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RECENT
RESEARCH

WOMEN, MARRIAGE, AND DIVORCE IN CALIFORNIA, 1849–1872

BONNIE L. FORD*

PREFACE

I wish to express my family's great appreciation to the California Supreme Court Historical Society, and to *California Legal History*, for publishing this portion of Dr. Bonnie L. Ford's "Women, Marriage, and Divorce in California, 1849–1872," a dissertation my mother completed in 1985 as part of her doctorate in history from the University of California, Davis. My mother's path to the Ph.D. was not without challenge, because of her gender.

She was inspired to study history by a female high school teacher; in college she was further encouraged by her advisor to pursue a Ph.D. With this strong example and support, my mom enrolled in Stanford University's graduate program in History in 1960. At that time, Stanford steered women into the M.A. degree rather than the Ph.D. for history. After earning her M.A., my mother taught at the junior and senior high school level.

* This selection from Bonnie L. Ford's Ph.D. dissertation (History, University of California, Davis, 1985) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at <https://dissexpress.proquest.com/search.html>.

In the late 1960s, after I was born, my mom still yearned for her Ph.D. She applied to graduate programs, but was rejected, in one case with a stinging comment that the advanced study of history was not for “bored housewives.”

A dedicated feminist, my mom found a professional home at Sacramento City College, where she taught women’s studies and directed the Women’s Center, one of the earliest such affinity spaces. For nearly thirty years, my mother taught women’s history under the auspices of California’s American Institutions requirement for public university graduates of the UCs, CSUs, and community colleges. Her curricular innovation transformed a conventional course of study into a more inclusive and representative history of the United States.

Still, the advanced study of history called. While my brother and I were in elementary school, my mother applied to UC Davis’s Ph.D. program, and was accepted. My mom had the good fortune to work with Ruth Rosen and the late Roland Marchand, renowned scholars at UC Davis. While working full time as a professor and raising two children with her husband, Judge James T. Ford, of the Superior Court of California, she earned her doctorate.

Re-reading “Women, Marriage, and Divorce in California” today, at the invitation of *California Legal History*, I am struck by the exceptional quality of its scholarship, force of expression, and relevance. The work offers a veritable clinic in how to do legal history and how to read primary sources generated by lawyers, judges, and court rulings for the study of U.S. history, broadly and inclusively. “Women, Marriage, and Divorce” reveals how disfranchised Americans have routinely sought to use the courts to redress inequalities and injustices, as best they could, and, at times, successfully so — even where powerful and pervasive cultural beliefs, such as gendered “separate spheres,” operated.

Our California family has been dedicated to the intertwined study of US history and practice of law in this state. My mother’s example in completing her doctorate was a powerful one for me. I, too, earned my Ph.D. in history at UC Davis. I also studied the nineteenth century, including the ways Black Americans looked to the courts to pursue citizenship rights before the Civil War. My brother, Dylan Ford, and his wife, Kathy, are attorneys today in Los Angeles, and my husband, Bryan Lamb, is a trial

attorney in San Francisco. Following my father's death in 2004, my mom has provided care and boundless love for grandchildren Theo and Iris, as we have pursued our own careers in history and law.

My father enthusiastically supported my mother's scholarship; in turn, his own successful tenure on the Superior Court bench was informed by this history of women's experiences in California's courts, that my mother so sensitively and carefully recovered.

What follows is a superb example of legal history as a means to understand how the disempowered have sought a fuller ounce of justice in their lives through California's courts.

DR. BRIDGET FORD

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INTRODUCTION

Recent historical interpretations of women in the West have interpreted women's experience on the western frontier as proof of the acceptance of the ideology of woman's separate sphere by both middle-class and working-class women.¹ This separate sphere consisted of the following elements: women were seen as the moral superiors of men; they ruled the home and created its special tranquil atmosphere; they had notable instincts for parenting not granted to men; and they possessed sensitivity of feeling and delicacy of physique. In evaluating the acceptance of this model, Julie Roy Jeffrey writes in *Frontier Women*:

Women's participation in the Westward movement provided a test for the power of nineteenth century beliefs about woman's place. Although these conceptions seemed farfetched on the frontier, even counterproductive, they lost little potency, for they helped women hold on to their sexual identity and offered them hope of an ever-improving life. Ideology proved to be as pervasive as it was

¹ Julie Roy Jeffrey, *Frontier Women "Civilizing" the West? 1840–1880* (New York: Hill and Wang, 1979); Robert Griswold, *Family and Divorce in California, 1850–1890* (Albany: State University of New York Press, 1982).

powerful. Pioneer women's records suggest the extent to which ideology seems to have crossed class and regional lines.²

Carrying this argument a step further, Robert Griswold, in his examination of family life in *Family and Divorce in California, 1850–1890*, theorizes that not only did women of the middle and working-classes accept the ideology of woman's separate culture and role, but that men and women together adhered to a new conception of marriage based on that ideal. The new marital ideology that emerged in the nineteenth century centered on the companionate marriage and family. Using divorce records from San Mateo and Santa Clara counties, Griswold found that the phenomenal rise in the divorce rate during the latter half of the nineteenth century represented the assumption of the ideal of the companionate marriage by both middle-class and working-class couples. He writes, "As the expectations and importance of marriage went up in the nineteenth century and as companionship, love, affection, and mutuality became the accepted norm, husbands and wives who fell short of such high standards found themselves vulnerable in divorce trials."³

He further defines the companionate marriage in the following manner: it was a partnership between husbands and wives founded on domestic equality; family relations were based on affective values; men respected women and treated their wives kindly; and parents conceived of childhood as a special stage of life demanding nurturance and care. Griswold shows how prescriptive themes changed from the patriarchal pattern of the seventeenth century to the companionate ideal of the nineteenth. He then attempts to prove that both middle-class and working-class people accepted the newer formula. "Men and women from all class backgrounds," he writes, "evinced concern about women's chastity, social respectability, domestic tranquility, and moral rectitude and with men's diligence, industriousness, sobriety, sexual decorum and kindness."⁴

The present work disagrees with these two interpretations and hypothesizes that evidence from divorce records in Sacramento County from 1849–1872 shows just the opposite — that working-class women did not,

² Jeffrey, *Frontier Women*, xiii.

³ Griswold, *Family*, 3.

⁴ *Ibid.* 172.

in fact, demonstrate the absorption of the ideology of the special role of women nor did their marriages exemplify the acceptance of the companionate ideal. What accounts for these opposite conclusions?

In the case of Julie Jeffrey's work, the letters, journals and reminiscences of women in California that were her primary sources reflected the values of middle-class women. Not only were such women as Eliza Farnham, Sarah Royce and Louisa Amelia Knapp Clappe especially gifted observers, but they were also well educated for the time and decidedly middle-class in background. In contrast, the divorce records that I consulted were most notably the records of working-class women. Jeffrey admits that the women whose works she consulted were literate and frequently middle-class. Yet she asserts that "internal evidence suggests the lower-class origins of at least some of the women and almost all of the Mormon pioneers." I would submit that the fact these women were literate and articulate places them in a very different class from those women who are found in the divorce records I examined. The class composition of my study is the opposite of Jeffrey's. In the case of the divorce files that I examined, most of the women were working-class and only a few of the women were middle-class. I agree with Jeffrey that in the sources she relied upon, the women do indeed reveal an acceptance of the moral superiority of women as well as their belief in separate spheres. However, I believe that her sources represent the more visible and articulate segment of Western women while mine represent more of the inarticulate women of that time and place.

Griswold's sources are similar in nature to those upon which this work is based; therefore, the divergence between his conclusions and mine demands close analysis. In fact, though the two works ostensibly cover the same time period, they are not really contemporary. Sacramento was populated immediately at the beginning of the Gold Rush and experienced its greatest population growth by 1860. The growth of San Mateo and Santa Clara counties took off after 1860. All of the cases studied in this work were litigated from 1849 to 1872 with 90 percent occurring in the 1850s and 1860s. In contrast, the bulk of Griswold's cases (88 percent) were litigated in the 1870s and 1880s. In addition, the population of the two counties studied in the Griswold work were agricultural and rural, while Sacramento began as an "instant" commercial city, around which agriculture developed only gradually.

But equally important, the terms of the two analyses are vastly different. Whereas Griswold sees the importance of divorce litigation as the evidence of dashed expectations, I see the litigation as evidence of real behavior. He focusses on the prescriptions that are violated, while I concentrate on the standards that are revealed. Conduct resulting in divorce can be looked on as aberrant behavior — a departure from the norm — or it can be seen as an example of existing behavior — perhaps extreme or perhaps representative of many similar cases that did not reach the courts.

Since attorneys, judges and legislators were overwhelmingly middle-class, it is likely that considerable attention would be paid to middle-class conventions in divorce cases. It is important to sift behavior from homilies. Certainly, the formula with which each complaint was drafted showed an acceptance of the middle-class standard of behavior, but that acceptance was the result of the lawyer's beliefs and his determination of what might impress the court. The behavior itself shows that the realities of working-class marriages were far from the companionate ideal.

It seems appropriate at this point to discuss the uses and limitations of divorce records as historical sources. Given the nature of the documents contained within such records, questions may be raised about truthfulness, comprehensiveness and representativeness.

The question of truthfulness arises because claims in divorce cases are made to seek a favorable outcome in an adversarial process. Consequently, certain facts are emphasized or distorted to support a case, and information that is unfavorable is omitted. However, I looked for behavior, rather than ideals. The divorce laws of this period were strict when it came to issues of fact. Charges had to be corroborated by witnesses. Usually, the witnesses' testimony was believable. While I did see a few cases where the witnesses were obviously coached, for the most part, testimony seemed authentic in voice and detail. It is true that divorce became formulaic in later years, but in the first two decades of the divorce law's existence evidence was carefully taken. Clearly, the court's bias, especially in the first decade, was to deny divorces if charges of wrongdoing were not corroborated by witnesses. For this reason, I believe most of the charges that stood up in court were sufficiently verified to serve as historical evidence.

Second, there is a question of comprehensiveness. The only information required by the court to obtain a divorce at this time consisted of the

names of the spouses, the date and place of marriage and the charge of the plaintiff. Many facts about the marriage were omitted. On the other hand, many unsolicited facts were presented as well as details necessary to prove charges. By means of these other facts I was able to quantify many other characteristics. In none of the characteristics that I quantified did the data appear in less than 25 percent of the cases.

In regard to representativeness, I believe the difficulties placed in the path of a divorcing partner were so great that only the most persistent would prevail. For that reason, it seems likely that many others experienced similar situations but failed to obtain divorces.

Unlike Griswold, I do not give as much weight to the ideologies expressed in the divorce cases as I do to the behaviors they revealed. What was significant to me was the extent to which the women in these cases did not conform to the ideology of nineteenth-century womanhood rather than the extent to which they paid obeisance to it in their statements. In fact, some of the women appeared to have contempt for the conventions. Not all divorcing women showed these tendencies, but the women who had different standards of behavior were usually working-class women, while middle and upper-class women tended to respect the conventions.

In contrast to the behavior of working-class women, the marital law of California was harmonious with the companionate ideal and was influenced by the feminist movement in the East. It was also deliberately reformist. A constitutional provision perceived to be in the mainstream of this reform was included in the Constitution. From 1850 to 1872, the law included a community property system with such protections for married women's property as separate property registration, provision for antenuptial contracts and the availability of sole trader status. In addition, a liberal divorce law embodied the grounds of divorce common in the most progressive laws of the time. The basic outlines of marital law that were to govern California were developed during this period and at length summarized in the Civil Code of 1872. This code was a compilation of statutory and case law from the previous twenty-two years and combined to form a system whose essential principles governed California family law for over a century, until the feminist movement of the 1970s.

The laws governing marriage, while copied from the reforms of the East, had little relevance to the West. The eastern laws were incubated in

a developed society with a significant number of propertied, middle-class women. In the West in this early period, few women or married couples had acquired enough property to put the laws to any use. Few women saw any benefit to the separate property registers or the antenuptial agreements. Divisions of community property at divorce were uncommon because there was usually nothing to divide. Most of the marital reforms simply did not fit actual circumstances.

The divorce law was the most utilized of the reforms, and 70 percent of plaintiffs in divorce cases were women. This does not prove, however, that women expected companionate marriages as Griswold concluded. The absent husband whose whereabouts were unknown violated the companionate ideal. To expect the presence of a husband in marriage is hardly a high standard, and yet this is where most of the husbands failed. Cases litigated under this ground also showed the desperate circumstances of many women who were abandoned in a strange land with few friends or family to help them.

The duty of a husband to support his family so that his wife could pursue domesticity was a key part of the companionate ideal. Yet the court commonly refused to grant divorces on that basis. To grant a divorce wherever a wife contributed to the support of the family would have been folly in early California. Cases pursued under this provision of the law demonstrated the extent to which women supported the family rather than the extent to which they were keepers of the domestic hearth. Such cases also confirmed that it was immaterial to the court whether a husband supported his wife or not. That the wife supported the family was perfectly acceptable to the court, at least for working-class families.

If the court was reluctant to enforce the husband's unaided support of the family, it tried valiantly to compel female purity. Adultery was the most frequent and most successful charge made by male plaintiffs. That so many divorces were obtained by men on the basis of this charge illustrated that the courts believed in the purity of womanhood, but it also proved that women's behavior reflected something less than devotion to the ideal. In contrast to the tenets of Victorian morality, many working-class women evidenced a lack of concern for observing the confinements of marriage, given that over 50 percent of male plaintiffs alleged adulterous conduct on the part of their wives and that most of these men proved their cases in court.

The lie was also given to the commitment of husbands to a new ethic of gentleness and consideration to their wives. One of the most common images invoked by proponents of liberal divorce laws was the cruel husband, whose violence could be curbed by the woman's ability to seek divorce. However, cruelty was a difficult charge to prove at the beginning of this period. The court proved less than sympathetic unless a woman's life was in danger. Cases under this charge disclosed instances of serious physical cruelty in the lives of working-class women. I did note a trend toward higher expectations in the expanded definition of cruelty that was gradually broadened during this period to encompass mental suffering.

Like the charges of failure to provide support and extreme cruelty, the charge of habitual intemperance did not work to a working-class woman's advantage as reformers had expected that it would. Instead of relieving the married woman of her addicted spouse, the charge of drinking to excess was easier to prove against a woman than a man. A double standard emerged in judicial response to the charge of habitual intemperance; the seriousness of women's drunkenness far outweighed that of men in the eyes of court, witnesses and jury. Men could understand the drinking habits of other men, but found women's excessive drinking particularly obnoxious. The ample evidence in these court cases that working-class women did drink and did buy liquor at bars and saloons also suggests that lower-class women did not experience the domestic cloistering that was decreed by the ideal of true womanhood.

Not only did financial support during marriage prove illusory, but so did a husband's responsibility for support after marriage. Financial awards at divorce were so rare as to be nearly nonexistent.

Though courts had the power to award community property and make orders for support, less than 1 percent of women in the cases I studied received any form of support — child support, spousal support, or alimony. Less than 5 percent sought any of these forms of relief. Probably working-class women rightly suspected that awards, if granted, would in most instances be useless where husbands were absent or impecunious. That men frequently avoided equal division of any community property by using their control of property to sell it and abscond with the proceeds hardly shows great respect for the equality of women.

When a judgment for divorce was handed down, the court could also make an award of child custody. Neither the court nor the parties to the divorces seemed to believe that women had some special instinct toward motherhood. Usually, the woman did in fact get custody of the children, not because of her special qualities, but rather because the father was missing. Laws were vague and left child custody issues to the discretion of the court. At the trial court level, the custody of children was usually determined on the basis of the guilt or innocence of the party in the divorce suit. On the whole, few cases of child custody were contested. The major problem for children in the period was orphanhood, not custody.

This dissertation examines the enactment and actual enforcement of a system of marital law formulated on the bourgeois assumption of woman's separate sphere and moral superiority. Yet the women who came in contact with these laws were primarily working-class women whose behavior did not meet the criteria of the ideal standard. What is most noticeable about this conjunction is the inappropriateness of the legal system to these women's lives and the way in which their violations of middle-class standards had the ironic effect of sometimes turning the laws to their disadvantage.

In order to cogently analyze the data available in the divorce records, we must examine the legal context in which the litigation occurred. California's law of marriage and the family, to which we now turn, seemed to hold out significant promise for all women.

MARITAL LAW IN CALIFORNIA 1849-1872

California's first marital law was based on the companionate ideal. Laws most consonant with women's equality in marriage at the time were part of the constitutional scheme and enacted by statute. Experience eventually showed, however, that the law was unsuited to the men and women expected to live under it. It was a system too advanced for the population to make use of or to accept. The new system was inspired by legal debates in New York and other eastern states. As the law impinged on people's lives, however, significant and steady change was required to adjust the law to popular mores and sentiments. This chapter will explore the innovations and the retrenchments and will set the legal scene, a critically important aid to our understanding of marriage and divorce in the new state.

On September 1, 1849, delegates to California's constitutional convention assembled at Monterey to write a constitution. Delegates were anxious to obtain statehood as gold-seekers swarmed into the state.⁵ An important question for this convention was what form marital property law should take; the delegates had to choose between the common law and the civil law of marital property. They could also choose from a number of common law reforms then being advanced in other parts of the U.S.

By 1850, seventeen states had passed some form of a married women's property act to reform the common law.⁶ The traditional system of common law merged the identity of wife with husband at marriage and declared the wife civilly dead. Its origins lay in feudal society and its main function was to prevent estates from being divided. The marriage settlements that wives brought with them to marriage became a part of their husbands' estate that would be handed down intact to the eldest sons under the system of primogeniture. Because the married woman had no property, she could not contract, sue or be sued, or make a will. In the event of dissolution of the marriage, her rights were limited. Divorce was almost unobtainable, and at the death of her husband she had only dower rights in his estate, which allowed her the use of one-third of her deceased husband's estate until her death. Even her earnings came under her husband's control.⁷ This civil death at marriage was termed coverture.

The married women's property acts, which purported to mitigate the disabilities of the married woman under the common law, predated the organized women's movement. Though they embodied a powerful challenge to the subordinate status of women under the law, their main purpose was to reinstate rights of middle- and upper-class women who had lost the right to hold equitable trusts by reason of legal codifications that had taken place in order to simplify the law. Women who had customarily protected their property by means of a trust could no longer do so.

⁵ Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975," *UCLA Law Review* 24 (October 1976): 10-12.

⁶ Lawrence M. Friedman, *A History of American Law* (New York, Simon and Schuster, 1973), 186.

⁷ Prager, "Community Property," 3.

In addition to reinstating a means by which married women could hold property, proponents of married women's property acts saw the possibility of aiding debtors by shielding that property. In an increasingly commercial economy, the hazards of the boom-and-bust cycle had plunged many families into want. By preserving the wife's property, some help for debtors could be enacted. In the process of dealing with these two problems, the disabilities of coverture were scrutinized and brought to public attention. This scrutiny led to women's consciousness of their legal position in marriage and gave the women's movement a powerful claim of victimization by the law. Perhaps the most important effect of the legislative debate and passage of women's property acts was the impetus given by the very process to the women's rights movement in general.⁸

The reform acts of the 1840s declared the right of a wife to the separate property she brought to the marriage and to the property she received by gift or inheritance during the marriage. More conservative separate property acts gave the husband the right to control and manage his wife's separate property. A more radical version of the married women's property act not only secured her separate property but also gave her the legal right to its management and control. Other provisions of these marital property acts provided a married woman with the right to her earnings as her separate property.⁹

Instead of the common law, or a reformed version of the common law, the delegates to the constitutional convention could choose the community property system of marital law that had come to California via Spain and Mexico. The community property system in the civil law significantly differed in theory from the common.

It emphasized the shared property of the marriage rather than separate property. All earnings of either spouse during the marriage became the property of both. Consequently, the housewife's contribution was theoretically equal to the wage-earner's. However, community property also recognized separate property and defined it in much the same manner as the married women's property acts did. Separate property was that property which a husband or wife brought to the marriage or that which they received as a gift or

⁸ Norma Basch, *In the Eyes of the Law: Women, Marriage and Property in Nineteenth Century New York* (Ithaca: Cornell University Press, 1982), 39-49.

⁹ Prager, "Community Property," 4.

inheritance during the marriage.¹⁰ The debate at the constitutional convention concerning marital property law devolved upon the issue of whether or not separate property for married women would be recognized. Both the married women's property acts and the community property system provided for separate property for married women, and little or no distinction was made between the two systems in the discussions. The more revolutionary aspect of community property law — the sharing of property in marriage — was ignored by the delegates in their debate.

The starting point for the argument over separate property was a proposed constitutional provision that stated:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.¹¹

This was taken verbatim from the Texas Constitution of the time.¹² The words "common property" meant community property in a civil law context.¹³ The word "common" appeared in the provision and, while the debaters considered this a question of the civil law versus the common law, no one expressed concern about the possible ramifications of the sharing principles of community property law. It appears that the constitutional provision under discussion was recognized as enacting community property law but that the delegates' understanding of community property law was unclear.¹⁴

¹⁰ Elizabeth A. Cheadle, "The Development of Sharing Principles in Common Law Marital Property States," *UCLA Law Review* 28 (October 1981): 1276.

¹¹ Ross J. Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution* (Washington, D.C.: John T. Tower, 1850), 259–60.

¹² William A. Reppy, Jr., *Community Property in California* (New York: The Michie Co., 1980), 18.

¹³ Peter Thomas Conmy, *The Historic Spanish Origin of California's Community Property Law and its Development and Adaptation to Meet the Needs of an American State* (San Francisco: Grand Parlor, Native Sons of the Golden West, 1957), 1.

¹⁴ Prager, "Community Property," 10.

The forty-eight delegates to the convention, identified according to origin and recency of migration, comprised four groups: the native Californians of Mexican or Spanish descent; the old-line Americans who had resided in California for a long period of time (ten to twenty years); the more recent American immigrants, most of whom had come at the time of the Mexican-American War (three to ten years previous to the convention); and the very recent immigrants who had come fewer than three years previous to the convention.¹⁵ Interestingly neither the native Californians nor the old-line residents participated in this debate. In Mexican California, marital property seldom became an issue because of the rarity of divorce and the conservative nature of the land-based rancho society that was not highly commercial.¹⁶ The newer emigrants who had come to California from four months to three years previous to the convention played the leading roles on this issue.

Presumably these more recent immigrants were familiar with the debates concerning married women's property acts that had taken place during the last decade in the eastern states, while the natives and older residents were largely unaware of these developments. The seven men who took extensive part in the polemics, Henry Halleck, Kimball H. Dimmick, Frances Lippitt, Charles T. Botts, Myron Norton, John M. Jones, and Henry A. Tefft had a number of characteristics in common. First, they were all recent immigrants. Second, they were all lawyers.¹⁷ Finally, five of the seven were born in or had lived most recently in New York.

The New York link is significant because New York had recently undergone major legal reforms, including marital property reform. From 1841 to 1848 eight bills were introduced in that legislature which provided for married women's separate property, four of which were considered in 1846 and 1847.¹⁸ At the New York constitutional convention of 1846, a clause almost identical to the one proposed at the convention in California was put forward. It too was probably copied from the Texas Constitution but

¹⁵ *Biographical Sketches of the Delegates to the Convention to Frame a New Constitution for the State of California* (San Francisco: Francis and Valentine, Publishers, 1878), 8-9.

¹⁶ Prager, "Community Property," 13.

¹⁷ Of the forty-eight members of the convention, only fourteen were attorneys.

¹⁸ Basch, *Eyes of the Law*, 138.

slightly modified to eliminate the phrase “common property.” This constitutional provision was not passed, but in 1848 a married woman’s property act was passed that was similar in content.¹⁹ The controversy resulting from this lengthy process of reforming the New York law and the law of other common law states had resulted in a number of articles in national publications.²⁰

New York was the previous residence of Dimmick, Halleck, Lippitt, and Norton. As lawyers, they were no doubt familiar with the arguments that had been advanced in the campaign. Many of their arguments were similar to those voiced in the New York debates. Jones had most recently been a resident of Louisiana where community property law governed. The remaining recent arrival was Charles T. Botts who took the conservative position championing the unreformed common law. Botts was born and raised in Virginia before coming to California eighteen months previously.

The content of the debates indicates that the issue paramount to the delegates was the economic condition of married women under the law. Subtopics of the debate included the ramifications for creditors’ rights and the disruption that would result to the native Californian tradition if the law were changed. The undesirability of the common law was mentioned because of its complexity. Delegates expressed a desire for a simple understandable law. The most important question, however, was that of women’s rights. The focus of the New York debate had shifted in California. The main questions in New York had been how to reinstate trusts for married women after they had been removed by changes made to simplify the law and how to relieve debtors. In California, the broader question of the legal position of married women was the major issue.

Botts argued for the traditional common law including coverture on the basis of the natural law:

In my opinion, there is no provision so beautiful in the common law, so admirable and beneficial as that which regulates this sacred contract between man and wife. Sir, the God of nature made woman frail, lovely, and dependant [sic]; and such the common law pronounces her. Nature did what the common law has done

¹⁹ *Ibid.*, 150.

²⁰ *Ibid.*, 138.

— put her under the protection of man; and it is the object of this clause to withdraw her from that protection, and put her under the protection of the law. I say, sir, the husband will take better care of the wife, provide for her better and protect her better, than the law. He who would not let the winds of heaven too rudely touch her, is her best protector. When she trusts him with her happiness, she may well trust him with her gold. You lose the substance in the shadow; by this provision you risk her happiness forever whilst you protect her property. Sir, in the marriage contract, the woman, in the language of your protestant ceremony, takes her husband for better, for worse; that is the position in which she voluntarily places herself, and it is not for you to withdraw her from it.²¹

Botts, was the most conservative of the debaters. It was his belief that a married woman should be totally dependent on her husband economically, that the husband should be the head of the family, and that a married woman's property act would destroy the harmony of the marital relationship and transform marriage into a battleground by placing the wife's interests in opposition to her husband's. Dimmick, who represented a large native Californian constituency in San Jose, was unimpressed by the dependency of women assumed by the common law.

We are told, Mr. Chairman, that woman is a frail being; that she is formed by nature to obey, and ought to be protected by her husband, who is her natural protector. That is true, sir; but is there anything in all this to impair her right of property which she possessed previous to entering into the marriage contract?²²

In order to bolster his argument, Botts invoked Blackstone and the Bible. "By marriage," says Blackstone, "the husband and wife are one person in the law." Botts continued:

This is but another mode of repeating the declaration of the Holy Book, that they are flesh of one flesh, and bone of bone. It is a principle, Mr. Chairman, not only of poetry, but of wisdom, of truth, and of justice. Sir, it is supposed by the common law that the

²¹ Browne, *Debates*, 259–60.

²² *Ibid.*, 263.

woman says to the man in the beautiful language of Ruth: “Whither thou goest I will go; and where thou lodgest, I will lodge; thy people shall be my people, and thy God my God.”²³

Jones, the representative of San Joaquin and the youngest of the debaters at twenty-five, pleaded the cause of reform by stating that the despotism of the husband had been the subject of reform in the eastern United States for the past forty or fifty years²⁴ and that he favored simplification of the common law.²⁵

Botts replied that despotism was warranted in the case of husband and wife. He also blamed the woman’s rights movement for the married women’s property acts saying, “This doctrine of woman’s rights, is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe.”²⁶

Some delegates predicted a rise in the divorce rate if married women were allowed to hold property.²⁷ Dimmick replied that the community property system with its separate property provisions had been in effect in California since the coming of the Spanish without destroying marriage.

In addition, Dimmick voiced his concern for the native Californians who had operated under that system, stating:

Women now possess in this country the right which is proposed to be introduced in the Constitution. Blot it out, and introduce the common law, and what do you do? The wife who owns her separate property loses it the moment the common law prevails, and it is to avoid taking away that right of control over her property that I would wish to see this provision engrafted in the Constitution.²⁸

Still professing doubts about the wisdom of the measure, Lippitt expressed his fears for creditors’ rights. He contended, “If the husband is a dishonest man, gets in debt, and cannot or will not pay his debts, he has only to

²³ *Ibid.*, 267.

²⁴ This was clearly an overstatement, since the first Married Woman’s Property Act was passed in 1839.

²⁵ Browne, *Debates*, 264.

²⁶ *Ibid.*, 260.

²⁷ *Ibid.*, 267.

²⁸ *Ibid.*, 262.

pretend, when a bill or execution is sent against his property, that it belongs to his wife — that it is her separate property.”²⁹ Botts agreed arguing:

The husband and wife together may enjoy my property and yours, and become possessed of thousands and thousands, leaving us beggars; and then, sir, under this system, while they are indebted to us together for that which they have jointly used and occupied, under the pretence [sic] of this clause, they may leave us penniless while they revel in luxury.³⁰

Several of the proponents of the measure saw the provision from the perspective of aiding debtors. It was a means of saving families from ruin when the hazards of speculation bankrupted a family.³¹ Tefft foresaw a chaotic economy in California that would be characterized by “wildness of speculation.” As a means of preventing women and children from suffering from destitution because of the speculation of their husbands, Tefft wanted to offer them some security.³² Returning to the question of woman’s rights, Lippitt finally said that the provision was simply not necessary because a woman’s separate property could be protected by an antenuptial agreement or marriage contract. The constitutional provision would not help those women who always yielded to their husbands — they would never use the provision. On the other hand, those women who wore the “breeches” in the family would only be stirred up by such a right and dissension would be increased, according to Lippitt.³³

Jones admitted there were two kinds of women, those who wore the breeches and those who didn’t, but he drew the opposite conclusion. To him it was the latter woman who needed the constitutional provision because she would never suggest a marriage contract. The assertive woman would protect her property anyway, and “it is to those who do not wear the breeches — it is to those gentle and confiding creatures who do not think of contracts — that the protection of the law is designed to be given.”³⁴

²⁹ Ibid.

³⁰ Ibid., 268.

³¹ Ibid., 259.

³² Ibid., 258.

³³ Ibid., 261.

³⁴ Ibid., 267.

In sum, the arguments advanced at the convention by the proponents of separate property rights for women were as follows: that the traditional common law annihilated the rights of the married woman and that in this enlightened age her separate property should be protected; that a provision for separate property would save families from want and deprivation when husbands speculated unwisely; that the system of law of the native Californians should be continued so that their property rights would not be disrupted. But, above all, the debate had been transformed from the emphasis in the eastern states on legal reforms and creditors' concerns to that of a debate on the "woman question."

It is clear from the debate that delegates did not foresee the full impact of the sharing principles of community property. They considered community property under the civil law to be similar to separate property provisions enacted in the eastern states under the heading of married women's property acts.³⁵ The section was approved as written and became a part of the first Constitution of the state of California. That Constitution mandated that "laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband."³⁶ The delegates, intending to erase the disabilities of married women under the law, at least so far as their separate property was concerned, had gone much further toward companionate marriage by unwittingly adopting the radical principles of community property. The separate property reform was well ahead of the circumstances of the people then involved in divorce, and it would not be until the twentieth century that the promise of community property would come to fruition.

The first legislature followed the mandate of the Constitution by enacting a law on April 17, 1850 entitled, "An act defining the rights of husband and wife."³⁷ According to Orrin K. McMurray, this law was substantially taken from Texas law governing husband and wife, just as the constitutional provision concerning separate property had been taken from the Texas Constitution.³⁸ Succeeding legislatures amended this measure and

³⁵ Prager, "Community Property," 9.

³⁶ Browne, *Debates*, 259–60.

³⁷ *Laws of the State of California*, First Session, 1850, 254–55.

³⁸ Orrin K. McMurray, "The Beginnings of the Community Property System in California and the Adoption of the Common Law," *California Law Review* 5 (June 1915): 377.

adopted other statutes that pertained to the married woman during the period at issue — 1849 to 1872. During this time amendments and additions overlaid a common law tradition upon the community property law in order to conform to the experience of what was now a predominantly American population with a common law heritage.³⁹

The original act defined separate property as that property, both real and personal, owned by a spouse before marriage or obtained after marriage by gift or inheritance. Community property was simply defined as all property acquired after marriage by either husband or wife that was not separate property.

The husband was granted complete management of both the community property and the wife's separate property, though her separate property could not be sold without her consent in writing. In addition, she could be examined in private to determine if her signature had been obtained by coercion. If the wife believed that her husband was mismanaging her property she could go to court and ask the judge to appoint a trustee to manage the funds under the supervision of the court. This aspect of the law placed it in the category of the conservative reformed common law states. Under Mexican community property law, she would have had exclusive control of her separate property.⁴⁰

In addition to the protection of the wife's separate property, eight out of twenty-three sections of the marriage law provided for the regulation of marriage contracts.⁴¹ These provisions enabled wives to gain their husband's prenuptial consent to management and control of their own separate property.

While extensive protections for the wife's separate property were enacted, with regard to community property the husband had seemingly unlimited control. What then did community property mean to the married woman? The answer came in a California Supreme Court case in 1860. In *Van Maren v. Johnson*, Chief Justice Field characterized the wife's interest in the community property as a "mere expectancy." Ruling on whether the community property was liable for the husband's premarital debts, Field wrote,

³⁹ Prager, "Community Property," 34.

⁴⁰ *Ibid.*, 7.

⁴¹ *Laws of the State of California*, First Session, 1850, 254-55.

Yet the common [community] property is not beyond the reach of the husband's creditors existing at the date of the marriage, and the reason is obvious; the title to that property rests in the husband. He can dispose of the same absolutely, as if it were his own separate property. The interest of the wife is a mere expectancy, like the interest which an heir may possess in the property of his ancestor.⁴²

In other words, the wife's half interest only materialized at the death of her spouse or at divorce. This lack of recognition of the sharing principles of community property is consistent with the constitutional convention's ignorance of the differences between common law and community property law. In reality, during the existence of the marriage, community property and the common law marital property systems were virtually indistinguishable.⁴³ If the "mere expectancy" could only be realized at death or divorce, what was the nature of the wife's interest in these two circumstances?

When a spouse died, one-half of the community property went to the survivor and the other half to the descendants of the deceased husband or wife. This was a radical departure from common law where the husband retained full rights to the property upon the death of the wife while the wife, upon the death of her husband, only received the use of one-third of the property until her death. In the 1850 act both parties were entirely equal. "The major problem with this approach was that it resulted in property, which those reared in the common law thought of as the husband's property, being passed on the wife's death to people other than the husband."⁴⁴ When this aspect of the law became clear — that men would lose half the community property at the death of their spouses — it was quickly challenged in the courts. In the case of *Panaud v. Jones*, the court ruled that the provision of the act that fixed such parity was unconstitutional. The Court stated, "It would be a startling doctrine to hold that, on the death of the wife, one half of the community property immediately vested in the children of the marriage, without reference to the payment of debts contracted by the husband for the benefit of the joint community."⁴⁵

⁴² Van Maren v. Johnson, 15 Cal. 308, 311 (1860).

⁴³ Prager, "Community Property," 39.

⁴⁴ *Ibid.*, 36.

⁴⁵ *Panaud v. Jones*, 1 Cal. 488, 517 (1851).

Despite the plain language of the statute, the court refused to recognize the liberalized marriage laws. It was too “startling” to those reared and educated in a common law tradition.

In 1861, the legislature revised the provision to conform to the court decision and specified that if the wife died, all the property went to the husband. If the husband died, one-half of the property went to the wife and the other half to his descendants after his debts had been paid. In addition, it was provided that the husband could will one-half of the community property while granting no such testamentary rights to the wife.⁴⁶ Very quickly, the more radical aspects of community property law were being brought into conformity with common law doctrine.

The disposition of the community property upon divorce also necessitated revision. The original act of 1850 provided for the equal division of the property in the event of divorce. This meant that, in terms of property at least, a form of no-fault divorce existed. In practice, it galled victims of adultery and extreme cruelty to divide their property equally. In 1857 the provision was amended to state that, in those two causes for divorce, the court could divide the property at its discretion on the basis of what it considered just.⁴⁷ Still, in all other cases the marital property was to be divided evenly. In common law jurisdictions at this time, a wife was entitled to nothing upon divorce. In this one circumstance — that of divorce — the radical nature of the sharing principles of community property law were inescapable.

The laws concerning the rights of married women to make wills already conformed to the common law. Wives could make wills according to the legislation of 1850, but only with the consent of their husbands, unless they had a marriage contract that provided differently. Wills made by unmarried women were revoked upon marriage and were not revived upon the death of the husband.⁴⁸ In 1866, the legislature liberalized the will statutes by providing that a married woman could dispose of her separate estate without the consent of her husband, “in like manner as a person under no disability may do.”⁴⁹ This language, referring to the disability of being a married woman, was common law terminology.

⁴⁶ *Statutes of California*, Twelfth Session, 1861, 310–11.

⁴⁷ *Laws of the State of California*, First Session, 1850, 254–55.

⁴⁸ *Ibid.*, 178–79.

⁴⁹ *Statutes of California*, Sixteenth Session, 1866, 316–17.

Just as statutes regarding the making of wills by married women showed the influence of the common law so also did a statute passed in 1852 that was taken directly from the common law. This statute was called “An Act to authorize Married Women to transact business in their own name as Sole Traders.” A reference to *femme sole* showed the common law heritage of this act. Under the common law, it had become customary to allow married women to provide for their own support in cases where husbands were absent or unable to work. Obviously, a woman operating under coverture, who could neither sue nor make contracts, could hardly enter into business. In order to make it possible for her to support her family, a special category was constructed that made a married woman single for certain purposes and under circumstances that were well regulated by law. According to the California act, a woman could designate herself as a sole trader by declaring her intention to carry on business in her own name before a notary public or other official and by recording that declaration in the County Recorder’s office. In addition, she was required to publish in the newspaper her intention to enter into business. Once she had fulfilled those requirements, the debts and credits of the business were hers alone. That her earnings as a sole trader should be her separate property offended community property principles and showed the inevitable contradictions that appeared when combining aspects of common law with civil law.⁵⁰

Moreover, according to the sole trader statute, a married woman could sue and be sued and make contracts, but her liability would extend only to her separate property. She could not invest more than five thousand dollars in her business unless she took an oath that sums over five thousand dollars did not come from her husband.⁵¹ The intent of this legislation was to enable a woman with a dissolute or absent husband to support herself. It was the one statute that working-class women found useful. Legislators had feared that a husband might shield his property from liability by placing it under his wife’s name under the sole trader enactment, and by 1862 they were convinced that fraud was common under the 1852 act. After that year a woman could be a sole trader only upon application to the district court where she had to explain why it was necessary for her to earn her

⁵⁰ Prager, “Community Property,” 40.

⁵¹ *Laws of the State of California*, Third Session, 1852, 102.

own livelihood. It also stated that “nothing contained in this Act shall be deemed to authorize a married woman to carry on business in her own name, when the same is managed or superintended by her husband.”⁵² A year later the legislature made it a felony for a woman to fraudulently represent herself as a sole trader.⁵³ After an initially bold move, again the legislature retrenched.

Other enactments during the period allowed a married woman to execute powers of attorney and to insure her husband’s life.⁵⁴ In 1870 an act was passed that protected her earnings from liability for the debts of her husband. If she were living apart from her husband her earnings were her separate property.⁵⁵ This was much less progressive than common law reforms of the time in eastern states that considered her earnings as her separate property even when she was still living with her husband.

The original work of the legislature defining the rights of husbands and wives conformed closely to the Spanish civil law and showed the legislature’s desire to fulfill the assumed constitutional mandate to adopt the community property law. But as the law was tried and tested, modifications were made in a common law direction. The legislature and the courts little by little transformed the concept of community property law into little more than a reformed version of the common law. By the enactment of the Civil Code of 1872, the constitutional provision was defined as follows: “The term ‘separate property’ . . . is used in its common law sense, and by that law ‘separate property’ means an estate held, both in its use and in its title, for the exclusive benefit of the wife.”⁵⁶ The writers of the code seemed unaware of the community property origins of the section. The true implications of the choice of community property at the constitutional convention of 1849 would not be manifest until well into the twentieth century except in the case of divorce, but in order for a divorce to take place it was first necessary to adopt a divorce law for California.

⁵² *Statutes of California*, Thirteenth Session, 1862, 108–9.

⁵³ *Statutes of California*, Fourteenth Session, 1863, Ch. 189.

⁵⁴ *Laws of California*, Fourth Session, 1854; *Statutes of California*, Fourteenth Session, 1863, 165.

⁵⁵ *Statutes of California*, Twentieth Session, 1870, 226.

⁵⁶ *The Civil Code of the State of California* (Sacramento: T.A. Springer, State Printer, 1872), 54.

Most northeastern states by this period had divorce statutes that provided for judicial divorce on grounds of adultery, desertion, extreme cruelty, and failure to provide support. The only restrictive state north of the Mason–Dixon line was New York, which allowed for divorce only in cases of adultery.⁵⁷ Most of these laws had been passed soon after the Revolution, and divorce was well established long before the Civil War. Divorce became a part of the antebellum reform movement in the 1840s with the attempt to enlarge the number of grounds on which a divorce in New York could be obtained. According to Max Rheinstein, the long argument for increased grounds for divorce in New York turned upon the plight of women in marriage: “The possibility of divorce was urged as a means of protection for women abused by tyrannical, profligate or abusive husbands.”⁵⁸ The reformers failed to liberalize the divorce law in New York.

When California legislators took up the question of divorce in 1851, a highly emotional struggle ensued. The Assembly sent a divorce bill to the Senate after a lengthy debate and a close vote of 17 ayes to 16 nays.⁵⁹ The bill was referred to a select committee of the Judiciary Committee, which in turn recommended that it be rejected because of concerns about its effect upon marriage and womanhood. The committee saw the marriage tie as sacred and “indissoluble except by death.” More importantly, the committee believed that divorce would

subvert the purity of woman and unloose the restraints which have accompanied and helped to construct a refined civilization. If marriage is only conventional, so is the chastity of woman, as is her modesty, her delicacy, her refinement, and if we desire that these qualities should remain unimpaired, it behooves us to look well to

⁵⁷ Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States* (New York: The Macmillan Co., 1962), 50.

⁵⁸ Max Rheinstein, *Marriage Stability, Divorce, and the Law*, (Chicago: University of Chicago, 1972), 37–39.

⁵⁹ Theodore H. Hittell, *History of California*, 4 vols. (San Francisco: N. J. Stone and Co., 1897), 4 (1897), 68.

the effect which our legislation will have in . . . relaxing those rules which have fixed a high standard of female excellence.⁶⁰

Divorce was squarely faced as a woman's issue, and fears of woman's sexuality being "unloosed" were very much in evidence.

