

STUDENT SYMPOSIUM

CALIFORNIA ASPECTS OF THE RISE AND FALL OF LEGAL LIBERALISM

UC Hastings College of the Law

INTRODUCTION:

Examining Legal Liberalism in California

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Modern American liberalism is capacious, embodying a vast panoply of political beliefs and policy prescriptions. At its core, however, are two characteristics: a commitment to mildly redistributive economic policies within a capitalist economic system, and a belief in the value of cultural pluralism. These basic principles have manifested themselves through a variety of laws and legal institutions that developed in the United States since the 1930s. Redistributive principles have been fostered by programs such as Social Security, unemployment insurance, minimum wage laws, and laws supporting the right of workers to form unions. The commitment to cultural pluralism was most famously advanced by the United States Supreme Court in its decisions holding the various manifestations of racial discrimination unconstitutional. These cases were, of course, just the tip of the iceberg. In the years following the Second World War, legislative,

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judicial, and administrative actions promoted the rights of racial, religious and ethnic minorities, political dissenters, and women.

As the twentieth century progressed, these two strands of liberalism met with different fates. Liberalism's defense of cultural pluralism has grown more robust. The law now seeks to protect the rights of other formerly marginalized groups, including gays, lesbians, and the disabled. While debates over issues such as affirmative action and marriage equality indicate that pluralist beliefs are still contested, even the most cursory comparison between the rights afforded women and racial, religious, and ethnic minorities in 1945 and those afforded them at the end of the twentieth century demonstrates that, to use David Hollinger's evocative phrase, we have expanded "the circle of we."¹

Liberalism's attempt to promote economic egalitarianism, on the other hand, was considerably less successful. During the last third of the twentieth century, the various mechanisms that sought to further modest redistribution of wealth have been dismantled: taxation has become less progressive, social programs starved of resources or eliminated, the right of workers to join unions eviscerated, the regulatory state weakened by deregulation. The result has been a dramatic increase in income inequality within the United States.

The articles in this symposium examine the legal aspects of the rise and fall of liberalism. Each article explores a component of legal liberalism in California.² In some cases the story is one of the ascension and triumph of liberal legal principles. In other cases, the story is mixed, as legal liberalism falters in the face of hostile social and political forces, or struggles against its own internal contradictions. Whatever their differences, however, each article demonstrates that California legal history provides a rich source of material about the contours of twentieth-century American liberalism.

The first article, Jeremy Zeitlin's exploration of the demise of Sunday closing laws in California, shows that some of the earliest rumblings of cultural pluralism in the state were felt in the nineteenth century. Zeitlin begins his piece with a description of the California Supreme Court's

¹ David A. Hollinger, "How Wide the Circle of We? American Intellectuals and the Problem of Ethnos Since World War II," 98 *American Historical Review* 317 (1993).

² Laura Kalman coined the phrase "legal liberalism." See Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996).

surprising 1858 decision that held the state's Sunday closing law to be unconstitutional. Within three years the Court backed away from its initial hostility toward the law, upholding a newly-passed law by giving it a secular justification. The explicitly Christian rationale for the law evolved into a religiously neutral defense of the workingman's right to a day of rest. By the end of the century, however, Californians rejected this justification, viewing it as an unfair burden on religious minorities within the state, thereby incrementally increasing the rights of those minorities.

If Zeitlin's piece illustrates the pre-history of legal liberalism in California, Catherine Davidson's contribution to this symposium takes us into prime time: the years following World War II. She also introduces us to one of legal liberalism's most famous practitioners: California Supreme Court Justice Roger Traynor. Davidson chronicles the rise of no-fault divorce in California, locating its origins in the 1953 California Supreme Court case, *DeBurgh v. DeBurgh*. Traynor's opinion in *DeBurgh* abolished the doctrine of recrimination in California divorce law, thereby making it easier for women to leave failed marriages. Davidson places the *DeBurgh* opinion in the context of two of postwar liberalism's most salient features: women's entry into the work force and the rise of egalitarian feminist ideology. She also describes how Traynor made these changes in the law, while nevertheless adhering to the modest judicial role dictated by the principle of *stare decisis*. Traynor's genius, Davidson argues, was his ability to bring the law into harmony with the liberal sentiments of the age without asserting an excess of judicial power.

