See *Judge Pregerson Dissents in 60 Cases: Objects to Effective Deportation of U.S. Citizens*, IMMIGRATIONPROF BLOG (Oct. 20, 2007), <https://lawprofessors.typepad.com/immigration/2007/10/judge-pregerson.html>.

²⁶ *Platas-Hernandez v. Lynch*, 611 F. Appx. 404, 406 (9th Cir. 2015) (Pregerson, J., dissenting) (citation omitted); see *Cabrera-Alvarez v. Gonzalez*, 423 F.3d 1006, 1013, 1015 (9th Cir. 2005) (Pregerson, J., dissenting) ("I pray that soon the good men and women in our Congress will ameliorate the plight of families . . . and give us humane laws that will not cause the disintegration of . . . families.").

²⁷ *Angeles Castro v. Lopez Gonzales*, 176 Fed. Appx. 866, 868-69 (9th Cir. 2006) (Pregerson, J., dissenting) (footnotes omitted); see also *Sanchez v. Sessions*, 870 F.3d 901 (9th Cir. 2017) (Pregerson J.) (holding unlawful the U.S. government's racial profiling of undocumented Mexican immigrant apprehended by the Coast Guard while lawfully fishing with friends in U.S. territorial waters), *withdrawn and replaced with* 904 F.3d 643 (9th Cir. 2018).

justice. From immigration to death penalty,²⁸ and even to professional sports franchise cases,²⁹ Judge Pregerson viewed the federal judge as playing a pivotal role in fairly resolving a dispute for the common good. That always was his primary goal as a judge. Although some observers questioned his judicial approach, including his hands-on direction of the Century Freeway litigation,³⁰ the subject of this symposium, one cannot dispute Judge Pregerson's deep and unswerving commitment to justice for all and his consistent striving to do the right thing for all of the people affected by a case. As has been discussed, raised in the hardscrabble and multiracial East side of Los Angeles, he had seen injustices first-hand and dedicated his life to remedying them.

The following colloquy at the hearing on his confirmation to the U.S. Court of Appeals for the Ninth Circuit provides a sense of the depth of Judge Pregerson's devotion to justice:

"If a decision in a particular case was required by case law or statute," Senator Alan Simpson, a Wyoming Republican, . . . "and yet that offended your own conscience, what might you do in that situation?"

Judge Pregerson . . . replied unflinchingly.

"I would try and find a way to follow my conscience and do what I perceived to be right and just," he said.

At another point he said: "My conscience is a product of the Ten Commandments, the Bill of Rights, the Boy Scout Oath and the Marine Corps Hymn. If I had to follow my conscience or the law, I would follow my conscience."³¹

B. *The Century Freeway Litigation*

Judge Pregerson's role in the Century Freeway litigation represents a case study in the effective exercise of broad and decisive judicial power in a complex case with major social impacts. In his mind, the impacts of the freeway on everyday people was always paramount. It is hard not to concede that he took an active role in the litigation. In some ways, Judge Pregerson fit perfectly into the category of what Professor Resnik characterized as managerial judges, who unabashedly wielded judicial power in an attempt to solve complex social problems and sought to forge justice for all. Although the pendulum has swung somewhat and the

²⁸ See Phillip Hager, *Debate Rages Over Delays in Harris Execution*, L.A. TIMES (Oct. 24, 1992), <https://www.latimes.com/archives/la-xpm-1992-10-24-mn-746-story.html> (reviewing the history of the much-publicized Robert Alton Harris death penalty litigation, including a middle of the night stay of execution issued by Judge Pregerson that the Supreme Court later lifted); Dolan, *supra* note 1 (noting that Judge "Pregerson . . . angered some when he issued an order in 1992 to put a hold on the execution of Robert Alton Harris, who was already strapped inside the gas chamber . . . Conservatives railed at him for overturning death sentences and accused him of activism . . . Pregerson said he simply believed that many death row inmates had not been given fair trials.").

²⁹ See Christopher David Ruiz Cameron, *The More Things Stay the Same, the More They Change: The Influence of Judge Harry Pregerson on Franchise Movement Policy in Professional Team Sports*, 61 SANTA CLARA L. REV. 283 (2020) (reviewing Judge Pregerson's rulings on the movement of professional sports franchises).