Finally, the committee believed that if divorce were allowed, people would enter into marriage impetuously, whereas if divorce were impossible, marriage would be approached cautiously.⁶¹ Against this majority view, a minority of the committee issued a report supporting the divorce law. The members of this dissenting group argued that

when by the fault of either of these parties . . . respect and affection has ceased — when joy has departed from the family circle; when discord, and outrage, and violence have usurped the very inner temple of the household; when virtue itself has deserted the family altar; when children are trained up, both by precept and example, to indulgence in hatred, passion, and vice — the marital obligations become a distressing burden to the parties themselves, and a festering curse upon the community.⁶²

The minority report also saw divorce as an issue of woman's right to the pursuit of happiness. The report clearly showed that the members of this group saw the husband as the menace to married happiness:

When a husband has forgot his duty to his God, his country, his family, and himself, and prostrates himself below the level of the brute — when he has become a miserable, wretched, loathsome drunkard, a living carcass, bringing naught but wretchedness and misery into the bosom of his family — he has violated every obligation of the marriage contract, and it becomes . . . the bounden duty of those who are watching over the interests of the innocent and the oppressed to interpose the shield of the law, and to rescue the suffering wife and children from their pitiable condition.

When he becomes a demon, and dares descend to the vile crime of cruelty to her whom he has sworn to cherish and protect,

⁶⁰ Senate Committee on the Judiciary, "Divorce Report, 1851," California State Archives, Sacramento, 3-4.

⁶¹ *Ibid.*, 5.

⁶² *Journal of the Senate*, "Minority Report on Divorces," 1851, Appendix N, 667.

it would scarcely seem possible that any one could be found who would seek to arrest the sword of justice, when wielded to sever such abominable ties.⁶³

Never did the committee write similar arguments intimating that the wife might be at fault. Divorce was clearly seen by the writers of this report as a reform to ameliorate the condition of women. The legislators, by means of the divorce law, would save women from cruel, drunken husbands. The final paragraph of the report amply illustrated the paternalistic motives of the committee's minority. "It appears to your committee," they wrote, "that the law should throw its protecting arm around the unfortunate, and rescue them from the abyss into which one false step has plunged them."⁶⁴

The key assumption of the law according to this minority report was that divorce was a matter of guilt and innocence. The guilty party committed a wrong against the innocent, aggrieved party. These senators believed that a woman needed protection against the cruel, bestial, besotted male. She would, of course, be a morally upright and sympathetic victim.

The full Senate voted on the bill, passed it by a vote of seven-to-three and sent it to the governor for signature. The governor signed the divorce bill into law March 26, 1851.⁶⁵ According to the act, the District Courts (today the Superior Courts) had exclusive jurisdiction over divorce. This followed the constitutional convention's determination to avoid legislative divorce and to turn the process over to the courts. The act also authorized divorce from bed and board (legal separation) as well as divorce from the bonds of matrimony. Annulment was not available.

Grounds for divorce were similar to most other states at the time. Divorces could be granted for impotence and marriage contracted by force or fraud. In addition, six other grounds were available under which to file suit. They were adultery, extreme cruelty, habitual intemperance, willful desertion, failure to support, and conviction of a felony.⁶⁶

Adultery was hedged in statements that prevented the ground from being used in a manner not intended by the legislature. It was specified that the party guilty of adultery could not initiate the proceedings, nor could the

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Hittell, *California*, 69.

⁶⁶ *Laws of the State of California*, Second Session, 1851, 186–87.

partners collude in the adultery, nor could adultery be considered a cause of divorce if the partners had lived and cohabited as man and wife after the victim's knowledge of the act of adultery. Adultery was considered a grave offense, but one that should not be manipulated so as to make divorce consensual.⁶⁷

Extreme cruelty, habitual intemperance, willful desertion for three years, or neglect on the part of the husband to provide the common necessities of life for three years, assuming he had the ability, and imprisonment for a felony were next in order.⁶⁸ No stipulation required that wives must provide housework or sexual services comparable to the duty of the husband to support. These grounds reflect the assumption that the husband's duty was to provide support for his wife. All of these grounds relate to his neglect of that duty. It is not surprising that more women than men should file for divorce because the divorce law was implicitly designed to serve the needs of women.

The financial obligations of the parties were defined in the divorce act and in the act concerning the relation of husbands and wives. In the latter statute, the community property provisions were spelled out — that the property should be divided equally at the dissolution of the marriage.⁶⁹ This was to be later (1857) amended regarding cases of adultery and extreme cruelty. The divorce act itself provided for orders for support of the wife and children.⁷⁰ One interesting omission in the law was a section pertaining to the custody of children. No law during this period specified rules regarding the custody of children.

The divorce law of California was liberal in the sense that divorce was definitely obtainable, but it was strict in the sense that cause had to be shown and proved to the satisfaction of the court and that proper corroboration and legal forms had to be complied with. This divorce law in its essentials — the concept of fault and the grounds enumerated — were to remain the divorce law of California until 1970. With the major legislation concerning marriage and divorce in place, some critics were sure that California was on its way to perdition and others thought that the laws in California with regard to women were exceedingly progressive. Those laws were grounded

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ *Laws of the State of California*, First Session, 1850, 254–55.

⁷⁰ *Laws of the State of California*, Second Session, 1851, 186–87.

solidly in the ideology of companionate marriage. Women would have their own economic base in marriage; husbands and wives would be able to fashion a marriage contract according to their own wishes devoid of patriarchal common law strictures. Should the marriage fail, divorce was the ultimate remedy and a divorce law the ultimate security.

The remainder of this dissertation will consider the reality of the law rather than the theory of the law. How was it interpreted and enforced? How did women make use of it? The economic aspects of the law will be closely examined since the major point of all the legislation heretofore discussed was to ease the economic thralldom of women. We will investigate the use women made of such laws as separate property provisions, sole trader statutes and marriage contracts. The community property provisions will also be tested against the outcome of divorce cases and each major ground of divorce — failure to provide, desertion, adultery, extreme cruelty and intemperance — will be examined to see how it functioned for women. If the women of early Sacramento who took advantage of these laws were predominantly middle-class then the legal scheme should be found appropriate to their needs. If, on the other hand, they were largely working-class, we are more likely to find a system of marital law ill-suited to the real lives of women in this urban society. To put all of this in context, however, we should first examine the environment and social structure of early Sacramento, and particularly the class origins of California's new citizens. We must identify them and the circumstances of their daily lives in order to correctly analyze their behavior under the new legal system.

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CONCLUSION

Sacramento was the second largest city in California in the period from 1849–72. It was typical of small cities throughout the United States in size and occupational structure, but it was unique in its sex ratio (in which men greatly outnumbered women) and the hardships its residents suffered. In addition, immigrants had to survive a rigorous journey even to reach California. Because of these conditions, I submit that women who lived in Sacramento from 1849–72 were either women of unusual boldness and adventurousness or women who did not have the option of remaining in the East while their husbands sought fortunes in the West. The data suggests that the latter predominated.

Recent works on the history of women in the West have concluded that women of all classes, especially the working class, accepted the ideology of separate spheres for the sexes and that the companionate marriage was adopted by most working-class families. In contrast, I have shown that divorce records indicate that, for most working-class families, the ideal was impractical and unrealistic. The behavior of the divorcing women of the working class was the contrary of the ideal of domesticity, purity, and modesty. Their husbands, too, failed to exhibit sobriety, conscientiousness, and gentle concern for their spouses. Marriages lacked domestic equality,

child-centeredness and a separation of spheres. But did these failing marriages show only unrealized expectations of the ideal? I think not. I believe that the deportment of the divorcing couples represented the behavior of many more couples who did not pursue legal redress. The divorce records give us a window into the private lives of an inarticulate class that is rarely scrutinized. The lack of economic security evidenced by the propertylessness of this class intimates that, for them, middle-class values were a luxury too lofty to achieve. The following examples give credibility to this position.

Life in California did not readily allow exclusive domesticity for wives. In order to support families in the boom-and-bust atmosphere, it was frequently necessary for women to work for wages. Some husbands had bad luck, some were irresponsible, and others became addicted to liquor, gambling and prostitutes. All of these circumstances made it difficult to embrace the domestic ideal. Fidelity to marital vows was also an impossible standard in many cases, and living with a man who was not one's lawful husband was tolerated. In contrast, for middle-class couples, adultery was the stuff of tragedy and suicide. The contrast between the classes stands out in high relief in the divorce records. Middle-class prohibitions for women such as walking alone on the streets were not observed by working-class women who had no choice but to go out in the streets. Forbidding women the solace of alcohol was to deny them an important palliative against harsh circumstances.

Men who felt no qualms about telling their wives to support themselves, even by prostitution if necessary, appear commonly in the divorce documents. Physical and mental cruelty abounded as did husbands who drank and visited brothels. Marriages did not reflect domestic equality, nor did child-centeredness appear in the legal actions of the period. This evidence suggests that the manners and mores of the working class during this period were distinct from those of the middle class. While working-class standards of behavior have been inaccessible to historians, middle-class norms have been well documented. It is these working-class mores that the divorce records reveal. Though Robert Griswold draws the opposite conclusion from divorce records, it is possible that his thesis and mine are reconcilable. Perhaps the trickling down of middle-class mores did occur from 1850–1890 as he has stated, but it happened after 1870 when the bulk of the divorce cases he examined were litigated. The other possibility is that the opposite conclusions of our respective investigations are due to

the contrast between the rural population of San Mateo and Santa Clara counties and the urban population of Sacramento County.

In juxtaposition to the working-class pattern of family behavior that I have delineated, early political leaders formulated a family law system that articulated the companionate ideal of marriage. The family law that governed this early population was derived from the more advanced middle-class reform movements of the East. The law reflected the expectations of the middle class and was largely irrelevant to the working class, which did not share the same prospects. Reform of the disabilities of married women under the common law was heavily weighted toward the regulation of property-holding in marriage. Such reforms were truly of little import to the propertyless. At times separate property laws and sole trader laws functioned to allow couples to avoid creditors and bankruptcy, but such loopholes were soon closed. The anomaly of a working-class population governed by laws formulated by middle-class reformers is amply demonstrated in the legal records.

In addition to the class bias of the law, there was also a sex bias that appeared in the litigation. Laws formulated with a view to the improvement of women's status were sometimes turned upside down in the courtroom. Male judges, lawyers and juries had difficulty enforcing the acceptable conduct for husbands that the reformers had envisioned. It was difficult to persuade the legal authorities to find a man guilty of not supporting his wife, drinking too much, or treating his wife cruelly. It was too easy for the men in the legal system to empathize with the man who had difficulty providing for a family. It was even harder to discriminate between husbandly authority and cruelty unless a woman's life was seriously endangered, and it was impossible to distinguish excessive drinking from normal male drinking habits. On the contrary, it was easy to find a woman's drunkenness repulsive and to find her adultery reprehensible.

Domestic relations law encompasses an intersection of class and sex that provides historians with invaluable insights into the past. I have considered the legal and social setting of this germinal period in frontier history. Against that background, I have analyzed not the expectations but the actions and deeds of an urban population. For the working class, the laws represented an ideal that was an unattainable luxury. Marriages of working-class women consisted in large measure of hard work, domestic

inequality, and sometimes brutality and intemperance, but little of kindness, respect or concern. There was no soft and special place for these women.

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THE EVOLUTION OF WORKERS' COMPENSATION POLICY IN CALIFORNIA, 1911–1990

GLENN MERRILL SHOR*

This chapter from Glenn Shor's Ph.D. dissertation (Public Policy, University of California, Berkeley, 1990) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at <https://dissexpress.proquest.com/search.html>.

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Chapter 2

ORIGINS OF WORKERS' COMPENSATION IN CALIFORNIA

THE ROLE FOR HISTORY IN POLICY ANALYSIS

In this part of the dissertation, I discuss the historical evolution of workers' compensation¹ policy in California. Workers' compensation is a complex of problems. This leads to asking, if this institution is so problematic today, how did we first construct or devise it? An ability to identify the elements that first created the problem is an excellent starting point for any effort to ameliorate it.

The problems we see in today's workers' compensation system need to be analyzed through the lens of history. Armed with an understanding of the system's history, we can better explore the questions of what is possible to change. History allows us to question policy that we believe to be inevitable through examining thoroughly the factors that together led to what evolved.

Policy often starts with high hopes and ideals. Problems present real opportunities for achievement of progress, and improving how they are conceptualized and handled can lead to a reduction in the problem. But problems,

¹ Until 1974 in California, the system was known as "workmen's compensation."

especially ones that have become public, can also be extremely resistant to change. Legislative compromises, institutional rigidities, and administrative complexities often combine to limit the effect of policy goals.

Through an understanding of these limitations and how they affect outcomes, policy analysts can learn lessons from history. An historical focus allows analysts to look at an institution in tandem with looking at the conditions of its birth. The problems that the original institution was formed to deal with may be different than the problems existing today, yet the institution may be stuck in the past, attempting to handle new problems with old solutions. Studying history can help us see the evolution of problems as well as the programs set up to deal with them.

History can inform public policy analysis and decision making in many ways. History can help us analyze the past in ways that expand the range of choices available to decisionmakers. It can help give decisionmakers an accurate sense of what alternatives have previously surfaced. It can provide the context in which a present policy began, or conversely the context in which alternatives were not chosen. History can help to remove barriers to change by clarifying and exposing the political roles of the parties. Current policy gets some of its legitimacy from the notion that an institution or practice has always been with us and further that it will therefore always be with us. The study of history can demystify a subject by showing it was not always what it is now, and by showing that policy is fluid and thus not without hope for change. Thus, it is important to ask, "Did it have to turn out this way? How could it have been different?" Through a study of history as a comparative device, the pieces of the present system appear less determined and fixed. David Rothman and Stanton Wheeler note that historical inquiry challenges a source of legitimacy of current policy — the notion that since an institution or practice has always been with us that it must necessarily always be with us. Rather, by exposing the past record and showing that what goes into the present construct is not totally determined and fixed, the policymaker is freer to propose change. In their words, "an aura of inevitability gives way to sense of experimentation."²

² David Rothman and Stanton Wheeler, eds., *Social History and Social Policy* (New York: Academic Press, 1981), 7.

We look at the past not to copy it but to search it for possibilities that may again be relevant. Knowing that some things may have been possible in the past does not necessarily mean they are possible now; however, it is more informative than thinking that whatever is not present today was never possible. With this purpose in mind, we begin with the origins of workers' compensation.

ORIGINS OF WORKERS' COMPENSATION

In the late 1800s and the early 1900s, occupational injury and illness increased dramatically as a result of massive industrialization. Realization of the problem and a policy response to it began in many nations of Europe, with Germany being the first country to establish a governmental program.

In the United States, it took longer for the problem to be perceived as a social issue deserving of government action. However, between the turn of the century and the First World War, a broad-based social movement arose in the United States generally, and California particularly, to achieve a safer and more healthful work environment.³ The movement began with notions of employer liability as reflected in state laws defining negligence, and evolved into a complex structure of prevention and compensation with specified ways to ensure that the system operated efficiently — namely through regulated insurance that would spread the costs of work-related injury and illness.

This chapter describes the context in which workers' compensation was developed and then established in California in the early twentieth century. The chapter includes an articulation of the process by which policymakers became convinced of the need for governmental intervention into the problem; the major debates regarding what kind of intervention would be most appropriate and effective; how the problem was addressed elsewhere, and how the policy evolution that took place in California responded to the perceived problem.

³ David Rosner and Gerald Markowitz, "The Early Movement for Occupational Safety and Health, 1900–1917," in Judith Walzer Leavitt and Ronald L. Numbers, eds., *Sickness and Health in America: Readings in the History of Medicine and Public Health* (Madison: University of Wisconsin Press, 1985), 467–82.

HISTORICAL CONTEXT

Industrialization in the United States at the turn of the twentieth century was characterized by changes in the organization of work that had profound impact on worker health and safety. Work was increasingly mechanized, with much of the nation's employment shifting to big factories with high speed machinery powered by belts and pulleys running off steam-driven generators. The development of the elevator allowed larger construction projects. The chemical age was also beginning, as was widespread use of electrical power.

The physical hazards of mechanized work were complicated by what the Somers call the "impersonal corporate organization of industry" which separated employers physically and socially from their workers. Finally, the widespread use of low-paid immigrant labor reduced attention to health and safety on the job.⁴ In some Western states like California, beyond the hazards of factory work much of the workforce was engaged in agriculture and other inherently hazardous occupations related to resource exploitation, such as mining and logging, and railroad work.

The occupational injury rate in the United States probably peaked around 1907, the year the Interstate Commerce Commission reported 4,534 fatalities among railroad workers, and the federal Bureau of Mines counted 2,534 dead in bituminous mines.⁵ Frederick Hoffman, statistician of the Prudential Life Insurance Company, estimated there were approximately 17,500 work-related accidental fatalities among the 26 million men gainfully employed in 1908.⁶ Allegheny County, Pennsylvania, recorded a death a day among coal miners in 1909.⁷ In 1911 John Mitchell, vice president of the American Federation of Labor cited a statistic of the American Institute of Social Service "that 536,165 workmen are killed or injured

⁴ Herman and Anne Somers, *Workmen's Compensation* (New York: John Wiley and Sons, Inc., 1954), 7.

⁵ Interstate Commerce Commission, "Accident Bulletin 119" (1951), 112; U.S. Bureau of Mines, "Injury Experience in Coal Mining: 1948," Bulletin 509 (1952), 72.

⁶ Frederick L. Hoffman, "Industrial Accidents," *Bulletin of the Bureau of Labor* 78 (September 1908), 418. Cited in Anthony Bale, "Compensation Crisis: The Value and Meaning of Work-Related Injuries and Illnesses in the United States, 1842-1932" Ph.D. diss., Brandeis University, 1987), 141.

⁷ Crystal Eastman, *Work Accidents and the Law* (New York: Russell Sage Foundation, 1910).

every year in American industry.” The statistician of the Prudential Life Insurance Company estimated the annual number of industrial accidents at 2 million.⁸

While industrial injury was clearly a leading cause of death and disability among working men and women, there was little being done by employers to address the problem. Incentives to reduce the trend were largely nonexistent. In the first decade of the century, safety requirements or standards were minimal in most industries. In California, the political strength of the railroads even insulated that industry from state government controls.⁹ Legislation on factory inspections that did exist was vague and budgets for enforcement were meager. There were no state inspectors enforcing any minimum levels of worker protection, and no mechanisms in place allowing regulatory agencies to create standards.

Compounding the problem, workers received little if any compensation for job-related injury and illness. Workers trying to recover damages against their employers for injuries faced many obstacles under common law. The law provided that if a person were injured on the job due to employer negligence, he or she could sue for all damages. But, under the “master-servant” structure of the common law, employers had three strong defenses that effectively shielded them against most such claims: 1) that the worker had assumed the risks of the employment by accepting wages for it (“assumption of risk”); 2) that the injury was due to the negligence of another worker and thus not of the employer (“fellow servant doctrine”); and 3) that the worker himself had contributed to the act (“contributory negligence”). Given the lack of job security, it was also difficult to convince co-workers to testify on behalf of injured workers. These realities together meant that workers had extremely limited chances of achieving compensation for a job related injury.

Under these liability rules, although employers bore indirect costs such as retraining, down time, and damage to machinery caused by accidents, they were able to externalize much of the cost of industrial injury by not having to pay full compensation for a worker’s losses, both economic and

⁸ John Mitchell, “Risks in Modern Industry: Burden of Industrial Accidents,” *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 76.

⁹ See Walton Bean, *California: An Interpretive History* (New York: McGraw-Hill Book Co., 1968, 1973), especially Chapter 25.

social.¹⁰ The lack of regulation, compounded by insignificant compensation, meant employers had few incentives to prevent occupational injury and illness.

After 1900, muckraking journalists began to expose the extent and effects of the injury problem to the general public, creating sympathy for workplace injury victims. Further, the problem was seen as an indication that the capitalist system was insensitive and unable to correct itself without outside intervention. Academic reformers connected with the Progressive movement saw the problem as contributing to the erosion of the social fabric. The Knights of Labor adopted the slogan, "An injury to one is the concern of all," and organized a campaign of strikes and boycotts over the issue of control of working conditions, including abolition of child labor and limitations on hours of work.¹¹ As injuries mounted and victims were left to the responsibility of family or community care to compensate their losses, it gradually became clear that employers got most of the benefits while undercompensated workers assumed most of the risks.

Crystal Eastman, lawyer, sociologist and later secretary of the New York State Employers' Liability commission, first focused the debate in the U.S. on two questions in her 1910 Russell Sage Foundation Report:¹² Who was responsible for work injuries, and what were the economic consequences? If workers were the cause of most injuries, then there would be little sympathy to their plight after injury. If employers were guilty of subjecting employees to excess danger, then they should be punished and made to pay damages. But if the work itself was dangerous and could not easily be made safer, then Eastman concluded that the loss should be distributed. "Equity

¹⁰ Under the economic theory of hazard pay, one would expect workers in more dangerous jobs to have higher pay, either before or after an injury to compensate for the extra risk. But dual labor market theorists posit the existence of two parallel labor markets, a primary sector of privileged workers one in which people work for high wages in relatively good working conditions, with job security and the administrative mechanisms to back up rules, and a secondary sector of poor working conditions, low wages, high turnover and frequent job changes by individuals. There is also very little mobility between the two tracks.

¹¹ Sidney Lens, *The Labor Wars: From the Molly MacGuires to the Sitdowns* (Garden City, N.Y.: Anchor Press, 1974), 65.

¹² Crystal Eastman, *Work Accidents and the Law* (New York: Russell Sage Foundation 1910), volume 6 of *The Pittsburgh Survey*, edited by Paul Kellogg.

demanded that the economic loss (or part of it) be transferred from the worker to the employer and, ultimately, to the consumer.”¹³

In the interest of preserving the social fabric, analyses like Eastman’s study of the Pennsylvania coal mining districts documented the costs of industrial injury, and showed that the burden of disability lay “directly, almost wholly, and in likelihood finally, upon the injured workmen and their dependents.” In a majority of cases, she found, employers assumed no losses after injuries. Thus, to the employer, the economic costs of avoiding injury exceeded any economic benefits. In an earlier era, employers had direct contact with their workers and might have felt social and political benefits of assisting their injured “servants.” But Eastman argued that with competitive pressures, the primary motivations were “economy and rapidity of production.” Only by instituting a “uniform and inescapable penalty” against each accident, she believed, could “one economic motive be set off against another.” Thus workers’ compensation was perceived by one of its earliest American theoreticians as an injury tax.

Increasing outrage about industrial working conditions and increasing numbers of disabling work injuries had led to the enactment of safety requirements and regulations both at state and national levels. Violation of these statutes was presumed as employer negligence and created liability on their part. These laws also began to tighten loopholes. For example, under the “safety appliance” act affecting interstate railroad workers, the U.S. Supreme Court found that employers were under an absolute duty not only to install specified safety appliances, but also to keep them in working order.¹⁴

The employers’ liability statutes, however, were based upon negligence or violation of statutory duty, and thus would not cover those accidents not traceable to legal fault. The alternative principle of workers’ compensation was that industry in general should bear the financial burden of all industrial injuries, regardless of fault.

¹³ Roy Lubove, *The Struggle for Social Security* (Cambridge: Harvard University Press, 1968), 48.

¹⁴ American Federation of Labor and The National Civic Federation (AFL-NCF), *Workmen’s Compensation: Report Upon Operation of State Laws* (Washington, GPO, 1914), 14.

COMPENSATION IN THE UNITED STATES

Introduction

In the late 19th and early 20th centuries, there was increasing perception of the problem of work-related injury and illness in the United States and a gradual shift toward replacing laissez-faire individualism with a new ethic of social responsibility. The evolution of this early attempt at problem-solving went through several stages. First, beginning in the 1880s and 1890s, there was a focus on employer liability for these injuries and to what increased degree employers were to be responsible. Through legislative enactment and court decisions, employer defenses against negligence lawsuits were reduced. For example, some states made unlawful the practice of allowing workers to sign away their rights to compensation as a condition of employment. While these changes helped a few workers, the changes were inadequate for most.

Next, in the first decade of this century, reformers began systematically analyzing these employer liability systems and found numerous shortcomings. The laws were found to be based on anachronistic assumptions that were not consistent with realities of industrial society. (The narrow liability rulings assumed that workers had knowledge of all the hazards they were facing and could therefore assume the risks of the job knowing full well the tradeoff between risk and compensation. They assumed that if a worker had in any way contributed to the causation of an injury, the company was not to blame because if it were not for the fault of the worker, the accident would not have happened. The rulings further assumed unless the actual employer had caused the injury directly, the worker could not recover against him or her. Thus, employers would be off the hook if injuries had been caused by the acts of a “fellow servant” to the master.) Great majorities of injured workers received little if any compensation, and there was inconsistency between awards made. The systems were wasteful, slow, and inefficient. The systems of lawsuits inevitably aroused antagonism between labor and management. For most employers, the systems involved minimal financial incentive to practice prevention, and because they did, left many injured workers without compensation and created a burden on the public welfare.¹⁵

¹⁵ Herman Somers and Anne Somers, *Workmen's Compensation* (New York: John Wiley and Sons, 1954), 22-26.

Having generated public indignation against existing plans, the next step involved efforts to develop and pass state legislation that would address many of these inadequacies. Progressive reformers looked to the European experiences and settled on the concept of assessing liability without fault, and allocating the costs of industrial accidents to employers as legitimate costs of production. Early attempts in several states confronted state constitutional barriers, but beginning around 1911, most states found ways to adopt workers' compensation systems that could withstand legal challenges.

In designing the new compensation systems, most reformers chose to rely more on the English experience of private insurance companies, court administration, elective coverage, and no inherent injury prevention program, than on the German model of mutual insurance associations, collective responsibility of the industry with self-governing administration, mandatory coverage, and accident prevention and enforcement in the hands of the associations themselves.¹⁶

Employers' Liability

The English common law served as precedent for liability for negligence in the United States in the late nineteenth century. In some states, factory inspection laws of the 1880s and 1890s had provided a foot in the door for those seeking restitution for workplace injuries by specifying what conditions would constitute employer negligence. Juries had begun making awards that reflected their sympathy to the plight of the industrially disabled. The outcome, however, was generally not large monetary awards to injured workers, but rather more litigation and delay as employers and insurers appealed decisions.

Different strategies of intervention were posed. For example, some tried to curb or remove common law defenses through legislation. They contended that making employers responsible for the costs of workplace injuries would gradually drive down the number of injuries; when

¹⁶ Theoretically, the merging of individual risks with others in the same trade led to a "direct and obvious interest of the employers in each trade to keep down the mutual premiums, and they can only do that by making their mills and factories safer working places." Durand Van Doren, *Workmen's Compensation* (New York: Moffat, Yard, and Co. for Department of Political Science, Williams College, 1918), 139.

prevention became less costly than compensation, it would be practiced. But the objective of making employers responsible conflicted with an objective of keeping firms solvent. Many small and medium size businesses would be unable to pay any significant settlements to an injured worker. Any series of injuries, intentional or accidental, could easily lead to financial ruin without some kind of insurance.

Thus, as the law for employer negligence broadened, so did the market for insurance. The first employers' liability policy in the U.S. was issued in 1886 by the London-based Employers' liability Assurance Corp. Ltd, and the first domestic company (Travelers Insurance Company) entered the market in 1889.¹⁷ Nationwide, employers' liability insurance premiums rose from about \$150,000 in 1887 to \$14.7 million in 1904 to \$35 million in 1912.¹⁸

Among employers, the liability policies were generally popular because they offered protection from employee lawsuits. Private insurance companies took over the defense of the claim from the first determination of whether there was employer negligence to the final judgement. If the injured employee filed a claim, insurers handled the settlement and claims adjustment process, generally pitting their lawyers against unrepresented plaintiffs. If the adjustment process did not resolve the claim, workers could take their case to court. If workers could prove employer negligence by a preponderance of the evidence, relying on their fellow workers for testimony, they could win a jury judgement against the employer. In the extremely improbable scenario that an injured worker won his or her case, and the judgment was not appealed, policyholders would be indemnified by the insurance carrier up to the policy limits.

By 1905, however, there was growing dissatisfaction with the system from all quarters. Some employers were dissatisfied with the liability system because insurance policies, which limited coverage to damages of \$5,000 per person or \$10,000 per accident, only covered some of their potential losses.¹⁹ Juries were less reluctant to award damages against large

¹⁷ W. F. Moore, "Liability Insurance," *Annals of the American Academy of Political and Social Science* 26, no. 2 (September 1905): 499; Edson Lott, *Pioneers of American Liability Insurance* (New York: United States Casualty Company, 1938), 103, 35.

¹⁸ Lubove, *Struggle for Social Security*, 51.

¹⁹ *Ibid.*, 52.

employers, and appellate courts increasingly were upholding the decisions.²⁰ The cost and efficiency of the policies were also being criticized; high commission fees and administrative overhead meant that private insurers paid losses amounting to 40 percent or less of premiums.²¹

From the employee's viewpoint, the ability to take one's employer to court, even under liberalized conditions, was of little value. The delays and uncertainty of cases usually weighed against the injured claimant, forcing the injured worker into a low settlement. Where studies were done, it was clear that while some workers were beginning to win large judgements, the vast majority of injured workers received inadequate compensation for their injuries.²²

Employers' liability laws were a stopgap measure that eventually pleased no one. The next stage was to design a social welfare system under which the needs of injured workers could be balanced against the resources of business.

Movement for Social Welfare

Sensing an opportunity to use the public indignation and rising value of injured workers claims to mobilize for change, some reformers proposed a broad platform of social welfare initiatives, including universal health insurance, prohibition of child labor, and unemployment relief, as had already been done in many European nations. The American Association for Labor Legislation (AALL) was formed in 1906 by a small group of academic economists, including John Commons and Richard Ely of the University of Wisconsin, and Henry Seager of Columbia University. After factfinding trips to Europe, they became among the first Americans to lobby for introduction of a no-fault industrial injury compensation plan.

In 1908, during the Progressive-era administration of Theodore Roosevelt, the first limited workers' compensation act for federal civilian employees was passed. It applied only to federal civilian employees in hazardous occupations, excluded injuries due to the negligence or misconduct of the worker, and provided for the payment of full wages during

²⁰ Bale, "Compensation Crisis," p. 127–28.

²¹ Moore, "Liability Insurance."

²² See discussion on "Financial Recoveries" in Bale, "Compensation Crisis," 166–76.

disability.²³ While the plan applied to relatively few workers, it put the federal government in the position of advocating compensation mechanisms, and allocated federal resources to the study, design, and dissemination of plans.

Throughout the first part of the century, many individual states had become aware of the social upheaval caused by work accidents and began to study workers' compensation schemes as methods of protecting the welfare of private sector workers injured on the job. Generally, attempts to legislate compensation systems applied to specific dangerous occupations, in which injuries were seen less as preventable accidents than simply as expected outcomes of the work. The fact of injury, rather than the determination of negligence, was the gateway to benefits. In some jurisdictions, the system of workers' compensation was an added, rather than a replacement remedy, as modeled on the British system. That is, injured workers would have the choice of whether to pursue a tort remedy for employer negligence, or choose limited benefits under compensation.

Constitutional Issues

The principles of liability without fault, and the nonexclusivity of remedy were to confront serious challenges of constitutionality. A short description of some state proposals illustrates this.

In Maryland, an act passed in 1902 applied to specified dangerous occupations, such as mining, quarrying, transportation, municipal, and construction work. It paid a death benefit of \$1,000 to dependent families and was financed by a public Employers and Employees Cooperative Insurance Fund created with equal contributions from workers and employers. The law abolished the fellow servant doctrine and made the employer defense of contributory negligence only useful in reducing damages paid. The act was declared unconstitutional on the grounds that it deprived employers and employees of trial by jury, and that it vested judicial power in an executive office.

In Montana, a 1909 compensation act applying to coal mine employment was passed but then also struck down on Constitutional issues in 1911. The Act provided for a co-operative fund, with employers contributing based on their production, and employees on their gross earnings.

²³ 35 U.S. Statutes at Large, 556; noted in Van Doren, *Workmen's Compensation*, 52.

The act set up a State-administered system, with fixed sums payable to injured persons in case of disability. While the law was obligatory in requiring contributions from both employers and workers, injured miners and their dependents could ignore the provisions of the compensation law and choose to sue for damages under common law. The Montana Supreme Court found that “in reserving to the employee his right to an action at law, the act denies to the mine operator the equal protection of the laws [A]fter full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case.”²⁴ The court cited other state acts as examples of what it might accept. Washington State had traversed the “equal protection” problem by abolishing all actions for negligence, and the early Maryland act allowed employers to deduct settlement costs in lawsuits from required contributions to the compensation fund.²⁵

Because of its economic prominence, the struggle over New York State’s compensation law attracted national attention. The law, passed in 1910, was mandatory for eight especially dangerous occupations.²⁶ Under the act, employees were covered by a compensation act for accidents in which no negligence of the employer could be shown, while workers retained the right to sue for all accidents due to the fault or negligence of the employer.²⁷ The law struck down the “fellow-servant,” “contributory negligence,” and “assumption of risk” defenses, retained all existing liabilities based on negligence against the employer, and permitted the injured

²⁴ *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 108, 119 Pac. 554, quoted in James Harrington Boyd, *Workmen’s Compensation and Industrial Insurance Under Modern Conditions* (Indianapolis: Bobbs-Merrill Co., 1913), vol. 1, 141–42.

²⁵ Chapter 74, Session Laws, Washington, 1911; Laws of Maryland, 1910, chapter 153; quoted in Boyd, vol. 1, 143–44.

²⁶ Erection or demolition work involving iron or steel framework; operation of elevators or hoisting devices for conveyance of materials in iron or steel erection or demolition; work on scaffolds greater than twenty feet high; construction, operation, alteration or repair of wires or cables charged with electricity; work close to blasting or involving explosives; operation, construction or repair on railroads; construction of tunnels and subways; and all work carried out under compressed air. Boyd, *Workmen’s Compensation and Industrial Insurance*, vol. 1, 84–85. The number of trades is counted as twelve in Harry Alvin Millis and Royal Ewert Montgomery, *Labor’s Risks and Social Insurance* (New York: McGraw-Hill Book Company, 1938), 194.

²⁷ AFL/NCF, *Workmen’s Compensation*, 15.

employee to elect *after an accident* which remedy — employers' liability or workers' compensation — he or she would pursue.

The legislative commission writing the bill feared the consequences of a continuing high injury rate without victim relief. "Not the least of the motives moving us is the hope that by these means a source of antagonism between employer and employed, pregnant with danger for the State, may be eliminated."²⁸ But, the New York statute had been modelled on the system adapted by the British parliament, and failed to consider what one commentator called the "rigidity" of a written constitution: It "may at times prove to be a hindrance to the march of progress." On March 24, 1911, the act was labelled "plainly revolutionary" and declared unconstitutional by the New York Court of Appeals.²⁹

In its decision, the New York Court declared that making an employer liable to pay compensation for an injury due in no part to the fault or neglect of law by the employer violated due process. While supporting the "public good" theory of compensation, the Justices wrote that they could not justify it under the law. "Courts are not permitted to forget that the law is the only chart by which the ship of state is to be guided. If such economic and sociological arguments as are here advanced in support of this statute can be allowed to subvert the fundamental idea of property, then there is no private right entirely safe." Without this protection from the Legislature, "the guarantees of the Constitution are a mere waste of words."³⁰

In a disastrous coincidence, on the day following the appeals court declaration that the New York statute was unconstitutional, a major fire at the Triangle Shirtwaist Manufacturing Co. in New York City killed 145 of the 500 trapped employees.³¹ Ironically, garment workers were not among the eight dangerous trades in the New York Act. The disaster fueled demands for better workplace safety and health regulation, and led to calls for universal compensation coverage

²⁸ Ibid., 95.

²⁹ *Ives v. South Buffalo Railway Company*, 201 N.Y. 271, 94 N.E. 431.

³⁰ Ibid.; decision quoted in Boyd, *Workmen's Compensation and Industrial Insurance*, 104-5.

³¹ Under the New York law, the garment trade was not considered a hazardous occupation, and workers were not covered under the workers' compensation act.

WORKERS' COMPENSATION IN CALIFORNIA

Context

In the first decade of the 1900s, California's state government was under the control of narrow private interests, primarily the Southern Pacific Railroad. The urban districts of the state were also confronted by an intense struggle between organized labor and organized business. By the end of the decade, however, a massive political upheaval put Republican Progressive reformers in control of the governor's chair and the Legislature. The Progressives' broad platform for change included measures to increase political democracy through direct action like the initiative, referendum and recall, and to mediate the struggles between labor and capital through social reform by instituting government measures that strengthened the state in relation to any private interest.

Conditions of Work in the Early 1900s

Under factory inspection laws enacted in 1889 and amended in 1901, 1903, and 1909, California employers of more than five workers were expected to keep their workplaces clean, with sufficient water-closets within reasonable access and separated for the sexes, and ventilated sufficiently so that the air would not become injurious to health.³² Yet according to a report of the State Bureau of Labor Statistics in 1912, these provisions were "practically of no value." "Its provisions were too indefinite, there were no precise standards erected by law and the Bureau's authority to insist upon rigid regulations was limited."³³

The Law of Employers' Liability Before 1911

Before 1911 in California, there had been no widespread agitation for compensation, except a statement in the founding platform of the new Progressive faction. Professor Ira Cross, the first secretary to the California Industrial Accident Board, wrote that prior to the Progressive administration, "the state had been rather backward in legislating for the welfare of

³² California Statutes 1889, 3. Amended Statutes 1901, 571; 1903, 16; and 1909, 43.

³³ Earl C. Crockett, "The History of California Labor Legislation, 1910-1930," Ph.D. diss., University of California, 1931), 195.

its workers.”³⁴ Even the Aetna Insurance Company, a national leader in employers’ liability insurance coverage, agreed that pre-1911 conditions in California “have been such as to permit remarkably few recoveries by injured employees, for damages arising out of injuries sustained within the course of their employment, as compared with many other States. This is clearly evidenced by the [premium] rates chargeable for Employers’ Liability insurance by the various companies operating in California. The State as a whole has been rated lower than practically any other State in America.”³⁵

While backward, California had not been totally insulated from liberalizing its treatment of injured workers. The state’s first legislative limitations on employers’ common law defenses appeared in 1907. Employers were made responsible for the negligence of employees supervising injured workers, and the fellow servant doctrine could not be applied to employees working in different departments or on machines or appliances than the one on which the injured worker was working.³⁶ Furthermore, court decisions began to reduce the burden of proof for claimants by restricting the defenses. In 1910, the California Appellate Court declared that employers had the burden of proof in cases alleging contributory negligence. Decisions also clarified that once the employee gave notice to the employer that machinery might be defective and the employer promised to fix it, the employer thereby assumed the risk of injuries caused by the defect. The court found that a person could not assume risk for working in hazardous environment if they hadn’t been warned, and that without evidence that a worker knew of dangers, there was no implied assumption of risk. Thus, employers were found to have an active responsibility to warn of hazards and instruct workers in safe work methods. Finally, the level of court awards began to have some impact. Employers faced \$5,000 verdicts in one death case, one case of the loss of a right arm, and one case

³⁴ Ira Cross, “Workmen’s Compensation in California,” *American Economic Review* 4 (June 1914): 454.

³⁵ Aetna Life Insurance Co. (Western Branch), *Employers’ Liability and Workmen’s Compensation in California: The Roseberry Law* (1911; 32 pages). The authors compare the “manual” rate for machine shops as twenty-five cents (per \$100 payroll) in California compared to sixty cents in Illinois.

³⁶ Cal. Stats. 1907, 119–20.

of scalding burns from steam; each award was upheld as appropriate and not excessive.

The combination of broadened legislative and judicial decisions had begun to shift the balance in industrial injury cases even before the Progressives came to power in California in 1911. As employers began to feel the burden of industrial injuries, they also began to see the problem as a social issue worthy of government intervention.

The Progressives and Workers' Compensation in California

On May 21, 1907, a small group of "Lincoln Republicans" met in Los Angeles to announce the objective of "emancipating" the state Republican Party "from domination by the Political Bureau of the Southern Pacific Railroad Company and allied interests." The reform platform of what was to become the California Progressives included: a direct primary; initiative, referendum and recall; effective regulation of railroad tariffs and other utility rates; outlawing racetrack gambling; conservation of forests; women's suffrage; a minimum wage for women; and a workers' compensation act for California.³⁷ Just over three years later, the Progressives won the Governor's office and were given the chance to set policy in many of these areas.

The middle-class California Progressives viewed human nature through "an Emersonian optimism about man's innate capacity for good, with strong faith in the political abilities of 'the people.'" ³⁸ But this group of "small independent free enterprisers and professional men"³⁹ were distrustful and critical of the power of organized capital and organized labor. They "wanted to preserve the fundamental pattern of Twentieth Century industrial society at the same time [they] sought to blot out the rising clash of economic groups," but to do it all without profound economic reform.⁴⁰ The workers' compensation ideal closely followed this philosophy.

³⁷ Bean, *California: An Interpretive History*, 323.

³⁸ Telegram. Harris Weinstock to Governor Hiram Johnson, October 28, 1911; in Hiram Johnson papers (Bancroft Library, University of California).

³⁹ There is an entry for "woman's suffrage" but none for "women" in the index of George Mowry's respected work on the California Progressives. I am unaware of any women in leadership positions of the Progressives during in California during the Johnson era.

⁴⁰ Bean, *California: An Interpretive History*, 327.

In December 1910, after being elected on a platform supporting “an Employers’ Liability act which shall put on industry the charges of its risks to human life and limb along the lines recommended by Theodore Roosevelt,” California Governor-elect Hiram Johnson appointed a committee “to investigate and report upon the need of considering human beings as more entitled to help than broken machines.”⁴¹ In his 1911 inaugural address, the governor said that “in this State all parties stand committed to a just and adequate law whereby the risk of the employment shall be placed not upon the employee alone, but upon the employment itself. Some new legal questions will be required to be solved in this connection, and the fellow servant now in vogue in this State will probably be abrogated and the doctrine of contributory negligence abridged.”⁴²

One of the measures intended to reduce the increasing tensions between the laboring and employing classes was a system of workers’ compensation with the primary goals of adequately compensating workers for injuries at work and creating incentives to prevent further injuries. The reformers assigned to design and implement California’s workers’ compensation system had the advantage of coming to power at a time when the public was ready for reform, and when others around the country had already done much of the groundwork and analysis of alternative arrangements, and had tested arrangements in the courts. Given a mandate and the opportunity to assess already extensive experiences elsewhere, the California Progressives were able to put together a system that could withstand Constitutional challenges, be relevant to the needs of both employers and workers, and follow the lead of Progressive leaders elsewhere in the nation.