The next two articles in this symposium describe policy areas in which legal liberalism's successes have been more muted than those illustrated by Zeitlin and Davidson. David Willhoite places an ironic spin on one of legal liberalism's triumphs: the passage of California's Agricultural Labor Relations Act (ALRA). Passed in 1975, the ALRA guaranteed the right of California farm workers to form labor unions and required employers to bargain with such unions. The law, which stemmed from the economic and political organizing of Cesar Chavez's National Farm Workers Association, was one of the most pro-union laws in the country. Yet Willhoite demonstrates that channeling disputes between farm workers and agricultural employers into legal forums (as well as Chavez's increasingly erratic behavior) sapped the movement of the grassroots political activism that had sustained it. What

should have been a legislative milestone of legal liberalism had become, by the 1980s, a dead letter — unenforced and ineffective.

Elaine Kuo's examination of California environmental law reveals an outcome that, if not as dismal as the ALRA's, is at least ambiguous. Kuo demonstrates how the state's attempts to preserve its water resources and control its air pollution interacted with the equally powerful commitment to the automobile and to exploiting the state's water resources to promote development. Legal protection of the environment is another significant manifestation of legal liberalism, but, as Kuo demonstrates, countervailing economic and cultural impulses have blunted this facet of postwar liberal ideology. The irony of California's environmental legal history is the simultaneous urge to both preserve the state's resources and to exploit them.

The final piece in this symposium, Jennie Stephens-Romero's article on pregnancy discrimination and family medical leave laws, recounts another of legal liberalism's successes: the passage of state and federal laws that prohibited discrimination against pregnant women and that required employers to grant family medical leave to their employees. Stephens-Romero recounts the complicated interaction of state and federal law and politics that resulted in the passage of these laws. In doing so, she highlights divisions within postwar feminism. Egalitarian feminists believed that any law recognizing differences between men and women would undermine women's equality. Other women's rights advocates thought it was crucial for the law to recognize the specific needs of women, even if it meant giving them benefits, such as pregnancy leave, that men could not have. Stephens-Romero's article thus illustrates divisions within liberalism, focusing on its internal complexity and the effect this complexity had on the development of the law.

Taken together, these five articles demonstrate a range of approaches to studying legal liberalism. First, scholars can identify and describe the legal manifestations of liberalism, and explain how they came into being. Second, they can examine how social forces interacted with legal liberalism, imposing constraints on it and preventing the law from fulfilling liberalism's political desires. Finally, scholars can look at the conflicts within legal liberalism, exploring how different aspects of liberal ideology interacted with one another, shaping and limiting the law and legal institutions

that furthered liberal policy goals. As these articles reveal, the complex legal order of postwar California provides an excellent medium for studying the laws and legal institutions that have shaped contemporary society both in this state and nationally.

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EDITOR'S NOTE

Among the goals of the California Supreme Court Historical Society and its journal are to encourage the study of California legal history and give exposure to new research in the field. Publication of the following "Student Symposium" furthers both of these goals.

Professor Reuel Schiller, whose course offerings at UC Hastings include a seminar on American Legal History, devoted his spring 2012 course to "The Rise and Fall of Legal Liberalism." Professor Schiller — who is also a member of the journal's Editorial Board — graciously agreed to propose to his seminar students that they consider writing on California aspects of legal liberalism with the possibility that the most promising papers might be accepted by the journal. From those provided by Professor Schiller, I have selected the five that appear on the following pages as our first presentation of a Student Symposium in the field of legal history in California.¹

— SELMA MOIDEL SMITH

¹ The papers provided by Professor Schiller also included the one that appears here by Jeremy Zeitlin, which was written for Professor Joseph Grodin (another member of the journal's Editorial Board).