

*Creating Order and  
Constructing Racial Distinctions:  
Law and Politics in Frontier California*

BY SUSAN WESTERBERG PRAGER

*Taming the Elephant: Politics, Government, and Law in Pioneer California* (UC Press, 2003; also published as vol. 81, no. 3/4 of *California History*), edited by Richard Orsi and John Burns, with assistance from Marlene Smith-Baranzini, is the California Historical Society's fourth and final volume in its *California History Sesquicentennial Series*. I recently had the opportunity to discuss this path-breaking anthology with retired CSU-Hayward professor Dick Orsi, who conceived of the project while the editor of the *California History* series.

The book's separately authored nine chapters, each a freestanding essay, are filled with over ninety illustrations drawn from photos, paintings, handbills, newspapers, and political cartoons, many of which have not been published previously. One of this volume's attractions is the highly readable nature of so many of the essays, making it easy for people with crowded lives to dip into our California history. Start at any chapter, without feeling that you have missed some foundational prelude.

Two themes, sometimes interrelated, pervade much of the book. In the telling of vibrant, memorable stories, many of the essays make concrete the enormous task of creating order – of establishing institutions that today we take for granted as essential. Indeed the achievements of the period are quite remarkable. The other overarching theme present in many of the essays is, as Stephen Becker, CHS's Executive Director, and Dick Orsi explain in the preface, "the importance and legacy of ethnic and cultural diversity as a major dimension of the state's history." In the introductory essay, co-editor and former State Archivist John Burns drives home the present value of understanding both our racialized history and the development of institutions and order: "with greater knowledge of California's political and governmental legacy, society might gain a needed, more comprehensive understanding of contemporary California's public environment."

On the subject of creating order, the editors begin with the formidable consequences of the influx of gold seekers. Burns supplies important context for the transition from Mexican Alta California to statehood, including California's first constitutional convention. Next, Roger McGrath's essay focuses not only on the criminal activity which pervaded gold rush era northern California, but also the varied reactions to lawlessness, many of which were extralegal and horrifically violent themselves. In "A Violent Birth: Disorder,

Crime, and Law Enforcement, 1849-1890," McGrath puts faces on familiar names like Joaquin Murieta and Black Bart, and introduces us to the complexities of some of the responses to criminality, from the vigilance committees to the idea of the private prison. In the next chapter, "The Courts, the Legal Profession, and the Development of Law in Early California," Gordon Bakken argues that many in the legal profession saw vigilante justice as supportive of the formal legal system.

Later, in "Officialdom': California State Government, 1849-1879," Judson Grenier brings both detail and perspective to what Orsi emphasized to me has been a summarily mischaracterized aspect of our history. Orsi is particularly excited that Grenier has filled an important gap in our historical understanding of the early accomplishments, not only of governors and legislators, but also of the early commissions.

The fact that *Taming the Elephant* has integrated its other theme, that of race, so well and in so many of the essays exemplifies something of a sea change taking place in our historical literature. Over a period of many years now, there has been excellent historical work focused on specific populations defined by race. However, the lessons of these historians have yet to become embedded in our common knowledge.

Most of us who grew up in California were unfamiliar with the history of racial violence and racial discrimination in our state. Taught a romanticized view of the missions as fourth graders, we were ignorant of the brutal, inhumane treatment of California Indians in the missions, and unaware of the government-sponsored raiding parties which killed Indians during the years immediately following statehood. Our views were shaped by the sanitization or denial of our Spanish-speaking history. We celebrated the contributions of the Chinese in building the railroad through the treacherous Sierras, unaware of California's role in driving forward legal measures to rid the state of the Chinese after that work was completed and the state experienced hard economic times. We were superior about the fact that California was not the South and labored under the illusion that there was no history of discrimination here. Even pervasive knowledge of the Japanese "relocation" after Pearl Harbor was quickly rationalized, and California's Progressive-Era Alien Land Laws which targeted the Japanese were a forgotten, even unknown, matter.