The program that emerged in California had four major goals. It was meant to: 1) Create a mixed system of social regulation and economic incentives to reduce hazards at work and prevent injuries on the job; 2) Provide injured workers and their families with a living wage during times of disability and cover their medical and rehabilitative expenses; 3) Create a model mixed system of public and private insurance to efficiently and effectively raise the capital needed for compensation, and distribute the

⁴¹ Franklin Hichborn, *The Story of the California Legislature of 1911* (San Francisco: Press of the James H. Barry Company, 1911), 236. The commission was chaired by Meyer Lissner, a future commissioner of the Industrial Accident Commission.

⁴² Address quoted in full in Hichborn, *Story of the California Legislature of 1911*, iii.

benefits in a timely and nonadversarial manner; 4) Establish and maintain a management information system to continually evaluate the nature of the problem of occupational injury and its economic consequences, and to assess the progress toward meeting the other three goals.

The Roseberry Employers' Liability Act

When the 1911 session of the Legislature convened, there was general agreement that the state's liability law needed liberalization, but no consensus over specific changes. Organized labor and their Progressive supporters from the San Francisco delegation to the Legislature wanted a liability law that would abolish the "assumption of risk," "fellow servant," and "contributory negligence" defenses. More conservative Progressive legislators from Los Angeles and mid-state, however, hesitated over abrogating the employers' common law defenses.⁴³ In the context of important national events and a sense that the state constitution could not support radical change, a compromise bill written by Senator Louis H. Roseberry (Santa Barbara) and supported by the governor gave employers the choice of remaining under common law, or of choosing to be covered under the new compensation principle.⁴⁴

The first part of the Roseberry bill covered employers wishing to remain under a liability system. The bill abrogated the defenses of assumed risk and the fellow servant rule, provisions that even conservative legislators

⁴³ George E. Mowry, *The California Progressives* (Berkeley and Los Angeles: University of California Press, 1951; Chicago: Encounter Paperbacks, 1963), 145.

⁴⁴ The bill was actually the third draft of a pending measure in Wisconsin. Ex-President Theodore Roosevelt's 1910 Labor Day address had mentioned the Wisconsin study that preceded the bill:

The United States still proceeds on an outworn and curiously improper principle, in accordance with which it has too often been held by the courts that the frightful burden of the accident shall be borne in its entirety by the very person least able to bear it. Fortunately, in a number of states — in Wisconsin and in New York, for instance — these defects in our industrial life are either being remedied or else are being made a subject of intelligent study, with a view to their remedy.

Quoted in Hichborn, *The Story of the California Legislature of 1911*, xv. Harris Weinstock had given the governor a copy of the New York state statute, later declared unconstitutional, in December 1910, but Roseberry took the lead on the issue in the Legislature and no variations on the New York law were introduced.

could not justify in the modern context of work. But, in early versions of the bill, the doctrine of “contributory negligence” was left intact; thus, if the injured employee could be shown to have been even slightly negligent leading to the injury, the employer would be absolved of all responsibility. If not eliminated completely, labor at least wanted a shift to a system of comparative negligence which would let a jury decide the balance of fault in the case and determine the level of benefits appropriately.⁴⁵ In the final compromise, workers could recover damages under the liability section of the bill if their contributory negligence was minor, relative to that of the employer.

By limiting employers’ defenses against liability lawsuits, Roseberry hoped to encourage participation in the voluntary system of workers’ (then workmen’s) compensation. Employers could relieve themselves from liability if they elected a no-fault compensation system and agreed to pay a fixed schedule of benefits in injury cases. As a voluntary act in which employees would, in most cases, choose their remedy before injuries took place, the bill hoped to sidestep the constitutional barriers that had befallen Montana and would negate New York’s system.

While the California Legislature was considering the measure, New York State’s mandatory act was declared unconstitutional, giving labor pause in pushing for a compulsory statute. Then, coincidentally, a series of industrial tragedies shocked the country. On March 25, 146 workers were trapped and killed in the Triangle Factory Fire in New York. During the first week of April, more than 75 miners died in a mine cave-in in Scranton, Pennsylvania and 150 convicts were killed in a coal mine explosion in Alabama.⁴⁶ Florence Kelly, general secretary of the National Consumers League, while cautious about implying a cause-and-effect character of the events, noted that in elections during the two-week period prior to April 7, twenty-six Socialist mayors were elected in the U.S.⁴⁷ On April 8,

⁴⁵ California State Federation of Labor, *Proceedings — 12th Annual Convention* (Oct. 2–6, 1911), 94.

⁴⁶ The tragedies occurred while the American Academy of Political and Social Science was holding a conference on “Risks in Modern Industry” in Philadelphia. See speech of John Mitchell, “Burden of Industrial Accidents,” *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 77.

⁴⁷ Florence Kelly, “Risks in Modern Industry: Our Lack of Statistics,” *Annals of the American Academy of Political and Social Science* 38, no. 1 (July 1911): 94–97.

seventeen days after the Triangle fire, the Roseberry Act was accepted by labor as a practical interim solution and approved unanimously in the Senate and Assembly.

Benefits Under the Compensation Alternative

The benefit package for those covered under the compensation system included both employer-paid medical care and adequate levels of lost income indemnification. Employers were required to furnish “such medical and surgical treatment, medicines, medical and surgical supplies, [and] crutches and apparatus, as may be reasonably required at the time of the injury and thereafter during the disability.” Medical benefits were, however, subject to a cutoff after ninety days or \$100. Income replacement benefits for most industrial accident victims were limited to approximately \$21 per week, with total aggregate benefits in any single injury not exceeding three times the average annual earnings of the employee or \$5,000, whichever was lower.⁴⁸ (The average weekly wage at the time was about \$18.) As an acknowledgement that disability often meant more than just lost wages and included its own extra costs, the act provided that totally incapacitated injured workers requiring the services of a nurse would receive weekly benefits of 100 percent of lost earnings, rather than the 65 percent awarded to all others.

Exclusive Remedy

In most cases, workers covered under the compensation statute traded off their rights to sue employers for the expectation of quick, sure and adequate benefits. Yet, following the lead of British compensation legislation, the Roseberry Act recognized an additional remedy was appropriate “when the injury was caused by the personal gross negligence or willful personal misconduct of the employer, or by reason of his violation of any statute designed for the protection of employees from bodily injury.” Under such egregious circumstances, injured workers had the option to either claim compensation under the act, or “maintain an action for damages therefor.”⁴⁹

⁴⁸ Note by Industrial Accident Board (IAB) to accompany Section 1, Chapter 399, Laws of California, 1911, hereafter Roseberry Act.

⁴⁹ Roseberry Act, Sections 12, 9, 8(1). As a comparison, the act provided for an annual salary for IAB members of \$3,600, or about \$72 per week.

Coverage

As a voluntary measure, the Roseberry Act applied only to those employers who elected coverage, and only if the employees at the workplace affirmed the decision. While initial hopes were that the voluntary system of liability without fault would attract significant numbers of employers, experience proved otherwise.

To encourage their enrollment, employers were told that the limited benefits of the compensation option offered them economic security and certainty, in contrast to the volatile liability system where awards were exceeding insurance coverage limits.⁵⁰ A New York State commission had found that 2.1 percent of fatal industrial injury cases had exceeded the insurance limit, and that larger sums still were being paid in cases of permanent disability. There had been a \$92,000 liability judgement against a California employer. "These instances plainly show that insurance under the old system of employers' liability is wholly inadequate, and that only through compensation, with its limited risks, can the employer be fully protected."⁵¹

Despite these inducements, the voluntary law failed to catch on. The compensation provision only enrolled a small percentage of workers. The Roseberry Act became effective in September 1911, but by December 1912 only about 45,000 of the 750,000 workers in the state came under its coverage, and most of these worked for large employers.⁵² There had been no provisions in the law to regulate insurance premium rates and many employers found the private insurers' rates for workers' compensation coverage to be prohibitive. Premiums for employers' liability coverage averaged \$1.71 per \$100 payroll, while premiums for workers' compensation were triple that amount. Many of the large employers who did enroll in the compensation plan did so after self-insuring their risk, and others sought

⁵⁰ "In determining whether or not he will elect compensation, a prudent employer will take into consideration his increased liability, the present tendency of the courts and juries to allow heavy damages for personal injuries, and the fact that the ordinary indemnity insurance is limited to \$5,000 for a single injury, and to \$10,000 where more than one person is hurt through a single accident."

⁵¹ Hichborn, *Story of the California Legislature of 1911*, 236-45.

⁵² While the average workplace in 1912 employed less than four workers, employers electing coverage under the Roseberry Act had, on average, 100 workers.

to set up mutual inter-insurance funds.⁵³ In any event, the disappointing levels of voluntary signup were due in part to exorbitant and unregulated insurance rates, and in part to fear of the unknown and ignorance about the new program.

The Industrial Accident Board

An important feature of the statute was the introduction of a new principle of administration in the form of an Industrial Accident Board (IAB) independent of the courts, with power to adjudicate any disputes or controversies. It was given no other official duties, but the three Progressive activist members appointed by the governor saw the IAB's role as broader than simply judging cases. These Progressives believed in professional administration, divorced from politics and run by specialists. Arthur Judson (A. J.) Pillsbury, Will J. French, and Willis Morrison each took on informal representation of a separate constituency — the public interest, organized labor, and employer — and they used the IAB as on-the-job training for their specialties.

Progressives generally believed that problems of government could be addressed intellectually; by collecting data, studying an issue and thinking it through, one could come to the right solutions.⁵⁴ In 1912, during a special legislative session, Senator Roseberry sought to strengthen the IAB's power by carrying legislation requiring employer recordkeeping on injuries and giving the IAB the authority to gather and disseminate statistical information regarding industrial accidents and their probable causes, and to investigate methods and devices for the prevention of accidents. It also authorized study of alternative systems of industrial accident insurance. Small employers and farmers, growers, and poultry raisers opposed the IAB's authority to enforce these statutes, and after a long fight, the Legislature exempted many of these farm and small employers from having to comply with the act. Nevertheless, the Board went to work gathering data wherever it was available.

⁵³ Industrial Accident Board of California, "First Report to Governor — September 1, 1911 to December 31, 1912" (hereafter IAB, 1912).

⁵⁴ See Discussion of the importance of governmental organization in Richard Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955), 257–71.

Economic Outcomes of Disability

The statistics generated by the new law helped to define the problem of industrial injury and risks of work, and more importantly, to highlight the differences in economic outcomes between those covered under the employers' liability and those opting for workers' compensation. The data showed that those whose disabilities occurred while under workers' compensation were more likely to receive compensation without a dispute and lengthy court battle, and got substantially larger settlements as well.

According to the IAB, during 1912, 10,385 Californians suffered disability on the job, with 412 injuries resulting in death. Of 9,627 that were disabled for more than one week, 4,311 (45 percent) received financial assistance from their employers; 912 of the injured workers were in employments covered under the compensation provision of the Roseberry Act, and were paid according to the schedule of benefits. Only 10 of the 912 required a hearing before the IAB. Of 8,715 cases under the existing liability system, however, only 3,399 were able to negotiate settlements, and these were at low levels. "Settlements were made for losses of thumbs at the rate of \$66.94 per thumb, index fingers went at \$114.02, left arms for average of \$586.66 and right arms for \$1,577.65. Feet brought \$624.73 each and eyes brought \$649.09."⁵⁵ Settlements in death claims averaged \$989; the average age of those killed was 33 years and the average wage was \$19 per week. The IAB publicized the outrageously low sums that were the outcomes of liability law and asked: "Is California so rich in men that it can afford to sell them to insurance companies, in their very prime of life and heyday of earning power, at less than \$1,000 per head." They estimated that only 10 percent of the total wage loss of injured persons was borne by employers and insurance carriers under the liability provisions, with the rest "thrown upon those least able to bear the burden, the injured workers and their families."⁵⁶

As had the German autocracy in 1884, and the New York commission in 1910, the Progressives perceived the industrial injury problem as creating conflict that threatened the "social fabric." "When the State enacts a

⁵⁵ Letter from Harris Weinstock to Hiram Johnson, February 13, 1910. In Harris Weinstock papers, C-B 581, Part 1 (Bancroft Library, University of California, Berkeley).

⁵⁶ IAB, "First Report to Governor," 4.

compensation law, it does so, not primarily to establish justice between an employer and his injured employee, but to safeguard itself against a prolific source of poverty which may become a burden to the State.” They declared that “industrial accident ranks third among the causes of poverty in the world” and that there was an obligation to attack it at its roots. They argued that if tort remedies only paid 10 percent of lost wages, the State would be left with a significant problem of “pauperism” that could not be handled by any private insurance scheme.⁵⁷

The Next Round: Proposals for a Mandatory Compensation Act

The Roseberry Act had been passed as an interim measure as the Progressives, supported by organized labor, recognized that defects in the State Constitution made a strong mandatory act impossible. They accepted the need to pass a Constitutional amendment before attempting a more comprehensive system.⁵⁸ Senate Constitutional Amendment 32 created that authorization.⁵⁹ Even with its limited success, however, the implementation of the Roseberry Act could be seen as a dry run for a more comprehensive statute. The act provided experience in administration, time for investigation and analysis of other states’ and nations’ policies toward injured workers, and data for policy analysis activities to design and evaluate alternatives.

⁵⁷ 22 million American workers held industrial accident insurance policies, but their “only purpose is to furnish the holder with his narrow six feet of earth outside the Potter’s field, and a decent funeral without passing the hat.” One funeral in every ten was a pauper funeral.

⁵⁸ California State Federation of Labor, *Proceedings — 12th Annual Convention* (Oct. 2–6, 1911), 94.

⁵⁹ The complete text of Section 21, Article XX, as quoted by Hichborn, *Story of the California Legislature of 1911*, 244n280 reads:

The Legislature may by appropriate legislation create and enforce a liability on the part of all employers compensate their employees for any injury incurred by the said employees in the course of their employment irrespective of the fault of either party. The Legislature may provide for the settlement of any disputes arising under the legislation contemplated by this section, by arbitration, by an industrial accident board, and by the courts, or either of these agencies, anything in this Constitution to the contrary notwithstanding.

In November 1911, the voters of the state approved the amendment 147,567 to 65,255. Industrial Accident Board, “Program for Workmen’s Compensation Legislation” (1913), 1.

The Workmen's Compensation, Insurance and Safety Act of 1913

To weaken support for employers' liability insurance in California, the IAB published reports both to shock the public with stories of the low indemnity payments paid under liability, and to cajole employers with assurances of improved labor-management relations if they adopted compensation coverage. While labor and employers took little initiative on their own, the IAB proposed a new type of compensation law, broad in scope and addressing not only the aftereffects of injuries, but a system of state regulation of insurance and industrial hazards as well, all concentrated in a single professionally administered commission.

Their proposal for an integrated system of compensation, insurance, and safety law was introduced by Senator Boynton in 1913.⁶⁰ Under the proposal, the Industrial Accident Commissioners would: 1) design and administer a statistical system designed to quantify the problem and structure of the problem of industrial injury; 2) coordinate a safety department through promulgating rules ("safety orders"), and assessing penalties for noncompliance; 3) provide oversight and direction to a state-run public enterprise insurance company; and 4) sit as judge and jury in the adjudication of disputed work injury cases. The proposals laid out by the Industrial Accident Board in 1913 still constitute the basis for California's system of injury compensation and regulation.

Benefits

The Progressives saw workers' compensation as a first step toward a comprehensive social welfare system, and always expected that health and medical care insurance was soon to come. Thus, their suggestion to remove the \$100 medical care coverage maximum of the Roseberry Act, and furnish "full medical and surgical relief" is not out of line. Cost and utilization containment was taken care of by giving control of medical care to the employer or insurer, by restricting the pool of physicians eligible to provide service, and by instituting a fee schedule for participating physicians.

Under the Roseberry Act, injuries lasting at least one week were compensable, but as a move to shift benefits to more severely disabled workers, the IAB proposed lengthening the "waiting period" for temporary total

⁶⁰ California Legislature, Senate Bill 905, Session of 1913.

disability benefits to 2 weeks, in effect reducing the number of compensable injuries by 30–36 percent.⁶¹ Organized labor opposed the lengthening of the waiting period but accepted the rationale, hoping that in time it would be remedied in their favor.⁶² The provision of the 1911 Act that gave those requiring full-time nursing care a higher level of replacement income was dropped without apparent opposition.

Insuring the Risk

As the IAB proposal was being formulated, the insurance market seemed untrustworthy. In California, many insurers had gone bankrupt in the aftermath of the San Francisco earthquake and fire of 1906. Those insurers that survived were shielded from Federal anti-trust action, and through rate-fixing cartels could force up prices, especially in a new market with little claims experience.⁶³ Insurers had shown this propensity with the high rates charged for compensation coverage under the 1911 act. Policymakers were faced with the knowledge that mandating compensation would require stricter insurance regulation or other means of assuring an adequate market with both available and affordable insurance coverage.

In an early exercise in policy analysis, the IAB studied various systems of insurance oversight and decided to attempt regulation through public enterprise competition.⁶⁴ Seeing private insurers as an obstacle to successful

⁶¹ The higher figure came from estimates prepared for the National Civic Federation by the IAC, and covered the first ten months of 1913. AFL/NCF Report (1914), 198.

⁶² Paul Scharrenberg (secretary, California State Federation of Labor), “Labor Legislation,” in *Labor Clarion*, Feb. 21, 1913, 5.

⁶³ Insurers maintained their cartels by subscribing to and adopting “advisory” rates of insurance premium rating bureaus. Insurers were protected from federal antitrust action before 1944 by Supreme Court rulings that insurance was not interstate commerce and thus not subject to federal antitrust law. After 1944, antitrust exemption was granted through the McCarran-Ferguson Act.

⁶⁴ Industrial Accident Board of California, “Program for Workmen’s Compensation Legislation, 1913.” The board laid out four policy alternatives in the area of insurance regulation: 1) the *status quo* — leaving the question of rate setting to the competition of the private marketplace. According to their research, such a policy existed in Great Britain, Russia, Spain and Greece but the members stated that it resulted in extortionate rates or “a savagery of competition” that drove hard bargains with injured persons or threatened the carriers’ solvency. 2) *Compulsory state insurance* had been seriously

implementation of the compensation law, the Board cited examples in Wisconsin, where a mutual insurance association was organized under the laws of the state, and in Michigan, where a "tentative, optional" state insurance fund was set up. The Board concluded that competition with private insurance carriers could equalize rates for compensation and liability coverage; a state-run insurance carrier would stand "ready to accept all risks brought to it at what it costs the State to do the business, leaving the field free to other responsible carriers to operate with so much of profit as they may be able to make by doing the business more efficiently and at less cost than the State can do it."⁶⁵ The IAB stressed that "the State should invade the sphere of private enterprise" in order to secure "just rates for employers and just treatment for injured workers."

The proposed State Compensation Insurance Fund (SCIF) would be assisted by a State Workmen's Compensation Insurance Rating Bureau (WCIRB) to provide advisory rates, with the intent "that the insurance rates shall be the most effective police force for making places of employment safe." Instead of a large bureaucracy, SCIF would be small, with an annual budget of \$68,000, and a 25-person staff. The WCIRB would operate with little additional staff (four clerks and two stenographers) on a \$12,500 annual budget.

Safety

The third element of the IAB proposal gave the Industrial Accident Commission power to make and enforce safety rules and regulations, to prescribe safety devices, to fix safety standards, and to order the reporting of industrial accidents. Such safety orders would be subject to review by the

attempted in Norway and Washington state, but the IAB said neither of these systems included coverage of all workers, and to do so would require "an army of officials" to administer. "To make a state monopoly inclusive of all employments would create a bureaucracy of intolerable proportions and high cost, while not to include under the protection of a compensation law all who labor is to fail of safeguarding the state from poverty due to industrial accident." 3) *State Control of Insurance Carriers* was dismissed by the IAB as "unworkable," a scheme which was abandoned by those jurisdictions that had attempted it. Instead, the IAB proposed 4) *Competitive State Insurance*, an idea borrowed from New Zealand (where Board member Will French was born) and other states of continental Europe.

⁶⁵ IAB, "First Report to Governor," 1912, 14.

courts. In addition, the IAB sought funding to set up safety museums in San Francisco and Los Angeles, “in order to show employers how to make their employments safe and make then show employees how and why they must help in saving themselves from harm.” Standards were intended to have the force of law, “without being as inflexible and difficult to change and adapt to experience as legislative enactments necessarily might be.”⁶⁶ With unbridled optimism, the Board expected that by instituting safety procedures, the injury rate could be cut in half.

Interest Group Response

Private Insurance Carriers. The proposed State Insurance Fund brought out significant opposition to the IAB plan, led by insurance companies wishing to protect themselves against attacks on their growing and profitable industrial insurance business. Premiums for employers’ liability insurance nearly quintupled from 1906 to 1913, and paid losses never exceeded 50 percent of premiums collected.⁶⁷

Large insurers tried to scuttle the State Insurance idea before it had a chance to prevail. Soon after the release of the IAB proposal, the Aetna Life Insurance Company (the state’s second largest liability insurer in 1912) sent letters to agents and other insurers urging vigorous opposition to the measures. “If you are selling casualty insurance, do you intend to sit idly by and allow the State to establish a business which eventually will abolish this source of income for you?”⁶⁸ Aetna raised the specter that successful encroachment in the compensation area would eventually lead to State insurance in all other areas as well. Aetna predicted that if the 100,000 people “interested” in the insurance business in California were to unite,

⁶⁶ Industrial Accident Board of California, “Program for Workmen’s Compensation Legislation, 1913.”

⁶⁷ Premiums had grown from \$500,000 in 1906 to \$1.27 million in 1911, and passed the \$2 million mark the next year, rising to \$2.3 million in 1913. Paid losses fluctuated between 23 and 34 percent of premiums between 1906 and 1912, but jumped to nearly 48 percent of premiums in 1913 as more liability claims were won under the liberalized measures of the Roseberry Act. In 1906, fourteen companies wrote liability coverage in California, with only one company, Pacific Coast Casualty, headquartered in the state. The number of companies doubled by 1912, with all but two located outside California. Reports of Insurance Commissioner of California, 1906–1913.

⁶⁸ Quoted in San Francisco Labor Council, *Labor Clarion*, February 21, 1913, 8.

that state insurance could be defeated. Insurer representatives sought to ally themselves with employers by charging that the employees' interest in the workers' compensation area was to see "how much he can get out of the industries of California."⁶⁹

Employers Response. Perhaps spurred by the accident insurers, the California Employers Federation was set up in early 1913 by large employer to "pull the teeth" from the compensation act and other labor bills pending in the Legislature.⁷⁰ Among other amendments to the compensation provision, the employers proposed that indemnity benefits pay 50 percent rather than 65 percent of lost wages. Several conservative newspapers around the state kept up an attack on the Boynton bill after its introduction. The San Diego Union called it "a sop to the Labor Unions."⁷¹ The Los Angeles Times said the bill would "paralyze production in California and perpetuate the stranglehold of the State political machine."⁷² And the *San Francisco Chronicle* criticized the plan as a dangerous scheme to centralize power in the proposed Industrial Accident Commission.

Labor Response. Labor was extremely pleased by several parts of the IAB proposal, particularly those concerning insurance and safety regulation. In arguing for an alternative source of compensation insurance coverage, the San Francisco Labor Council charged that the private casualty insurers had dictated employment practices for employers, frequently calling upon them "to discharge workers who refused to allow the insurance adjusters to defraud them out of compensation." The inclusion of a state fund would allow employers to take out insurance at fair rates. The establishment of the safety department, moreover, would be "tantamount to the passage of hundreds of minor safety acts," enabling the IAC "to regulate industries as effectually as the Railroad Commission regulates public utilities."⁷³ For this and other reasons, organized labor, represented by the State Federation of Labor, saw the Boynton bill as the "greatest achievement" of the 1913 session.

⁶⁹ Quoted in *Labor Clarion*, March 28, 1913, 10.

⁷⁰ *Labor Clarion*, March 28, 1913, 10.

⁷¹ *Labor Clarion*, May 14, 1913.

⁷² *Labor Clarion*, April 17, 1913.

⁷³ Paul Scharrenberg, "Labor View of Legislature," *Labor Clarion*, May 16, 1913, 4.

The Legislative Process

The IAB Proposal (Senate Bill 905) was introduced by Senator Boynton on January 28 and referred to the Committee on Labor and Capital. On April 8, after the “get-together” stage of the legislative process,⁷⁴ and many hearings, the bill was reported out of committee, with a majority recommendation of “do pass” and a minority report attached to a substitute bill authored by Senator Wright. The bill was returned to committee April 18 for further amendment, emerging on April 21. During Senate debate beginning on April 23, opponents first tried to make the bill elective, then tried to strike the provision for state insurance, and finally attempted to strike out the safety provisions, but were able to muster at most six votes for these amendments. During final Senate debate on April 28, opponents tried to exempt farmers and stock raisers from the Act, and to allow these employers the defenses in force before the 1911 law. This was rejected by a 9–25 vote. A measure to ensure that no more than two of the three IAC commissioners could belong to the same party was rejected 7–27. The Senate then approved the compensation, insurance, and safety package by a 30–5 margin.

In the more conservative Assembly, opponents were somewhat more successful. Farm employers won exemption from the Act just as they had convinced the Assembly to absolve them from injury reporting the previous year, leaving farmers to elect coverage if desired. Household domestics were also exempted. The Assembly consented to removing the \$100 maximum on medical assistance, but the 90-day limit on medical benefits remained. Labor continued to oppose, but was unable to stop, the elongation of the waiting period on benefits to two weeks after injury, during which only medical care, and no indemnity benefits would be paid. Three days before adjournment, the bill passed 55–13. By final passage, it had changed little from the plan written by the IAB. Temporary total disability

⁷⁴ *Labor Clarion*, March 28, 1913. “On many subjects different bills have been introduced, entirely irreconcilable as to aims and means to accomplish them. The authors and other persons behind such bills are advised by the solons to get together and settle their differences out of court, that is, before pressing them for action by a committee. . . . Many a measure thus concocted will be but a miserable compromise, satisfying neither side, but exempting the representatives of the people from going on record either for or against a clean-cut policy.”

would be compensated at 65 percent of average weekly earnings, subject to a maximum aggregate of three times average annual earnings, and extending for no more than 240 weeks; 40 weeks of benefits would be payable for each 10 percent of permanent disability, with life pensions of 10-40 percent for those above 70 percent disability. Unlike other states, there was no list of benefits for specific injuries, such as loss of a member (finger, hand, etc.); rather, all payment would be related to disability level under a schedule to be promulgated by the IAC. Death benefits payable to dependents ranged from \$1,000 to \$5,000, with only burial expenses paid in cases where the decedent had no dependents.⁷⁵ As in the earlier Roseberry Act, compensation was the exclusive remedy available to injured workers, except when the employer was guilty of gross negligence or willful misconduct. In those cases, the employee had the option to claim compensation or sue at law for damages. Insurance carriers were prohibited from offering insurance against such gross negligence.

A year after the law was passed, some IAC officials boasted that the workers' compensation law's safety regulations had reduced the number of industrial accidents by 50 percent.⁷⁶

CONCLUSION

Between 1907 and 1913, the burden of job-related injuries began to shift, slowly but perceptively, from workers to employers until both parties saw common interest in developing a new order. A major shift occurred in the way in which California workers were compensated for injuries occurring on the job. As industrialization changed the systems of work, the courts began to adapt laws to follow new circumstances. Constitutional problems were at first sidestepped, then dealt with through the direct Constitutional amendment process made possible by other Progressive reforms. Policy

⁷⁵ By pocket veto, the governor rejected a bill (SB 1519) "to protect married men under new compensation law." The bill would have required employers to pay the death benefits incurred on account of death to an unmarried employee into the state Accident Prevention Fund. The bill was designed to prevent discrimination against married workers "as it is feared that employers will prefer to employ unmarried men so as to save the cost of death benefits." State Federation of Labor, Summary of Legislation, 1913.

⁷⁶ "Millions paid to injured workmen," *Insurance and Investment News* 15, no. 3 (January 1915): 83.

analysis was used to identify and clarify program objectives, evaluate criteria and alternative institutional structures. A new system of social insurance was launched with high hopes and expectations. The passage of the Roseberry Act in 1911 and the Boynton Act in 1913 gave California the tools to begin implementing a comprehensive system of workers' compensation, insurance, and safety. While it has been through many changes, the basic structure remains even today.

With roots in Germany and in British common law, the laws were reformist measures with several objectives, but committed the state to ameliorating the problems of industrial injury for both injured workers and their employers. In passing the 1913 Act, the state also undertook to establish a state enterprise that would try, through example and competition, to change the structure of insurance coverage. As had been the case in Germany, the planners saw workers' compensation as a first step in a comprehensive state system of welfare for its people; its expectation was that other parts would follow. It was intended to help reduce the number of injuries, as well as their after-the-fact compensation. But passage of the law was only the beginning; the complex problem of implementation was to follow.

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INVENTING THE PUBLIC TRUST DOCTRINE:

California Water Law and the Mono Lake Controversy

RANDAL DAVID ORTON*

These selections from Randal Orton's Ph.D. dissertation (Environmental Science and Engineering, University of California, Los Angeles, 1992) are presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at <https://dissexpress.proquest.com/search.html>.

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PREFACE

A great university harbors many educational philosophies, some of which allow students to seriously overextend themselves. In this particular case, the Graduate Division allowed me to pursue doctorates in both Biology and Environmental Science and Engineering for much longer than I would ever have thought possible. The early goal of this extended multidisciplinary exercise was to provide a broad and deep overview, by case study, of the environmental movement, in particular its presence in science, law, and political advocacy. The end product is a dissertation on what is, in essence, the legal and moral basis for an emerging and very powerful political class. Their agenda is addressed to a controversy that increasingly faces citizens today; how shall we regulate society, what rules are both needed and just, and who shall have the authority to make them?

Most biologists who get outdoors occasionally have some familiarity with natural resource law, especially statutory laws such as the Endangered Species Act, the National Environmental Policy Act (NEPA), and the California Environmental Quality Act (CEQA). However, the Public Trust Doctrine is neither statutory law nor even a reasonably well-defined body of case law. I think I am the first to reduce it to an acronym, but this is solely because the need is great in a document of any length. That other

authors have not is, I think, some indication of an unconscious understanding that acronyms suggest rather more institutionalization than is true of the Public Trust Doctrine.

However, this situation is changing fast. As I write this, another symposium on the PTD is scheduled for May 7 [1992], sponsored by the State Lands Commission. This is interesting because several authors have recently suggested that public land management is not quite ready for the PTD. An expanded, institutionalized PTD has also found support in the California Attorney General's Office, the California Department of Fish and Game, and the State Water Resources Control Board.

In retrospect, I was not prepared to find a live, statewide political movement in my research. Nor did I realize that I had until I was deeply involved in it. This realization came about at a time when I believed that the legal aspects of the Mono Lake controversy could be dealt with quickly, and without much original thought. When this proved not to be the case, naivete rescued me from despair; I simply attributed my difficulties to insufficient legal coursework. However, with time, I realized that the problem lay not with the curricula of my law classes, but more with the nature of "Public Trust" advocacy itself, wherein an attempt has been made, under apparent compelling need, to legislate, *sensu lato*, what cannot easily be legislated *sensu stricto*.

I doubt that most authors will agree anytime soon on what defines the proper scope of the Public Trust Doctrine, or even Public Trust adjudication. In this regard, this dissertation does not and cannot purport to definitively circumscribe the Public Trust Doctrine. This is primarily because the PTD differs from state to state, but also because the doctrine remains in a state of flux, particularly in California. I think I have provided enough of a geographic and historical overview of the Doctrine to enable a reader to grasp its character, but I cannot guarantee that readers will agree with the conceptual boundaries I have placed around the subject. However, I have tried to be very broad in this regard, and I hope that most of these readers will find too much included within the fabric of the Public Trust Doctrine, rather than finding that I have omitted a particular thread of the doctrine.

Chapter 1

THE PUBLIC TRUST DOCTRINE AND THE REFORMATION OF CALIFORNIA WATER LAW:

Overview of Critical Issues

The Invention of the Public Trust Doctrine is about the modification of water rights in the state of California, and the doctrine that serves as its legal and moral basis. It is about law, politics, and science, because these are the tools that were used to invent the Public Trust Doctrine in a water rights context. It is about a reduction in water rights for a city of 3.5 million people, because that is what the Doctrine found necessary. It is about the reform of California water law, because this is what the use of the Doctrine could not avoid. And finally, and perhaps most importantly, it is about the evolution of the Public Trust Doctrine beyond California water law, because it is my conviction that this is what the Public Trust Doctrine is poised to do.

The literature is replete with descriptions of the Public Trust Doctrine, but the literature is mainly notable for its failure to converge on a single definition or definitive principle. This is an odd finding for a doctrine capable of sustaining a constitutional challenge,¹ particularly given the

¹ *Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892). Often cited as the “lode-star” in Public Trust litigation (Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, *Michigan Law Review* 68 (1970): 489), this case involved a large grant of Chicago waterfront to the Illinois Central Railroad

scrutiny that any legal doctrine must endure when it threatens established water rights.

The reasons for this state of affairs provide a good introduction to the origins of the Public Trust Doctrine. From its recognition by the Supreme Court in *Illinois Central Railroad v. Illinois*,² the Public Trust Doctrine has continually evolved through court decisions, and these decisions have often changed the Doctrine's scope and content. Also, in the United States, the Doctrine is primarily a creation of state jurisprudence, and the courts of each state have developed their own version of the Public Trust Doctrine to meet the needs that statutory law could not.

Each state's version of the Public Trust Doctrine differs on such basic issues as the permissible uses of Public Trust resources, which resources are clothed in Public Trust protections, what remedies are available when the Trust is violated, what conditions must be met in abridging the Trust, and what constraints limit the accommodation of competing public interests. In my opinion, the level of development found in each state reflects the status of the environmental crisis that is imminent, or appears to be so.

In California, Public Trust litigation has realized the state's reputation for legal innovation. Landmark state Supreme Court decisions in 1970 (*Marks v. Whitney*³) and 1983 (*National Audubon Society v. Superior Court*⁴) significantly expanded the scope of the Public Trust Doctrine beyond the limits set by previous courts in any state. Further, in *Marks v. Whitney*, the court asserted that the Doctrine was "sufficiently flexible to encompass changing public needs," thereby ensuring that any future definition of the Public Trust Doctrine would be as labile as the public interest itself.

The Court's ruling in *National Audubon* demonstrated that the stage for reform set in *Marks* would indeed be played. In this decision, the Court found the public's interest in Mono Lake sufficient to revise water rights

through an act of the Illinois State Legislature. The legislature subsequently sought to revoke the grant without compensating the railroad, citing its constitutionally based sovereign authority over navigable waters and their submerged beds. The railroad contested the revocation on the grounds that it violated the due process clause of the Constitution. The Supreme Court ruled in favor of the state.

² *Id.*

³ 6 Cal. 3d 251 (1970).

⁴ 3 Cal. 3d 419 (1983).

that the city of Los Angeles had depended on for over seventy-five years. Justice Broussard's introduction in this decision clearly recognized the precedent set with respect to both the Public Trust Doctrine and California water law:

This case brings together for the first time two systems of legal thought: the appropriative water rights system which since the days of the gold rush has dominated California water law, and the public trust doctrine which, after evolving as a shield for the protection of tidelands, now extends its protective scope to navigable lakes. Ever since we first recognized that the public trust protects environmental and recreational values . . . the two systems of legal thought have been on a collision course.

Perhaps the best evidence of the political impact of these rulings is found in *Putting the Public Trust Doctrine to Work*, a survey of the status of the Public Trust Doctrine in thirty-one states and territorial possessions.⁵ In this study, attorneys general and administrative agencies were asked to characterize the nature and the direction of the Public Trust Doctrine in their states, and to describe its impact on resource management issues. The results were provocative; what emerges is a record of nascent but similar actions by these agencies, their staff and supervisors, to effect broad reforms under the authority of the precedents set by the California judiciary. The relatively modest assertions of sovereign authority found in earlier Public Trust lawsuits have been replaced with a tool of unprecedented potential to reform the state's stewardship of its water resources.

In 1988, a hearing convened by the state Assembly introduced the Public Trust Doctrine as one of the most critical developments in California water law since the creation of the appropriative rights system.⁶ This hearing was specifically convened to address the precedent set by the Supreme Court's decision in *National Audubon Society v. Superior Court*. However,

⁵ David C. Slade et al., *Putting the Public Trust Doctrine to Work: The Application of the Public Trust Doctrine to the Management of Lands, Waters, and Living Resources of the Coastal States* (Connecticut Department of Environmental Protection, Coastal Resources Management Division, 1990).

⁶ California Legislature, Assembly Committee on Water, Parks and Wildlife, "Public Trust Doctrine Application to Water Rights" (November 21, 1988), Jim Costa, Chair.

legislation⁷ intended to provide statutory guidelines for the application of the Public Trust Doctrine to California water rights went no further than subcommittee review. As of 1992, the impact and the scope of the Doctrine's application to existing water rights in California was very uncertain, due in part to the state's continuing effort to relicense the rights originally revisited by the Supreme Court in *National Audubon*.

The Invention of the Public Trust Doctrine reviews the Supreme Court's decision in *National Audubon* and examines the controversy that precipitated it. It places the state's original allocation decision in an historical context, and reviews the environmental problems this decision caused. It also considers the reasons why the Court in *National Audubon* found the Public Trust Doctrine necessary to resolve them. This research will find that, more than a legal doctrine, the Public Trust emerges as a *political* doctrine, a tool of political advocacy that is capable of reforming the laws and regulations that water agencies — and governments — must abide by.

Central to this finding is the study of the origins of the Public Trust Doctrine provided in Chapter 2. Several of the Doctrine's most important elements are found in the laws of earlier societies, and more than one American jurist has cited this history in support of an important ruling. In reviewing this history, we will discover a thread of public activism that has repeatedly, and successfully, challenged the authority of previous sovereigns in their stewardship of natural resources. In effect, we will find that the Public Trust Doctrine has survived governments.

Nor has this survival been passive. This research will find that the Doctrine has served to reform and, occasionally, to contract sovereign authority over the natural resources that earlier societies found most useful. Once this perspective is understood, those early elements of the Public Trust Doctrine found in the Roman Institutes of Justinian, the Spanish Plan of Pitic, and the common laws of medieval England reveal themselves as concessions of sovereign authority, concessions that were either imposed by political forces, or offered in exchange for some service to the state.

To an important degree, the historical issues found in earlier Public Trust controversies have repeated themselves in the Mono Lake controversy, the subject of Chapter 3. This controversy can be traced to an error

⁷ Assembly Bill 4439.

in water allocation in 1940, and it eventually led to the California Supreme Court's affirmation of the Public Trust Doctrine's earliest precept: that no government has an ultimate authority to disenfranchise its citizens from their inheritance of natural resources.

This affirmation comes at a time when government agencies are rapidly investing themselves with an *administrative* authority for the Public Trust Doctrine. Implicit in these efforts is the idea that the terms of the Public Trust Doctrine are purely a matter of implementing the authority created by judicial opinion. Through this process, the Public Trust Doctrine appears as merely one more set of environmental regulations promulgated under the authority of legislative edict.

If this were true, this dissertation could have restricted its attention to the scientific and political issues associated with the application of the Public Trust Doctrine to the city's water rights. The dissertation would be no more nor less than an analysis of the necessity and the adequacy of environmental review for a CEQA⁸ project, albeit a very controversial one.

However, the Public Trust Doctrine springs from no act of Congress, which on one occasion has squarely rejected the Public Trust Doctrine, and the investiture of authority sought by administrative agencies is proceeding with relatively little attention from those agencies of American government most directly responsible for translating the public will into law. However, it is an investiture whose goals seem unimpeachable, because they are clearly, unmistakably popular.

These are uncomfortable statements in a democracy, but they bear important implications for the Public Trust Doctrine in the United States. The contests of sovereign authority, so prevalent in the Doctrine's historical use, have reemerged in an American context. However, in contrast to the outcome of earlier societies, the American case history reveals a steady growth of sovereign authority, with each judicial ruling incrementally expanding the scope of the Doctrine.

This research explores some of the reasons for this uniquely American direction that the Public Trust Doctrine has taken. Some of these reasons will find their origins in the physical character of the American frontier, wherein the rules and precedents of European doctrine proved awkward

⁸ California Environmental Quality Act.

or unjust. Other reasons will be traced to the absence of government itself, wherein the public will find little opposition from sovereign interests. Most significantly, however, we will find that the form of American government, which so persistently substituted democracy for minority rule, had the odd result of investing the government with unprecedented stewardship over natural resources.

Ultimately, we will find that the adversarial character of the Public Trust Doctrine, so definitive in its historical development, has faltered. In *National Audubon Society v. Superior Court*, the fight between citizen and state is very brief. The fight, in fact, did not last beyond the Court's opinion, which simply, and brilliantly, incorporated the Doctrine into California water law.

Nonetheless, this reconciliation leaves many questions unanswered. The actual allocation of Mono Basin water must still be made, and it is not at all clear what consequences will follow either a reduction of the water supply of Los Angeles, or the continued diversion of water from Mono Lake. In Chapters 3 and 4, this research will examine some of the scientific, legal, and public policy issues associated with the Mono Lake controversy (Chapter 3) and its resolution by the State Water Resources Control Board (Chapter 4). It will also investigate the quasi-democratic nature of the decision-making process created by the Court, exploring in particular its potential for scientific, political and legal abuses.

Ultimately, we will explore the impact of the Mono Lake controversy on the Public Trust Doctrine itself. In Chapter 5, this exploration takes a step back from the immediate problems found in the controversy, and reexamines the common thread that seems to run through the literature and the historical record of the Public Trust Doctrine. From its assertion of civil rights in Roman law, to its presence in England as a source of early parliamentary annoyance for the king, the Public Trust Doctrine marks reforms in the terms of the social contract. In the United States, the Doctrine repeatedly emerges amidst the most heated and stubborn civil disputes; it justified the government when the early New York subways arrived in the basements of angry storefront owners; it transferred property rights from titled landowners to squatters in nineteenth-century San Francisco; it provided coastal access for Californians in 1970. In every case, the Public Trust Doctrine served one public interest to the detriment of others.