³⁰ See, e.g., James A. Kushner, *The Unintended Consequences of Consent Decrees and the Case of the Century Freeway Litigation: Keith v. Volpe*, 36 SW. U.L. REV. 301 (2007).

³¹ Roberts, *supra* note 24.

Supreme Court has restricted the courts' tools in securing social change, Judge Pregerson represents the archetype of the heroic—or villainous—managerial judge.

In the Century Freeway litigation, Harry Pregerson proved to be a positive role model for federal judges in public law litigation. Consider the sprawling and multi-faceted case, as described in the presiding judge's own words:

In 1972, four couples, the NAACP, the Sierra Club, the Environmental Defense Fund, and the City of Hawthorne sued federal and state officials over pending construction of the I-105 Freeway, which had been planned since the late 1950s. . . . It came before me on a motion for a preliminary injunction, and I ruled that further work should be enjoined until federal officials complied with the National Environmental Policy Act (NEPA) of 1969 and state officials complied with the California Environmental Quality Act (CEQA) of 1970. As the case progressed, I considered issues relating to the plaintiffs' rights under other state and federal statutes, including federal housing laws.

I spent a lot of time drafting the preliminary injunction order to cover every possible contingency. After I issued the preliminary injunction, it took several years for the governmental entities involved to satisfy the federal and state environmental protection laws, including laws designated to protect homeowners and renters. Seven years later, a comprehensive consent decree was signed by the parties

. . . . The consent decree required: modification of the original freeway plans to provide for more environmentally responsible transportation options; construction of below-market replacement housing for displaced former residents of the freeway corridor; affirmative action for minorities and women for freeway construction employment; job training for prospective workers; management training for prospective project subcontractors; and child care for area residents.³²

³² Harry Pregerson, *The Freeway With a Heart: My Life as a Consent Decree Judge in the Century Freeway Case*, 36 SW. U.L. REV. 291, 294 (2007); see Anthony N.R. Zamora, Note, *The Century Freeway Consent Decree*, 62 SO. CAL. L. REV. 1805 (1989). During the Century Freeway litigation, Judge Pregerson also had on his docket another piece of public law litigation that deeply affected the people of greater Los Angeles and concluded in a comprehensive consent decree. His description of the litigation provides a sense of its complexity and importance:

Another [case involving a detailed consent decree] was the Hyperion Wastewater Treatment Plant case. I was on the case from 1977 until 1999. *We rebuilt Hyperion, at a cost of approximately \$1.6 billion, into one of the finest wastewater treatment facilities in the country.* Today, all of the wastewater treated at Hyperion receives full secondary treatment before it is returned to the ocean. On an ordinary day, the plant treats approximately 350 million gallons of wastewater. In addition, each day approximately thirty million gallons of secondary effluent is pumped from Hyperion to the water treatment facilities at West Basin Municipal Water District. There it receives advanced treatment (tertiary filtration and then reverse osmosis). The resulting pure water is either sold to industrial customers for their use or injected into the ground to provide a barrier to salt water intrusion into the fresh water aquifer under the south bay.

Pregerson, *supra*, at 292 (emphasis added); see *Pac. Legal Found. v. Quarles*, 440 F. Supp. 316 (C.D. Cal 1977) (outlining the claims in the litigation on a motion for preliminary injunction). As is evident from Judge Pregerson's description, the Hyperion case clearly raised complex and technical environmental and clean water issues with potentially far-reaching consequences for the people of Los Angeles.

As the description makes clear, the Century Freeway case is a textbook example of the public law litigation discussed in Part I. It had multiple and changing parties, extensive negotiations and mediation between the litigants, and a managerial judge in the midst of the fray. The stakes unquestionably were high for the people of Los Angeles. Lives would be disrupted and forever affected by the new freeway corridor at the core of the sprawling and teeming metropolis. Besides somewhat relieving the city of a literal daily traffic jam, the Century Freeway stood to displace residents—predominately people of color of modest means—who would be forced to relocate to make room for the new freeway.