If this was your "history," as it was mine, Shirley Ann Wilson Moore's chapter, "'We Feel the Want of Protection': The Politics of Law and Race in California, 1848-1878," is must reading. For *Taming the Elephant*, Professor Moore crafted a relatively short but quite wide-ranging treatment of the reality of

California history on the issue of race. A few examples from her article may give you some sense of what we missed. More than half of mission-born Indians did not live beyond age five. At Mission Santa Cruz, converts survived an average of only eight and a half years after their conversion. In 1852, a California heavily influenced by the presence of Southerners enacted a Fugitive Slave Act, mandating the return of runaway slaves to their masters, and an estimated five hundred to six hundred slaves worked the gold sites.

To expand on other actions Moore mentions, it was in 1860 that California enacted its first school segregation law, specifically prohibiting “Negroes, Mongolians, and Indians” from attending public schools. An 1850 law originally prohibiting a “black or mulatto person, or Indian” from testifying in criminal cases in favor of or against a white person was extended to the Chinese by a California Supreme Court majority eager, in my view, to draw a firm race line privileging only whites, even when the result was legally sanctioned violence. In short, there is ample evidence that law played a powerful role in constructing discrimination in nineteenth-century California. Yet, on a more positive note, Moore’s essay does remind us that there were serious efforts, as early as the 1850s, to combat the discriminatory frameworks, with, for example, African Americans acting early in the 1850s to attempt to lay claim to our democratic values.

Joshua Paddison, who together with Teena Stern served as Illustration Editor for *Taming the Elephant*, additionally wrote “Capturing California,” using a series of color images to document basic elements of order and distress, as well as the racial tensions that persisted and indeed characterized post-statehood California. The historical context that Paddison supplies for each of his chosen paintings, photographs, and illustrations clearly influences how the art affects us. My favorite, Theodore Wores’ exquisite 1881 painting, “New Year’s Day in San Francisco’s Chinatown,” portrays a scene of tranquility and beauty. Yet Paddison introduces the painting with a chronicle of the “formidable anti-Asiatic sentiments” in 1870s California, including the formation of “dozens of anti-coolie clubs” around the state. The anti-Chinese frenzy culminated in the California Constitution of 1879’s prohibition on corporate or government employment for “any Chinese or Mongolian” and intense California pressure on the federal government to enact what would be the nation’s first anti-immigration law, the Chinese Exclusion Act of 1882.

Donna Schuele’s contribution, “None Could Deny the Eloquence of This Lady’: Women, Law, and Government in California, 1850-1890,” artfully connects some seemingly disparate events in California’s

first forty years, reminding us that women were a subject of contention in the two constitutional conventions that mark either side of the period covered by this book. Of the 1849 Convention’s decision to follow the civil law in granting married women property rights, she asks the interesting question: was the purpose of the Constitution’s guarantee of separate property to married women “to protect women or to empower them,” pointing out that the delegates who gathered in Monterey in the fall of 1849 disagreed on this point. The goal of married woman’s property rights was subsequently thwarted so that: “By 1870, the marital property system, intended as a reform, actually rendered California wives worse off than their eastern sisters. . . . and blatantly violated the state’s constitution.”

Schuele deftly moves from this reality to the California women’s rights movement, pointing out that efforts in California were more broadly based than those in many other states which targeted voting rights. As a result, her story of women’s rights in Gilded Age California is one of brief moments of triumph amidst twenty years of agitation and defeat. Although reformers did achieve some occupational rights for women, their successes in securing political and property rights were virtually non-existent. Schuele concludes: “Perhaps the most satisfying explanation lies in the varying power of these proposals to threaten the social order.”

Edward Lyman’s “The Beginnings of Anglo-American Local Government in California” is filled with fascinating detail and insight regarding the need for local action in the context of growth and change, and more. Contrary to the image of a world of gold seekers out only for themselves, Lyman’s essay reveals a picture of people organizing for the common good early in the 1850s – from the El Dorado County requirement that men devote four days a year to road repair work, to Sacramento’s extraordinary struggle to protect the city from the natural flood plains of the American and Sacramento Rivers, to the early efforts to pay doctors to attend to the indigent ill. These acts stood in puzzling contrast to the initial failure to establish public schools in the new state. Much of this remarkable chapter reflects path-breaking original work.