More than implementing the public interest, we will find that the Doctrine *defines* the public interest.

It is this use that requires an explanation of the Public Trust Doctrine. We must ask if there is some general principle, beyond contemporary public needs, that allows a legal theory — an “it” — to adjudicate between competing interests. For, absent a general principle, an “it,” we must then ask “who?” In whom does the authority of the Public Trust Doctrine vest, and who shall decide what is in the public interest?

Several authors have proposed a general principle for the Public Trust Doctrine. In Chapter 2, I have provided my own. However, it would be pure hubris to suppose that all readers will find these principles all that general after all. This underscores the nature of the Public Trust Doctrine as an exercise in political advocacy. In the Mono Lake controversy, *political* advocacy has become environmental advocacy. Separate elements emerge: environmentalism as a *political* endeavor, a matter of advertising one’s assertions; environmentalism as a *scientific* endeavor, ensuring that one’s assertions withstand objective scrutiny; environmentalism as a *legal* endeavor, ensuring that one has the power to effect reforms (insofar as the rule of law prevails).

With the Superior Court’s decision to delegate the initial allocatory decision to the State Water Resources Control Board,⁹ the locus of Public Trust authority shifted from the courts to a state administrative agency. Thus, from its initial filing in May of 1979 to its arrival at the State Board in August of 1989, the *National Audubon* lawsuit transformed the PTD from a legal theory to a legal requirement in the administration of water rights. Further, after a relatively short period of stasis, it appears that the SWRCB will indeed act on the precedents set in the Mono Lake controversy. In May 1992, the SWRCB released a Notice of Public Hearing to consider “interim water rights actions *pursuant to Water code Sections 100 and 275 and the Public Trust Doctrine* to protect the San Francisco Bay/Sacramento–San Joaquin Delta Estuary” (emphasis added). Under *Future Actions and*

⁹ A significant feature of the Court’s decision in *National Audubon* was their refusal to rule on the main issue, the proper allocation of Mono Basin water, and the Court’s finding that the legitimacy of the PTD was codified “in part” in the California Water Code. The Superior Court’s delegation to the State Water Resources Control Board was partly a logical consequence of these features of the *Audubon* decision.

Authorities, the Water Board parenthetically provided the complete lineage of its authority under the PTD: “See *National Audubon Society v. Superior Court* (1983) 33 Cal. 3d 419, 189 Cal. Rptr. 346.”

In addition to its penetration of the State Water Resources Control Board, the emergence of a powerful regulatory agent of indeterminate scope has attracted the attention of the California Legislature, which held a hearing in November, 1988, to collect the opinions of utilities, environmental groups, water law attorneys, and state agencies on the nature of the PTD and its applicability to water rights.¹⁰ The PTD has also developed on a parallel track in the area of coastal zone management, and, here too, the PTD has attracted the attention of a very broad coalition of proactive state administrative agencies and the offices of state attorneys general.¹¹

These events herald the assimilation of the PTD into existing government. In this regard, it is unclear whether the government’s “rediscovery” and incorporation of the PTD into water rights administration will require any change in existing administrative rules and practices. One of the remarkable features of the judiciary’s conveyance of the PTD to the State Board is that it supplied little additional definition to the PTD itself. The essence of the “administrative rule” imposed by *National Audubon* is that the state must “take such [Public Trust] uses into account in allocating water resources.”¹² How might this “accounting” be made?

To date, the State Board’s relicensing of Mono Basin exports does not provide a clear indication of how the SWRCB will proceed in the “post-*Audubon*” era. As of early 1992, beyond rhetorical references to the PTD, the specifics of the State Board’s relicensing of the city’s water rights in the Mono Basin were indistinguishable from the CEQA process it follows for

¹⁰ Assemblyman Jim Costa, Chair.

¹¹ Slade et al., *Putting the Public Trust Doctrine to Work*. Additionally, Felix Smith, a policy spokesperson for the State Department of Fish and Game, issued a recent statement (Appendix A) on his department’s position with respect to the trusteeship responsibilities associated with the PTD. It provides a detailed declaration of the specific duties adopted by the department to implement this trusteeship. While not necessarily engendered with the force of law, this policy statement nonetheless reflects the willingness of state administrative agencies to embrace the PTD as a source of expanded authority over natural resources.

¹² *National Audubon*, 33 Cal. 3d at 452.

any controversial project.¹³ In my opinion, absent any substantive definition of the PTD from the State Board staff, the substance of the PTD in a water rights context could be set in a *de facto* fashion by the methods, choices, and preferences of the scientists and technical consultants involved in the State Board CEQA process. Indeed, one of the difficult tasks facing the State Board is evaluating the credibility and utility of a decade of research conducted in an adversarial arena.

In this regard, the perspective offered in this research is that of a scientist who has participated directly in the scientific, legal, and administrative arenas that contain the Mono Lake controversy. It is a perspective that takes issue with many of the truths established by court precedent (Chapter 3), and critiques the process by which some of the unanswered questions in the Mono Lake controversy will be resolved (Chapter 4).

However, it is a perspective that also recognizes a deeper merit to the Public Trust Doctrine. The Mono Lake controversy is a microcosm of the global environmental problems that have appeared in recent years. The parallels are striking: a resource allocation decision, driven by the public interest, emerges decades later as an apparently imminent threat to the native ecosystem. The only solution that law can support is to revisit the original allocatory decision, suspending in the process the sovereign authority that was used to provide and ensure the allocation in the first place. In both cases, the value of a legal doctrine that can transcend sovereign authority is evident. The question, though, is who shall decide when it should?

In this regard, both the destination and the overt motive for this research is an argument for a broader consideration of the Public Trust Doctrine by the public it purports to serve. It is my conviction that the Public Trust Doctrine is poised to effect significant reforms in the management of California's water resources, and it is vital that the public, the legislature, and water agencies understand that these reforms will accommodate virtually any level of public participation. If there is any duty incumbent on a democratic government, it is to ensure that this level is very broad indeed.

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¹³ This particular relicensing effort is the first time that the State Board has had to explicitly address the PTD, and the Superior Court's delegation to the Board was conditioned on the Court's final review of the Board's performance and final decision.

Conclusion:

THE PUBLIC TRUST DOCTRINE AS SOCIAL CONTRACT

The threads of the PTD found in the Institutes of Justinian refer to things subject to varying degrees of human control; the air, the sea, running waters, and access to fishing grounds.¹ For the Roman citizen of 500 A.D., the inclusion of the air and the sea in this list may have seemed the product of either hubris or ambition. However, over millennia, the natural elements addressed by the Institutes of Justinian have become increasingly subject to human control and impacts. As we approach the twenty-first century, the original fifth-century list seems incomplete.² For

¹ Many authors trace the roots of the PTD to Roman law in general, and the Justinian code in particular. For examples, see Molly Selvin, *This Tender and Delicate Business: The Public Trust Doctrine in American Law and Economic Policy, 1789–1920* (New York: Garland, 1987); Joseph L. Sax, “The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,” *Michigan Law Review* 68 (1970): 471–566 and “Liberating the Public Trust Doctrine from Its Historical Shackles,” *UC Davis Law Review* 14 (1980): 185–94; or John Franklin Smith, “The Public Trust Doctrine and *National Audubon Society v. Superior Court*: A Hard Case Makes Bad Law or the Consistent Evolution of California Water Rights,” *Glendale Law Review* 6 (1984): 201–25.

² Contemporary questions of global warming and ozone loss come to mind here, although a modern list could also embrace DNA, the electromagnetic spectrum, and near-earth space as things that are common to humanity, potentially subject to a Public Trust, and potentially in need of regulation.

example, how could the Roman lawmakers have foreseen the coining of the Dutch word, “impoldering,” which refers to the destruction of inland seas by landfill? The Dutch effort to provide living space rendered obsolete an entire class of sailing vessel, while inventing three entirely new types of ships whose purpose is to lay what is, in effect, artificial sea bottom.

Some legal commentators have argued that these coda in Roman common law reflect only an attempt to classify the natural world, and should not be identified as an early effort to realize environmental law.³ Other authors have argued that this history, regardless of its intent, is not particularly relevant to modern formulations of the PTD.⁴ In my opinion, both of these criticisms deflect the reader away from the essence of the PTD as a fundamental feature of the social contract between citizen and state.

A Public Trust suit brings before the court an argument that the state has breached a contract of sorts. Implicit in the act of bringing such a suit is the affirmation that the state exercises an inalienable dominion over water resources. However, it also implies that the state cannot do whatever it wants with these resources. Rather, the state’s authority is contingent on its adherence to the public interest.⁵ This result may be derived from a number of sources, including the PTD,⁶ constitutional language,⁷ or the general rationale for government found in various theories of social contract.⁸ This contingency does not imply that a lapse by the state alienates it from the resource, and it would be foolish to contend that such a lapse invalidates the state itself. However, the trust in which the state holds public resources does imply some constraints.

³ Several references for this idea are provided by Jan G. Laitos, *Natural Resource Law: Cases and Materials* (St. Paul: West Publishing, 1985).

⁴ For an example of this argument see Harrison C. Dunning, “The Significance of California’s Public Trust Easement for California Water Rights Law,” *UC Davis Law Review* 14 (1980): 357–98.

⁵ *Illinois Central R.R.*

⁶ *Id.*

⁷ Preamble.

⁸ Thomas Hobbes, *Leviathan* (1651); Immanuel Kant, *Metaphysics of Morals* (1797); John Locke, *Treatise of civil government* [1689] and *A letter concerning toleration* [1690], ed. by Charles L. Sherman (New York: D. Appleton–Century, 1937); Rousseau, *The Social Contract* (1762).

Previous authors have struggled (somewhat unsuccessfully, in my opinion), to identify those constraints, finding their substance elusive, immaterial, or in a constant state of flux. In this regard, the reader may recall the state Supreme Court's language in *Marks* and *National Audubon*, wherein the Court referred to the "flexibility" of the PTD and its ability to encompass changing public needs.

We may detect in these observations the presence of an active relationship between citizen and state with respect to the allocation and management of natural resources. A "chain of custody" for natural resources illustrates the potential loci of these "feedback loops," and highlights some of the structural features of sovereign authority. What is clear from the diagram is that the PTD can potentially apply to virtually any level of government, a result that follows from its basic attachment to the legitimacy of sovereign authority over natural resources.

To date, Public Trust lawsuits have avoided pitting coequal branches of government against each other, although the City argued that this situation was present in *National Audubon*. The court in that case answered this charge by holding that it did not dictate any particular allocation of Mono Basin water. Rather, it left this decision to an unspecified "responsible body,"⁹ eventually being the State Water Resources Control Board. It is noteworthy that the SWRCB did not challenge the Court's revisit of the Board's earlier water rights decision. That is, the SWRCB avoided an intra-sovereign conflict. Equally noteworthy is the specific manner in which the Court reconciled the potentially conflicting sources of public will, being the 1940 Water Code and the emergent PTD.¹⁰

However, in language important to the issue at hand, the Court found that its reconciliation of these two sources of sovereign authority does

not render the judicially fashioned public trust doctrine superfluous. Aside from the possibility that statutory protections can be repealed, the non-codified public trust doctrine remains important both to confirm the state's sovereign supervision and to

⁹ *National Audubon*, 33 Cal. 3d at 447.

¹⁰ By reference to the Water Code's requirement that all water allocatory decisions must be "in the best public interest," the Court found the PTD to "codify in part the duty of the Water Board to consider public trust uses of stream water." *National Audubon*, 33 Cal. 3d at 446 n.27.

require consideration of public trust uses in cases filed directly in the courts without prior proceedings before the board.¹¹

From the court's promotion of the PTD as a remedy for legislatively repealed protections, it follows that future courts would have to construct their opinions very carefully to avoid the appearance of a conflict with the public will. Further, the Court's language implies an investiture of political power in the judiciary that would likely be hotly contested by the legislature, if not other members of the judiciary itself.¹²

Regardless of one's position on this issue, two questions come to mind. First, assuming the judiciary is correct in its assumption, via *National Audubon*, of a penultimate role as public trustee, what remedy is available should the Court eventually decide against a plaintiff? Under such conditions, should a plaintiff accept that the PTD is completely contained within the state, or can the contest be carried further? Secondly, what serves as a basis for the legitimacy of a PTD that exists independent of the courts or the government itself?

Most legal commentators would likely view a PTD existing independent of formal state institutions as more of a political than a legal doctrine. This view, while probably correct, does not necessarily deprive the PTD of its force, or even the major part of it. In this regard, we may return to the Doctrine's roots in Roman law, in particular the concept of *jus gentium*, translated as the law of nations or, more accurately, the law applicable to the citizens of nations other than Rome.

The relevance of such a legal construct is plain for one who rejects the legitimacy of a governing body, particularly when that body continues to enjoy majority support. However, it is equally relevant *within* the framework of existing institutions; the concept of political self-determination, promoted forcefully by the current political administration, supplies a contemporary example of a *jus gentium*.

¹¹ *Id.*

¹² We may note in this regard that higher courts have not addressed the constitutional questions implicit in the *Audubon* Court's language. In *Illinois Central R.R. v. Illinois*, the U.S. Supreme Court found only that the legislature could not sever its title in a manner that prevented it from subsequently exercising its will for the public good. The Supreme Court was supported in its ruling by the state itself. That is, even this landmark Public Trust suit did not pit the PTD against the legislative will.

What remains to be answered is the political forum where these issues might be settled, the scope of the debate, and the content of an extra-governmental PTD. With respect to the first question, we may note that common law is notorious for geographic inconsistencies, and whereas higher courts may defer to local custom, the invocation of a “public trust” for water resources could have far-reaching regional impacts. In this situation, democratic principles should dictate a fairly general assay of the public will.

With respect to the second question, presumably the scope of reform would be guided by the standard against which the violation of the trust appeared. That is, the state’s mismanagement of the trust could not be detected without some reasonably clear standard of performance. Most importantly, this standard must be independent of the particular form of government found in the state. If not, then the state would be not only the administrator and guardian of the trust, but also the author of its terms and its standards for performance.

The matter of content returns us to the central problem of natural resource allocation and management. In this regard, very few commentators have proposed a particular substantive principle for the PTD, in the manner of a *jus naturale*, for example.¹³ Rather, advocates have promoted the PTD as a *procedural* tool,¹⁴ whereby the allocation of public resources

¹³ Sax (1970) is a notable exception. As noted by Smith (1984):

Sax used conceptual terms to define the purpose of the PTD to be prevention of the destabilizing disappointment of expectations, not formally recognized, yet held in common by a community. He asserted that the PTD would be used to help reduce the tensions derived from the destabilization of an expectation whether it be in expectation of private property ownership, or, the expectations of the public for a ready water supply and the protection of our ecological system. The obligation of the decision making trustee under the PTD is to insulate those expectations which support social, economic and ecological systems from avoidable disruption (p. 224).

Of course, in the context of *National Audubon*, this interpretation of the purpose of the PTD is problematic, since the social and economic disruption attending the revocation of a fifty-year-old water right must be weighed against ecological disruption. We may note, however, that this was precisely the problem addressed by the *Audubon* Court.

¹⁴ Smith (1984) notes that, whereas “the case-by-case expansion of the Public Trust Doctrine by the courts in California has left the scope and purpose of the Public Trust Doctrine poorly defined,” the procedural aspects of the PTD in the context of California water rights were clarified by the California Supreme Court in *National Audubon v. Superior Court*.

is brought under greater scrutiny by the public,¹⁵ by state agencies such as the state Fish and Game Department¹⁶ and the Office of the Attorney General,¹⁷ or by the courts.¹⁸ There is no shortage of volunteers for the position of Public Trustee.

Regardless, it is probable that, had the State Water Board been aware of the eventual outcome of its decision in 1940 (both in its legal and ecological consequences), it would have responded differently. In 1989, the City itself adopted an explicit policy of limiting its diversions to the degree necessary to avoid adverse impacts to the Mono Lake ecosystem. However, it is important to recognize that many¹⁹ of the impacts that drive the current controversy were not anticipated in 1940. For example, impacts on California gulls, arguably the centerpiece of the plaintiff's position in *National Audubon*, were not mentioned by the individuals who protested the Water Board's decision in 1940.

This observation underscores the central dilemma in natural resource management, and one which any *jus naturale* must address: Assuming an allocation decision is found to be equitable at the time it is made, how should the state respond to the unforeseen consequences of its decisions? In the public's view, what responsibility does the state have for its decision-making? Or, in more contemporary terms, what is the government's liability for damages to the public weal?

¹⁵ Sax (1970).

¹⁶ Robert Baiocchi, "Use It or Lose It: California Fish and Game Code Section 5937 and Instream Fishery Resources," *UC Davis Law Review* 14 (1980): 431–60.

¹⁷ Slade et al., *Putting the Public Trust Doctrine to Work*.

¹⁸ Sax (1970); Martha Guy, "The Public Trust Doctrine and California Water Law: *National Audubon Society v. Department of Water and Power*," *Hastings Law Journal* 33 (1982): 653–81.

¹⁹ Though not all. Impacts on air quality and recreation were raised during *City of Los Angeles v. Nina B. Aitken*, Superior Court Tuolumne County, No. 5092 (1934), and aesthetic and recreational impacts were raised before the Water Board in 1940 (Div. Water Resources Declaration 7055, 8042 and 8043, April 11, 1940 at 26). In a letter to the City and the State Fish and Game Commission, Eldon Vestal, an employee of the Fish and Game Department, cited the impacts of stream diversion on the fishes that had been introduced into the streams for decades in the previous century (LADWP Records).

The search for such standards of performance provides an intersection for science and the social contract.²⁰ Does the existing social contract imply citizen consent to every technological dependency authorized by government? In democratic systems of government, what are the rights of minorities who are identified by the loss of a resource, either directly or as the unanticipated result of an allocation decision made by the sovereign as trustee? In his introduction to social contract theory, Lessnoff distinguishes between consent and agreement, noting that “there is more to contract theory than mere consent. Consent can be a unilateral act: contract is bilateral or multilateral. One may consent to an existing state of affairs: one contracts with another contracting party or parties, in order to bring about a new state of affairs.”²¹

One can argue that the “bringing about of a new state of affairs” is attended more by scientific than political advances. Further, scientific advances under Lessnoff’s view of contract theory emerge and are often applied with minimal contact to democratic processes. In fact, Lessnoff viewed science’s relative insulation from democratic controls as itself an expression of the existing social contract.²²

However, too much emphasis on the virtues of science can raise alternative issues of its adverse impacts. In this regard, perhaps the critical issue concerns the rate at which these adverse impacts manifest themselves. As we have seen in the Mono Lake controversy, the impacts of decision-making can accumulate over a long period of time without public awareness, to emerge suddenly, and in a manner that challenges existing means of redress, adaptation, and reform.

Substantial concerns have been voiced by scientists and environmental advocates that the incidence of such impacts will increase. Global warming, to cite a current popular concern, is either a ploy of political activists, a natural and unavoidable phenomenon, or a consequence of our own reliance on fossil and extant organic fuels. From nuclear power to ozone chemistry to drift gill nets, the number of environmental issues seemingly

²⁰ It also underscores the increasingly important role played by science and scientists in the governance of resource use.

²¹ Michael H. Lessnoff, *Social Contract Theory* (New York: New York University Press, 1990), 3–4.

²² This association is primarily derived from rights of free speech.

multiplies geometrically. Most importantly, like the Mono Lake controversy, nearly all of them involve rights vested in various sovereigns, and promise dire and immediate consequences if these rights are not curtailed in some way.

In this regard, the Court's use of the PTD in *National Audubon* is an act of reform that might be construed as an adjustment not only to water law, but to the social contract itself. In terms of political mechanism, it purports to represent the public will, and thus implies a democratic process. In a constitutional context, it is a mechanism that makes no statement about the precedent it sets for existing democratic institutions. Most importantly, it highlights that the PTD is an agent of change,²³ a fact not often appreciated in environmental controversies.

Buchanan comes closer than most authors to the practical questions inherent to social contract theories. This is, perhaps, the result of his preoccupation with what he terms, "continuing contract," or post-constitutional contract. This area of social contract theory is not as concerned with explanations for society and government as it is with the practical needs expressed in social reform. However, even here, Buchanan almost states the case against a realistic contract theory too well. He writes of his "temptation" to accept the idea that social structure merely exists, and that "there is relatively little point in trying to understand or to develop a contractual metaphor for its emergence that would offer assistance in finding criteria for social change."²⁴

He supports this contention by reference to economics, a field that he notes has not resolved "major analytical complexities,"²⁵ even though it is concerned only with exchange processes, which can be considered a subset of the social contract.

²³ In Public Trust adjudication, there is often the sense that the PTD is conservatory in character, and that the point of a Public Trust lawsuit is to correct a deviant use of natural resources. In this sense, one can argue that the purpose of the PTD is limited to changing the "state of affairs" only insofar as it returns the status quo to an earlier, more legitimate condition. However, it is only prudent to treat any change in government or natural resource allocation as nothing more than simple reallocation, i.e., change.

²⁴ James M. Buchanan, *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago: University of Chicago Press: 1975), 53.

²⁵ *Id.*

It is easy to become frustrated with social contract theory, particularly when one attempts to relate it to the PTD. Although the idea of a “social contract” is nearly irresistible, even its component parts resist analysis. Buchanan is clearly, and eloquently, aware of the subject’s important pitfalls.²⁶ He does not purport to supply a theory of social contract that is completely free of presupposition, but he does endeavor to render it free of all but the most basic requirements. Buchanan requires only “rational, self-interested behavior” in his theory, a position that contrasts starkly with earlier writers such as Hobbes and Pufendorf,²⁷ who argued that self-interest in a state of nature led to consequences that are considered to be the antithesis of social behavior, such as universal warfare. In fact, Buchanan purports to not require the principle that “all are equal in the state of nature,” a principle that is common to most social contract theories in one form or another.²⁸

The challenge, then, posed by the Public Trust Doctrine is to identify exactly what it is that we wish the state to hold in trust for us. After *National Audubon*, responsibility for the future has returned to the public will, and we should be very careful in determining what it is that we wish to preserve. We should also be very quick about it. With very few exceptions, we may presume that a central feature of our will is our own survival. Without making any statement of what threats impend, we can be reasonably certain that their recognition will leave us little time to respond.

Like the Mono Lake controversy, many of these threats might require, or seem to require, the sacrifice of earlier sovereign commitments. Here, perhaps the only guidance available is that we adopt another meaning for the phrase “public trust:” that the concerns voiced both by advocates and

²⁶ For example, where he notes that the basic problem of contract theory is to “explain and to understand the relationships among individuals, and between individuals and the government,” he immediately raises the issue of normative standards, and admits that “the temptation to introduce normative statement becomes extremely strong at this level of discourse.” Explanation itself presupposes the existence of mutually agreed-upon standards of adequacy, proof, and expectation — in short, a social contract of sorts.

²⁷ Hobbes, *Leviathan* (1651); Samuel Pufendorf, *De Jure Naturae et Gentium* [1688], trans. by C. H. and W. A. Oldfather as *On the Law of Nature and Nations* (Oxford: Clarendon Press, 1934).

²⁸ See in particular John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), for a clear exposition of this principle.

their critics are sincere, and are not derived from narrow interests. Hopefully, we will proceed in a world whose benefits warrant dangers no worse than their predecessors.

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“HUSH, HUSH, MISS CHARLOTTE”:

*A Quarter Century of Civil Rights Activism by the
Black Community of San Francisco, 1850–1875*

JEANETTE DAVIS MANTILLA*

These selections from Jeanette Mantilla’s Ph.D. dissertation (History, The Ohio State University, 2000) are presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California’s legal history. The complete work is available at http://rave.ohiolink.edu/etdc/view?acc_num=osu1488195633521235 and <https://dissexpress.proquest.com/search.html>.

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INTRODUCTION

The history of Civil War and Reconstruction-era California Blacks is often overlooked, overshadowed by a more familiar history that recounts an earthshaking national drama permeated with pro-slavery and abolitionist rhetoric and replete with romanticized recitals of the devastating but heroic battles of brother against brother. Yet closer investigation reveals that a small community of Blacks centered in the rapidly developing city of San Francisco, while vocally participating in the national crisis, persistently forged ahead in a more localized battle for Black rights that has been undervalued and largely ignored.

The struggle lasted a quarter century, approximately from 1850 to 1877, and encompassed a series of civil rights issues — from an original battle for the right to freely testify in court to a culminating fight for equal access to public education. While historians have studied, investigated, analyzed, and remarked on some of the individual events, the connections between the battles and the ties between the participants have received short shrift, when they have been considered at all.¹ This study undertakes

¹ The bibliography for this study provides examples of the specialized texts that focus on a single issue, a specific ethnic group, or a particular event or time. Overall, Philip Montesano's work, *Some Aspects of the Free Negro Question in San Francisco*,

to understand how the particular environment of San Francisco, with its polyglot population and rapid social and economic changes, influenced, fueled, and finally helped to circumscribe the Blacks' struggles.

Traditionally history has been written from the viewpoint of white males, the portion of the population that controlled the laws, politics, finances, and social mores for the other members of the greater community. Belatedly, historians have begun to give “voice” to women, Blacks, and other formerly silent segments of the population. This study joins that effort. This narrative begins and ends with the experience of Miss Charlotte L. Brown, a middle-class, single, young adult, Black female who dared to raise her voice in protest at a time when even most white women usually remained mute on matters of serious concern in the public sphere. Other historical characters and important episodes in the quarter-century civil rights effort are introduced and analyzed before the concluding epilogue looks back at Miss Charlotte's personal experience at civil rights protest in light of what came before and after.

The participants in this civil rights struggle were tied together in an intricate web where the subtle connections between them sometimes were not evident until years later, when seemingly insignificant actions or chance happenstance were revealed to have been of vital importance to subsequent events. Looking at the participants' specific motivations and goals is a way to understand the personal motivations that rationalized public deeds. Thus, this narrative investigates a number of power brokers welding great personal influence in the white community, as well as at

1849-1870 (M.A. thesis, University of San Francisco, 1967; reprint, San Francisco: R & E Research Associates, 1973), most closely investigates the early civil rights struggles of the San Francisco Black community. Additionally, Rudolph Lapp, *Afro-Americans in California* (San Francisco, Boyd & Fraser Publishing Company, 1979), addresses the larger number of relevant issues from the quarter-century of 1850 to 1875. Yet, Montesano and Lapp look at the Black community more or less in isolation, and Lapp provides only a quick overview of this period in two brief chapters before moving on to more recent times. No modern work was uncovered that attempts to incorporate evidence from across the spectrum of race, gender, and class for this time frame and location. While works that investigate a specific group or a particular issue are extremely valuable and informative, additional texts that refocus by incorporating the new information from these specialized studies into the larger picture will help to provide an equally valuable new perspective.

various members of the Black community fighting stubbornly against pervasive racial discrimination.

Hush, Hush, Miss Charlotte often goes forward and backward in time, covering a particular issue or event from various perspectives. In this manner, American Indians, Hispanics, Chinese, and Irish emigrants enter this story to reveal that racial prejudice is not just a Black and white issue.² Rather, the manner in which one minority was treated influenced the treatment of the others. Additionally, the gold rush attracted far more males than females. Not only did males outnumber females for at least a decade (even longer among the Chinese), but the crowded conditions and hectic pace of life in San Francisco seemed to foster “precisely those appetites that reformers damned as unchristian and immoral.” As a result of this demographic imbalance, many males were forced to take responsibility for various tasks that traditionally were considered “women’s work.” Even as these changes allowed Chinese and Blacks to enter the labor market to perform work deemed undesirable to most white males (laundry, cooking, domestic duties), the shortage of white women increased their economic value and fueled concerns for the protection of white female virtue. Hence, matters of race, class, and gender percolate to the surface of public

² *Hush, Hush, Miss Charlotte* does not undertake the task of fully investigating the development or evolution of the various ethnic communities in San Francisco. Rather, it seeks to incorporate Chinese, Irish, Indian, and Mexican perspectives in those areas where these groups interacted or shared concerns with the Black and white communities that are the focus of this narrative. Sucheng Chan, *Asian Americans: An Interpretive History* (New York: Twayne Publishers, 1991), or Jack Chen, *The Chinese of America* (San Francisco: Harper & Row Publishers, 1980), each provides a comprehensive analysis of the experience of the Chinese in early California. R. A. Burchell, *The San Francisco Irish, 1848–1880* (Manchester, England: Manchester University Press, 1979) is the definitive work on the Irish community of early San Francisco, while Noel Ignatiev, *How the Irish Became White* (New York: Routledge, 1995), or John Duffy Ibson, *Will the World Break Your Heart?: Dimensions and Consequences of Irish-American Assimilation* (New York: Garland Publishing, 1990), both address the complicated subject of how the Irish were persecuted on their arrival in the United States, and then, in turn, persecuted Blacks and Chinese. Recent increasing interest in the study of ethnicity, cultural development, and the American West promises to produce equally valuable works on Mexicans and American Indians in California. For now, Charles Wollenberg’s oft-cited contribution, *Ethnic Conflict in California History* (Los Angeles: Tinnon-Brown, Inc., 1970) is a valuable and concise reference.

consciousness throughout the sequence of events that unfolds before Miss Charlotte is allowed to reenter the spotlight at the close of this narrative.³

One of the main duties imposed upon each professional historian is the responsibility to justify his or her research and results by locating his or her individual work in its proper place among the earlier texts produced from decade after decade of prior research conducted by generations of historical scholars over the years. The cumulative outcome of this task is called “historiography,” more or less, the history of professional history. In the process of declaring the importance of new findings, historians often revise older theories and reasoned assertions. The author of each new publication is aware that if his or her ideas and evidence are insightful, they will prompt additional research which, in turn, may lead to new ideas, new research, and additional revisions. This researcher did not escape the responsibility to add to the professional historians’ accumulation of historiographical arguments.

This study focuses on approximately twenty-five years of civil rights struggles conducted by a small community of San Francisco Blacks, aided by a handful of local whites, during a period in which the American nation underwent a civil war and a subsequent interval of troubled reconstruction (1850–1877). Perhaps understandably, most historical works that cover this time frame focus on the South — on conditions in the states that seceded from the Union, lost the war, and were forcefully reconstructed in an attempt to fit the victorious North’s evolving plan of reunification. For example, John Hope Franklin’s *Reconstruction: After the Civil War*, recognized as a significant contribution to Southern history, Black history, and Reconstruction history, covers the changing status of Reconstruction in the South — from the peacemaking efforts of President Lincoln, on to the radical policies imposed by Congress in reaction to President Andrew Johnson’s blundering attempts to continue Lincoln’s policies, and finally to the period

³ Albert L. Hurtado, “Sex, Gender, Culture, and a Great Event: The California Gold Rush,” *Pacific Historical Review* 68 (February 1999): 1–19, laments the fact that many historians still do not understand the importance of including the long-silent voices of women, Blacks, and ethnic peoples. Hurtado emphasizes the value of including these often-ignored perspectives when investigating early California history, especially considering the rapid demographic changes that took place in that multicultural region at that time.

of “Redemption” when local interests reclaimed control from the hands of Congress and the military to the detriment of local Blacks.⁴ *Hush, Hush, Miss Charlotte* moves the investigation of the Civil War and Reconstruction era geographically far to the west, to frontier California, a newly established state that joined the Northern effort to compel the Southern states to continue to participate in the Union.

Following the Civil War, contemporaries often analyzed the events of the war or Reconstruction by admittedly interjecting their personal passions and prejudices into the historical record, producing voluminous biographies of military and political figures and epic accounts of battles and major events that glorify the war years while adding little dispassionate insight into the causes or results of the national drama. Even Jefferson Davis and Alexander Stephens, the former president and vice-president of the Confederacy, each wrote historical treatises, *The Rise and Fall of the Confederate Government* and *War between the States*, respectively. Northerners were no less prolific in their written accounts, with presidential aspirant and newspaper editor Horace Greeley leading the way with *American Conflict*. By consensus, the historiographical record acknowledges these works as historical documents but passes over them as historiographical texts to begin the account of the era’s historiography approximately a half-century after the war, after the task of historian had become professionalized by a wave of “scientific” thinking that allegedly eliminated the biased emotionalism so prevalent in previously written history⁵ While professionalizing the task of historian curbed the practice of blatant impassioned proselytizing, historians are human beings who continue to have personal interests and biases that find subtle, or not so subtle, ways to influence their work. Undoubtedly, *Hush, Hush, Miss Charlotte* was influenced by the author’s life experiences and political outlook, most consciously by the 1960s civil

⁴ John Hope Franklin, *Reconstruction: After the Civil War*, The Chicago History of American Civilization Series, ed. Daniel J. Boorstin (Chicago: The University of Chicago Press, 1961).

⁵ Edwin C. Rozwenc, ed., Introduction to *Reconstruction in the South*, Problems in American Civilization (Boston: D. C. Heath and Company, 1952), vi; George Catkin, *Reluctant Modernism: American Thought and Culture, 1880–1900* (New York: Twayne Press, 1992), xii, 28, 35, 54–55.

rights movement and by personal ties to Native American Indians and the Latino immigrant community.

In 1907, William A. Dunning, destined to become a long-acknowledged expert in Reconstruction history, presented an historical analysis that appeared to embody the new scientific methods of research and analysis. Dunning's *Reconstruction, Political and Economic, 1865–1877*, synthesized contemporary historical works into a coherent theory that contended that the former Confederate states accepted defeat valiantly, and readily acquiesced to the well-intentioned directives of presidents Abraham Lincoln and Andrew Johnson, but balked at the strident policies enforced by the corrupt and vindictive Radical Republicans who usurped political power and redirected Reconstruction for their own selfish ends.⁶ Although the Dunning school's pro-South, anti-Radical Republican interpretation was eventually discredited as highly partisan and contemptuous of Blacks, the debate on the motivation and exact nature of the Reconstruction policies imposed upon the South continues.⁷

The intricacies of this extensive historiographical debate had little direct bearing on the research for *Hush, Hush, Miss Charlotte*, but the expanding arguments that continue to analyze the Dunning school and its successors encompass a variety of political, economic, and social issues that enter into any research covering the period, if only to provide comparisons over time between the regions and states. For example, important areas for additional research include a comparison of the legal, social, and political restrictions placed on Blacks; a comparison and analysis of the ways Blacks attempted to actively participate in the changing political, social, and economic spheres; or a comparison of the racial attitudes of

⁶ William A. Dunning, *Reconstruction, Political and Economic, 1865–1877* (New York: Harper and Brothers, 1907); Roberta Sue Alexander, “Presidential Reconstruction: Ideology and Change,” *The Facts of Reconstruction: Essays in Honor of John Hope Franklin*, ed. Eric Anderson and Alfred A. Moss, Jr. (Baton Rouge: Louisiana State University Press, 1991), 29–30.

⁷ Kenneth M. Stampp and Leon F. Litwack, eds., *Reconstruction: An Anthology of Revisionist Writings* (Baton Rouge: Louisiana State University Press, 1969) offers a useful summary of Reconstruction historiography; Eric Anderson and Alfred A. Moss, Jr., eds., *The Facts of Reconstruction: Essays in Honor of John Hope Franklin*, (Baton Rouge: Louisiana State University Press, 1991), completes the summary by providing a glimpse at more recent scholarship.

Northern and Southern whites during the Civil War and Reconstruction years. Such comparisons, however, have not been readily forthcoming for a wide geographical base because most historical texts continue to focus attention primarily on the South or on the political proceedings emanating from Washington, D.C.⁸ One notable exception is Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790–1860*, a well documented analysis of prejudicial laws and practices throughout the northern states. Yet, as Litwack's title reflects, there remains a need for additional work focusing on the North. *North of Slavery* ends just as the painfully slow, occasionally retrogressive, process of removing restrictions placed upon Blacks in the North, that Litwack so skillfully describes, is moving toward the critical years of Civil War and Reconstruction. By adding the western component, *Hush, Hush, Miss Charlotte* provides additional information for comparisons of the treatment of Blacks in the South, North, and West.⁹

Because California entered the union in 1850 and rapidly grew in population and importance due to the gold rush, that state was forced to immediately construct its legal system from "whole cloth" without a substantial legacy of prejudicial restrictions in place. The influx of settlers included a great number of Southern pro-slavery advocates and a substantial number of New Englanders with anti-slavery leanings. Thus, California provides an excellent opportunity to study whites' evolving attitudes on racial issues, along with the corresponding social and political ramifications during the Civil War and Reconstruction era. Additionally, research and scholarship on the development of racial prejudice in the United States may help modern Americans understand and deal with the concomitant discrimination, violence, and social and political

⁸ Vernon Lane Wharton, *The Negro in Mississippi, 1865–1890* University of North Carolina Studies in History and Political Science (Chapel Hill: University of North Carolina Press, 1947) is an early attempt to gauge Blacks' participation in the restructuring of postwar Southern life and politics; Howard N. Rabinowitz, "Segregation and Reconstruction," *The Facts of Reconstruction: Essays in Honor of John Hope Franklin*, ed. Eric Anderson and Alfred A. Moss, Jr. (Baton Rouge: Louisiana State University Press, 1991) 79–97, provides a concise update on newer scholarship that follows this regional focus; and David Donald, *The Politics of Reconstruction, 1863–1867* (Cambridge, Massachusetts: Harvard University Press, 1984) is an example of the strictly political approach to Reconstruction.

⁹ Leon F. Litwack, *North of Slavery: The Negro in the Free States, 1790–1860* (Chicago: The University of Chicago Press, 1961).

conflict that lingers on to reappear zealously in modern American society periodically.

In 1955, historian C. Vann Woodward first published *The Strange Career of Jim Crow*, prompted in part by the U.S. Supreme Court's landmark decision in *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1954), that declared unconstitutional the common dual practice of establishing separate schools for “colored” children while concurrently prohibiting those same students from attending “white” schools. *The Strange Career of Jim Crow* inspired a flood of new historical scholarship intent upon investigating the development of segregation. Segregated schools had been sanctioned by the Court over a half-century earlier through the “equal but separate” policy successfully defended in *Plessy v. Ferguson*, 163 U.S. 537 (1896), a lawsuit justifying the practice of racially segregated seating in railroad cars. For over thirty years, C. Vann Woodward and his disciples polished and supplemented his original thesis, looking to pinpoint the beginning of segregation in the South. The Woodward Thesis, as it was succinctly articulated by Woodward in the late 1980s, asserted that racial segregation was not a basic Southern practice of long standing inherent in a slave society, but rather, was a gradual response to postwar societal changes. According to the Woodward school of thought, segregation in the South did not solidify into a rigid practice until several decades after Reconstruction ended. Woodward asserted that segregation laws were not immediately put in place following the restoration of Southern home rule, rather such Jim Crow laws were first instituted by Northern whites as a response to competitive and unsettling urban conditions. C. Vann Woodward, acting as his own harsh critic, explained that after thirty-odd years of reflection he realized that he “got off on the wrong foot” by putting “the question of *when* before the question of *how*.”¹⁰ *Hush, Hush, Miss Charlotte* provides information useful in answering both questions.

After a false start that practically ignored the historical role of Blacks themselves, the historical profession finally recognized that any serious

¹⁰ C. Vann Woodward, *The Strange Career of Jim Crow*, 3rd rev. ed. (New York: Oxford University Press, 1974), 12–17, 69–74; C. Vann Woodward, *Thinking Back: The Perils of Writing History* (Baton Rouge: Louisiana State University Press, 1986), pp. 81–99; C. Vann Woodward, *The Future of The Past* (New York: Oxford University Press, 1989), 295–311.

consideration of the question of how segregation developed, of how United States race relations evolved, or of any other subject that encompasses American society must allow all of the historical participants to take an active part in the story. The historian must consider the motivations and actions of all the historical actors throughout the process of discovery and explanation. Like a candle, the intensity of focus on this new inclusive history wavered with the ebb and flow of time, shining brightly during the 1950s–60s civil rights movement, but flickering with the fracturing of that movement by the trauma of Vietnam, the aftershock of Watergate, and the preoccupation with global politics and global finance that dominated the remaining years of the twentieth century. Early in the modern civil rights era the historical profession recognized that Blacks and Black history, along with that of women, Native Americans, and other minorities, had been uniformly, if often unconsciously, written out of most of popularly accepted United States history. The paucity of any meaningful mention of Blacks in contemporary textbooks, outside of a cursory description of slavery, provided the incontestable proof. The problem was to figure out the best way to address this insufficiency. Introducing a full range of Black experiences into the historical record, including the moral paradox of slavery and its aftermath from the perspective of the Black historical actors, presented the members of the modern historical profession with an abundance of intriguing research questions that historians are still attempting to answer.¹¹

Understandably, partly in response to the modern civil rights era, modern African Americans were anxious to read history about Blacks, written by Blacks for Blacks. The 1960s and early 1970s witnessed a much-needed proliferation of Black history, much of it written by Blacks themselves despite the comparatively small number of Black professional historians. John Hope Franklin, one of the most highly respected Black professional historians, began his career during the transition to the modern civil

¹¹ Woodward, *The Future of the Past*, 29–52, contains useful insights about the evolution of Black history, including a quote from W. E. B. Du Bois (1877–1965), a renowned Black activist and historian. Du Bois criticized Charles A. Beard (1874–1948), an equally distinguished white historian famous for historical works that focus on the relationship between economics and politics, as lacking any consciousness that the historical treatment of Blacks involved moral questions.

rights era. Over several decades Franklin wrote extensively on the Civil War and Reconstruction era, incorporating the contributions and experiences of Black Americans without diminishing the importance of the fact that white Americans controlled the political, social, and economic spheres throughout that period. Franklin's *Reconstruction After the Civil War* emphasized the “counter-Reconstruction” that erased the postwar reforms and replaced them with racially biased laws that locked Blacks in the position of second-class citizens for almost a century.