Moreover, the massive freeway project would create many well-paying construction jobs. Equal access to those jobs was important to the local residents as well as to the greater Los Angeles community. The persons affected by the construction project, and the parties to the litigation, were numerous and changed over the many years of the case. In addition to the people in the community directly affected by the project, federal, state, and municipal governments, with a variety of different interests, stood before the court. More parties meant more attorneys, which greatly complicated, not simplified, the litigation and tasks for Judge Pregerson.

Judge Pregerson repeatedly took steps to ensure that the resolution of the litigation lived up to the promise of justice for all affected by the constitution of the new freeway. The published decisions in the Century Freeway case³³ moved the case forward and ultimately resulted in a resolution of the dispute, making it possible for the new freeway to be constructed with significant accommodations to the interests of the various community groups affected. Taking an active role in the litigation, Judge Pregerson shaped the multi-faceted consent decree in innumerable ways for social justice ends.

As has been discussed, Judge Pregerson's role went far beyond the published opinions in the Century Freeway litigation. "For more than two decades, Pregerson . . . personally supervised implementation of the agreement and . . . even managed to bootstrap child care and homeless programs onto the freeway project."³⁴ He ensured job training was available for skilled construction jobs, implemented an affirmative action program for the jobs, and more. Bluntly referred to by one attorney as "a thug for the Lord,"³⁵ Judge Pregerson vigorously pressed the litigants to fashion a consent decree that served the interests of the greater community.

Consider the housing component of the Century Freeway consent decree. It created the private, non-profit Century Housing Corporation, which wound up becoming one of the largest and most important community development financial institutions developing affordable housing

³³ See, e.g., Keith v. Volpe, 960 F. Supp. 1448 (C.D. Cal. 1997) (modifying consent decree); Keith v. Volpe, 618 F. Supp. 1132 (C.D. Cal. 1985) (housing aspects of the consent decree), *aff'd*, 858 F.2d 467 (9th Cir. 1988); Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972) (addressing environmental aspects of the case), *aff'd*, 506 F.2d 696 (9th Cir. 1974). For a succinct review of the progress of the litigation, see Christopher David Ruiz Cameron, *The Freeway with a Heart: Judge Harry Pregerson and the Legacy of the Century Freeway on Its 50th Anniversary*, 51 Sw. L. U. REV. (forthcoming 2022).

³⁴ Henry Weinstein, *A Concrete Accomplishment: Long-Planned Interstate 105 Opens with Gala Festivities*, L.A. TIMES (Oct. 15, 1993), <https://www.latimes.com/archives/la-xpm-1993-10-15-me-46006-story.html>.

³⁵ *Id.* (quoting anonymous attorney).

in California.³⁶ It to this point in time has been responsible for the construction of 45,000 affordable housing units, with more in the pipeline.³⁷ Not all of the units are in the Century Freeway corridor. Put simply, the consent decree created a financial institution, which continues to thrive to this day, committed to producing more affordable housing for greater Los Angeles, a city with a dire shortage of such housing and a large homeless population.

Judge Pregerson's approach to the Century Freeway litigation fit comfortably into Professor Resnik's mold of the managerial judge. He directed the Century Freeway litigation like the general of an army. With an affirmative vision of a "freeway with a heart,"³⁸ he pressed for justice at every opportunity in the case. He maneuvered the litigation toward a remarkable settlement. To do so, he almost literally took the case by the horns and wrestled it (and the litigants and their attorneys) into a complex and comprehensive consent decree, which he later vigorously enforced and modified where necessary. By taking an active, not passive, role as a judge, Judge Pregerson moved the case forward toward a most successful outcome.

Although Professor Resnik expressed profound concerns with managerial judges, the management of the Century Freeway litigation by Judge Pregerson in the end brought justice to many of those most directly affected. A passive judge sitting on the sidelines could not have achieved such an outcome. The freeway today stands as an iconic Los Angeles landmark, especially the Judge Harry Pregerson Interchange.³⁹ Community interests factored heavily into the construction project. It is difficult to imagine anything near a similar positive result being accomplished by a judge acting as a mere bystander, or a baseball umpire calling "balls and strikes,"⁴⁰ watching the case develop rather than shaping its development and final resolution.