Robert Chandler’s “An Uncertain Influence: The Role of the Federal Government in California, 1846-1880” forms a powerful concluding chapter, characterized by considerable detail (much of it not in the popular consciousness) and a level of fairness that deserves

our respect and attention. Chandler, Wells Fargo Bank's longstanding researcher for historical services, includes an excellent short discussion of the disputes over the validity of the Mexican land grants, the costs of the litigation, and the ways the prolonged uncertainty delayed agricultural development. He also discusses the impact of the Civil War, particularly federal concern about the state's loyalty to the Union, which was manifested in actions like the first use of Alcatraz as a prison to confine leading secessionists and the stationing of troops in southern California where pro-southern sentiments were strong.

In the immediate aftermath of the war, Chandler recounts, opportunities for African Americans in California improved. However, when the Democratic Party resurged in 1867, the state legislature failed to ratify the Fourteenth Amendment and "gleefully disapproved of and rejected the Fifteenth Amendment granting black suffrage." In describing the interplay of anti-negro and anti-Chinese sentiments, Chandler also discusses the ways federal action blunted some of the measures aimed at the Chinese. Finally, Chandler describes the first stirrings of federal environmental regulatory power as a federal judge acted to control the impact of hydraulic mining on rivers and farmland.

In short, *Taming the Elephant* has a great deal to offer. One of the editors' goals was to encourage our further reading and many of the authors provide rich footnotes to guide us. I urged Dick Orsi to share with us his favorite books on nineteenth-century California history, and he offered two: Sucheng Chan, *This Bittersweet Soil: The Chinese in California Agriculture* (UC Press, 1989), which he regards as a superb work of fact-based history, and Gerald Nash's classic, *State Government and Economic Development: A History of Administrative Policies in California, 1849-1933* (Institute for Governmental Studies, University of California, 1964). Yet, much as Orsi admires these and many other works, with a twinkle in his voice he prefaced his recommendations with this tantalizing idea: "The best books on California history are yet to be written."

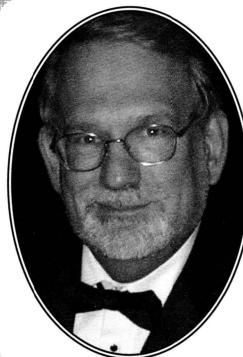
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*Taming the Elephant is provided as a 2004 benefit of membership at the Judicial level and higher. If you have not yet received your copy, or you would like to upgrade your membership in order to receive a copy, please contact the CSCHS office.*



DIANE YU reports that she received an honorary Doctor of Laws, Honoris Causa, from the City University of New York in May 2004. Yu is the Chief of Staff and Deputy to the President of New York University and is the highest ranking woman and person of color in the university administration. She also serves as Chair of the American Bar Association's Commission on Women in the Profession. As an out-of-state member of the Society, Yu writes, "My husband Michael and I do miss California friends and weather, but are enjoying our lives here nonetheless. Great cultural benefits are everywhere."

MAGDALENA REYES BORDEAUX was featured on the cover of the September 2004 issue of *Los Angeles Lawyer* magazine, in which she authored an article explaining how bankruptcy attorneys can assist debtors who are victims of identity theft expunge a fraudulent bankruptcy from the public record.



In January 2004, NORMAN PINE was honored by the Consumer Attorneys of Los Angeles as that organization's Appellate Lawyer of the Year for 2003.

Congratulations to the members of the CSCHS Board of Directors and Advisory Board who have been named as Superlawyers for 2004! Named in the area of appellate practice are VICKI DEGOFF, ELWOOD LUI, KENT RICHLAND, and DOUG YOUNG. Named in the area of business litigation practice are JOHN DONOVAN, MAGGIE LEVY, and KEVIN O'CONNELL. ERIC JOSS was named in the area of labor and employment law. Also listed were MEL GOLDMAN and TOM ROSCH. The Superlawyers listing can be accessed at [www.superlawyers.com](http://www.superlawyers.com).