In “What the Historian Owes the Negro,” an article published in the *Saturday Review* in 1966, historian Benjamin Quarles articulated his fellow Blacks' ongoing desire for additional works by Black historians. As Quarles explained, “Emergence of long obscured facts of Negro history brings with it the challenge to develop new perspectives on this nation's past.” Quarles also added an additional insight, “Manuscripts that challenged deeply held beliefs about the Negro have not been welcomed by publishers, who have not wished to antagonize potential white buyers.” Quarles explained that the process of reexamining the nation's past would be painful, forcing Americans to reevaluate the meaning of their most revered tenets of liberty and equality in light of years of government-sanctioned entrenched racial prejudice. Benjamin Quarles's carefully researched and well-written monographs covering the Black experience greatly contribute to the nation's enlightenment, earning numerous academic awards and a large and diversified readership. Quarles's *The Negro in the Civil War*, *Lincoln and the Negro*, *Black Abolitionists*, and *Black Mosaic: Essays in Afro-American History and Historiography* exemplify the outstanding scholarship written by Black historians in the last half-century.¹²

Although Black writers evidenced a very early interest in researching and writing the history of Blacks in California, most of these aspiring authors lacked the professional training necessary for the task. Reportedly

¹² John Hope Franklin, *Reconstruction: After the Civil War* (Chicago: The University of Chicago Press, 1961); Benjamin Quarles, “What the Historian Owes the Negro,” *Saturday Review*, no. 49 (September 3, 1966), 10–13 and also by Benjamin Quarles, *The Negro in the Civil War* (Boston: Little, Brown, 1953; New York: Da Capo Press, Inc., 1989); *Lincoln and the Negro* (New York: Oxford University Press, 1962; New York: Da Capo Press, Inc., 1990); *Black Abolitionists* (New York: Oxford University Press, 1969); and *Black Mosaic: Essays in Afro-American History and Historiography* (Amherst: The University of Massachusetts Press, 1988).

one of the most dedicated researchers of the history of Blacks in California was a Black woman and former newspaper reporter Delilah Beasley,¹³ writing just after World War I, who unfortunately did not adequately document her extensive research. By the end of the 1960s, universities across the country were matriculating a proud generation of skilled Black historians, yet their numbers remained small compared with the opportunities for historical investigation. As the sub-discipline of Black history came into its own, Black and white historians acknowledged the importance of working together to include various perspectives in order to provide a balanced view of history. Yet, the task was made more difficult by the fact that the *very* tools of the trade — the personal letters, local and state documents, old newspapers, official statistics, federal census reports, and the like, either had never adequately documented the Black experience or had not been carefully archived and cataloged with preserving the Black experience in mind. Fortunately, for researchers of California history, guidebooks and indexes were forthcoming detailing the expanding inventory of the essential historical documents placed in the various archives and depositories.¹⁴

While much is being published on the history of California Blacks, rather than focusing on the early Black community of San Francisco, the bulk of the studies focus on later developments in the larger Black communities of Oakland and Los Angeles. The years surrounding World War I, World War II, and the modern civil rights movement attract more interest than the Civil War and Reconstruction era.¹⁵ In the fall of 1996, *California History*, the official magazine of the California Historical Society, published a special edition to “examine the nature, scope, and significance of the African American presence in California.” Historian Shirley Ann

¹³ Delilah L. Beasley, *The Negro Trail Blazers of California* (Los Angeles, 1919; reprint, New York: Negro University Press, 1969).

¹⁴ James de T. Abajian, comp., *Blacks and Their Contributions to the American West: A Bibliography and Union List of Library Holdings Through 1970* (Boston: G. K. Hall & Co., 1974) and James de T. Abajian, comp., *Blacks in Selected Newspapers, Census, and Other Sources: An Index to Names and Subjects* (Boston: G. K. Hall & Co., 1977).

¹⁵ For example, Albert S. Broussard, *Black San Francisco: The Struggle for Racial Equality in the West, 1900–1954* (Lawrence, Kansas: University Press of Kansas, 1993); Lawrence P. Crouchett, Lonnie G. Bunch, III, and Martha Kendall-Winnacker, *The History of the East Bay Afro-American Community, 1852–1977* (Oakland: Northern California Center for Afro-American History and Life, 1989).

Wilson Moore, editor of the special edition, acknowledged the work of the leading experts in the field such as Douglas Daniels, Rudolph Lapp, Albert S. Broussard, and Kenneth G. Goode, but nonetheless articulated the need for additional research on California Blacks — particularly work that focuses on “African American cultural expressions,” “economic, political, and social dynamics,” and “community-formation in the Golden State.”¹⁶

Hush, Hush, Miss Charlotte begins to address this insufficiency in the historical record by concentrating on multiple aspects of the civil rights struggles initiated by the Black community of San Francisco during a critical period of grave national political and social change. *Hush, Hush, Miss Charlotte* follows San Francisco’s Black community throughout its first twenty-five years, disclosing the way Blacks repeatedly turned to each other to gather sufficient strength to battle discrimination. It follows their legal battles seeking justice, and emphasizes their faith in the new Reconstruction-era Constitutional amendments. *Hush, Hush, Miss Charlotte* lays the groundwork for consideration of the significance of the struggles and accomplishments of this early generation of Blacks in light of the modern civil rights movement and the evolution in the U.S. Supreme Court’s interpretations of the Thirteenth, Fourteenth, and Fifteenth Amendments. It also follows the evolution of discrimination from the perspective of the white community, detailing their use of illegal force, economic power, social custom, and law. In essence, *Hush, Hush, Miss Charlotte* is an historical narrative, meant to be enjoyed for the story it tells, even as it presents an informative and analytical interpretation of important historical issues.

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¹⁶ Shirley Ann Wilson Moore, “African Americans in California: A Brief Historiography,” *California History* 75 (Fall 1996): 194–97. For works by Daniels, Lapp, Broussard, and Goode, see the Bibliography for *Hush, Hush, Miss Charlotte*.

Chapter 2

A PICTURE WORTH A THOUSAND WORDS:

A Cartoon for Miss Charlotte

As a white male practicing law in mid-nineteenth-century San Francisco, Wellington Cleveland Burnett may have marveled at the tenacity of one of his clients, Miss Charlotte L. Brown, a young Black woman who brought suit against the Omnibus Railroad Company in an effort to obtain the right to ride in the horse-drawn railed streetcars of that burgeoning port city. Surely someone made attorney Burnett and his suddenly notorious client aware of the publication of a biting critique of her actions. A curious drawing clipped from a contemporary newspaper, although yellowed and worn, retains its ability to impart to even the casual peruser a most telling glimpse of the societal values and conditions of San Francisco during the Civil War and Reconstruction era. This yellowed clipping eloquently reveals the arduous task that Miss Brown undertook in her effort to assert her own personal dignity amid the local Black community's ongoing battle for civil rights, justice, and equality.

This unidentified newspaper clipping, a detailed cartoon of the inside of a streetcar, is a direct commentary on Miss Charlotte Brown's legal struggle. The car, identified as belonging to the Omnibus Railroad's local North Beach and South Park line, is depicted with a motley assemblage of passengers. The drawing bears the heading, "THE EFFECT OF JUDGE

PRATT’S DECISION.” The artist skillfully aligned a row of passengers, seating them on a long bench that faces the center aisle and abuts the windowed exterior wall of the streetcar. The subjects were carefully posed in order to leave no doubt regarding the intended message. Glancing down the line of passengers from left to right, there is first revealed *a leering Black man* turned to face *a cowering young white lady*, who is seated next to *a large and apparently unconcerned Black man*, with *another alarmed and crowded white lady* pushed up against *a massive and observant Black woman*, who safeguards a basket and overshadows *the final passenger, a frail, older Black gentleman*, facing straight ahead and seemingly making himself as small as possible in order to avoid any confrontation over the situation.



The facial expressions and body language of these fictional characters perfectly symbolize the racist message of the accompanying text. The presence of Blacks on the streetcars will make the cars an unpleasant, unsafe, and intimidating environment for white women — those delicate repositories of virtue and all that is good in society. The editorial legend printed with the cartoon reads:

Our artist this week gives us a glimpse of that “good time coming,” when all the narrow distinctions of caste and color shall be abolished, and when our colored brethren shall come into the full inheritance of their rights, — shall sit in the cars and the dress circles of our theatres, with none to molest them or make them afraid. For the inauguration of this happy era, we are mainly indebted (under Providence) to Judge Pratt. Poor Charlotte Brown, in spite of the efforts made by the *Gaz* [Gazette] to influence the jury, only got one tithe of what she demanded as a salve to her injured feelings. She said that her sensitive feelings were hurt to the amount of \$5,000 by being led out of the car by a conductor and a jury only gave her \$500. Try again, Charlotte, you may do better next time; and above all don’t pay the editor of the *Gaz* to write editorials in your favor, it will only injure your case. You owe a lasting debt of gratitude to Judge Pratt for putting you in the way of making an honest penny. He is very partial to niggers, is the Judge, the darker the complexion the better it suits Pratt and the family. You are a

*real nigger, are you not, Charlotte? You did not use burnt cork for the purpose of gaining your point, did you? Having received \$500 from the Omnibus Railroad Company, you will, of course, think it your duty to show your gratitude by patronizing them. Invest the money in car tickets, and you may possibly have the luck to be turned out again.*¹

The cartoon's text sarcastically refers to a lawsuit filed by Miss Brown against the Omnibus Railroad Company of San Francisco for ejecting her from one of their horse-drawn street railway cars on April 17, 1863. Ironically, this was a time when many local Black men looked forward to proving their loyalty and worth as Yankee soldiers in the effort to preserve the Union.² Seeking both to undermine Confederate morale and to secure political alignment with Great Britain by mollifying British abolitionists, President Lincoln previously had given lip service to the idea of improving the condition of "the Negro" by issuing the preliminary Emancipation Proclamation (effective January 1, 1863). This token political pronouncement actually freed no slaves, but it increased the hopes of free and enslaved Blacks and added to the fears of prejudiced whites on both sides of the Mason Dixon line.³ Although the Thirteenth Amendment declaring slavery unconstitutional did not become effective until December, 1865, earlier news of the possible abolition of slavery prompted San Francisco's Black community actively to formulate a way to attack the residue of prejudice that they believed would outlast the "peculiar institution" of slavery itself.⁴

¹ CHS Scrap Book No. 3, California Historical Society, San Francisco. The clipping carries no information as to the name of the originating newspaper or publication date. "S.F. — Negro. From: CHS Scrap Book No.3 page #76" has been typed in the margin. Considering the reference to the *Gaz*, the paper may have been the *California Police Gazette*, a paper published in San Francisco from 1859 through 1865 and usually embellished with elaborate woodcut illustrations.

² "Arming the Blacks," *Pacific Appeal*, August 16, 1862.

³ For a discussion of Lincoln's political motivation and personal reluctance to issue the Emancipation Proclamation, see Benjamin Quarles, *Lincoln and the Negro*, 165–67 and Richard N. Current, "The Friend of Freedom," *Reconstruction: An Anthology of Revisionist Writings*, ed. Kenneth M. Stampp and Leon F. Litwack (Baton Rouge: Louisiana State University, 1969), 25–47.

⁴ "The Visibility of Prejudice," *Pacific Appeal*, April 26, 1862.

This polemical newspaper cartoon is testimony to the state of race relations in San Francisco during the Civil War and Reconstruction era. The cartoon's caption endeavors publicly to humiliate Judge Pratt of California's 12th District Court for his alleged partiality to Blacks, even as it belittles Charlotte Brown's attempt to obtain justice in the courts. The writer prods Charlotte to reconsider any further efforts at legal redress in light of her own vulnerable position as a social inferior to the dominant white race. Yet, he dares her to purchase more tickets and then attempt to ride the streetcars again. The writer need not have bothered to challenge Miss Charlotte. Assured of family support and aware of related efforts within the Black community, Miss Charlotte L. Brown was not about to be silenced by a newspaper's cartoon or by its faceless subscribers.

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*Epilogue:***MISS CHARLOTTE TAKES HER
RIGHTFUL PLACE IN HISTORY**

In April 1893, a time when the cable car that had replaced the street railroad was in turn being replaced by the electric trolley, Edward F. Drum, reportedly the first conductor employed on San Francisco's first horse-drawn street railroad, gave an interview to a reporter from the *Morning Call*. Drum talked about his experiences as an employee of the Omnibus Railroad Company. He claimed to have a multitude of anecdotes, "both thrilling and ludicrous" that he could relate about those past times.¹

Drum explained that he had been one of the early California pioneers, having come west across the plains from Lancaster, Ohio. He took a job driving a stage [old-fashioned omnibus] "on the only route there was then along Third street to North Beach and South Park." Then, he switched to the railed horse-drawn streetcars when the first one was instituted in the city. After serving as a conductor for the Omnibus Railroad, Drum accepted a position as assistant superintendent for that same street railroad, working under Mr. Gardner. He served in that capacity for thirteen years. Later, Drum sat in the California legislature as a state senator. Drum related that, in the early days, there was always something interesting happening, but

¹ "San Francisco's First Things," *Morning Call*, April 9, 1893.

that he specifically remembered two occasions that were rather out of the ordinary. He admitted that he had taken them very seriously at the time, but had since come to laugh about them.

Edward Drum explained that, early on, the company had established a rule that Blacks were not to ride inside the cars. Then, one night, rather late, when he was driving along with the car empty, he was hailed by a Mr. Brown who used to run a livery stable and who, Drum believed, was the father of the younger Mr. Brown, the editor of the *Vindicator*. The elder Mr. Brown entered the car in the company of “three colored women, his daughters, his son, James E. Brown, and his son-in-law named Dennis.” It was “a wet, drizzly, nasty night” and Drum decided to let the women ride inside the car. But, when Drum approached the elder Brown, probably feeling magnanimous for allowing the women to take a seat, Brown refused to exit to a place on the platform as ordered. Instead, Brown inquired, “Why isn’t there room here?” Then, when Drum acknowledged that, indeed, there was room but that the company forbade such liberties, Brown replied that Drum would have to throw him out. Hence, Drum, although a man of small stature, took Brown by the lapels and jerked him forcefully down upon the nearest seat. The Black man came down with such force that he broke a window!

In response to the commotion, the Black women began to scream. From the way in which Drum related the incident to the reporter it is evident that the conductor had been surprised and alarmed at the turn of events. It is best to allow Drum to speak for himself:

Then the women screamed out “You low white trash,” jumped off the seats and sailed into me, and they were fighters too. I can tell you. It became a regular free fight for awhile with the whole gang on me. Sometimes I was on top and sometimes I was underneath. The air for awhile was full of petticoats and legs and arms flying around like a windmill. All the windows in the car were smashed to atoms and my clothes were badly torn, but I was determined I would not give in. I was going to show them who was the boss of that car, and finally after a hard tussle I succeeded in getting them all out, but the car was so badly damaged that it had to be hauled

up for repairs and cost the company a tidy little sum to put it in shape again.²

As the promised second exciting incident, Drum explained to the reporter what happened subsequently. He continued:

A result of this incident was a suit against the company, in which it was contended for the first time in this city that under the fourteenth amendment to the constitution colored people were entitled to ride in cars that were common carriers. This contention was upheld by the courts.³

Apparently, the incident to which Drum referred was the catalyst prompting Miss Charlotte's father to instigate his own lawsuit against the Omnibus Railroad. If so, Drum seems to have combined Charlotte's original suit with her father's case and prematurely inserted the Fourteenth Amendment as a legal factor. Probably, the incident that Drum described is actually the one that drove the Omnibus Railroad Company to offer James Brown the lucrative monetary settlement about which so many people have gossiped. In her suit, Charlotte Brown originally sued the Omnibus Railroad for \$5,000, and, ironically, that is the exact amount that James Brown is credited with getting when he settled his own lawsuit.⁴

Drum may have gotten a few details confused, but on one thing he was right on target. The Brown family was in the forefront of litigation that resulted in the local courts acknowledging that Blacks had full rights to ride common carriers, and Drum, as a former state senator, was not the only political figure to acknowledge this fact.

Senator Charles Sumner, the renown abolitionist and faithful spokesman for Black rights, once used Miss Charlotte Brown's lawsuit to underscore an argument for passage of his latest attempt at civil rights reform. His comments became part of the official Congressional record. During the second session of the 38th Congress, in February 1865, Senator Sumner took the floor to introduce a bill to repeal the charter of the Washington and Georgetown Railroad. He explained that when Congress previously

² Ibid.

³ Ibid.

⁴ Thurman, 8.

granted that charter, it had reserved the right to alter, amend, or repeal it at will. Then, the senator explained the reason behind his request:

The present proprietors of that charter, acting under it, insist daily upon outraging the law of the land, as that law has been declared in this Chamber by eminent Senators again and again to the effect that no corporation is justified in any exclusion from a public conveyance on account of color. That, sir, is the law of the land; but in the face of that positive principle, this successful, rich, and pampered corporation insists upon outraging it daily.⁵

Next, Senator Sumner read an excerpt from an undisclosed newspaper that reported on a recent ejection of an eighteen-year-old Black woman because a fellow passenger, a white woman, complained to the conductor and identified the “whiter and fairer” passenger as a Black woman. Sumner also told of a recent incident in which the local street railroad had ejected a Black soldier, in uniform, from the cars when a female former-rebel complained of his presence. Then Senator Sumner turned to his fellow senators to declare:

There is evidence of this outrage. I have said that the law has been often declared in this Chamber, but it has been declared also from the courts. I have in my hand the opinion of a judge in California, . . . I should like to call particular attention to the able and emphatic statement of the law by this learned judge in San Francisco . . . who I name to honor, Judge O.C. Pratt.

Whereupon, Senator Sumner quoted Judge Pratt as follows:

“That the plaintiff is one in whose veins flows blood of the African race, or whose skin has a darker color than the majority of other human beings with whom we are daily surrounded in life in no respect impairs her rights, nor do such blood and color, in any manner, place her outside of the protection of courts and juries when invoked to redress her alleged injuries.”⁶

Senator Sumner continued to read Judge Pratt’s words, revealing that the judge had directed the jurors on their duties in Miss Charlotte’s case. Pratt

⁵ *Congressional Globe*, Second Session of the 38th Congress, 915.

⁶ *Ibid.*, 916.

told the jurors that, if they believed the evidence given by the defense, then they were bound to find the plaintiff guilty.

Furthermore, the judge instructed the jury that if they found that the railroad's employee had willfully inflicted pain and suffering on the plaintiff then they could grant both pecuniary and punitive damages. Finally, Senator Sumner asserted the following declaration addressed to Senator Conness of California:

Sir, that is the common law laid down by a learned judge in California. I thank that State on the Pacific for teaching us here in Washington the law of the land.⁷

Senator Sumner explained that the California jury found for the defendant and awarded a fine of \$500 damages. Sumner said that he would like to see the Washington street railroad pay \$500 for every racially-motivated ejection case. He also asserted that if the Washington Railroad failed to mend its ways, then Congress should simply revoke its charter. Congress decided not to vote on Senator Sumner's proposal that day, but not before another senator had voiced the following retort:

Considering the amount of the legislation of Congress which is devoted to this negro race, it is time it should stop and that the poor degraded white should have some consideration.⁸

That insensitive and prejudiced remark was uttered in Congress early in 1865. By early 1877 many a white American would agree with that mean-spirited remark; but, in 1865, and for a handful of years to follow, there was a sufficient number of political radicals still in the nation's capital who steered additional Reconstruction reforms through Congress despite such opposition.

During the years that the nation struggled to reconstruct its federal alliance, California's Black activists responded to national issues by turning their attention to matters of suffrage, citizenship, and education. For a while, it was just "business as usual" for the street railroads largely because the California Supreme Court overruled Judge Pratt in the Turner and Pleasants cases on the issue of punitive damages. The proliferation of

⁷ Ibid.

⁸ Ibid.

ejection suits in the 1860s produced such small damage awards that the issue easily could be ignored by the street railroad companies if they so chose. Almost a decade of litigation failed to produce sufficient motivation for the street railroad industry to change its prejudicial policies.

The “Rules and Regulations for Conductors of the Omnibus R. R. Company, San Francisco, Cal.,” published in 1873, contain a host of company mandates that bear the approving signature of Superintendent Gardner. Conductors were not allowed to sit while on duty. They were ordered to walk the horses around curves and to call out the names of the streets as they were passing each intersection. Conductors were admonished not to permit smoking inside the cars, but to be “civil and attentive to passengers, giving proper assistance to ladies and children getting in or out.” Conductors were reminded to “never start the car before passengers are fairly received or landed.” There were joint rules for Conductors and Drivers that concentrated on safety and maintenance of schedules, including two pages of “Laws and City Orders,” extracted from the Penal Code of the State of California. Yet, nowhere in this official handbook can be found the company regulation, verbally put in force when the company was founded in 1862, barring Blacks from riding in the streetcars of San Francisco. Neither did the company provide a positive rule directing company employees to accept Blacks as passengers.⁹ It appears that despite public attempts to hush the protests of Miss Charlotte, it was the Omnibus Railroad that ultimately chose to be officially silent on the matter of Black access to its cars.

Charlotte Brown’s suit against the Omnibus Railroad did not end the discriminatory practices of San Francisco’s street railroads. Long after it became quite clear that common carriers were legally required to transport anyone willing and able to pay the fare if reasonably expected to obey the legal rules of the line, Blacks were occasionally removed by force when attempting to assert their right to ride. During the hiatus between Charlotte Brown’s suit and the U.S. Supreme Court’s approval of separate but equal standards in 1896, Jim Crow proved to be just as stubbornly supported by attachments to prejudicial custom as it had been before the Reconstruction reforms brought previously legitimizing laws and customs into question.

⁹ “Rules and Regulations for Conductors of the Omnibus R. R. Company, San Francisco, Cal.” (San Francisco, 1873), Manuscript Collection, F869S38055BL, Bancroft Library, University of California, Berkeley.

Before and after the Fourteenth Amendment was ratified, Jim Crow was alive and well in California, and as the school test case proved, monetary considerations proved a stronger weapon against Jim Crow.

Traditionally, when historians analyzed the Reconstruction era, they focused on the South. It is only more recently that a few scholars have investigated circumstances in the North or the Mid-west. Thus, Miss Charlotte Brown's valor and determination, for the most part, have gone unnoticed and uncelebrated in all but the most specialized histories. With the new interest in western history, and with the continued investigation and exposure of Black history and women's history, the importance of such individual struggles for justice, across the nation, may finally be recognized and applauded. Yet, seldom will an investigation of one individual incident provide sufficient insights to understand the larger struggle. Taken alone, Miss Charlotte Brown's ejection experience would only hint at the local Black community's decades-long determined resistance to entrenched ignorance and prejudicial restrictions. Placed in context, preceded by the battle for testimony rights, accompanied by William Bowen's, Emma Jane Turner's, and Mary Ellen Pleasants's lawsuits, and followed by Mary Francis Ward's assault on the closed door of the schoolhouse, Miss Charlotte's fight for justice and the right to ride the San Francisco streetcars reveals its true significance.

Looking at the San Francisco Blacks' quarter-century of civil rights struggles in a vacuum of Blacks' only experiences is misleading. The other components of San Francisco's polyglot society demand attention as well. Even a swift consideration of the white community's treatment of other groups that historically have been targets of oppression helps to focus the Black community's experience. Comparing the prejudiced treatment of various ethnic or religious groups (such as the Indians, Mexicans, Chinese, Irish, Jews, or Catholics) reveals that San Francisco's white community usually considered its Black population of minor concern when compared to other "inferior" or "undesirable" people. More detailed investigations of the Irish and Chinese experiences reveal that political and economic circumstances greatly influenced, both the white community's prejudicial attitudes toward any particular group, and each group's ability to fight back. In San Francisco, first, the Irish, then the Chinese, were targets of physical violence and determined prejudiced treatment.

During the vigilante years the Irish were persecuted, hanged, and banished. As San Francisco's economic situation stabilized and even prospered, the once-hated Irish Catholic community was welcomed as a productive component of the white community. In turn, the Chinese suffered increasing oppression after they were no longer needed to build the transcontinental railroad. Despite continued litigation and demands for equitable treatment and promised civil rights, the local Black community never suffered the concentrated rage that the Irish and the Chinese endured at the hands of the local whites. Yet, the potential for just such treatment was always present — making the Blacks' continued demands for justice all the more remarkable.

Consideration of the dynamics between the oppressed groups produces troubling insights. Locally and nationally, the Irish community often instigated oppression against Blacks instead of recognizing their shared experiences as targets of the larger white community's resentment and prejudice.

Studying the motivations and tenacity of both the white power brokers who resisted change and the handful of whites who worked with the Black community to accomplish reform provides valuable insights as well. This study is unusual for the scope of its investigation into the backgrounds and motivations of the white judges, jury members, lawyers, and financial leaders that influenced community values in San Francisco. Looking at Peter Donahue's life discloses the driving ambition that motivated and consumed a considerable number of the era's white entrepreneurs. A look at the merchant-led Vigilance Committees and their subsequent political participation underscores the power of money and discloses the potential threat inherent in such concentrated power. The participation of such a large number of merchants as jury members for the ejection cases after years of merchant-class neglect of such duties documents the growth of that power.

An in-depth study of Peter Donahue's life reveals that the streetcar industry leader preferred a more subtle form of influence — such as employing only white workers for the various enterprises of his expanding empire, and contributing to the political career of his crony, Eugene Casserly. On the other hand, the Irish senator was unabashedly overt in his hatred of Blacks. Casserly purposefully attempted to block enforcement of the Reconstruction amendments in as determined a manner as he earlier

had tried to prevent Miss Charlotte from riding the Omnibus Railroads streetcars in peace.

Charlotte Brown's stubborn fight to ride the street railway cars of San Francisco was one of the earliest instances of Blacks' determined fight to attain redress in the courts of American justice. She was in the vanguard of a long procession of Black women and men who risked physical danger and public humiliation from the threats and taunts of prejudiced whites, many of whom, like Senator Eugene Casserly or entrepreneur Peter Donahue, greatly influenced or controlled the political, financial, and social institutions of the local and national communities. In their struggles for reform the members of the Black community were joined by a small number of determined whites as well, with outspoken advocates such as Judge Pratt and Attorney Dwinelle leading the assault. As the individual stories of each of these resolute men and women reveal, the struggle for justice and equality crossed gender lines, racial barriers, and class strata, with the ranks of the militant reformers open to Black and white, male and female, rich and poor.

In California, Charlotte Brown, Emma Jane Turner, Mary Ellen Pleasants, William Bowen, and Mary Francis Ward were joined by Peter Anderson, Philip Bell, James E. Brown, Thomas Starr King, Wellington Cleveland Burnett, Judge O.C. Pratt, Judge Samuel Cowles, and John W. Dwinelle. The Black recruits outnumbered the whites, but an assortment of Californians fell in step with Miss Charlotte Brown to take their place in front-line positions in their individual battles in the collective struggle for reform. They each earned the right to be accorded membership amid the pantheon of civil rights activists who engaged in the centuries-long fight to force the American nation to live up to its self-proclaimed declarations of freedom, justice, and equality for all.

This study is a comprehensive analysis of twenty-five years of civil rights struggle led by a determined group of Black and white activists in San Francisco during the Civil War and Reconstruction era. This narrative, when considered in conjunction with related historical studies, provides abundant data for comparative analysis of similar struggles in other localities, in other regions, in other years. Many of the circumstances and actions experienced by the San Francisco residents during this unusual time in American history were replicated by other Americans whether at the

same time, before, or after. This is certainly true of the Black community's efforts to ride the streetcars or to access the public school system. Other events and experiences, such as the interaction with the Chinese community or the Vigilance Committees were unique to this time and place. One broad generalization is readily evident — the apparently-endemic prejudicial attitudes of white Americans concerning Blacks and other “inferior” groups were shared by the majority of white Americans throughout this twenty-five-year period and beyond. A hundred years passed before Miss Charlotte Brown's dream became Rosa Park's reality. In the interim, that dream was not forgotten. By striving to understand these San Francisco activists' stories and experiences, hopefully we may be better prepared to do our part in the struggles against prejudice, ignorance, and hate. Some day, perhaps the American dream of justice and equality for all will actually be a reality.

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WITH BALLOTS AND POCKETBOOKS:

Women, Labor, and Reform in Progressive California

DANIELLE JEAN SWIONTEK*

This selection from Danielle Swiontek's Ph.D. dissertation (History, University of California, Santa Barbara, 2005) is presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at <https://dissexpress.proquest.com/search.html>.

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INTRODUCTION

This dissertation examines the activism of California women around suffrage and reform during the 1910s and 1920s. Although it begins with the 1911 suffrage campaign, it is more than a story of suffrage. It is a story of Progressivism, domestic reform, organized labor, and understandings of political economy. The sixth state in the nation to enfranchise women, California enacted woman suffrage in 1911, nine years before the passage of the Nineteenth Amendment. As a result, women exercised the right to vote at the height of the state's Progressive movement, making it a unique moment for reform, women's activism, and an evaluation of suffrage. In many ways, I argue, the importance of the suffrage campaign for California women lay less in their attainment of voting rights than in their development of a vision of society and a reform agenda. [Were I to write this work today, in 2021, it would be much less Anglo-American centered and more inclusive of the diversity of California's history, but it is published here as a work of its own time.]

More than simply advocating women's rights, California suffragists grappled directly with the construction of industrial capitalism as they sought to create an ideal society. In pursuing a "better" California, they developed a number of strategies and arguments for reform, turning to both

legislation and consumption in their efforts to harness the power of the state and the marketplace to restrain the worst excesses of industrial capitalism. Although some of the legislation pursued by activist women can be seen as “maternalist,” aimed at protecting women as mothers and potential mothers, in reality these laws came out of broad concerns with social and economic equity for both men and women. Similarly, California women’s consumption efforts sought to deal with pressing problems of the industrial order, particularly the high cost of living, the growth of monopoly, and state prosperity. This commitment to social and economic justice continued into the 1920s, halted only by the paralyzing effect of the postwar Red Scare and the increasing political conservatism of the decade.

At the heart of this study are a number of questions about California women’s use of suffrage as means of both social criticism and political mobilization specifically and the challenges of translating a vision of reform into political activism more generally. Utilizing collections located at UCLA’s Special Collections, the Huntington Library in San Marino, California, the Bancroft Library at UC Berkeley, and the Labor Archives and Research Collection at San Francisco State University, the dissertation uses prominent middle- and working-class women reformers, women’s clubs, trade unions, and middle-class reform organizations in Los Angeles and San Francisco as a window into women’s broad-based reform activism. Focusing on two very different cities — Los Angeles, an open-shop town, and San Francisco, a strong union enclave — provides a comparative context that invites attention to the effect of local economic conditions, political culture, and class structure on reform efforts. To discern the public and private “faces” of California women’s suffrage and reform activism, I paid attention to the content, language, and purpose of specific records as I sought to answer the following questions. How did working- and middle-class women construct a vision of the franchise during the 1911 suffrage campaign? How did they expand on their vision of the ballot to critique the existing political economy? Once enfranchised, how did they use political strategies, including coalition-building, grass-roots mobilization, and the existing party system, to achieve their reform goals? How did they implement consumption strategies, such as union and “California” label campaigns, boycotts, and boosterism, towards the same goals? How

were these strategies affected by political successes and losses as well as by the increasingly conservative political environment of the 1920s?

In fighting for suffrage and other reform measures, California women employed both “state” and “market” arguments in rallying voters to their cause. Focused on specific legislative goals, middle- and working-class women constructed a vision of activist citizens using their ballots and pocketbooks to create a more equitable society. By voting and buying properly, informed citizens could refashion capitalism into a system that would ensure adequate food, shelter, and clothing, personal dignity, and ideal communities for all Californians. Social and economic equity rested on safe working conditions, good wages, stable homes, a social safety net, and social equality among all classes (although not necessarily among all racial and ethnic groups). For activist women, industrial capitalism in its Progressive-era form posed the greatest threat to this vision. Their goal in attaining the ballot and wielding their purchasing power, then, was to restrain and reshape the existing economic system.

California suffragists initially used the language of boosterism and progress as a way of unifying a diverse suffrage campaign and appealing to male voters’ interests in creating a “better” California. At the same time, they detailed the different kinds of women’s productive labor to justify their claims to the ballot. Women needed the vote, they frequently argued, to perform their duties to home and family. By fulfilling these obligations, enfranchised women too could help create an ideal California. Through these arguments, suffragists constructed the figure of the wage-earning woman, one who needed the ballot — and sometimes trade unions — to secure protections in the workplace. Over time, the “working woman” became a trope for discussing issues of political economy. Suffragists warned of the dangers of “wage slavery,” the evils of monopoly, and the threat of unrestrained industrial capitalism to the republic. It is through this trope that suffragists presented their critique of the state’s political economy and laid out a framework for post-suffrage reform.

After winning the franchise, activist women turned their attention to specific reform measures to move the state towards fulfilling their vision of equity. Middle- and working-class women rallied around the women’s eight-hour day as a way of protecting women workers and establishing a precedent for a universal hours law.

Similarly, their concern with providing broad social provision to care for workers vulnerable to sickness, injury, and death resulted in a long, volatile campaign for social health insurance. Both efforts fell short, undone by ideological limitations on state provision and the heightened nationalism of World War I. As we shall see, the failure of the social insurance amendment at the polls left only mothers' pensions as its limited legacy. In the wake of the defeat of the universal hours law, the women's eight-hour day persisted as an important political symbol in California, although it was ultimately undone by the state's "reactionary" governor, Friend Richardson. Rather than a victory for the protection of women and children, this ostensibly "maternalist" legislation represented the failure of activist men and women to achieve their reform goals.

In addition to pursuing legislative reforms, California women attempted to use the power of the marketplace to reshape capitalism. Recognizing the potency of politically minded purchasing, suffragists maintained that, with the franchise, women would be more aware of the consequences of their buying decisions and thus purchase with an eye towards social and economic equality. As a complement to their efforts to secure state-provided social welfare and labor protections, women and labor activists sought to rally consumers around union and "home products" labels in an effort to counter the growth of monopoly and to protect workers. The problem, of course, was that these efforts could become disconnected from their political objectives, leaving these reform campaigns open to co-optation by opponents. With both legislative and consumption campaigns, reformers' ability to remain focused on specific political goals — and to sustain the interest of the rank-and-file — proved crucial. Even so, male and female activists found that external political conditions, from World War I to the Red Scare, from fears of Kaiserism to fears of Bolshevism, could derail even the most well-orchestrated effort.

In pursuing legislative and consumption strategies, middle- and working-class women formed alliances with predominately male organized labor groups and middle-class male reformers. As historian Kathryn Kish Sklar has asserted, women's activism in the Progressive era frequently "served as a surrogate for working class social-welfare activism." The structure of the political arena provided middle-class women with the political "space" to lobby for a nascent welfare state, Sklar suggests, while other

interest groups, especially male trade unionists, found their social welfare activism hamstrung by a conservative court system.¹ In California, however, middle-class female reformers were not acting because organized labor was excluded from the political process. Both groups actively lobbied for political reforms aimed at addressing larger concerns with class oppression and the excesses of industrial capitalism. With similar goals and an ability to mobilize rank-and-file members, the clubwoman-labor alliance proved to be a powerful force in California's Progressive-era politics. This partnership developed out of both parties' legislative efforts, beginning with the women's eight-hour day when middle-class clubwomen and male labor leaders discovered an effective political affinity. Although their broader reform goals were thwarted at times, they were able to stake a claim for the state's role in providing social welfare and labor protections for all citizens. Perhaps more important, this coalition was able to defend their reform achievements from the worst "reactionary" attacks, at least for a time. The clubwoman-labor alliance was not without costs, however. Over time, working-class women were pushed out of the political arena. Their silence on crucial legislative issues points to the ways in which social reform became increasingly focused on the needs of (white) male breadwinners. Similarly, the breakdown of this alliance in the face of growing political conservatism left their Progressive achievements vulnerable to political assaults by long-standing opponents.

California women's focus on reshaping industrial capitalism and the power of the clubwoman-labor alliance revealed itself through the wider scope of this dissertation. By connecting suffrage to reform and the women's movement to the labor movement, this study offers new understandings of the meaning of suffrage, Progressive reform, and the origins of the welfare state. Due to issues of periodization and conceptualization, most scholarship on woman suffrage and women's reform activism have tended to treat the issues as discrete topics, focusing either on suffrage or reform. A few studies have brought the two together. Historian Ellen DuBois, for example, has examined suffragist Harriet Stanton Blatch's efforts to include

¹ Kathryn Kish Sklar, "The Historical Foundations of Women's Power in the Creation of the American Welfare State, 1830–1930," in *Mothers of a New World: Maternalist Politics and the Origins of Welfare States*, eds. Seth Koven and Sonya Michel (New York: Routledge, 1993), 44–45.

working-class women in the suffrage movement and to place legislative politics at its center, resurrecting Blatch's efforts to create a third path of "constructive" feminism focusing on women's economic equality.² More recently, historian Maureen Flanagan has documented Chicago women's efforts to transform city politics based on an alternative "female" vision of municipal government that made the welfare of its residents, especially women, children, and families, its central purpose. Flanagan explores the difference that municipal suffrage made for these activist women in working for improved schools, protective legislation, garbage disposal, pure milk, and other reforms. Although Flanagan does find evidence of female alliances with particular men's groups, especially the Men's City Club, her focus is on Chicago women and their cross-class, cross-race efforts.³ My study joins this scholarship uniting women's suffrage and political activism, recognizing that the suffrage campaign itself could be a politicizing event. By examining a broader milieu, including working- and middle-class women, organized labor, male middle-class proponents and opponents, this dissertation reveals not only the power of women's alliances with male activist groups, including organized labor, but also the ways in which "women's" legislation could serve broader political functions. Like Flanagan, I find that women were central to California Progressivism, and their inclusion recasts our understanding of this reform movement.

This dissertation contributes to three broad historiographical conversations on woman suffrage, the origins of the welfare state, and the politics of consumption. Students of the woman suffrage movement have complicated our understanding of suffrage by closely examining the campaign strategies, ideological and rhetorical justifications, and regional variations in pro- and anti-suffrage campaigns, as well as women's post-suffrage political and party involvement. Rather than a story of decline or a moment of triumph (as suggested in early studies by historians Aileen Kraditor and Eleanor Flexnor, respectively), the woman suffrage movement has come to be seen as more contested ground, a site where competing notions of gender, democratic and pluralist politics, and race were played out. As

² Ellen Carol DuBois, *Harriot Stanton Blatch and the Winning of Woman Suffrage* (New Haven: Yale University Press, 1997).

³ Maureen A. Flanagan, *Seeing With Their Hearts: Chicago Women and the Vision of the Good City, 1871–1933* (Princeton and Oxford: Princeton University Press, 2002).

proponents chose deliberately to narrow their focus from broadly defined “woman’s rights” to the specific goal of suffrage, political scientist Sarah Hunter Graham has shown that suffrage organizations, such as the National American Woman Suffrage Association (NAWSA), became more hierarchical and less democratic, damping down grass-roots activism and “crippl[ing] the women’s movement after the vote was won.” As a result, woman suffrage seemed only to have brought about women’s political ineffectiveness.⁴

Early scholarship suggested that the post-suffrage decline of women’s political power also stemmed from suffragists’ shift from nineteenth-century arguments concerning “justice” to a twentieth-century emphasis on “expediency.” First developed by historian Aileen Kraditor, this framework divides suffrage arguments into those based on the premise that women had the same natural rights as men, including the right to vote (“justice”) and those emphasizing the benefits woman suffrage would bring to society (“expediency”). With the turn towards expediency, Kraditor argued, suffragists compromised women’s moral power and tainted the ultimate suffrage victory.⁵ Subsequent scholars have argued that Kraditor’s

⁴ Sara Hunter Graham, *Woman Suffrage and the New Democracy* (New Haven: Yale University Press, 1996), quote on 153; Elna Green, *Southern Strategies: Southern Women and the Woman Suffrage Question* (Chapel Hill: University of North Carolina Press, 1997); Marjorie Spruill Wheeler, *New Women of the New South: The Leaders of the Woman Suffrage Movement in the Southern States* (New York: Oxford University Press, 1993); Suzanne M. Marilley, *Woman Suffrage and the Origins of Liberal Feminism in the United States, 1820–1920* (Cambridge: Harvard University Press, 1996); Susan E. Marshall, *Splintered Sisterhood: Gender and Class in the Campaign against Woman Suffrage* (Madison: University of Wisconsin Press, 1997); and Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago: University of Chicago Press, 1995), 165–71.

The two early seminal works on woman suffrage are Eleanor Flexnor, *A Century of Struggle: The Woman’s Rights Movement in the United States*, revised edition (Cambridge: Belknap Press of Harvard University Press, 1959; revised 1975); and Aileen Kraditor, *The Ideas of the Woman Suffrage Movement, 1890–1920* (New York: Columbia University Press, 1965). In general, Kraditor depicted the woman suffrage movement as a story of decline, with suffragists sacrificing broader ideas of democratic justice for “expedient” arguments for woman suffrage, while Flexnor saw the woman’s rights movement as a “century of struggle” resulting ultimately in a hard-won suffrage victory for women.

⁵ Kraditor, *Ideas of the Woman Suffrage Movement*, 44–46, 52–74. See also William O’Neill, *Everyone Was Brave: A History of Feminism in America* (Garden City: Quadrangle Press, 1971).

model is overly reductive,⁶ noting that the two sets of arguments coexisted harmoniously as suffragists alternated between them throughout much of the seventy-year national suffrage campaign. That alternation, historian Rebecca J. Mead notes, was less a moral failing than a pragmatic response to a “political struggle” that “demanded . . . constant . . . negotiation” among various ideas and rhetorical strategies. More important for this study, Kraditor’s model and thesis, which relied on the ideas and experiences of elite, national leaders in the east, ignored early woman suffrage in the West.⁷ As a result, the difference made by a reformist political climate, such as that flourishing in Progressive-era California, in shaping women’s arguments for — and subsequent use of — the ballot has been generally overlooked.

The early attainment of woman suffrage in California thus offers a moment to reevaluate ideas and consequences of suffrage. Woman suffrage came early in the West, with Wyoming, Idaho, Colorado, and Utah all enfranchising women by 1896. In 1911, California became the sixth state to enact woman suffrage. By 1914, one territory and ten states, all located west of the Mississippi, had given the ballot to women.⁸ Relatively few historians have attempted to explain this phenomenon. Historian Alan P. Grimes, for example, placed woman suffrage in the context of the West’s “Puritan revival” that focused on cleaning up American politics through “purifying” legislation such as alcohol prohibition, immigration restriction, and

⁶ See Nancy Cott, *The Grounding of Modern Feminism* (New Haven and London: Yale University Press, 1987), 29–30; Graham, *Woman Suffrage and the New Democracy*, 30–31; Marilley, *Woman Suffrage and the Origins of Liberal Feminism*, 1–2. Even newer frameworks, such as Marilley’s description of early twentieth century suffrage thought as the politics of personal development and personal freedom, tends to obscure suffragists’ concerns with political economy, workers’ rights, and corporate capitalism and tends to overlook the still fairly vigorous socialist movement in the west during the Progressive era.

⁷ Rebecca J. Mead, *How the Vote Was Won: Woman Suffrage in the Western United States, 1868–1914* (New York and London: New York University Press, 2004), 4–5.