In sum, the Central Freeway litigation unquestionably fell into the category of public law litigation and Harry Pregerson was undoubtedly a managerial judge. The consent decree ending the litigation forever transformed the greater Los Angeles metropolitan area. As he intended, the litigation improved the lives of residents of the multiracial city that Judge Pregerson loved.⁴¹ In a time when litigation was widely considered to be a legitimate means to achieve social change,

³⁶ For discussion of the affordable housing provisions of the Century Freeway consent decree, see *Keith v. Volpe*, 960 F. Supp. 1448 (C.D. Cal. 1997).

³⁷ See *Century*, <https://century.org/about/>.

³⁸ Pregerson, *supra* note 32; see Hillel Aron, *The Last Freeway*, SLAKE (July 2011), <https://longreads.com/2015/03/23/the-last-freeway/> (interview of Judge Pregerson).

³⁹ See Assemb. Con. Res. 142, 2001-02 Leg., Reg. Sess. (Cal. 2002) (naming the interchange of the 105 and 110 freeways near downtown Los Angeles the "Judge Harry Pregerson Interchange"). The opening scene of the Oscar winning film "La La Land" was shot at the interchange. See Oliver Wang, "La La Land": Los Angeles and the Hollywood Imagination, KCET (Feb. 3, 2017), <https://www.kcet.org/shows/artbound/la-la-land-los-angeles-and-the-hollywood-imagination>.

⁴⁰ See Charles Fried, *Balls and Strikes*, 61 EMORY L. REV. 641, 642 (2012) (discussing Chief Justice John Roberts' famous statement during his Senate confirmation hearings about "calling balls and strikes" as a Supreme Court Justice and his commitment to approaching cases without an ideological agenda); see also John Roberts, "My Job is to Call Balls and Strikes, and not to Pitch or Bat", CNN (Sept. 12, 2005) ("The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire."), <https://www.cnn.com/2005/POLITICS/09/12/roberts.statement/>.

⁴¹ Although Los Angeles has been declared to be the Latino metropolis because of its large Latinx population, see VICTOR M. VALLE & RODOLFO D. TORRES, *LATINO METROPOLIS* (2000), it has a rich multiracial population of people of color, including African Americans, Asian Americans, and others, see U.S. Census Bureau, Quick Facts: Los Angeles City (showing racial demographic breakdown in 2016), <https://www.census.gov/quickfacts/losangelescycalifornia>.

the Century Freeway litigation fit comfortably in this model. It exemplifies the promise of public law litigation and the good that a managerial judge can do. Of course, not all—perhaps not many—judges could have achieved the results that Judge Harry Pregerson did. But the outcome of the case shows how judges, following his example, can direct successful social change litigation. As the United States seeks to refurbish its infrastructure, Judge Pregerson’s approach offers important lessons, including for political leaders, about community engagement.

CONCLUSION

The Century Freeway litigation reflects the modern conception of judges presiding over complex pieces of litigation with far-reaching social impacts. The case came in an era when public law litigation, and the goal of reforming U.S. institutions for the common good, was at its height of popularity. At the same time, judges exercised more direct management authority over these cases than traditionally had been the case in conventional litigation between private parties. It is hard to dispute that Judge Pregerson was the right judge with the right judicial philosophy at the right moment of history to steer the massive Century Freeway litigation to a fair resolution for all.

Judge Harry Pregerson is a historic figure. One of his many lasting legacies is the Century Freeway case, with the completed freeway a physical manifestation of his devotion to justice for all. Driven to that end, Judge Pregerson relentlessly pushed the litigants to fashion a practical and fair resolution of the dispute and the ultimate completion of the freeway. Poor and working people, people of color, and greater Los Angeles, as well as the general public, benefited from the new freeway and continue to do so every day. The Century Freeway, busy as it often is, demonstrates the power of Judge Pregerson’s deep and enduring commitment to justice for all. We all should be proud of his dedicated commitment to justice and the careful craft of his judicial handiwork.