⁸ Kathryn L. MacKay, *Battle for the Ballot: Essays on Woman Suffrage in Utah, 1870–1896*, edited by Carol Cornwall Madsen (Logan: Utah State University Press, 1997), viii; and Sandra L. Myres, *Westering Women and the Frontier Experience, 1800–1915* (Albuquerque: University of New Mexico Press, 1982), 233–34. Western states that enacted woman suffrage were (in order of enactment) Wyoming (1869 as a territory, 1890 as a state), Colorado (1893), Idaho (1896), Utah (1870 as a territory, 1896 as a state), California (1911), Oregon (1912), Arizona (1912), Kansas (1912), Alaska (1913 as a territory), Montana (1914), and Nevada (1914).

child labor laws, while historian Beverly Beeton argued that early western suffrage resulted from political expediency, as westerners sought to attract settlers and investors, embarrass political opponents, recruit eastern suffragists' support for statehood bids, and shore up white voter dominance by pitting white women against Hispanics and new immigrants. Historian Sandra Myers, on the other hand, supported a variation of Turner's "frontier theory," arguing that the frontier's practice of social and political "innovation" and "lack of restrictive tradition" fostered the "diffusion" of woman suffrage across the West.⁹

Only a single work explains the spread of suffrage across the West or, more importantly for students of California's past, accounts for the enactment of suffrage in specific states. In that study, historian Rebecca J. Mead demonstrates that western suffragists in Colorado, Washington, California, and Nevada gained critical urban support by working through trade unions and party organizations in their successful campaigns for the ballot.¹⁰ Less concerned with how and why California women won the vote, this dissertation explores suffragists' ideas and rhetoric during the campaign, examining proponents' suffrage language, their understandings of the ballot's potential for change, and the political consequences of their rhetoric. As we shall see, suffragists relied on the language of boosterism and "civilization" to gain broad support for the reform, while simultaneously basing their claim for full citizenship rights on different notions of women's productive labor. In so doing, California suffragists both expanded and limited the meaning and power of the ballot.

Scholars of the national suffrage movement have noted a decline in women's political participation following the Nineteenth Amendment, suggesting that suffragists' narrow focus on achieving the vote somehow deprived

⁹ Alan P. Grimes, *The Puritan Ethic and Woman Suffrage* (New York: Oxford University Press, 1967); Beverly Beeton, *Women Vote in the West: The Woman Suffrage Movement, 1869–1896* (New York: Garland Publishing, 1986); and Beeton, "How the West Was Won for Woman Suffrage," 99–116, in *One Woman, One Vote, Rediscovering the Woman Suffrage Movement*, ed. Marjorie Spruill Wheeler (Troutdale, Ore.: New Sage Press, 1995); Myers, *Westering Women*, 233–34; and Mead, *How the Vote Was Won*. In the latter article, Beeton argues that the process of drafting state constitutions forced Westerners to rethink assumptions about who should have the right to vote, frequently resulting in the enactment of woman suffrage.

¹⁰ Mead, *How the Vote Was Won*, 1–4, 119–21.

them of the kind of broad political agenda necessary to wield the vote effectively. Recent scholarship suggests that suffragists' campaign strategies were not entirely to blame for the post-suffrage fall-off in female political activism. Although politics and parties opened up to include women voters, political scientist Kristi Andersen has shown, party organizations in the 1920s typically relegated women activists to subordinate roles, redrawing gender boundaries within the parties and confining female politicians to low-status positions focused on "women's" issues. The failure of women's suffrage groups to reform as a "woman's party," political scientist Anna Harvey has argued, maintained women's subordinate status in the political arena. Political scientist Jo Freeman, on the other hand, finds that political parties did make room for women following suffrage. Valued for their organizing skills and their votes, women played important roles as party workers, performing much of the difficult organizing work from grassroots to national levels. Although suffrage did not result in the immediate sharing of political power with women, Freeman argues that this early party work laid the groundwork for the political gains of 1970s "second wave" feminism.¹¹

As part of this debate over the consequences of suffrage, many historians have viewed the period before suffrage as a time of greater and more effective women's political activism. Studies of women's reform efforts in the late nineteenth and early twentieth centuries have noted middle-class women's success in attaining the passage of "municipal housekeeping" and "maternalist" legislation, such as clean milk and water laws, mothers' pensions, kindergarten movements, and minimum hours laws for women. Despite their disenfranchised status, historians have argued, middle-class female reformers successfully employed the "politics of influence" to achieve municipal improvements, early welfare legislation, and labor protections for working-class women that labor groups and other middle-class (male) reformers were unable to achieve.¹²

¹¹ Kristi Andersen, *After Suffrage: Women in Partisan and Electoral Politics Before the New Deal* (Chicago: University of Chicago Press, 1996); Anna L. Harvey, *Votes Without Leverage: Women in American Electoral Politics, 1920–1970* (Cambridge, U.K.: Cambridge University Press, 1998); and Jo Freeman, *A Room at a Time: How Women Entered Party Politics* (New York: Rowman & Littlefield, 2000).

¹² Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* (Cambridge: Belknap Press of Harvard University Press, 1992); Robyn Muncy, *Creating a Female Dominion in American Reform, 1890–1935*

California women pursued this kind of legislation as enfranchised citizens, a fact that allows a new understanding of the origins of these reforms. In examining laws such as mothers' pensions, social insurance, and protective laws for women workers, scholars Theda Skocpol, Gwendolyn Mink, and Linda Gordon, among others, have demonstrated the central role women reformers played in the construction of a "maternalist" welfare state during the Progressive era. Not only did middle-class women justify their public activism based on their duty as mothers and potential mothers, these scholars have shown, but they conceived of, lobbied for, and implemented a variety of statist welfare reforms that ultimately restricted aid to a narrow segment of poor women and their children.¹³ Although more recent scholarship on other social insurance measures, such as historian Beatrix Hoffman's work on New York's health insurance campaign, has broadened its focus to include the participation of organized labor, manufacturers, insurance companies, and policy groups — as well as women reformers — it has continued to concentrate on single welfare policies.¹⁴ Examining these policies independently has obscured the larger contemporary debates over social provision. In the process, this work has tended to overemphasize the role of particular groups, especially clubwomen in the case of maternalist legislation, concealing the contingent nature of the development of the welfare state and the more complicated nature of

(New York: Oxford University Press, 1991), Linda Gordon, *Pitied But Not Entitled: Single Mothers and the History of Welfare* (Cambridge: Harvard University Press, 1994); Lori Ginzburg, *Women and the Work of Benevolence: Morality, Politics, and Class in the 19th Century United States* (New Haven: Yale University Press, 1990); Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942* (Ithaca: Cornell University Press, 1995); Robert H. Wiebe, *Self-Rule: A Cultural History of American Democracy* (Chicago: University of Chicago Press, 1995), 165–71.

¹³ This scholarship includes Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917–1942* (Ithaca and London: Cornell University Press, 1995); Gordon, *Pitied But Not Entitled*; Molly Ladd-Taylor, *Mother-Work: Women, Child Welfare, and the State, 1890–1930* (Urbana and Chicago: University of Illinois Press, 1994); Skocpol, *Protecting Soldiers and Mothers*; and Muncy, *Creating a Female Dominion*, among others. These reforms ranged from the establishment of the U.S. Children's Bureau in 1912, to state-level mothers' pension programs and birth registration drives, to the passage of the Sheppard-Towner Maternity and Infancy Act in 1921, the first federally funded social welfare program.

¹⁴ Beatrix Hoffman, *The Wages of Sickness: The Politics of Health Insurance in Progressive America* (Chapel Hill and London: University of North Carolina Press, 2000).

maternalism itself. Although maternalism frequently functioned as an effective rhetorical strategy during particular legislative campaigns, as an ideology it did not necessarily reflect the entirety of women reformers' policy agenda.

In addition to scholarship on the origins of the welfare state, protective legislation, such as women's eight-hour day and minimum wage laws, has invited the attention of students of legal, labor, and gender history. These scholars have explored the dual functions of these laws as protections for women workers and legal precedents for broader labor legislation. Legal historians have traced the twists and turns of the arguments for protective legislation, as sympathetic lawyers sought to find the constitutional basis for state "interference" in the freedom of contract between workers and employers. The winning strategy emphasized the state's social interest in protecting female workers as "mothers of the race," thereby permitting limitations on women's hours and other kinds of work.¹⁵ Legal and labor historians have also examined how labor leaders and other reformers aimed to use protective legislation as an "entering wedge" to broader, "universal" legislation benefiting the working class and especially male workers. For these scholars, state labor organizations' willingness to engage in partisan politics and legislative lobbying demonstrated a flexibility and pragmatism often absent at the national level of the American Federation of Labor (AFL). Ultimately, this entering wedge strategy foundered on maternalist ideology, as courts and lawmakers became convinced of women's need for protection, but not men's.¹⁶

¹⁵ Julie Novkov, *Constituting Workers, Protecting Women: Gender, Law, and Labor in the Progressive Era and New Deal Years* (Ann Arbor: University of Michigan Press, 2001), 77–182; David A. Moss, *Socializing Security: Progressive-Era Economists and the Origins of American Social Policy* (Cambridge and London, England: Harvard University Press, 1996), 97–116; and Melvin I. Urofsky, "State Courts and Protective Legislation during the Progressive Era: A Reevaluation," *Journal of American History* (June 1985): 63–91.

¹⁶ K. R. Willoughby, "Mothering Labor: Difference as a Device Towards Protective Labor Legislation For Men, 1830–1938," *Journal of Law and Politics* 10 (Spring 1994): 445–89; Miriam Cohen and Michael Hanagan, "The Politics of Gender and the Making of the Welfare State, 1900–1940: A Comparative Perspective," *Journal of Social History* (Spring 1991): 469–84; Elaine Johnson, "Protective Legislation and Women's Work: Oregon's Ten-Hour Law and the Muller v. Oregon Case" (Ph.D. diss., University of Oregon, 1982), cited in Holly J. McCammon, "The Politics of Protection: State Minimum Wage and Maximum Hours Laws for Women in the United States, 1870–1930," *Sociological*

More recently, feminist scholarship has used protective legislation as window into analyzing maternalism as a legal and political strategy. According to these studies, the success of protective legislation in legislative halls and courtrooms rested on gendered assumptions of women workers' physical frailties and reproductive functions, the state's interest in protecting them as mothers and potential mothers, and the belief that women were short-term workers. Feminist scholars, in particular, have noted the ways in which the ideology of maternalism discriminated against women in the long run, working to confine them to low-wage, sexually segregated jobs and limiting their access to employment-based welfare benefits.¹⁷ As insightful as this work has been, its close focus on maternalism has obscured the

Quarterly 36 (Spring 1995): 217–49; and Urofsky, "State Courts and Protective Legislation," 63–91. Urofsky notes that state courts upheld most protective legislation during this period; thus, state labor groups were not being naive in pursuing entering wedge and legislative strategies to gain high wages, shorter hours, and improved working conditions. On state labor organization's willingness to pursue legislative strategies, see Julie Greene, *Pure and Simple Politics: The American Federation of Labor and Political Activism, 1881–1917* (Cambridge, U.K.: Cambridge University Press, 1998); and Gary M. Fink, *Labor's Search for Political Order: The Political Behavior of the Missouri Labor Movement, 1890–1940* (Columbia: University of Missouri Press, 1973). For a good overview of protective legislation for women, see Alice Kessler-Harris, *Out to Work: A History of Wage-Earning Women in the United States* (New York and Oxford: Oxford University Press, 1982), 180–214.

¹⁷ Skocpol, *Protecting Soldiers and Mothers*, 373–423; Mink, *Wages of Motherhood*; Mimi Abramovitz, *Regulating the Lives of Women: Social Welfare Policy from Colonial Times to the Present* (Boston: South End Press, 1988); *Women, the State, and Welfare*, ed. Linda Gordon (Madison, WI: University of Wisconsin Press, 1990); and Miriam Cohen and Michael Hanagan, "The Politics of Gender and the Making of the Welfare State, 1900–1940: A Comparative Perspective," *Journal of Social History* 24 (Spring 1991): 469–84. The maternalist label has been used particularly to describe efforts by middle-class clubwomen to build a nascent welfare state. Historian Kathryn Kish Sklar notes Florence Kelley's use of maternalism as a legal strategy for justifying protective legislation. See Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830–1900* (New Haven and London: Yale University Press, 1995), 258–59. On working-class women's use of maternalism to gain protective legislation, see Annelise Orleck, *Common Sense and a Little Fire: Women and Working-Class Politics in the United States, 1900–1965* (Chapel Hill and London: University of North Carolina Press, 1995), 121–68. On the effects of the enforcement of protective legislation on women workers, see Holly J. McCammon, "Protection for Whom? Maximum Hours Laws and Women's Employment in the United States, 1880–1920," *Work and Occupations* 23 (May 1996): 132–64. Other scholars have examined the construction of

ways in which protective legislation was bound up with the larger political issues at the time. As we shall see, the popularity of protective legislation for women among voters and lawmakers in California had as much to do with navigating Progressive-era politics as assisting wage-earning women in the workplace.

Recent scholarship on consumption (and even President George W. Bush's exhortation, in the immediate aftermath of the terrorist attacks on 9/11, that Americans should do their patriotic duty and go shopping) has highlighted "the relationship between material culture and citizenship," the way that states as well as grassroots organizations have attempted to persuade "consumer-citizens" to use their purchasing power in politically minded ways.¹⁸ Students of consumption have typified the Progressive era as a critical period of transition¹⁹ to a "consumers' republic" beginning in the 1930s and 1940s, where citizens turned to the private marketplace, constructed and supported by the state, to pursue economic, political, and social goals for "a more equal, free, and democratic nation."²⁰ As historians Dana

a maternalist welfare state without specifically discussing protective labor legislation. See, for example, Gordon, *Pitied But Not Entitled*.

Not all scholars of protective legislation have emphasized maternalism in their analysis, although they note the ways in which the laws accommodated capitalism's contradictory needs for a cheap, female labor supply and a reproducing labor class. See, for example, Susan Lehrer, *Origins of Protective Labor Legislation for Women, 1905–1925* (Albany: State University of New York Press, 1987). For a general overview of protective legislation, see Nancy Woloch, *Muller v. Oregon: A Brief History with Documents* (Boston and New York: Bedford Books of St. Martin's Press, 1996). Woloch notes the dual purpose of these laws to protect women workers and to provide a precedent for universal labor legislation.

¹⁸ Matthew Hilton and Martin Daunton, "Material Politics: An Introduction," in *The Politics of Consumption: Material Culture and Citizenship in Europe and America*, eds. Matthew Hilton and Martin Daunton (Oxford and New York: Berg, 2001), 3, 5. See also Meg Jacobs, "The Politics of Purchasing Power: Political Economy, Consumption Politics, and State-Building, 1909–1959" (Ph.D. diss., University of Virginia, 1998), 31–32; and Charles McGovern, "Consumption and Citizenship in the United States," in *Getting and Spending: European and American Consumer Societies in the Twentieth Century*, eds. Susan Strasser, Charles McGovern, and Matthias Judt (Cambridge and New York: Cambridge University Press, 1998), 37–58.

¹⁹ Meg Jacobs, *Pocketbook Politics: Economic Citizenship in Twentieth-Century America* (Princeton and Oxford: Princeton University Press, 2005), 15–52.

²⁰ Lizabeth Cohen, *A Consumer's Republic: The Politics of Mass Consumption in Postwar America* (New York: Vintage Books, 2003), 13.

Frank, Kathryn Kish Sklar, and Margaret Finnegan have shown, effective consumption campaigns in the early twentieth century required the tight linkage of consumer behavior to specific political goals in order to motivate consumers to buy union label goods, follow National Consumer League guidelines, or support woman suffrage. Even with clear objectives, consumers, usually women, often found it difficult to seek out “approved” items.²¹

In a “proto-citizen consumer” moment, historian Lizabeth Cohen argues, Progressive-era consumption campaigns complemented reformers’ political efforts to protect workers, children, mothers, and consumers “from the dangers of an industrial and increasingly urban society.” Consumers, then, came to be seen as yet another class of citizens requiring the state’s protection. Similarly, Cohen sees in Progressive reforms like the eight-hour day, minimum wage, and even union label campaigns the beginning of organized workers’ willingness to accept “the reality of industrialized labor,” no longer opposing “wage slavery” and instead “agitat[ing] for ‘a living wage’ adequate to provide an ‘American standard of living.’” In California, consumption operated as another means to broad objectives of restraining industrial capitalism. Rather than seeking to protect consumers from corporate malfeasance, activists placed politically minded consumers on the front lines, encouraging them to wield their voting and buying power for specific political objectives. More than an attempt to get “a fair shake at consumption,” as Cohen sees it,²² these political reforms and the consumer campaigns represented a continuation of efforts to shape a just society. As historian Meg Jacobs has noted, early twentieth-century consumerism and the language of purchasing power represented an ongoing debate about “how to organize, reform, and regulate American capitalism.” The struggle over economic citizenship, combined with the simultaneous debates over state-provided social welfare, helped legitimate

²¹ Dana Frank, *Purchasing Power: Consumer Organizing, Gender, and the Seattle Labor Movement, 1919–1929* (New York: Cambridge University Press, 1994); Kathryn Kish Sklar, “The Consumers’ White Label Campaign of the National Consumers’ League, 1898–1918,” 17–35, in *Getting and Spending: European and American Consumer Societies in the Twentieth Century*, eds. Susan Strasser, Charles McGovern, and Matthias Judt (Cambridge and New York: Cambridge University Press, 1998); and Margaret Finnegan, *Selling Suffrage: Consumer Culture & Votes for Women* (New York: Columbia University Press, 1999).

²² Cohen, *Consumer’s Republic*, 21–22.

the rise of an “interventionist” state.²³ In California, Progressive activists, male and female alike, relied on both political and consumption methods in their efforts to achieve a more equitable distribution of social and economic power.

The connection between politics and consumption can be seen in the suffrage campaign nationally, as historian Margaret Finnegan has shown. In the Progressive era, she suggests, the rising consumer culture, coupled with Progressive concerns over industrial capitalism, led to arguments that women needed the ballot to protect women’s traditional roles as family purchasers as well as to counter the threat of moral degradation posed by movies, dance halls, racetracks, and other kinds of vice. Women’s politically empowered consumption could create a better world. By the 1920s, Finnegan argues, consumption had become a goal rather than a method for suffragists. By acting like consumers — shopping among candidates rather than putting forth their own agendas and representatives — female consumer-voters drained the ballot of its potency.²⁴ The seductiveness of this new consumer culture, I would argue, was less at fault than the crushing political conservatism of 1920s, which limited both legislation and consumption as means to broader political ends. In California, activist leaders found the state’s political climate stultifying, blocking their attempts at reform and fostering a kind of apathy among rank-and-file clubwomen and female trade unionists that was difficult to overcome. Nevertheless, for many California activists, consumption still held potential as a reform tool.

The dissertation consists of five chapters. Chapter One explores middle- and working-class women’s use of state boosterism and concerns about civilization’s progress in the woman suffrage campaign. In the process, suffragists developed a strategy based on symbols and rhetoric that tied women’s enfranchisement to male voters’ desires to create a “great state” of California. Although this rhetoric was effective in gaining male support, it ultimately made suffrage about something other than women’s rights — which had the potential to undermine women’s exercise of political power in the post-suffrage period. Chapter Two examines how middle- and working-class women constructed a vision for the ballot the during the 1911

²³ Jacobs, *Pocketbook Politics*, 264–65.

²⁴ Finnegan, *Selling Suffrage*, 31–32, 39–43, 171–74.

campaign and how this vision translated into a post-suffrage critique of the state's political economy. In particular, suffragists used the figure of the wage-earning woman as an accessible trope to discuss the ways in which they believed the excesses of industrial capitalism threatened the republic. Rather than "expedient" arguments, I argue, their construction of the need for justice and class uplift and the dangers of "wage slavery" rested on their understandings of women's productive labor. At bottom, suffragists made women's civic work central to the creation of a more equitable society.

Chapter Three examines the linkage of suffrage, voter registration drives, and protective legislation for women in the immediate post-suffrage period as new women voters attempted to act on their vision of economic reform. The chapter shows that protective legislation, especially the women's eight-hour day, functioned as an important political tool in balancing and appeasing the competing needs and interests of middle- and working-class women, male labor leaders, and large employers. Chapter Four uses the successful mothers' pension and failed old-age pension campaigns as a window into the efforts of female reformers and male trade unionists to attain broad-based social insurance for the working class. This chapter demonstrates that "entering wedge" victories, such as mothers' pensions, were less maternalist reforms aimed at protecting poor women and children than the result of a complex calculus of political factors. Over time, the labor-clubwoman coalition became increasingly focused on the needs of male breadwinners, squeezing out activist working-class women and reflecting a belief in traditional gender roles. Chapter Five explores how progressive-minded women and organized labor turned to consumption strategies, such as "buy California" campaigns, union label efforts, and Consumer's Leagues, to achieve their reform goals during the 1910s and 1920s. The connection between consumer efforts and clear political objectives significantly affected the success of these efforts before and after World War I.

The dissertation begins with a prologue situating the project in the context of California history and ends with an epilogue describing the implications of women's efforts to deal with industrial capitalism for California history.

By widening the lens of inquiry to include reform-minded women and organized labor in the study of political and consumer activism, this study

complicates our understanding of woman suffrage, Progressive reform, and the politics of consumption. It demonstrates that the importance of suffrage lay not simply in women's attainment of voting rights, but in their construction of a vision of society and a plan for reform. California women, allied with organized labor, sought to reshape the state's political economy to achieve a more equitable society — first through the power of their ballots and then through the power of their pocketbooks. In doing so, they challenged received historical wisdom about the maternalist origins of the early welfare state, the ultimate (in)significance of woman suffrage, and the functioning of gender and class in the Progressive era. In short, they demonstrated the centrality of women's activism in California and the West to understanding Progressive reform.

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PROLOGUE

On October 10, 1911, California became the sixth state to enact woman suffrage, joining Wyoming, Idaho, Colorado, Utah, and Washington in enfranchising women. This western trend continued, such that, by 1914, one territory and ten states, all located west of the Mississippi, had given women the ballot.¹

Although a few historians have attempted to account for this western phenomenon, only a single work explains the spread of suffrage across the west or, more importantly for students of California's past, accounts for the enactment of suffrage in a specific state.² In her study, historian Rebecca J. Mead demonstrates that western suffragists in Colorado, Washington, California, and Nevada gained critical urban support by working through trade unions and party organizations.³ In California's case, the 1911 campaign for woman suffrage found its impetus and success in the state's long history of protest and reform. Since the gold rush, Californians conceived of themselves and their state as free and egalitarian — a place “wide open”

¹ See Introduction above, note 8.

² See Introduction above, note 9.

³ Rebecca J. Mead, *How the Vote Was Won: Woman Suffrage in the Western United States, 1868–1914* (New York and London: New York University Press, 2004), 1–4, 119–21.

to financial opportunities and political and social freedoms. The protest movements that arose during the nineteenth and early twentieth centuries focused on the contradiction between the state's promise of freedom and prosperity and the constraining reality of economic monopoly. Capitalizing on the momentum of the state's Progressive movement, suffragists in 1911 tapped into the state's tradition of discontent and protest to argue for their right to the vote. As reform-minded state legislators and voters in the 1910s sought once again to expand democracy and to curb the excesses of monopoly — with the Southern Pacific railroad⁴ as the most clear and reviled symbol of economic excess — suffragists were able to lay claim to their rights as part of this new reform movement, while simultaneously framing suffrage as part of the state's history of reform and protest.

Anglo-Americans' interest in California began in the late eighteenth century with the development of a lucrative fur trade between New England and Chinese merchants with the help of Yankee, British, and Russian hunters. With the resulting near extermination of the region's population of sea otters and fur seals, California's economy turned to cowhide and tallow trade. Also profitable, the hide-and-tallow trade, more importantly, cemented in the minds of eastern Americans the idea that California was a place of potential economic bounty, if only it were "in the hands of an enterprising people." Determined to be those "enterprising people," early Anglo-American settlers arrived with commerce and profit in mind. American immigrants to northern California focused on trade and

⁴ Although before the mid-1880s, the railroad was known as the Central Pacific railroad, I will refer to it as the Southern Pacific for simplicity's sake. The transcontinental Central Pacific railroad was founded in 1861 by Mark Hopkins, Collis P. Huntington, Theodore Judah, Leland Stanford, and Charles Crocker, known as "the Big Four." To eliminate competition, the Big Four in the late 1860s gained control of the original Southern Pacific, designated to be a western transcontinental route, linking Los Angeles with New Orleans. Although they tried to maintain the fiction that the Central Pacific and the Southern Pacific railroads were under separate control, few were fooled and California newspapers generally referred to the whole system as "the railroads." In 1884, the railroad system officially became called the Southern Pacific, when the Big Four incorporated their company in Kentucky, where incorporation laws were most lax. Thus, from the mid-1880s on, the railroad in California was called the Southern Pacific. See Walton Bean and James J. Rawls, *California: An Interpretive History*, 5th ed. (New York, St. Louis, and San Francisco: McGraw-Hill Book Company, 1988), 155–57, 165–67.

merchandising; in the south, they generally concentrated on establishing large mercantile firms and acquiring land, usually through a series of strategic marriages to wealthy *Californios*. In 1845, a more significant overland migration to California began, but, before the gold rush, American settlers tended to be more attracted to Texas and Oregon, which, unlike Mexican-controlled California, were considered to be part of “the states.”⁵

With the discovery of gold, however, attitudes underwent a significant change. Gold proved to be the biggest impetus to westward immigration, and its discovery coincided with the cession of California and other territories to the United States as part of the Treaty of Guadalupe Hildago, which ended the Mexican-American War.⁶ American settlers streamed into the state. In 1849, 80,000 “forty-niners” immigrated, and by 1854 approximately 300,000 persons had moved to California.⁷ Most were young married men who hoped to make their fortunes in the gold mines and return to their places of origin.⁸ In contrast to this rapid immigration in the north, southern California was largely unchanged by the gold rush. Culturally, the region remained a Spanish-Mexican territory, with Spanish as the primary language for both spoken and written communication. Throughout the 1860s and 1870s, Los Angeles remained essentially a small Mexican town, and the surrounding “cow counties,” for the most part, lay undeveloped and uninhabited.⁹ White Americans’ focus stayed to the north and on gold.

Despite this population explosion and the land’s legal cession to the United States, California lacked a formal government from 1848 to 1850, although it was nominally under military rule. The region’s status as territory

⁵ Walton Bean and James J. Rawls, *California: An Interpretive History*, 5th ed. (New York, St. Louis, and San Francisco: McGraw-Hill Book Company, 1988), 56–58, 61, 65–66. Quote on 57.

⁶ Bean and Rawls, *California*, 68, 79.

⁷ Malcom Rohrbough, “No Boy’s Play: Migration and Settlement in Early Gold Rush California,” in *Rooted in Barbarous Soil: People, Culture, and Community in Gold Rush California*, eds. Kevin Starr and Richard J. Orsi (Berkeley, Los Angeles, London: University of California Press, 2000), 25.

⁸ Bean and Rawls, *California*, 92–93. According to Bean and Rawls, at the end of 1848, 6,000 miners had extracted \$10 million worth of gold. By the end of 1849, 40,000 prospectors worked the mines, and by 1852 100,000 miners lived in the state.

⁹ Carey McWilliams, *Southern California Country: An Island on the Land* (New York: Duell, Sloan & Pearce, 1946), 50.

became embroiled in the larger national debate over slavery, when white settlers drafted a constitution banning slavery. As a result, California's entrance into the union was nearly rejected by Congress as southern Senators sought to extend the Missouri Compromise line to divide the territory into slave and free states. After much wrangling in the Senate, California gained its statehood as part of the Compromise of 1850, skipping the territorial phase entirely.¹⁰

The significance of the gold rush lay not simply in easing California's entrance into the union and fostering rapid immigration, but in developing the cultural foundations for what settlers considered to be "western" ideas of freedom, liberty, and equality. For newcomers, California and the gold rush became symbols of the nation's promise of economic democracy. The gold rush suggested that anyone, regardless of class or status, could strike it rich in the gold fields. Hard work, miners believed, would naturally be rewarded with economic success, the result of one's own daring and labor; wealth, in their view, was available to all.¹¹ San Francisco residents in particular embraced these ideas, seeing their city — the gateway to the gold country — as the embodiment of unparalleled freedom, equality, and

¹⁰ Bean and Rawls, *California*, 95, 96, 101; McWilliams, *Southern California Country*, 58. Historian Sucheng Chan provides a succinct description of the problem: California's "admission into the upset the formula that had been established thirty years earlier in the Missouri Compromise — that territories would become states in pairs: one free and one slave, in order to preserve the fragile balance between free and slave states. A problem arose because California was the only state seeking admission in 1850. But its statehood could not wait until another territory was ready because the discovery of gold made Congress eager to incorporate California into the nation. Its entry as a free state was part of the Compromise of 1850, which also made New Mexico a territory and abolished the slave trade in the District of Columbia. To placate the slave-owning states, Congress passed a stringent fugitive slave law." See Sucheng Chan, "A People of Exceptional Character: Ethnic Diversity, Nativism, and Racism in the California Gold Rush," in *Rooted in Barbarous Soil: People, Culture, and Community in Gold Rush California*, eds. Kevin Starr and Richard J. Orsi (Berkeley, Los Angeles, London: University of California Press, 2000), 70. See also Spencer C. Olin, Jr., *California Politics, 1846–1920: The Emerging Corporate State* (San Francisco: Boyd & Fraser Publishing Company, 1981), 1–2, 5, 9, 12. Olin notes that the provision in the state constitution banning slavery was less an humanitarian gesture than an economic one: white miners refused to work alongside Black slaves, fearing both the social degradation of their work and the possibility that slaveholders would have "an unfair advantage" in extracting gold.

¹¹ Rohrbough, "No Boy's Play," 28.

democracy. Rapid urbanization and industrialization accompanied this sense of egalitarianism and economic opportunity, fostering an entrepreneurial spirit among miners and merchants alike. Many merchants found that the real riches lay in supplying miners with tools, housing, food, and other necessities and equipment.¹² The discoveries of oil and silver in the 1860s continued the economic expansion, attracting new immigrants as well as technological innovation and corporate investment to these capital- and labor-intensive, extractive industries.¹³

In this way, San Francisco, along with other western cities such as Denver and Seattle, became an “instant city,” arising almost overnight around mining ventures for gold, silver, and copper. The city’s rapid economic development came at a social and cultural cost, however. Instant cities, as historian Gunther Barth notes, were marked by social instability and a culture narrowly focused on the attainment of individual wealth. Inhabitants gave little thought, at least initially, to creating cohesive, stable societies.¹⁴ Moreover, the transience of population and wealth prevented broad-based civic participation in both state and local matters. As a result, in California, the more stable elites, including large farmers, ranchers, merchants, lawyers, and miners, gained unfettered influence over the state legislature and single-mindedly furthered their own political and economic interests. The concerns and needs of laborers — whether small-time miners or farm workers — received little attention.¹⁵

Nevertheless, San Francisco’s population grew quickly, from 56,802 inhabitants in 1860 to 342,782 in 1900, according to the U.S. census.¹⁶ From the beginning, San Franciscans were a diverse lot, and this heterogeneity

¹² Gunther Barth, *Instant Cities: Urbanization and the Rise of San Francisco and Denver* (New York: Oxford University Press, 1975), 6–7, 38. Despite the sense of disarray and rapid change, San Francisco did create its own urban culture, based on the experiences of the diverse group of people it attracted. Unlike rustic mining towns, urban centers like San Francisco and Los Angeles did search for “social cohesion and cultural identity,” often based on a self-conception of freedom and egalitarianism and setting them apart from eastern cities. Moreover, these cities were forced to urbanize and industrialize quickly — and to deal with urban problems common to the late nineteenth century.

¹³ Olin, *California Politics*, 15–18.

¹⁴ Barth, *Instant Cities*, 129.

¹⁵ Olin, *California Politics*, 15–18.

¹⁶ Barth, *Instant Cities*, 135.

continued into the twentieth century. Although the vast majority (94 percent) of the inhabitants were white, this “white” population was itself diverse, made up of Irish, German, English, and Italian immigrants, among others. By 1900, foreign-born inhabitants composed 30 percent of the city’s population, while 40 percent were first-generation Americans. Chinese and Japanese residents constituted just 5 percent of the city, and African Americans represented only 0.5 percent. This racial and ethnic diversity had important results socially and economically. Beginning in the 1860s, for example, anti-Asian sentiment among white working-class San Franciscans helped galvanize labor organization through “white only” campaigns. These efforts, racist though they were, paid off. By the early twentieth century, San Francisco was the most heavily unionized city on the west coast.¹⁷

Although non-elites tended to lose out in this system, the small numbers of women and Blacks actually worked to reinforce San Francisco’s self-concept as an egalitarian and “wide-open city.”¹⁸ African Americans were able to attain economic security — and sometimes amass small fortunes — working at relatively well-paying jobs, even as they experienced blatant discrimination.¹⁹ White women, although still constrained by nineteenth century limits on female employment, were often able to capitalize on a favorable sex ratio to make advantageous marriages and remarriages. Moreover, the demand for female labor as schoolteachers, boardinghouse keepers, and seamstresses in woman-scarce San Francisco meant that single women could often manage to live independently based on their own labor. A few exceptional women, such as Marietta Lois Beers Stow, managed to achieve significant prominence. Stow published and edited a

¹⁷ Mansel G. Blackford, *The Lost Dream: Businessmen and City Planning on the Pacific Coast, 1890–1920* (Columbus: Ohio State University Press, 1993), 22; Olin, *California Politics*, 23–26; Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, Los Angeles, and London: University of California Press, 1971, 1995), 262–65.

¹⁸ Barth, *Instant Cities*, 175.

¹⁹ Douglas Henry Daniels, *Pioneer Urbanites: A Social and Cultural History of Black San Francisco* (Berkeley, Los Angeles, and Oxford: University of California Press, 1990), 35–37. Daniels notes that some Black hotel workers at the Palace Hotel did particularly well based on the wise investment of salary and tips. The Palace was eventually forced to fire all its Black employees when white workers unionized.

newspaper aimed at women's industrial education and later ran as an independent candidate for California governor. Women like Stow enabled white women to imagine themselves as free and equal, at the very least, with some arguing that California's political and economic opportunities "presaged a 'golden dawn of a new era for women.'"²⁰

Los Angeles, on the other hand, grew more slowly than San Francisco and had a much more homogeneous population. Southern California did not experience its first boom until 1868, driven by the spread of the citrus industry (lemons, navel and Valencia oranges) and the "health rush" to the south. Physicians, newspaper editors, and other boosters encouraged the chronically ill and their families to move to southern California for their health. Although the cure had little basis in medical fact, it did persuade thousands to immigrate.²¹ Unlike San Francisco's diverse population, Los Angeles during the nineteenth century attracted primarily native white Americans and western European immigrants, despite its Mexican-Spanish background.²² Aggressive railroad promotions of southern California as a tourist attraction and retirement locales contributed to the real estate boom that peaked in 1887, as midwesterners, in particular, were enticed west to a supposedly beautiful and bountiful rural land. By the twentieth century, however, southern California became increasingly more urban in character, and immigrants from southern and eastern Europe, Mexico, and Japan began to join the ranks of *Angelenos*.²³ With a population of only 50,395 in 1890, by 1910 the city had 319,198 residents.²⁴ Still, the city remained largely Anglo, with 96 percent of the city considered "white." Of these white *Angelenos*, 81 percent were native-born Americans. Unlike the prospectors who traveled to San Francisco during the gold rush, Los Angeles was primarily comprised of independent farmers and small-town

²⁰ Barth, *Instant Cities*, 175–76. Quote on 176. Even by 1880, the ratio of women to men in San Francisco was still only 5 to 7. Despite the greater economic opportunity in California, wages for female workers in the west were 25 to 50 percent lower than wages for male workers in the 1880s. For more on the sheer variety of Western women's occupations, see Glenda Riley, *Building and Breaking Families in the American West* (Albuquerque: University of New Mexico Press, 1996), 137.

²¹ Bean and Rawls, *California*, 189–91.

²² Blackford, *Lost Dream*, 23.

²³ Bean and Rawls, *California*, 191–92.

²⁴ McWilliams, *Southern California Country*, 130.

midwesterners who had come to retire. The city, as a result, had a markedly middle-class flavor.²⁵

While the discoveries of gold, oil, and silver and the growth of the railroad, tourism, and the citrus industry shaped San Francisco and Los Angeles, early federal land policy profoundly affected the social, economic, and political realities of California's central valley. Beginning in 1860, the federal government began to break up early Spanish and Mexican land grants, selling California land to private individuals. The intention was not to redistribute land to small shareholders and settlers, however, and these land sales tended to concentrate land in the hands of private individuals and corporations. By 1880, wealthy individuals had purchased most of the valuable land, while the federal government gave nearly 11.5 million acres to the railroads. These grants and land sales totaled almost 36 million acres — over one-third of the state's land. By removing the most desirable property from the open market, historian Spencer C. Olin, Jr. notes, these early land transfers worked to undermine the Homestead Act in California. As contemporary critics argued, this land monopoly frustrated small independent farmers and fostered instead large-scale agriculture based on low-paid wage labor.²⁶

The development of an early form of agribusiness had important, long-term social consequences for the state. Rural areas suffered from social instability, longstanding labor problems, land monopoly, and a sharply divided social structure made up of absentee corporate owners, corporate farm managers, small farm owners, and poor migratory farm workers. In 1916, the state Commission of Land Colonization and Rural Credits acknowledged the negative consequences of the system, noting that “at one end of the social scale [we have] a few rich men who as a rule do not live on their estates, and at the other end either a body of shifting farm laborers or a farm tenantry made up largely of aliens, who take small interest in the progress of the community.” In the view of the Commission, the concentration of land in the hands of a powerful few was detrimental to society as a whole as well as to poor farmers and laborers. Moreover, migrant workers were primarily of Asian or Mexican descent, and thus the majority was

²⁵ Blackford, *Lost Dream*, 23.

²⁶ Spencer C. Olin, Jr., *California's Prodigal Sons: Hiram Johnson and the Progressives, 1911-1917* (Berkeley and Los Angeles: University of California Press, 1968), 27.

disenfranchised. Those who were American citizens frequently did not vote because they could not meet the residency or literacy requirements.²⁷

The concentration of wealth and power into the hands of a few individuals and corporations shaped California's political culture in the late nineteenth century. Although other corporations and individuals were also guilty of monopoly, corruption, and power grabs, state politics from 1870 to 1910 centered on the Southern Pacific Railroad and the reform movements its monopolistic tactics generated. The railroads received generous benefits, including land grants and rights-of-way over state land, from both the state and federal government. In addition, the Southern Pacific spent thousands of dollars lobbying legislators and generally controlled the state Senate through much of this period. Not as evil as its critics maintained, the railroad did bring real benefits to the state by "encouraging immigration, stimulating agricultural growth, fostering economic expansion, and promoting land values." In the context of the economic depression of the late 1870s, however, these benefits hurt rather than helped, or so farmers and workers argued. Small farmers protested unfair rail rates, while urban laborers blamed railroad-sponsored immigration for expanding the labor pool, resulting in rising unemployment and declining wages. Moreover, the Southern Pacific's efforts to use its political influence to protect its economic position smacked of corporate privilege and political corruption. In late 1877, small farmers and workers formed the Workingmen's Party to provide a militant political voice to their concerns, targeting both corporate corruption and Chinese workers for the economic downturn.²⁸

²⁷ Olin, *California's Prodigal Sons*, 27–28.

²⁸ Olin, *California Politics*, 30–32, 33–36, and William Deverell, *Railroad Crossing: Californians and the Railroad, 1850–1910* (Berkeley, Los Angeles, London: University of California Press, 1994), 131. The Southern Pacific's power became so pervasive that it tried to name and control every politician from the governor on down. In 1884 the Southern Pacific spent \$600,000 on influencing legislation. Other reform movements during this period also attempted to address the growing concentration of corporate power. As Olin notes, "Recovering slowly from the wounds earlier inflicted by intense internal debates over slavery, secession, and the Civil War, and from a decimation of its ranks by former Democrats who had gravitated into the Workingmen's Party, Democratic leaders were faced with a major rebuilding task. In this process of reconstruction, antimonomopolists took the lead. They assumed control of local Democratic organizations across the state and won the election of 1882. In capturing nearly every state office, all positions on the Railroad Commission, six congressional seats, and a vast majority of

In response to these protests and widespread concern over the depression and increasing corporate control, California voters took very specific action in September 1878: They called a new constitutional convention. Delegates hoped to address the problems of class division, social conflict, economic depression, and growing poverty that had accompanied the state's rapid urbanization, industrialization, and population growth. The convention highlighted Californians' fundamental belief in the importance of ensuring equal opportunity for all individuals as they attempted to address the problems of monopoly. The domination of the Southern Pacific in the state's politics and economy, the concentration of land into the hands of a few wealthy corporate and individual landowners, and political cronyism and corruption all came under fire as betrayals of American ideals. Delegates of the Workingmen's Party in particular sought to mitigate the power of large landowners and urban bankers who, in their view, had "reduced workers and small farmers to a condition of servitude and dependency." The new constitution attempted to exert public control over corporations, stock and bond markets, and rate-manipulating railroads through greater state regulation.²⁹ Although it provided for equal education and employment opportunities (to enable white women to compete more effectively against male Chinese workers), the new constitution did not enfranchise women. What limited discussion of woman suffrage there was at the convention highlighted the Party's anti-Chinese sentiment, as it centered on the potential advantages of enfranchising white women to counter Chinese-American male voters.³⁰ Ultimately, the revised constitution failed to achieve its goals. The power of the state railroad commission

the state legislative seats, the Democratic Party in California demonstrated a vital resurgence as a political force as well as the broad popularity of its antimonopoly stance." See Olin, *California Politics*, 41–44. Historian William Deverell notes that anti-railroad sentiment was central to the creation of the Workingmen's Party. See Deverell, *Railroad Crossing*, 43.

²⁹ Olin, *California Politics*, 37–39. As Olin notes, "By 1879 the population of California was approaching a million, having dramatically increased 800 percent since statehood and having become ethnically and racially more heterogeneous through continuous immigration. Moreover, 37 percent of the total population now lived in cities, such as San Francisco (with one quarter of the state's residents), Oakland, Sacramento, San Jose, Stockton, and Los Angeles." See also Deverell, *Railroad Crossing*, 60.

³⁰ Mead, *How the Vote Was Won*, 39–40.

was undermined by the co-optation of the railroad board by the Southern Pacific as well as by pro-railroad decisions of the U.S. Supreme Court. By 1880 the Workingmen's Party had lost steam, unable to attract members from the emerging labor movement and unable to sustain organizational momentum among poor, often unemployed, laborers and farmers. At the party's demise, Workingmen's members moved into the state Democratic Party, bringing with them their anti-monopoly, anti-railroad, and anti-Chinese stances.³¹

In the mid-1880s, California underwent significant economic, demographic, and political change, stemming in large part from the state's recovery from an extended recession. Rapid immigration accompanied economic recovery, as 340,000, primarily midwestern, immigrants streamed into southern "cow counties." This population growth not only helped revive rural economies, but also fundamentally altered the state's political balance, as the demographic shift also marked a shift in political power to the south. Although San Francisco remained the eighth largest city in the country at this time and fielded a powerful, united legislative bloc, southern California gained more seats at the state capitol and thus more power in state politics. In addition, the state Republican Party began to threaten Democratic control over state legislative and executive branches.³² Ultimately, San Francisco lost its economic preeminence in both the state and the west coast during this period. By the end of the 1890s Seattle and Portland began to rival San Francisco in economic ventures, while by the early 1900s Los Angeles and Oakland had gained significant ground in foreign commerce, manufacturing, and trade with the state's interior valleys.³³ Economic recovery also lessened the anti-railroad rhetoric, as voters began to worry about the effects of government involvement in the economy and encroachment on private property rights. Lower rail rates — due to competition between the

³¹ Olin, *California Politics*, 37–39. As Olin notes, "By 1879 the population of California was approaching a million, having dramatically increased 800 percent since statehood and having become ethnically and racially more heterogeneous through continuous immigration. Moreover, 37 percent of the total population now lived in cities, such as San Francisco (with one quarter of the state's residents), Oakland, Sacramento, San Jose, Stockton, and Los Angeles." See also Deverell, *Railroad Crossing*, 60.

³² Olin, *California Politics*, 45.

³³ Mansel G. Blackford, *The Politics of Business in California, 1890–1920* (Columbus: Ohio State University Press, 1977), 9.

Southern Pacific and Santa Fe railroads — also decreased animosity toward the railroads, as did the economic boom in southern California due to increased immigration and a rising real estate market.³⁴

In the mid-1890s, the return of economic depression and the railroads' continuing monopolistic practices reinvigorated antimonopoly and anti-railroad sentiments.³⁵ Farmers, urban laborers, and others joined together in the state's Populist movement, targeting the railroad and advocating a variety of direct democracy measures. California Populism grew out of the Nationalist movement and Edward Bellamy's vision of utopian socialism. In his novel *Looking Backward*, Bellamy advocated replacing private ownership of the means of production and the individual pursuit of wealth with a "nationalized, cooperative state" where public control of the economy would provide for the general good. For many Californians, frustrated with the Southern Pacific's control over the economy and state legislators, Bellamy's vision proved enticing. Nationalism clubs spread rapidly, finding particular strength in Los Angeles and San Francisco. By 1890, more than one-third of all Nationalism clubs nationwide could be found in California, with 3,500 members in 62 clubs. Despite this apparent strength, Nationalist candidates failed to win broad public support in the 1890 elections. Yet Nationalism did not disappear. Both ideas and members migrated to the new People's Party of California. In rural, economically depressed regions of southern California, in fact, many Nationalist clubs simply renamed themselves Farmers' Alliance cooperatives.³⁶

Initially, Alliance leaders chose to endorse Democratic and Republican legislators who favored their goals, but by late 1891, the growth of the state's Farmers' Alliance — approximately 30,000 members in more than 500 cooperatives — encouraged its leaders to create the People's Party to push their own political agenda. As formulated in its October 1891 platform, the People's Party advocated "government ownership of communication and transportation, woman's suffrage, and the eight-hour day on all public works." Despite its popularity among small farmers and — unlike the movement elsewhere — some urban workers, Populism was unable to garner the broad-based support necessary to win significant numbers of

³⁴ Olin, *California Politics*, 44, and Deverell, *Railroad Crossing*, 62–63.

³⁵ Olin, *California Politics*, 44, 46–47, and Deverell, *Railroad Crossing*, 63–64.

³⁶ Olin, *California Politics*, 46–47.

public offices and legislative positions. Democratic leadership was able to undercut Populist appeal in rural areas in southern and central California by supporting anti-monopoly and anti-railroad measures, while Republican candidates branded Populists as radical and dangerous. By 1896, Populism in California had largely disintegrated over its leaders' fusionist strategies with the Democratic Party and the rising prominence and popularity of Eugene Debs and his brand of socialism. Nevertheless, the state's Populist movement was important in detailing a critique of the existing political, social, and economic order and in supporting the expansion of democracy. Populist-supported direct democracy measures, such as the initiative, referendum, and recall, as well as woman suffrage, continued on in Progressive reform circles — as did anti-railroad sentiment.³⁷

Despite these similarities, California Progressivism was in many ways significantly more conservative than Populism. Rather than attempting to restructure entirely the political economy, most Progressive activists aimed to reform and stabilize the state's economic, social, and political order. Fiery rhetoric about the Southern Pacific railroad coupled with this inherent conservatism in action allowed a wide range of political perspectives to come together under the Progressive umbrella. Progressive businessmen sought to use the state's regulatory power to preserve their competitive advantages by stabilizing a previously turbulent economy. Other Progressive reformers hoped to bring about a more fair and equitable economy by constraining the forces of monopoly and opening politics to the interests and influences of "the people."³⁸ All these aims could be accommodated in a movement targeting the railroads as symbols of monopoly and corruption.

The heyday of Progressivism in California grew out of ongoing demographic changes and a shift in the balance of power from the north to the southern part of the state. Continuing the trends of the late nineteenth century, Los Angeles, and southern California more generally, made gains in population as well as economic and political power. In the early 1910s, the state's tremendous population growth — from 1,485,053 in 1900 to 2,377,549 in 1910 — was largely attributable to mass immigration to southern California. By 1910, Los Angeles' population had risen to 319,198 — a 212 percent

³⁷ Olin, *California Politics*, 47–49.

³⁸ Blackford, *Politics of Business in California*, x.

increase over the decade — and not far behind San Francisco's 416,912 inhabitants. In this same period, the San Joaquin and Sacramento valleys grew quickly, as did the populations of Berkeley and Oakland. Favorable railroad rates, coupled with the chaos following the 1906 San Francisco earthquake, helped Los Angeles merchants control the flow of goods to and from the San Joaquin Valley. San Francisco also lost out to Los Angeles and Oakland in shipping and manufacturing. By the 1920s and 1930s, Los Angeles had surpassed its northern rival in both industry and population.³⁹

This tremendous growth in the south not only undermined San Francisco's preeminent position in the state, but it also provided the impetus to the Progressive movement as a response to this rapid economic, political, and social change. Progressivism in California began as a city-based reform effort to root out municipal corruption and smash local political machines through direct legislation measures, but the movement rapidly became a statewide phenomenon.⁴⁰ Progressive reform took dramatically different shapes in the state's two major cities. In Los Angeles, a loose coalition of reformers came together to oppose the Southern Pacific's domination of the city's politics. Through the political talents of Dr. John Randolph Haynes, a wealthy physician and real estate mogul, prominent businessmen, lawyers, and journalists, along with socialists, Nationalists, and union labor leaders, joined to clean up government and attempt to create a more equitable society. (Although Los Angeles was ostensibly an open-shop town, labor unions did wield some political power, if limited economic power.) Through a Direct Legislation League, Haynes and his compatriots persuaded voters to include the initiative, referendum, and recall in the new city charter in 1903. Despite ridicule and denunciations from conservative Harrison Gray Otis's *Los Angeles Times*, Haynes and his Good Government League succeeded in throwing out corrupt city councilmen and in sweeping much of the 1906 city election. Most notably in Los Angeles, middle-class political and moral reformers were able to ally fairly successfully with working-class and socialist activists on particular issues.⁴¹ Nevertheless, labor strife

³⁹ Blackford, *Politics of Business in California*, 9–12.

⁴⁰ Olin, *California Politics*, 55, and Olin, *California's Prodigal Sons*, 6.

⁴¹ Bean and Rawls, *California*, 244–45. On Los Angeles as an open-shop town, see McWilliams, *Southern California Country*, 274–77, and Bean and Rawls, *California*, 230–34.

consumed the city from 1907 to 1910, with union organizers pitted against Harrison's *Times* and the conservative Merchants & Manufacturers Association (the "M&M" in local parlance). With the fateful dynamiting of the *Times* in October 1910 and the McNamara brothers' subsequent confession to the bombing, organized labor and socialists lost much of their political strength and credibility. Not only was the socialist candidate for mayor, who had led in the primaries, soundly defeated by the Republican incumbent, but the labor movement was almost fatally weakened.⁴²

In San Francisco, on the other hand, organized labor drove much of the city's politics and reform efforts in the early twentieth century. After limited success in organizing sailors and coastal seamen in the 1880s and 1890s, the city became a union stronghold through the early 1920s after a sometimes violent, but successful, waterfront strike in 1901. Union members formed their own political party, the Union Labor Party, and successfully ran candidates for mayor and city supervisor. Unfortunately for organized labor and the long-term success of the party, the Union Labor Party, under the control of political boss Abraham Ruef, became embroiled in the infamous graft trials beginning in 1906.⁴³ The graft trials directly manifested the Progressive impulse to end municipal corruption and, to an extent, reflected class tensions between middle-class reformers and working-class Union Labor politicians. Federal prosecutor and San Francisco native, Francis J. Heney, headed up the investigation, ultimately gaining confessions of bribery from the city's mayor and most of its supervisors. When, quite dramatically, Heney was shot in the courtroom by a prospective juror, attorney and future governor Hiram W. Johnson took over the case. Reform-minded, middle-class clubwomen added to the spectacle by attending the trials everyday in order to demonstrate the proceedings' moral legitimacy. In the end, the trials fizzled,

⁴² McWilliams, *Southern California Country*, 279–83.

⁴³ Bean and Rawls, *California*, 229–30; Michael Kazin, *Barons of Labor: The San Francisco Building Trades and Union Power in the Progressive Era* (Urbana and Chicago: University of Illinois Press, 1987), 113, 128–32, 136–39, 177–201; Lucille Eaves, *A History of California Labor Legislation with an Introductory Sketch of the San Francisco Labor Movement* (Berkeley, 1910); William Issel, "Business Power and Political Culture in San Francisco, 1900–1940," *Journal of Urban History* 16 (November 1989): 65–67, quote on 66; William Issel and Robert W. Cherny, *San Francisco, 1865–1932: Power, Politics, and Urban Development* (Berkeley, CA: University of California Press, 1986), 139–99.

as Heney and Johnson began targeting wealthy San Francisco businessmen. In 1909, voters threw out politicians favoring the prosecution for an administration pledging to end the graft trials. Despite the demonstrated corruption of Union Labor politicians, organized labor remained a potent political force in the city. In the 1911 mayoral race, pro-labor Republican James Rolph won the mayoral race and retained his seat through 1931, in large part, by pledging government support of unions.⁴⁴

California Progressivism grew out of its municipal roots to become a statewide movement largely by attacking the Southern Pacific, as reformers turned their focus from cleansing their cities to cleansing their state of the railroad's political and economic corruption. Anti-railroad activism resonated with voters in all political parties, particularly those in southern California, the San Joaquin valley, and San Francisco — a response in large part to the railroad's continual displays of monopolistic power and its disregard for individual rights and the public good. In Los Angeles, Collis Huntington — one of the Southern Pacific's Big Four — demonstrated the railroad's overreaching power in his attempt to relocate the Los Angeles harbor from San Pedro to Santa Monica, where he had extensive land holdings.⁴⁵ In the San Joaquin valley, the Mussel Slough incident dramatized for the public the Southern Pacific's high-handedness and fueled popular resentment. At Mussel Slough, farmers had settled on land that was promised to the Southern Pacific by the federal government. When the railroad finally gained title to the land and offered it to the settlers, the price was set at market value (some claimed as high as \$80 per acre) rather than the \$2.50 per acre that the Southern Pacific had paid the government. When a small group of militant-minded settlers refused to buy or to vacate the land, U.S. Marshals, at the railroads' behest, attempted to evict forcibly the settlers. The result was the "battle of Mussel Slough," ending with the deaths of seven settlers and the imprisonment of

⁴⁴ Bean and Rawls, *California*, 244; Gayle Gullett, *Becoming Citizens: The Emergence and Development of the California Women's Movement, 1880–1911* (Urbana and Chicago: University of Illinois Press, 2000), 156–57; Olin, *California's Prodigal Sons*, 10–11; and Deverell, *Railroad Crossing*, 154–55.

⁴⁵ Olin, *California's Prodigal Sons*, 5, and Deverell, *Railroad Crossing*, 94–95, 121. For a complete discussion of the Los Angeles "Free Harbor Fight," see Deverell, *Railroad Crossing*, 94–122.

five others.⁴⁶ In San Francisco, anti-railroad sentiment united, for once, organized labor and business leaders; workers opposed its anti-labor practices and businessmen its monopolistic rates.⁴⁷

This statewide Progressive campaign began as an attack on the railroads, but ended with Progressive control of the governorship and much of the statehouse. In 1907, reform-minded Republicans formed the Lincoln-Roosevelt League, with the aim of wresting control of the state Republican Party from the Southern Pacific. The League called for state regulation of railroads, the direct election of U.S. senators, and direct primaries in state and local elections. By 1908, the Lincoln-Roosevelt League directly challenged the Southern Pacific on a statewide basis and succeeded in electing one-half of Republican legislators.⁴⁸ The 1909 legislature went on to enact a direct primary bill, which prevented the Southern Pacific from controlling the nominations of state and local candidates. Candidates could appeal directly to voters,⁴⁹ which, in 1910, enabled Hiram W. Johnson to win the Republican nomination for governor.

Johnson won the gubernatorial race largely due to his fiery anti-railroad rhetoric, and his election to governor in 1910 signified for many reformers the triumph of Progressivism in California. Yet, his victory was hardly decisive. Progressive strength remained concentrated in the south. Although he squeaked out a victory in San Francisco, Johnson lost 21 out of 50 counties in the state. It was only his overwhelming victories in southern California, where he won all nine counties, that enabled him to secure the governorship. Despite the narrowness of his victory, Johnson was quick to claim a mandate for reform. In his inaugural address, he argued that “the interests’ were choking off economic and political opportunities from ‘the people’” and pledged to curb the power of special interests and monopolies to ensure an overall public good.⁵⁰

⁴⁶ Bean and Rawls, *California*, 171, and Deverell, *Railroad Crossing*, 56–57, 143–44. Although the settlers legal standing and claim to the land was murky at best, public opinion laid the blame for the incident entirely at the feet of the Southern Pacific.

⁴⁷ Olin, *California’s Prodigal Son*, 5.

⁴⁸ Olin, *California Politics*, 55, 56, 58–59, and Deverell, *Railroad Crossing*, 160–61.

⁴⁹ Olin, *California’s Prodigal Sons*, 13.

⁵⁰ Olin, *California Politics*, 59–60.

The Progressive reform agenda thus focused on expanding democracy and the regulatory power of the state through “railroad legislation, direct legislation, woman suffrage, labor legislation, and conservation.” Johnson’s most direct attack on “the interests” came in his aggressive curtailment of the Southern Pacific’s political power and economic monopoly. Through the enactment of the Stetson-Eshleman railroad bill, the state gained broad regulatory authority over the railroads, enabling the state railroad commission to establish rates for both freight and passengers. This regulatory authority was later expanded in 1911 to include all public utilities (in the 1911 Public Utilities Act). Although widely billed as a victory for all the people, this regulatory-based reform was largely conservative. State regulation of the Southern Pacific primarily benefited other large capitalists, including large farmers and ranchers, oil producers, and other businessmen. Johnson and his male Progressives sought to foster competition among corporations — not to challenge or overhaul capitalism.⁵¹ Women reformers, as we shall see, had a broader definition of reform and sought more comprehensive change in the economy. Nevertheless, Johnson’s regulation of railroads and public utilities represented a significant ideological shift away from laissez-faire attitudes of the nineteenth century and toward a centralized state government with control over business.⁵²

During his term in office, Johnson and his Progressive friends pursued legislation that followed a general Progressive framework. They sought to free government of corruption and influence by passing the initiative, referendum, and recall. They expanded democracy by enacting a woman suffrage amendment and the direct election of U.S. senators. They sought to establish a nonpartisan government by making the positions of judges, school officials, and county and township lawmakers nonpartisan. As a result, candidates for nonpolitical offices were elected on a nonpartisan basis. Cross-filing destroyed the party system, seen as corrupt, by allowing the most popular candidate to win a party’s nomination, regardless of the candidate’s party affiliation. In addition to promoting democracy and curtailing partisanship, California Progressives sought to regulate the economy to ensure the general social welfare, going well beyond the regulation of

⁵¹ Olin, *California Politics*, 59–62.

⁵² Olin, *California’s Prodigal Sons*, 172, 173.

railroads and public utilities to assist poor and working-class Californians. Progressive lawmakers passed an eight-hour law for women, workmen's compensation, mandatory periodic payment of wages, child labor laws, and mothers' pensions, as well as creating an Immigration and Housing Commission and a Conservation Commission.⁵³

In this context, woman suffrage was part and parcel of broad-based reform. State suffragists could be hopeful for their own victory when they saw other progressive and democratic measures enacted, especially "women's" legislation such as the eight-hour day, workmen's compensation, and child labor laws long supported by Progressive and Socialist women. As we shall see, women suffragists drew on deep roots of California history and protest, as well as on longstanding concerns with monopoly, democracy, egalitarianism, and other western values, to argue for their right to the ballot. Suffragists successfully placed the woman suffrage campaign in the context of California culture by using the state's cultural values and political identity to their advantage. Proponent rhetoric that suffrage was a uniquely Californian and western reform not only resonated with voters but also normalized and deradicalized their call for enfranchisement. Moreover, their critique of California's political economy resonated with businessmen and workingmen alike — both of whom sought to change and free up California's economy, albeit in different ways. Suffragists could appeal to all these currents to make their demand for the franchise appear reasonable, sensible, and Californian.

As we shall see, once enfranchised, reform-minded women used the ballot in the period of progressive reform to lobby for a wide range of legislation aimed at reshaping the state's economy. Seeking to constrain capitalism through both legislative and consumption efforts, female activists hoped to create a more equitable society for all Californians. Their successes and failures depended as much on contemporary political realities as on the power of the ballot. Nevertheless, it was through their belief in the strength of the franchise that women activists developed their broad vision of reform. The 1911 suffrage campaign proved critical to this process, and it is to this movement that we now turn.

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⁵³ Olin, *California Politics*, 65, 70.

THE CREATIVE SOCIETY:

Environmental Policymaking in California, 1967–1974

ROBERT DENNING*

These selections from Robert Denning's Ph.D. dissertation (History, The Ohio State University, 2011) are presented here as part of a diverse group of previously unpublished dissertations chosen for inclusion in this volume of *California Legal History* (vol. 16, 2021) to give wider exposure to earlier research that remains valuable for the study of California's legal history. The complete work is available at http://rave.ohiolink.edu/etdc/view?acc_num=osu1306110418.

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INTRODUCTION

During his campaign for governor of California in 1966, Ronald Reagan called for the establishment of a “creative society” where the people shared in decision-making and the need for a powerful state government would melt away. “There is much to be done in California and much that can be done by a Governor who, instead of turning to Washington for help, turns to the people and leads them in building a creative society in which we rely on their genius, their abilities, and their desires to become active participants instead of merely bystanders, in the building of that society,” Reagan wrote during the campaign.¹ Under Reagan’s opponent, incumbent Edmund G. “Pat” Brown, Sr., the size and power of state government had increased dramatically, most visibly through the construction of massive highway and water redistribution projects. Reagan argued that the oppressiveness of big government had stifled the creativity of Californians, and he hoped to bring about a revolution in the relationship between the citizen and the state. In this new relationship, legislators and

¹ “The Candidates and the Issues,” *San Francisco Examiner*, 4 November 1966, reprinted in Franklyn C. Nofziger, “Press Secretary for Ronald Reagan, 1966,” in *Issues and Innovations in the 1966 Republican Gubernatorial Campaign*, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1980, 24.

bureaucrats would work with businessmen, academics, students, professionals, and workers to solve the state's problems. Partisanship would give way to best practices. The state's hidebound bureaucracy would be replaced by innovative and dynamic problem-solving. And, once all of these groups were actively participating in this endeavor, the size, scope, and cost of state government would go into permanent decline.

In most areas of state policymaking, Reagan failed to realize his creative society. The divisive social and political issues of the late 1960s and early 1970s, including race relations, antiwar sentiment, student uprisings, welfare reform, tax policies, increased crime, and family planning, affected California as much as they did the nation at large. Reagan was unable to unite Californians over such issues, though he did bring a level of pragmatism to governance that surprised many observers.² One realm of policymaking, however, did see the harmonious cooperation that Reagan envisioned, if only for a brief time. The protection of the state's natural environment and resources enjoyed bipartisan support in the state legislature and among the state's citizens during the Reagan years. Between 1967 and 1970, Reagan and the legislature launched sweeping reforms of the state's environmental regulations and invited the participation of concerned citizens, environmental interest groups, academics, businessmen, and industrial groups. In one of the great ironies of the Reagan years, this creative society built the most powerful environmental protection agencies and instituted the strictest regulations in the nation, making government more intrusive in the personal and business lives of all Californians.

This was an exciting time in environmental policymaking. Environmental groups were energized as they had never been before, and hoped for more governmental action. Business and industrial groups began to recognize that environmental protection and increasing regulations would be part of the cost of doing business in California. Soon after Reagan took office in 1967, the legislature created the State Water Resources Control Board, which introduced quality concerns into the water allocation process for the first time. It also merged the state's stationary and vehicular emissions control programs under the Air Resources Board, which quickly became the most

² See Lou Cannon, *Governor Reagan: His Rise to Power* (New York: PublicAffairs, 2003) and Jackson K. Putnam, "Governor Reagan: Reappraisal," *California History* 83, no. 4 (2006): 24-45, for excellent introductions to Reagan's performance as governor.

powerful environmental regulatory agency in the country. After years of fits and starts, the state and federal government finally established a Redwood National Park. Governor Reagan halted the expansion of the State Water Project by canceling the construction of Dos Rios Dam on the Eel River out of concern for the destruction of the site's natural beauty. The Porter-Cologne Water Quality Act of 1969 called for fines of \$6,000 per day on polluters, the highest such fines in the nation, and forced polluters to pay cleanup costs on an emergency basis instead of waiting for court injunctions.

The state also entered the realm of regional development and land use planning. The legislature gave the San Francisco Bay Conservation and Development Commission jurisdiction over all development within one hundred feet of the bay's shoreline and gave the Tahoe Regional Planning Agency the final say over development on the California side of that lake. The California Environmental Quality Act of 1970 required the creation of environmental impact reports for new development.

The creative society that was responsible for these actions began to fracture during Reagan's second term, however. Conservatives within the Reagan administration began to recoil from the expansion of state government. The argument that environmental protections threatened jobs also gained traction among some conservatives, including Governor Reagan. Conservative interest groups arose to defend property rights against environmental regulators. Even environmentally friendly legislators became concerned with the intrusiveness of some of the state's regulatory agencies, especially the Air Resources Board. In addition, the state and federal governments waged jurisdictional battles over the enforcement of national pollution standards at the state level. These battles delayed the implementation of those standards and dispirited many Californians. The pace of legislation slowed between 1970 and the end of Reagan's second term in early 1975, but the legislature still acted occasionally with the Wild and Scenic Rivers Act (1972) and the Energy Resources Conservation and Development Commission (1974).

As the legislature and the governor backed off from the activist environmental agenda of earlier years, concerned Californians pressed on, using extra-legislative means. The locus of environmental policymaking moved from the state capitol to the courthouse and the ballot box. Environmental activists took advantage of the state's ballot initiative system and the courts

to create new regulatory agencies and to force the state and federal governments to implement existing regulations. The Coastal Initiative, for example, created a powerful new regional planning commission in 1972. That same year, the California Supreme Court broadened the reach of the Environmental Quality Act to include private and public development and a federal court forced the federal Environmental Protection Agency to play a larger role in enforcing air quality standards in California. By going around the state legislature, environmental activists played an important role in the creation and enforcement of regulations during Reagan's second term.

California established its position as a national leader in environmental policymaking during the Reagan years. The state took that lead because of popular anger toward the environmental degradation that came with the state's rapid and uncontrolled expansion after World War II, the election of a governor and legislators who were willing to establish environmental regulations beyond what industry and business believed were necessary or even technically feasible, and an activist citizenry that pursued further regulation through lawsuits and ballot measures when they believed the state government failed. This story is about the political context of environmental legislation. There is a rich historiography on California politics during the 1960s and 1970s, and there have been many studies on individual environmental programs during those years, but there have been few attempts to bring together the politics and the environmental programs. This dissertation does just that.

Much of the analysis of California politics during the 1960s and 1970s has come through biographies of important political figures. Bookshelves buckle under the weight of volumes dedicated to the life and political career of Ronald Reagan, but as Matthew Dallek pointed out a decade ago, "even the biographers rarely spend more than one or two chapters discussing his rise as a politician in the early and mid-1960s."³ In the years since Dallek lamented this fact, a number of journalists, biographers, and historians have begun to look at Reagan's years as governor, focusing mostly on his role in the rise of the New Right in American politics. Conservative writer Stephen Hayward has called the 1960s and 1970s the "Age of Reagan" because of the

³ Mathew Dallek, *The Right Moment: Ronald Reagan's First Victory and the Decisive American Politics* (New York: The Free Press, 2000), x.

governor's influence on American politics during those years.⁴ Reagan captured the imagination of New Right conservatives in California through his support for Arizona Senator Barry Goldwater's presidential run in 1964, and within two years he became "the new conservative standard-bearer," according to Lisa McGirr.⁵ Dallek describes Reagan's victory in the 1966 gubernatorial election as a watershed moment in American politics. "For the first time, the conservatives learned how to push the right buttons on key issues, from race and riots to war and crime," according to Dallek. "Reagan successfully linked the liberal social programs of the '60s with disorder in the streets, and offered an alternative vision of what government should and should not do."⁶ These scholars present Reagan as an inflexible conservative ideologue. This reflects the governor's rhetoric and the image he presented at the time, and this image caused great fear and hand-wringing among environmentalists when he won the 1966 campaign.

That image did not always reflect the reality. Although Reagan is best known for leading an ideological political revolt in California in 1966 and nationwide in 1980, some recent writers have noted his pragmatism and flexibility as governor. Reagan was by no means an environmental activist but, as with many issues he dealt with as governor, he employed a pragmatic approach to solving environmental problems. The governor's "environmentalist stance" was "his most significant departure from his commitment to conservatism," according to historian Jackson Putnam. Reagan's support for stronger pollution control programs and his opposition to dam building made him "a consistent, if moderate, environmentalist."⁷ Lou Cannon, a journalist who followed Reagan's career from Sacramento to Washington, argues that the governor approached many controversial issues, including taxes, abortion, and the environment, with a willingness to compromise that ran counter to his ideological rhetoric.⁸ This dissertation uses Cannon's chapter on Reagan's environmental policies as a starting

⁴ Stephen F. Hayward, *The Age of Reagan, 1964–1980: The Fall of the Old Liberal Order* (Roseville, Calif.: Prima Publishing, 2001).

⁵ Lisa McGirr, *Suburban Warriors: The Origins of the New American Right* (Princeton: Princeton University Press, 2001), 192.

⁶ Dallek, *The Right Moment*, xi.

⁷ Putnam, "Governor Reagan: A Reappraisal," 29.

⁸ Cannon, *Governor Reagan*.

point in understanding how those issues gained legislative success during an otherwise conservative governor's watch.

Studies of Reagan's years in Sacramento now fill volumes instead of chapters, but the Reagan administration's environmental agenda rarely fills more than a few pages. With the exception of Cannon's book and Putnam's article none of the above works discuss the Reagan administration's environmental policies. Historians have failed to give the Reagan administration credit for its environmental policies. Stephanie Pincetl's description is typical: "much of the new major California environmental regulatory infrastructure had just been put into place during the last term of the Reagan Administration, a result of the combined forces of a Democratically-dominated Legislature and public concern ignited by the Santa Barbara oil spill of 1969," but "it remained for [Jerry Brown, Reagan's successor] to implement the new legislation."⁹ Such a statement downplays the support of Governor Reagan and Republican legislators, many of whom were strong advocates for environmental issues in the state legislature. Bipartisanship was a hallmark of environmental legislation during this era. Pincetl's statement also dismisses all of the legislative activity during Reagan's first term, which was much more productive than during his second term. Such statements could be a reaction to President Reagan's environmental policies during the 1980s, which were in many ways antithetical to those of Governor Reagan in the 1960s.

California never built a "single, statewide, super-environmental agency to handle all problems from pollution to conservation, land use planning and environmental quality" during the Reagan years. "Instead," according to one environmental critic, "California attempts to protect its environment through single-purpose agencies, with clearly defined spheres of responsibility for each element in the resources picture."¹⁰ Scholarly studies of environmental policymaking in California suffer from the same problem. Historians and political scientists have looked at many individual state agencies during the Reagan years but have failed to produce a general synthesis of the implementation of environmental legislation. We have seen

⁹ Stephanie S. Pincetl, "The Environmental Policies and Politics of the Brown Administration, 1975-1983," Ph.D. diss., University of California, Los Angeles, 1985, 26-27.

¹⁰ Ed Salzman, ed., *California Environment and Energy: Text and Readings on Contemporary Issues* (Sacramento: California Journal Press, 1980), 7.

studies of the San Francisco Bay Conservation and Development Commission, the Air Resources Board, the California Coastal Commission, and the Tahoe Regional Planning Agency, for example, but these studies rarely mention or provide comparisons to any of the other agencies or policies.¹¹

To rectify this, this project compares the state's experiences in establishing and implementing environmental regulatory policies in three broad areas: water pollution, air pollution, and land-use planning. The comparison between efforts to regulate these three areas demonstrates the complexity of environmental policymaking, even at a time when environmental issues enjoyed bipartisan support. The state legislature, regulatory agency bureaucrats, and environmentalists found water pollution to be the easiest of the three problems to address. Public support for clean water was so high that affected industries and businesses refused to publicly oppose the imposition of new standards. Calls to reform the state's water pollution program gained popularity in the wake of the Santa Barbara Oil Spill in 1969, though the legislature had begun to reform the program two years earlier.

The ease with which Californians found a solution to water pollution did not carry over into the field of air pollution. Public anger over hazy skies and smog that threatened public health prompted the state to create the powerful Air Resources Board in 1967, which had the authority to regulate the exhaust emissions from automobiles and to establish air quality standards that were higher than those of the federal government. Unlike with water pollution, however, industrial groups such as automobile manufacturers and oil companies refused to accept responsibility for contributing to smog and fought the state's attempts to regulate emissions, arguing that it was unfair to have one set of standards in California and another in the rest of the nation.

Land-use planning was the most difficult problem of all. The state's explosive postwar growth was largely unplanned, and many of its environmental problems stemmed from haphazard and inconsistent decisions

¹¹ See, for example, Rice Odell, *The Saving of San Francisco Bay: A Report on Citizen Action and Regional Planning* (Washington, D.C.: The Conservation Foundation, 1972), James E. Krier and Edmund Ursin, *Pollution and Policy: A Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, 1940–1975* (Berkeley: University of California Press, 1977), Paul A. Sabatier and Daniel A. Mazmanian, *Can Regulation Work? The Implementation of the 1972 California Coastal Initiative* (New York: Plenum Press, 1983), and Douglas H. Strong, *Tahoe: An Environmental History* (Lincoln: University of Nebraska Press, 1984).

regarding the locations of cities and suburbs, freeway construction, and redistribution of water. Although environmentalists and conservationists consistently urged the adoption of a master plan for further population growth and economic development, most legislators and Governor Reagan refused to get involved in centralized planning because it violated their sense of the proper role of government.

This story allows us to consider a number of broader themes in American western, political and environmental history. First, it demonstrates Western leadership on a national issue. Historians have debated the role of the federal government in the American West for over a century. Frederick Jackson Turner captured the nation's imagination in 1893 by arguing that the western frontier experience had imbued the American character with individualism, independence, and a love for democratic government.¹² The western frontier, as it moved from place to place through time, helped create the American nation. Beginning in the 1980s, a new generation of Western historians turned this vision of Western exceptionalism on its head. A popular thesis among these New Western Historians was the federal government's "conquest" and subordination of the West. Patricia Nelson Limerick rejected the myth of Western individualism and independence and argued that "the two key frontier activities — the control of Indians and the distribution of land — were primarily federal responsibilities." The federal government subsidized the construction of highways, harbors, and railroads, and controlled access to the nation's land and other resources.¹³ "The American West," according to Richard White, "is a creation not so much of individual or local efforts, but of federal efforts." As White describes it, "the armies of the federal government conquered the region, agents of the federal government explored it, federal officials administered it, and federal bureaucrats supervised (or at least tried to supervise) the division and development of its resources."¹⁴ Gerald Nash argued that "it was the federal government that

¹² Frederick Jackson Turner, "The Significance of the Frontier in American History," *Annual Report of the American Historical Association for the Year 1893* (Washington, D.C., 1894), reprinted in John Mack Faragher, ed., *Rereading Frederick Jackson Turner* (New Haven: Yale, 1984), 31–60.

¹³ Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W. W. Norton, 1987), 82.

¹⁴ Richard White, *"It's Your Misfortune and None of My Own": A History of the American West* (Norman: University of Oklahoma Press, 1991), 57, 58.

determined the pattern of farms in the humid regions, built the major roads and highways, and fostered the growth of the principle cities in the West.”¹⁵ Under this new conception, the American state created the West.

The problem with this thesis is that it presents federalism as a one-way street. Westerners and their states lose all agency in the federal-state relationship. And, as Karen Merrill points out, this creates a new myth of western exceptionalism, where the region differs from others not because of its rugged independence but because of its utter dependence on the federal government. It also removes the West from the story of American politics because it locates political power in Washington and presents a simple story of subjugation instead of interaction in the West.¹⁶ As Robert Johnson put it, “the New Western Historians have contributed substantially to the field’s evasion of the messy realm of the political.”¹⁷ The challenge that Merrill and Johnson present to Western historians is to engage the broader American political historiography and demonstrate that the West has a political history and that it affected Washington and the rest of the nation.

The story of environmental policymaking in California during the Reagan era provides an opportunity to bridge the gap between Western and political history. While this project does not dispute the power of the federal government in directing the settlement and development of the American West, it does provide an example of western activism and leadership on a national issue. Reforms to California’s existing air and water pollution control programs went further than those at the national level and provided precedents and examples for similar programs in other states. Even states that did not enact legislation similar to California sometimes felt the influence of its regulations. Automakers, for example, had to choose whether to build different versions of each model to meet local standards in every state or to build one version that conformed to the toughest emissions standards in the nation. In the protection of the environment, Western states, particularly California, led the nation.

¹⁵ Gerald D. Nash, *The Federal Landscape: An Economic History of the Twentieth-Century West* (Tucson: University of Arizona Press, 1999), x.

¹⁶ Karen R. Merrill, “In Search of the ‘Federal Presence’ in the American West,” *The Western Historical Quarterly* 30, no. 4 (Winter 1999): 451.

¹⁷ Robert D. Johnston, “Beyond ‘The West’: Regionalism, Liberalism and the Evasion of Politics in the New Western History,” *Rethinking History* 2, no. 2 (1998): 240.

The story of environmental policymaking in California during the Reagan years also allows us to analyze the relationship between conservatism and environmentalism, two of the most powerful political movements of the late twentieth century. Most of the scholarly work on this relationship focuses on the divide between the two movements, perhaps because this fits neatly into the present-day partisan framework. There was a time, however, when conservatives in California supported the expansion of government's regulatory powers in environmental matters. Much of this can be traced back to the influence of Progressive Era conservation programs and their Republican sponsors, such as President Theodore Roosevelt and Governor Hiram Johnson. Some early conservative thinkers, including Richard Weaver and Russell Kirk, believed that environmental preservation should occupy a central position within the philosophy of conservatism. As John R. E. Bliese points out, the traditionalist conservatism espoused by Weaver and Kirk rejected materialism, consumerism, and modern industrialism's war on nature. As Bliese puts it, "piety toward nature is, thus, a fundamental attitude of traditionalist conservatism."¹⁸ Other conservatives saw environmental regulation as a states' rights issue and saw local and state pollution control efforts as manifestations of the will of the people. These conservatives supported these efforts as long as they responded to the needs of the people and remained independent of outside (i.e. federal) control.¹⁹ Through the late 1960s, there was very little partisan or ideological tension over environmental issues.

This changed during the early 1970s, when conservatives began to withdraw their support for environmental causes. The conflict between environmentalism and conservatism "came to full flower when environmentalism turned from the effort, championed by Theodore Roosevelt and Gifford Pinchot, to preserve our national heritage to a project aimed at altering the exercise of influence in public policy and well-established American values" in the early 1970s, according to Richard Harris.

¹⁸ John R. E. Bliese, "Richard M. Weaver, Russell Kirk, and the Environment," *Modern Age* 38, no. 2 (Winter 1996), 148–58.

¹⁹ Marc Allen Eisner, "Environmental Policy from the New Deal to the Great Society: The Lagged Emergence of an Ideological Dividing Line," in Brian J. Glenn and Steven M. Teles, eds., *Conservatism and American Political Development* (New York: Oxford University Press, 2009), 31.

“Conservatives, already alert to perceived socialist tendencies of modern liberalism, found a deeply disturbing confirmation of their fears in environmentalists’ vision, rooted in collectivist arguments about the need to subordinate property rights and individual freedom to societal needs and ecological laws.”²⁰ Conservatives who had argued against the expansion of the administrative state since the New Deal joined with business and industrial groups who saw themselves as victims of arbitrary regulations to oppose new laws and possibly roll back existing ones. Conservative opposition to environmental causes also grew out of a general backlash against the liberalism on display in President Lyndon Johnson’s Great Society programs.²¹

At the national level, the withdrawal of conservative support for environmental issues began under the Nixon presidency. In 1969 the administration had supported the National Environmental Policy Act, and Nixon created the Environmental Protection Agency and supported the Clean Air Act Amendments the following year. But the president believed the environmental crisis was over by 1973. Environmentalism had been “largely a temporary phenomenon” for Nixon, according to J. Brooks Flippen. “His early efforts had paid little political dividends, destroyed his budget, alienated conservative allies, and hampered economic recovery.” Nixon felt justified in turning his back on environmental causes because the economic crises of the 1970s — unemployment, inflation, and energy shortages — took priority among many Americans.²²

Governor Ronald Reagan’s administration followed a similar, though not identical, trajectory in California. During his first term, Reagan supported the establishment of Redwood National Park, the expansion of the air and water pollution control programs, and the creation of regional planning agencies for the San Francisco Bay and Lake Tahoe. During his second term, he opposed the creation of the California Coastal Commission and fired members of the Air Resources Board for overreaching in

²⁰ Richard Harris, “Environmental Policy from the Great Society to 1980: A Coalition Comes Unglued,” in Brian J. Glenn and Steven M. Teles, eds., *Conservatism and American Political Development* (New York: Oxford University Press, 2009), 122–23.

²¹ J. Brooks Flippen, *Conservative Conservationist: Russell E. Train and the Emergence of American Environmentalism* (Baton Rouge: Louisiana State University Press, 2006), 8.

²² J. Brooks Flippen, *Nixon and the Environment* (Albuquerque: University of New Mexico Press, 2000), 189–91, 221–22. Quote on 221.

their fight against smog. But unlike Nixon, who saw environmentalism solely as a political opportunity, Reagan never completely turned his back on environmental issues. External factors such as high unemployment and the energy crisis in the 1970s made Reagan and other conservatives more wary of environmental regulations, but they never tried to undo earlier achievements.

This political history of the environment also allows us to look at the power of interest groups in California, especially their power to bring environmental problems to the attention of legislators and their power to mobilize public opinion. Pro-environmental interest groups have received plenty of scholarly attention, but anti-environmental interest groups also play a role in this story, especially during Reagan's second term. According to Samuel P. Hays, "one of the most curious features of contemporary environmental analysis is the limited focus on the environmental opposition."²³ A few books have appeared in recent years on the Wise Use movement and the Sagebrush Movement in the late 1970s and early 1980s, but there has been little discussion of anti-environmental groups in the 1960s and early 1970s.²⁴ This project will not completely fill that historiographical void but it will provide a context for the creation of the Pacific Legal Foundation. This law firm was established in Sacramento in 1973 to defend "the free enterprise system, traditional private property rights, and a balanced approach to weighing economic, social, and environmental concerns," according to one of its founders.²⁵ This foundation provided the inspiration for the Mountain States Legal Defense Fund, which formed the backbone

²³ Samuel P. Hays, *A History of Environmental Politics Since 1945* (Pittsburgh: University of Pittsburgh Press, 2000), 109.

²⁴ For works on Wise Use and the Sagebrush Rebellion, see Jacqueline Vaughn Switzer, *Green Backlash: The History and Politics of Environmental Opposition in the U.S.* (Boulder, Colo.: Lynne Rienner Publishers, 1997); William L. Graf, *Wilderness Preservation and the Sagebrush Rebellions* (Savage, Md.: Rowman & Littlefield Publishers, 1990); and R. McGreggor Cawley, *Federal Land, Western Anger: The Sagebrush Rebellion and Environmental Politics* (Lawrence: University Press of Kansas, 1993).

²⁵ Ronald A. Zumbrun, "Life, Liberty, and Property Rights," in Lee Edwards, ed., *Bringing Justice to the People: The Story of the Freedom-Based Public Interest Law Movement* (Washington, D.C.: Heritage Books, 2004), 42. Italics in original. For a discussion of the Pacific Legal Foundation's relationship with President Reagan's administration, see Jefferson Decker, "Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971–87," Ph.D. diss., Columbia University, 2009.

of the Sagebrush Rebellion in other Western states.²⁶ Not all opposition to environmental causes came from explicitly anti-environmental organizations. The Automobile Club of Southern California, for example, opposed an attempt to divert gas tax revenues away from highway construction and toward air pollution research and mass transit.²⁷ Anti-environmental organizations and their fellow travelers did not wield much influence over environmental legislation during the Reagan years, but they became much more influential as the 1970s wore on.

This dissertation follows a chronological format. Chapters 2 and 3 summarize the relationship between Californians and the state's natural resources between statehood and the 1960s. California has always been the land of "exceptional opportunities," according to journalist Carey McWilliams, and these chapters describe how Californians have used the state's natural resources to take advantage of those opportunities.²⁸ Americans first flooded into California during the Gold Rush, but the railroads and other boosters tried to keep them coming throughout the late nineteenth and early twentieth centuries by emphasizing the state's natural beauty. The Progressive Era left two important legacies in California that are relevant to the history of environmentalism. First, the debate over conservation and environmental preservation, as most vividly demonstrated in the Hetch Hetchy dam controversy between 1903 and 1913, drew generations of political leaders into discussions of the state's natural resources. By the 1960s, even the most conservative politicians championed at least some resource conservation. This formed a basis of the bipartisanship that characterized environmental issues through the Reagan era. Second, Progressives such as Governor Hiram Johnson brought the initiative system to California, which allowed citizens to circumvent the legislature. Environmentalists began to use the initiative system in the 1970s to create new programs and regulations. After World War II, the state underwent unprecedented population growth and economic development, much of which was fueled by

²⁶ Graf, *Wilderness Preservation and the Sagebrush Rebellions*, 243; Switzer, *Green Backlash*, 164.

²⁷ "Two Suits Demand Auto Club Cease Fighting Prop. 18," *Los Angeles Times*, 15 October 1970, C1.

²⁸ Carey McWilliams, *California: The Great Exception* (Santa Barbara: Peregrine Smith, reprint 1976), 63.

state- and federal-funded infrastructure projects. Conservation, the most efficient use of natural resources, was the guiding philosophy in the relationship between mankind and the environment in California during the first half of the twentieth century. Thus, two massive water projects redistributed water from the wet North, where few people lived, to the dry South, where many people lived. The state also underwent a massive highway construction program to facilitate the movement of people and goods. Little regard was made to environmental sustainability with these projects, which contributed to polluted lakes and waterways, infilling in San Francisco Bay, and smog in Los Angeles and other cities.

Chapter 3 analyzes the criticism of such unrestrained development. During the 1960s, many Californians became concerned with the misuse of land, overpopulation, and the health effects of pollution. Alfred Heller and Samuel Wood established California Tomorrow in 1962, an organization devoted to the creation of environmentally sustainable regional and statewide land-use planning. Raymond Dasmann lamented the loss of productive agricultural land to suburbs in *The Destruction of California* (1965). The growth of cities, suburbs, and exurbs resulted from unsustainable population growth, according to Stanford biologist Paul Ehrlich, who predicted a Malthusian nightmare of famine in *The Population Bomb* (1968). All of these arguments influenced California lawmakers and became rallying cries for environmental organizations.

This chapter also looks at the attempts to fight environmental degradation at the local, regional, and state levels between World War II and 1967. These early attempts were largely ineffective for four reasons. First, polluting industries and businesses fought attempts to toughen environmental regulations or participated in the legislative process to weaken new laws. Second, cities and counties inconsistently enforced existing environmental regulations, sometimes avoiding it altogether in order to attract business. Third, the causes of some forms of pollution, especially smog, eluded Californians until the 1950s. Fourth, and most important, environmental regulations hampered economic development, which was the overriding concern for politicians like Governor Edmund G. "Pat" Brown, Sr., who saw massive highway and water redistribution projects as signs of progress. The state and local governments enacted some environmental regulations in spite of these constraints, but these failed to slow the deterioration of the state's natural resources.

Chapter 4 discusses the gubernatorial election of 1966, the environmental philosophy of Governor Reagan, and the people who made up his administration. This election was a pivotal moment in environmental policymaking in California, though few observers noted it at the time. The incumbent, Governor Pat Brown, personified the old conservationist ethic by advocating for the redistribution of water from North to South and the construction of highways to connect every city in the state. His Republican opponent, Ronald Reagan, had no strong environmental agenda, and made a number of gaffes during the campaign that offended environmentalists, but he espoused a philosophy of rolling back government that could include reducing state support for Brown's development projects. After his victory, Reagan and his advisers filled many state offices with men who were sympathetic to the environmental movement. The most influential environmentalist in the administration was Norman Livermore, a former member of the Sierra Club Board of Directors, who Reagan tapped to head the Cabinet-level Resources Agency. Livermore served as an influential proponent of environmental issues throughout Reagan's tenure and his Resources Agency became home to many environmentally minded officials, such as State Parks Director William Penn Mott and San Francisco Bay Conservation and Development Commission Chairman Melvin Lane. Very few Reagan appointees resisted the state's new environmental philosophy. William Gianelli, the Director of the powerful Department of Water Resources, was a conservationist who advocated the wise use of resources, especially rivers. Others, such as State Geologist Wesley Bruer and James Stearns, Director of the Department of Conservation, brought ideological opposition to environmental regulations. But these were among the few exceptions in an otherwise environmentally friendly Reagan administration.

Chapter 5 discusses the state's war against air and water pollution, which peaked between 1967 and 1970. Californians were largely united on the need for action on environmental issues and were optimistic that solutions could be found. During this three-year period, the State Legislature and Governor Reagan reformed the state's water and air pollution programs. Despite his usual deference to local concerns, Reagan supported efforts to establish regional planning agencies around the San Francisco Bay and Lake Tahoe to prevent further degradation in those waterways.

California won its reputation as the national leader on environmental issues because of these reforms.

The most visible attempt to realize Reagan's vision of a Creative Society was the Governor's Conference on California's Changing Environment, the subject of Chapter 6. At this conference, held in Los Angeles in November 1969, government officials, businessmen, experts, academics, and concerned citizens came together to discuss the relationships between people and land, air, water, and urban society. Conference participants argued that the unrestrained economic development that had characterized California since World War II was no longer feasible or desirable, and that the state must create a centralized plan for development that was based on ecological sustainability instead of on population density. The conference did not spark a revolution in mankind's relationship with its environment, but it provided a forum for a wide range of solutions to environmental problems. Californians debated many of these solutions over the following year. 1970 became known as the Year of the Environment and was the high point for environmentalism across the country. President Nixon created the Environmental Protection Agency, Congress passed strong Clean Air Act Amendments, and Americans everywhere celebrated the first Earth Day. In California, Reagan made the environment a centerpiece to his reelection campaign and the State Legislature debated dozens of new environmental bills, including the California Environmental Quality Act, which required public development projects to prepare environmental impact reports. The future looked bright for environmental issues in California.

The Year of the Environment ended on Election Day in November 1970. Governor Reagan's interest in environmental issues declined after his reelection, and many legislators followed suit. Chapter 7 traces the decline of legislative activity on environmental issues during Reagan's second term. California's politicians began to lose interest in environmental issues as the state's regulatory agencies got bogged down in jurisdictional fights and other controversies. As the pace of legislative activity declined, environmental organizations stepped in to enact new policies through lawsuits and ballot initiatives. The California Supreme Court's Friends of Mammoth decision required private development projects to prepare environmental impact reports in addition to public projects. A federal court forced the Environmental Protection Agency to step in when California

failed to meet the Clean Air Act's implementation plan requirements. Two important initiatives appeared in 1972 with mixed results. Proposition 9, the Clean Environment Act, failed, but Proposition 20, the Coastal Initiative, passed and created a new commission that regulated all development within 1,000 yards of the state shoreline. The economic cost and intrusiveness of these measures, and concerns over the energy crisis and unemployment, sparked a backlash among many conservatives. Public interest law firms such as the Pacific Legal Foundation began to challenge environmental regulations. This was the beginning of the end for bipartisan support for environmental issues in California.

The epilogue assesses environmental legislation at the state and national level after Reagan left Sacramento on 6 January 1975. California continued to enact strong environmental legislation and provided inspiration and precedents to other states and the federal government. The state was also home to organizations that supported and opposed environmental regulations, and those groups inspired others across the country. The epilogue also offers some theories on how Governor Reagan, who pursued a mildly progressive environmental agenda, evolved into President Reagan, whose environmental record has been rated among the worst of all modern presidents.

This project is not an attempt to "greenwash" Ronald Reagan. His presidential administration's record on the environment deserves the criticism it has received from historians and environmentalists. But his record as governor was more complicated and pragmatic, and it deserves closer, and objective, scrutiny. He, his administration, legislators, environmental organizations, and concerned citizens built an environmental regulatory state that has met many (though certainly not all) of California's environmental challenges. The creative society that tackled those problems may not have been the one that Reagan had in mind when he campaigned for the governor's office but his support for new regulations and bureaucracies complicates his ideological reputation.

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EPILOGUE

FROM GOVERNOR REAGAN TO PRESIDENT REAGAN

Republican Assemblyman Robert Burke argued in 1974 that the Energy Resources Conservation and Development Act was “a statist-socialist measure that the Governor not only should not have approved but one which would appear to be contrary to all that he has stood for as governor these last 7½ years.”¹ Burke must not have been paying attention during those 7½ years. The California Energy Commission was just the latest new centralized government bureaucracy created during the Reagan years. It followed the State Water Resources Control Board, the Air Resources Board, the permanent San Francisco Bay Conservation and Development Commission, the Tahoe Regional Planning Agency, and the Coastal Commission, along with dozens of local commissions and pollution control boards. Governor Reagan did not initiate the legislation that created these agencies, but he obeyed the will of the voters and he supported the efforts of legislators to address environmental problems, even when they pursued “statist-socialist” means.

¹ “How the New Energy Act Should Work,” *California Journal* 5 (July 1974): 239.

Every discussion of Ronald Reagan's environmental record as governor seems to end with the same question: what happened? How did Governor Reagan evolve into President Reagan, whose administration launched what Samuel Hays called an "anti-environmental revolution?"² Such questions are beyond the scope of this project, and definitive answers to those questions would fill a separate volume, but the evidence suggests a number of hypotheses.

First, the environment ceased to be a bipartisan issue during the 1970s. Democrats across the nation continued to support environmental issues as they had during the 1960s but Republicans outside of the northeast increasingly abandoned the environmental movement. A new generation of conservative leaders, who were more concerned with reducing the size of the federal government, marginalized environmentally friendly Republicans such as former EPA Administrators William Ruckelshaus and Russell Train. During the 1980s and 1990s, the Republican Party actively courted business interests who chafed under environmental regulations, and eventually the GOP "became a major instrument of anti-environmental policy," Samuel Hays has argued. "Republicans with positive environmental views were placed under considerable pressure to conform to a growing official anti-environmental stance by the party as a whole." Over time, the environment became a litmus test for conservatives in the Republican Party, and it "joined taxes and a litany of social concerns such as abortion and gay rights as wedge issues, defining one's partisan allegiance," according to J. Brooks Flippen.³

Second, Reagan joined the chorus of critics who believed that environmentalists often went too far. As governor, Reagan respected moderate Californians who feared for the loss of the state's natural treasures, but he placed environmentalists who called for population control or discarding traditional conceptions of property rights in the same category as radical

² Samuel P. Hays, *Beauty, Health, and Permanence: Environmental Politics in the United States, 1955–1985* (Cambridge: Cambridge University Press, 1987), 491.

³ Samuel P. Hays, *A History of Environmental Politics since 1945* (Pittsburgh: University of Pittsburgh Press, 2000), 118–19; Russell E. Train, *Politics, Pollution, and Pandas: An Environmental Memoir* (Washington: Island Press, 2003), 260–66; J. Brooks Flippen, *Conservative Conservationist: Russell E. Train and the Emergence of American Environmentalism* (Baton Rouge: Louisiana State University Press, 2006), 216.

student protestors and juvenile delinquents. After leaving office, he chastised environmentalists for putting the welfare of trees or animals above the welfare of humans. In one telling example, Reagan ridiculed efforts to save the Tan Riffleshell, a mussel that had once been common in rivers in Alabama, Kentucky, Tennessee, and others but became threatened with extinction because of construction along those rivers. Saving the endangered animal would require limits on development, and Reagan saw an environmental conspiracy. The Tan Riffleshell was “the latest in a string of exotic pets favored by ultra-environmentalists intent on halting construction projects they don’t like,” according to Reagan.⁴

Third, his conception of federalism allowed for strong regulation at the state level but rejected similarly strong laws and standards at the federal level. In this, Reagan was consistent. As governor, Reagan supported amendments to the federal Air Quality and Clean Air Acts in 1967 and 1970, respectively, to allow California an exemption from national air quality standards, and he railed against the EPA’s attempt to impose a draconian implementation plan on the state in 1973. As president, Reagan did not interfere with state environmental programs and tried to shrink or dismantle the federal agencies that could have interfered.

Fourth, Reagan’s opinions on environmental issues depended on the people around him. After he left the governor’s office, Reagan had little contact with environmentally minded subordinates like Ike Livermore or William Penn Mott, but he had frequent contact with western entrepreneurs like Colorado brewer Joseph Coors, who complained about the costs to their businesses of environmental regulations. When Reagan won the presidency, he again left personnel matters to his campaign managers and supporters. Those advisers recruited people like James Watt of the Mountain States Legal Foundation for Secretary of the Interior, conservative Colorado legislator (and frequent Watt ally) Anne Gorsuch as EPA Administrator, Colorado rancher Robert Burford as director of the Bureau of Land Management, and Exxon Corporation attorney Robert Perry as EPA general counsel. Potential members of President Reagan’s environmental policy team were “carefully selected and screened for their ideological

⁴ Ronald Reagan, “The Tan Riffle Shell Case,” *Sacramento Bee*, 8 October 1977, discussed in Jefferson Decker, “Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971-87,” Ph.D. diss., Columbia University, 2009, 74.

purity and were briefed by the White House, rather than agency professional staff, to ensure that the presidential agenda would be faithfully executed,” according to political scientists Michael Kraft and Norman Vig.⁵ With advisers like these, Reagan was rarely presented with opinions or policy options that were favorable to the environmental movement.

Finally, advisers like Livermore or Watt were so influential because the environment was not a high priority for Reagan. It is almost unfair to call his first term as governor a “Reagan environmental revolution” or his first years as president a “Reagan antienvironmental revolution.” It was the people around him who sparked those revolutions, not the man himself. The only environmental problems that troubled Reagan were those he experienced directly. Thus, as governor he favored cleaning up the smoggy air that prevented him from seeing the mountains, and cleaning up the water that he and his constituents drank. He supported the Tahoe Regional Planning Agency only after spending time there and seeing for himself the fragility of the lake’s ecosystem. Problems that he could not see or feel did not trouble him. Endangered species such as the massive redwoods or the tiny Tan Riffleshell played no role in his life so he paid no attention to them, and he never understood why other people cared so much. As president, Reagan had even less firsthand experience with environmental degradation than he did as governor. Looking down on the country from Air Force One, the president saw vast expanses of seemingly unspoiled, uninhabited land, and he found it difficult to imagine that human activity could possibly threaten such empty wilderness. President Reagan’s primary experiences with nature came at his idyllic, sheltered ranch in the hills outside Santa Barbara, where he could ride his horse for miles for miles without seeing any other people.⁶

⁵ Lou Cannon, *President Reagan: The Role of a Lifetime* (New York: PublicAffairs, 1991, 2000), 468; Hays, *Beauty, Health, and Permanence*, 494; Mark K. Landy, Marc J. Roberts, and Stephen R. Thomas, *The Environmental Protection Agency: Asking the Wrong Questions From Nixon to Clinton* (New York: Oxford University Press, 1994), 245–78; Michael E. Kraft and Norman J. Vig, “Environmental Policy in the Reagan Presidency,” *Political Science Quarterly* 99:3 (Autumn 1984): 427.

⁶ Reagan biographer Lou Cannon recalled that “once, on a flight over Colorado in 1979, Reagan turned to me and, with a gesture toward the expanse of mountain wilderness below, remarked that the unspoiled land still available in the United States was much more abundant than the environmental movement realized. He seemed not to

Reagan's advisers knew that the environment was not a pressing concern for Reagan. Resources Secretary Livermore, who was concerned with pollution and the loss of natural beauty or resources, personalized environmental issues for Governor Reagan. He brought Reagan to Tahoe so he could experience the lake's majesty, and he brought representatives of the Yuki tribe to Sacramento to show the governor how the Dos Rios Dam would negatively affect peoples' lives. Interior Secretary Watt, EPA Administrator Gorsuch, and other conservative environmental policymakers, who were concerned with reducing the size and the reach of government, did not follow suit. President Reagan then turned to other matters that concerned him more than did the environment.

CALIFORNIA AFTER REAGAN

Californians, on the other hand, never lost their appetite for environmental laws. Legislators and the voters continued to enact regulations and legislation affecting a wide range of economic activity. The state passed the California Waterfowl Habitat Preservation Act (1987) and the Sacramento-San Joaquin Delta Protection Act (1992) to protect wetlands and other wildlife habitats. To help compensate for drought conditions, legislators passed the Water Recycling Act and amended the Porter-Cologne Water Quality Act in 1991 to bar potable water from nonpotable uses, such as watering plants or use in certain industries. The voters approved Proposition 65, the Safe Drinking Water and Toxic Enforcement Act, in 1986 to protect Californians from chemicals known to cause birth defects or cancer. The Air Toxics "Hot Spots" Information and Assessment Act (1987) and the Atmospheric Acidity Protection Act (1988) broadened the jurisdiction of the Air Resources Board. Other new regulations included the Surface Mining and Reclamation Act (1975), the California Beverage Container Recycling and Litter Reduction Act (1986), the Hazardous Waste Management Act (1986), and the Plempert-Keene-Seastrand Oil Spill Prevention Response Act (1990). Dozens of bond issues during those years provided millions of dollars to park land acquisition and maintenance. In the decades since

notice that the plane in which we were flying had taken off through a layer of smog in Los Angeles and was landing through another layer of air pollution in Denver." See Cannon, *President Reagan*, 465-71.

Reagan left office, Californians have repeatedly demonstrated a commitment to protecting their state's environment and natural resources.⁷

There were exceptions. As Americans celebrated the twentieth anniversary of Earth Day, environmentalists collected enough signatures to place Proposition 128, the Environmental Protection Act of 1990, on the November ballot. "Big Green," as the proposition was called in the press, was the most ambitious environmental legislation ever proposed in California. Its story echoed that of 1972's Proposition 9, which had previously held the title of most ambitious environmental legislation. Like its predecessor, Big Green was the result of environmentalists' frustration with the slow pace of the state legislature. Also like Proposition 9, Big Green attempted to attack all forms of environmental degradation with one massive, complicated law. Proposition 128 would have banned all pesticides known to cause cancer in laboratory animals, established a \$300 million bond to buy ancient stands of redwoods to prohibit logging, banned clear cutting, required a 40 percent reduction in greenhouse gas emissions by 2010, barred the manufacture or sale of ozone destroying chemicals such as those used in air conditioners, required builders to plant one tree for every 500 square feet of any commercial or residential project, banned oil and gas drilling in state waters, required the state to develop an oil spill response plan, required stronger treatment of sewage, and strengthened the coastal commissions' power to stop any project that threatened any coastline, bay, or estuary.⁸

The voters rejected Big Green by a two-to-one margin in 1990 for many of the same reasons the previous generation rejected Proposition 9 in 1972. It tried to do too much, and it sparked opposition from a wide variety of interests. Developers and timber companies claimed that it would cost jobs. Utilities and county officials warned of higher power and sewer bills. Chemical companies and many farmers predicted that the ban on pesticides would reduce agricultural production by 40 percent and food prices

⁷ Owen H. Seiver, "California Environmental Goals and Policy, Part II: Inventory of Major California Environmental Legislation and Accomplishments since 1970," presentation to the Center for California Studies' Faculty Fellows Program, California State University Sacramento, May 1995, available at CSUS University Library.

⁸ Larry B. Stammer and Richard C. Paddock, "Big Fight Brews over 'Big Green' Initiative's Scope," *Los Angeles Times*, 25 March 1990.

would rise by up to 50 percent.⁹ Supporters of Big Green, like their earlier counterparts, blamed the defeat on big business's deep pockets and a failure to formulate a clear, simple message.

One lasting result of the Proposition 128 debate was the creation of the California Environmental Protection Agency (Cal/EPA). Newly elected Governor Pete Wilson, a Republican who had served on the Assembly committee that proposed the Environmental Bill of Rights and the California Environmental Quality Act in 1970, followed through on his campaign promise to establish the environmental superagency that environmentalists had demanded for decades. He stripped the Air Resources and Water Resources Control Boards from the Resources Agency and combined them with the new Departments of Pesticide Regulation and Toxic Substances Control to form the Cal/EPA.¹⁰ With the creation of this new agency, the state's environmental bureaucracy had two voices in the governor's cabinet: secretary for environmental protection and secretary for natural resources.

In doing so, Wilson and his successors institutionalized the long running split between conservationists and environmentalists. The Resources Agency's mission, "to restore, protect and manage the state's natural, historical and cultural resources for current and future generations using creative approaches and solutions based on science, collaboration and respect for all the communities and interests involved," would have made perfect sense to Progressive Era conservationists. The mission of the Cal/EPA, "to restore, protect, and enhance the environment, to ensure public health, environmental quality and economic vitality," was more in line with the goals of the environmental movement of the 1960s and beyond.¹¹

⁹ Stammer and Paddock, "Big Fight Brews over 'Big Green' Initiative's Scope"; Marla Cone, "Prop. 128 Might Double Most Sewer Bills in O.C.," *Los Angeles Times*, 31 October 1990; Rudy Abramson, "Growers Fear Pesticide Controls in 'Big Green,'" *Los Angeles Times*, 11 July 1990.

¹⁰ California Environmental Protection Agency, "The History of the California Environmental Protection Agency: The Long Winding Road to Cal/EPA," available online at <https://calepa.ca.gov/wp-content/uploads/sites/6/2016/10/About-History01-Report.pdf>, accessed 1 May 2021.

¹¹ California Natural Resources Agency, "Mission Statement," available online at <https://resources.ca.gov/About-Us/Our-Agency-History>; California Environmental Protection Agency, "Cal/EPA Mission," available online at <http://www.calepa.ca.gov/about>, both accessed 1 May 2021.

The differences are subtle (“manage” vs. “enhance”), but a study of the relationship between the two agencies would likely show that the debate over environmental preservation and conservation is alive and well.

As happened at the national level, bipartisan support for environmental issues in the state legislature decreased over time. Since 1973, the California League of Conservation Voters (CLCV) has tracked the votes of individual legislators and published annual scorecards that help to demonstrate the growing partisan divide. According to those scorecards, Democratic state senators’ support of CLCV-backed bills increased from 77 percent in 1975 to 91 percent in 2010. Democratic assemblymen followed a similar pattern, rising from 76 percent to 94 percent. During that same period, Republican state senators’ support dropped from 48 percent to 6 percent, and Republican Assemblymen’s support dropped from 36 percent to 7 percent. In the 2010 session, the lowest score for a Democratic legislator was 30 percent (and only one other Democrat scored below 50 percent), and the highest for a Republican was 21 percent.¹²

These scores do not provide a perfect method of gauging partisan support for or opposition to environmental issues. The CLCV is an interest group, after all, and it issues grades according to what it believes is the “correct” vote on a bill. This system also does not differentiate between easy, noncontroversial bills such as the use of toxic chemicals in children’s toys, and complicated or controversial ones such as the regulation of greenhouse gases. Different legislative sessions also faced different environmental issues and problems, making comparisons between sessions difficult. But, in the absence of a definitive study on the partisan split over environmental issues, these scores help demonstrate the growing divide between conservatism and environmentalism.

In earlier decades, such a dramatic ideological and partisan divide could have changed the trajectory of the state’s environmental laws, but it has played almost no role in the success of such legislation in recent years. The state senate and the assembly are so dominated by high scoring Democrats that a unified Republican opposition stands little chance

¹² These statistics are from the California League of Conservation Voters, “California Environmental Scorecard” for 1975, 1980, 1985, 1990, 1995, 2001, 2005, and 2010, all available online at <https://www.clcvfund.org/page/scorecard-archive>, accessed 1 May 2021.

of blocking what they see as burdensome or intrusive regulations. AB32, the Global Warming Solutions Act of 2006, provides one example. Democrats easily pushed this act, the first in the nation to address climate change and greenhouse gas emissions, through both houses despite nearly unanimous opposition from Republicans. Ever since Governor Arnold Schwarzenegger (another Republican actor-turned-governor who built a surprisingly strong environmental record) signed the bill, Republicans have tried without success to repeal AB32 through legislation and ballot initiatives. The most recent attempt to overturn AB32, Proposition 23, lost by a two-to-one margin in 2010, and a majority of Californians continued to support AB32 ten years after its passage.¹³ In opposing environmental regulations, today's California Republican party seems to be out of step with the voting public.

CALIFORNIA, THE NATION, AND BEYOND

Environmental laws and regulations enacted during the Reagan years influenced legislation in other states and at the national level. "California was often the lead state" on environmental issues, according to historian Samuel P. Hays, by "originating policies in coastal-zone management, environmental-impact analysis, state parks, forest-management practices, open-space planning, energy alternatives, air-pollution control, and hazardous-waste disposal." Environmentalists and legislators across the country tried to replicate California's successes. California's leadership on environmental issues continued after Reagan left office. Congress and President Nixon enacted a Coastal Zone Management Act in 1972, but other states looked to California's Coastal Initiative for guidance on land use planning for their coastlines because the federal law seemed weak by comparison. The California Environmental Quality Act's requirement that privately funded projects submit environmental impact reports went beyond similar laws at the state and national levels, which applied only to public projects. The State Water Resources Control Board was one of only a

¹³ Mark Baldassare, "AB32," Public Policy Institute of California, 2015, <https://www.ppic.org/blog/tag/ab-32>, accessed 1 May 2021.

handful of state agencies across the country that required questions about water quality to enter into decisions about water allocation.¹⁴

California's lead was most apparent in the fight against air pollution. Reagan's successor, Jerry Brown, revitalized the Air Resources Board (which had been gutted during the nitrogen oxide controversy discussed in the previous chapter), and it has remained a powerful force in California ever since. During the year after Reagan left office, the ARB forced Chrysler to recall 21,000 cars and 700 trucks because they failed emissions tests, levied \$328,000 in fines for selling cars that violated air quality standards, and forced the company to repair 70 percent of its cars manufactured in California. The Board forced Chrysler to recall another 23,000 vehicles, Mitsubishi to recall 12,000 vehicles, and Peugeot to recall 5,000 vehicles for failing to meet the state's nitrogen oxide, hydrocarbon, and carbon monoxide standards in 1988. Ten years after that, the ARB forced Toyota to recall 330,000 vehicles for faulty computer emissions control systems.¹⁵

Automakers continued to grumble about the unfairness of having different standards in California than in the rest of the country, and sympathetic columnists have called the state's ever-stricter standards a "shakedown," but they have failed to convince Congress to revoke California's exemption from the Clean Air Act. Congress went in the opposite direction in 1990 when it amended the Act to allow other states to adopt California's emissions standards. Massachusetts, New York, Texas, Virginia, and a dozen other states adopted California's emissions standards, making almost half of the nation's automobile market subject to policies set in Sacramento rather than Washington, D.C.¹⁶

In the first decade of the twenty-first century, California was the first to tackle global warming, a much more controversial issue than smog or polluted water. In the late 1990s and early 2000s, scientists warned that the accumulation of greenhouse gases such as carbon dioxide and methane in the

¹⁴ Hays, *Beauty, Health, and Permanence*, 44, 451, 454, 455, 402. Quote on 44.

¹⁵ Ed Salzman, "A Two-Year Appraisal of Brown as Governor," *California Journal* 7 (November 1976): 366; Carla Lazzareschi, "The Pressure Tactics of Smog Boss Tom Quinn," *California Journal* 8 (July 1977): 225; "California Air-Rule Recall Involves 40,000 Autos," *Automotive News*, 16 May 1988, 26; "California Orders Large Recall for Toyota," *The New York Times*, 3 September 1998, A29.

¹⁶ Matthew L. Wald, "California's Pied Piper of Clean Air," *The New York Times*, 13 September 1992, F1, F6.

atmosphere would cause a rise in temperatures around the world that could melt glaciers, cause flooding, and change vegetation patterns. Alarmed by studies conducted by the National Academy of Sciences and the United Nations' International Panel on Climate Change that predicted global temperatures could rise as much as ten degrees Fahrenheit over the next century, California legislators expanded the ARB's mandate to include the regulation of greenhouse gases in 2002. Two years later the Board announced new greenhouse gas emissions standards for cars, trucks, and sport utility vehicles for model year 2009, with the goal of a 22 percent reduction by 2012 and a 30 percent reduction by 2016.¹⁷ Sixteen other states quickly announced their intention to adopt California's greenhouse gas emissions standards.¹⁸

California's anti-pollution programs began to cross national boundaries in 2001. Various state agencies cooperated with local, state, and federal governments in Mexico to establish that country's first smog check program, monitor industrial wastewater in three border cities, and research methods for sustainable development along the Sea of Cortez.¹⁹ A year later, the federal EPA and its Mexican counterpart announced a more expansive version of this arrangement, called Border 2012. This program involved ten U.S. and Mexican border states and numerous American and Mexican federal agencies. The goals of Border 2012 include improving environmental health and reducing water contamination, land contamination, and air pollution.²⁰

¹⁷ California Environmental Protection Agency, "AB 1493 (Pavley) Briefing Package: Global Warming and Greenhouse Gas Emissions from Motor Vehicles," undated [probably 2002], formerly available online at http://www.climatechange.ca.gov/publications/legislation/AB1493_PRESENTATION.PDF, accessed 17 December 2009; California Environmental Protection Agency, Air Resources Board, "ARB Approves Greenhouse Gas Rule," 24 September 2004, available online at <http://www.arb.ca.gov/newsrel/nr092404.htm>, accessed 1 May 2021.

¹⁸ Andrew Clubok, quoted in Chris Bowman, "EPA Panel Gets an Earful," *Sacramento Bee*, 31 May 2007, A3; David Whitney, "Lawsuit Against EPA is Vowed," *Sacramento Bee*, 14 June 2007, A3; John J. Broder and Felicity Barringer, "E.P.A. Says 17 States Can't Set Emission Rules," *New York Times*, 20 December 2007; Environmental Protection Agency, "EPA Grants California GHG Waiver," 30 June 2009, available online at https://archive.epa.gov/epapages/newsroom_archive/newsreleases/5e448236de5fb369852575e500568e1b.html, accessed 1 May 2021.

¹⁹ California Environmental Protection Agency, "The History of the California Environmental Protection Agency."

²⁰ See United States Environmental Protection Agency, "U.S.-Mexico Border 2012," available online at https://archive.epa.gov/ehwg/web/html/basic_info.html, accessed 1 May 2021.

The San Francisco Bay Conservation and Development Commission has positioned itself as an international leader on climate change. The commission is no longer worried about the Bay shrinking to the size of a river because of infilling and development. In recent years it has focused more on the dangers of rising sea levels as a result of global warming. The danger now, according to the BCDC, is that the Bay may expand and flood low lying areas. In 2009 the BCDC partnered with similar agencies in The Netherlands to share solutions and ideas and sponsored an international competition to find more effective strategies for dealing with rising sea levels. The commission hopes that many of these ideas will help other low-lying coastal communities around the world.²¹

California did not lead the nation in legislation only. Many non-governmental organizations with interests in environmental issues got their start in California, which inspired similar groups across the country during the 1970s and beyond. California Tomorrow was one of the most influential planning organizations in the country, possibly because it followed a moderate approach to the environment. Its members never completely condemned development; instead they wanted to subject it to careful planning and make it sustainable within the context of a fragile and disappearing natural environment. California Tomorrow's goals were to limit the expansion of urban areas; protect lands of ecological, scenic, or historical importance; and conserve agricultural land. These were not radical goals, though the organization proposed some radical methods of achieving those goals.²²

This approach inspired other organizations across the country, which embraced a broad range of perspectives. State, regional, county, and city governments, chambers of commerce, and activist groups have founded organizations modeled on some aspects of California Tomorrow, including its name. The Colorado Tomorrow Alliance supported an extensive list of "smart growth" principles, including: mix land uses; compact community design; create a range of housing opportunities and choices; create walkable neighborhoods; foster distinctive, attractive communities with a

²¹ San Francisco Bay Conservation and Development Commission, "2009 Annual Report," 9 February 2010, 2–3.

²² For a full explanation of California Tomorrow's goals and their proposals, see Alfred Heller, ed., "The California Tomorrow Plan: Revised Edition," *Cry California* 7, no. 3 (Summer 1972): 5–111.

strong sense of place; preserve open space, farmland, natural beauty, and environmental areas; conserve water; strengthen and direct development towards existing communities; provide a variety of transportation choices; and make development decisions practicable, fair and cost effective.²³

Maui Tomorrow's purpose "is to advance the protection of the island of Maui's precious natural areas and prime open space for recreational use and aesthetic value [and] to promote the concept of ecologically sound development." Charlottesville (Virginia) Tomorrow's mission is "to inform and engage the public by providing clear, non-partisan information and research on land use, transportation, and community design issues with the confidence an informed public will make decisions that will protect and build upon the distinctive character of the Charlottesville-Albemarle area." Bluegrass Tomorrow "envisions the Central Kentucky (Bluegrass) Region as a place where our best agricultural land remains secure and productive, and development occurs deliberately, responsibly, and with environmental sensitivity." Sarasota (Florida) Tomorrow, a creation of the local Chamber of Commerce, wants to "revitalize Greater Sarasota's economy, protect the environment and enhance the quality of life for all residents" through support for green businesses. Similar organizations can be found in Tyson's Corner, Virginia; Houston, Texas; Hendersonville, Tennessee; and Manhattan, Kansas.²⁴ Some of these prioritize environmental preservation, while others focus more on promoting business, but almost all of these mission statements could have come from California Tomorrow's literature.

²³ See "Smart projects in Colorado," *The Denver Post*, 19 March 2008, available online at <https://www.denverpost.com/2008/03/19/smart-projects-in-colorado>, accessed 1 May 2021.

²⁴ See, for example, Maui Tomorrow (<http://maui-tomorrow.org/donate>), Charlottesville Tomorrow (<https://www.cvilletomorrow.org/articles/charlottesville-tomorrow>), Bluegrass Tomorrow (<http://www.bluegrasstomorrow.org/about>), Sarasota Tomorrow (<https://www.sarasotamagazine.com/news-and-profiles/2008/09/sarasota-tomorrow>), Tyson's Tomorrow (<https://www.facebook.com/Tyson-Tomorrow-34358535609>), Houston Tomorrow (<http://www.houstontomorrow.org>), Hendersonville Tomorrow (<https://www.hvilletn.org/home/showpublisheddocument/1593/636492137931600000>), and Downtown Tomorrow (<https://cityofmhk.com/DocumentCenter/View/919/Downtown-Tomorrow-Plan?bidId=>), all accessed 1 May 2021.

Organizations opposed to environmental regulations also owe a debt to the Reagan era. As noted in Chapter 7, the Pacific Legal Foundation, which had been established by officials in Reagan's gubernatorial administration, sparked the creation of other "freedom-based" public interest law firms across the country. The most notable offshoot of the PLF was the Mountain States Legal Foundation, established in Colorado in 1977. Bankrolled by wealthy brewer (and Reagan supporter) Joseph Coors, the MSLF's mission was "to fight in the courts those bureaucrats and no-growth advocates who create a challenge to individual liberty and economic freedoms," in the words of founding president James Watt. The MSLF and Watt took on cases involving the right to develop private property as the landowner saw fit and the right for all Americans to use federal lands and resources that environmentalists wanted to "lock up." Coors, Watt, and the MSLF were among the leaders of the so-called Sagebrush Rebellion that engulfed western states during the late 1970s and early 1980s.²⁵

Watt's advocacy for private property rights and free enterprise earned him his position as Secretary of the Interior in President Reagan's administration. Watt believed that his job at Interior was to open up federal resources for development as quickly as possible. "We will mine more, drill more, cut more timber to use our resources rather than simply keep them locked up," he promised.²⁶ Watt was not the only MSLF attorney to join Reagan's team in Washington. Reagan and his advisers appointed some of Watt's former colleagues to the Department of Energy, Department of Justice, and the Equal Employment Opportunity Commission, where they continued to carry on the fight against environmentalists and other liberal groups.²⁷

The environmental opposition won a short-term victory with the inclusion of people like Watt and Gorsuch in President Reagan's administration. The federal government issued few new regulations during Reagan's

²⁵ For more on the Mountain States Legal Foundation and the Sagebrush Rebellion, see Jacqueline Vaughn Switzer, *Green Backlash: The History and Politics of Environmental Opposition in the U.S.* (Boulder: Lynne Rienner Publishers, 1997), 164–65; and William L. Graf, *Wilderness Preservation and the Sagebrush Rebellions* (Savage, Md.: Rowman & Littlefield Publishers, 1990), 242–43. Watt quote from Lou Cannon, *Reagan* (New York: G. P. Putnam's Sons, 1982), 358.

²⁶ Watt quote from Cannon, *Reagan*, 359.

²⁷ Jefferson Decker, "Lawyers for Reagan: The Conservative Litigation Movement and American Government, 1971–87," Ph.D. diss., Columbia University, 2009, 5.

first three years in Washington. The EPA lost 20 percent of its staff through cuts and resignations. Provisions of the federal budget that dealt with natural resources and environmental protection were cut in half. But environmental opponents failed to convert these short-term gains into long-term policy and regulatory changes. Watt, Gorsuch, Burford, and others were high profile members of the administration, but they were relatively few in number and they failed to build political coalitions within their agencies, among members of Congress, or within the voting public. Conservative goals, such as transferring federal land to the states, privatizing some services in the National Parks, and granting generous mining and drilling leases on federal land, angered many Americans. Membership, donations, and the capabilities of environmental organizations grew dramatically during Reagan's first term. Groups like the Sierra Club, National Resources Defense Council, Environmental Defense Fund, National Audubon Society, and Wilderness Society entered electoral politics as they never had before to support candidates who would oppose the Reagan agenda. These organizations, their congressional allies, agency bureaucrats, and the public successfully pressured the administration to replace Watt and Gorsuch in 1983. The Reagan administration did not suddenly embrace the environmental movement after the departure of Watt and Gorsuch, but it scaled back its opposition to new legislation and its calls for privatization.²⁸

Californians have not solved all of their environmental problems. They still generate 93 million tons of waste every year. As of 2011, their state is home to 11 of the 25 American cities most polluted by air particulates and 12 of the 25 cities most polluted by ozone. Suburbs continue to expand onto former agricultural land. The state has lost 95 percent of its wetlands and 89 percent of its riparian woodlands. It is also home to more endangered and threatened species than any other state.²⁹ The Golden State still provides plenty of environmental opportunities and challenges.

But California's environmentalists, and the various state agencies, boards, and commissions that enforce environmental regulations, can also

²⁸ Kraft and Vig, "Environmental Policy Under Reagan," 437–39; Hays, *Beauty, Health, and Permanence*, 513–20.

²⁹ David Carle, *Introduction to Earth, Soil, and Land in California* (Berkeley: University of California Press, 2010), 179; American Lung Association, "State of the Air 2010," 11, 13; David Carle, *Introduction to Water in California* (Berkeley: University of California Press, 2004), 135.

point to numerous success stories. Californians have recycled between 70% and 80% of their beverage containers every year since 1990, reducing the amount of solid waste in landfills. The surface area of the San Francisco Bay has increased by nearly 16,000 acres since 1970 through the efforts of the Bay Conservation and Development Commission (and, possibly, global warming). The state and regional water resources control boards restored salmon fisheries on the Klamath and other rivers. The National Park System administers 8.2 million acres of land in the state, and the National Forest Service controls 20.6 million acres. California's 148 wilderness areas cover nearly 15 million acres, and its 278 state parks cover another 1.5 million acres. The coastal commissions have preserved and expanded public beach access through its permit program. Today's air is the cleanest on record, and the number of smog alerts in the Los Angeles area fell from 200 per year in the early 1970s to less than ten in 2009.³⁰ Californians managed to accomplish all of this despite doubling in population over the past four decades.

The state owes much of its success to the creative society that developed during the Reagan years to tackle environmental problems. Conservationists, students, organized labor, urban planners, scientists, environmentalists, business leaders, judges, bureaucrats, and politicians from both parties came together in forums such as the Governor's Conference on California's Changing Environment to discuss solutions to air and water pollution, the loss of agricultural land, and human overpopulation. Until the early 1970s, legislators from both parties and the Reagan administration enacted dozens of laws regulating the use of natural resources and the destruction of the state's environment. When legislators' environmental resolve seemed to weaken in the early 1970s, and as new anti-pollution programs got bogged down in controversy or jurisdictional disputes, the

³⁰ Grassroots Recycling Network, "California, USA Model Beverage Container Recycling System," 11 September 2001, formerly available online at <http://www.grrn.org/beverage/deposits/california.html>, accessed 12 April 2011; California Department of Resources Recycling and Recovery, "Beverage Container Recycling," available online at <http://www.calrecycle.ca.gov/bevcontainer>, accessed 1 May 2021; San Francisco Bay Conservation and Development Commission, "2009 Annual Report," 29 February 2010, 5; Carle, *Introduction to Earth, Soil, and Land in California*, 106, 109, 112; State Water Resources Control Board, "Accomplishments Report 2010," 4, 43; California Air Resources Board, "ARB's 40th Anniversary," undated, available online at <http://www.arb.ca.gov/knowzone/history.htm>, accessed 1 May 2021.

people stepped in to enact new regulations and programs through ballot propositions or they forced the state to address ongoing problems through lawsuits. The combined efforts of all of these groups made California the national leader on environmental issues.

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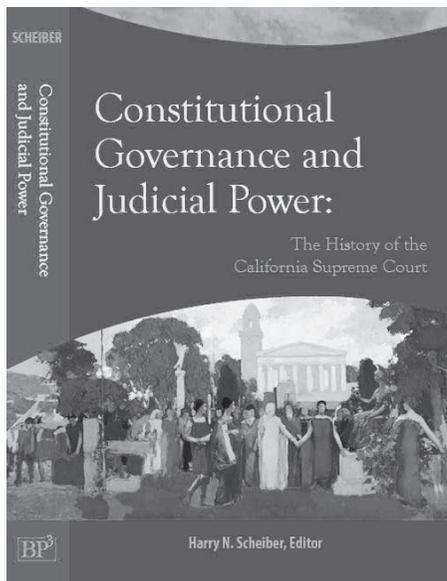
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