STUDENT SYMPOSIUM

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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

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[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).

WHAT'S SUNDAY ALL ABOUT?

The Rise and Fall of California's Sunday Closing Law

JEREMY ZEITLIN*

One Sunday in April 1858, Morris Newman decided to keep his tailor shop, located at 100 J Street in Sacramento, open for business.[1] Soon after, Newman was arrested, tried, and convicted for violating the California law known as "An Act for the better observance of the Sabbath."[2] Newman's actions had been plainly illegal under this statute. By selling his wares on a Sunday, Newman had violated the law's requirement "that no person shall, on the Christian Sabbath, or Sunday, keep open any store, warehouse, mechanic-shop, work-shop, banking-house, manufacturing establishment" or sell "any goods, wares, or merchandise on that day . . . ."[3] As a result of this conviction the trial court imposed a fine of twenty-five

* Jeremy Zeitlin received his J.D. in May 2012 from UC Hastings College of the Law. He expresses his gratitude to Professor Joseph Grodin for both introducing him to the study of California legal history and for his guidance throughout this project. He would also like to thank Vincent Moyer and Professor Reuel Schiller for their generous help. As always the author sends his special love to his family.

[1] *Ex Parte* Newman, 9 Cal. 502, 504 (1858); William M. Kramer, Jewish-Activist Lawyers of Pioneer California 5 (1990).

[2] *Newman*, 9 Cal. at 503.

[3] *Id.* at 519 (Field, J., dissenting).

dollars on Newman. When he failed to pay, the judge ordered Newman imprisoned for thirty-five days.[4]

Newman's desire to break California's Sunday closing law stemmed from his religious affiliation. As an observant Jew, Newman followed his faith's tradition and celebrated the Sabbath on Saturday.[5] Because Newman's religion required him to refrain from work on Saturday, he chose to flaunt the Sunday closing law and keep his shop open on the day of rest demanded by the state.[6]

Newman emphasized this law's burden on his religious exercise when he subsequently challenged the constitutionality of the act before the California Supreme Court. In the case of *Ex Parte Newman*, he contended that the Sunday closing law conflicted with California Constitution article I, section 4's guarantee that individual rights to "the free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever allowed in the state."[7]

Ex Parte Newman was the first volley in the almost quarter-century-long debate over the state's Sunday closing law. This contest played out in both the legal and political realms of nineteenth-century California. Opponents of the law believed that the state was granting an impermissible benefit to a particular religious outlook when it declared all must rest on the traditional Christian Sabbath. Those in favor of the Sunday closing did not focus on the law's effect on religious exercise. These Californians considered the law to be a legitimate extension of the state's police power. In the nineteenth-century understanding of this doctrine, the police power conferred to the states included broad constitutional authority to regulate the people's health, welfare, and morals in order to promote the public good.[8] Because the act's only actual prohibition was on the time period

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[4] *Id.* at 504.

[5] Kramer, *supra* note 1, at 5.

[6] *Newman*, 9 Cal. at 504.

[7] Cal Const. art. I, § 4 (amended 1879). Newman also argued that a law totally banning business activity on any day of the week, even if devoid of religious effect, violated California Constitution article I, section 1's protection of property rights. *Newman*, 9 Cal. at 503.

[8] *See* Thomas M. Cooley, A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 572–77 (1868).

Californians could work, supporters of the law characterized it as a simple labor regulation born from the state's traditionally broad police powers.

Ex Parte Newman rejected this police power rationale for the Sunday closing and instead held that the act violated article I, section 4's guarantee of individual religious rights.[9] *Ex Parte Newman's* precedential value was, however, quite minimal.[10] Three years later the California Supreme Court reversed course and found that the Sunday closing did not unconstitutionally interfere with religious rights. The Court now held that the law was "purely a civil regulation, and spends its whole force upon matters of civil economy."[11] Over the next two decades the California Supreme Court pushed questions of religious preference to the sideline as it repeatedly affirmed that the Sunday closing law was rooted in the state's police power.[12] By 1882 the judiciary's comfort with this interpretation was so complete that the California Supreme Court did not feel it necessary to discuss the law's effect on individual religious exercise when it again upheld the statute.[13]

Although California's judges had come to a consensus concerning this law, popular opinion of the ban on Sunday work was decidedly mixed. Indeed, the people of California never wholly adopted the Court's opinion of the Sunday closing law. While civil issues of labor regulation, public morals and temperance did seep into the people's understanding of the law, many Californians continued to view the prohibition on Sunday work as primarily concerning spiritual matters.

In the nineteenth century, the opinion of California's judges and of its people diverged. In decision after decision, the California Supreme Court sustained the Sunday closing law as a reflection of the state's police power to legislate for the general welfare. A conflicting view of the Sunday closing law held sway among the people. Throughout the second half of the

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9 *Newman*, 9 Cal. at 506.

10 *Ex Parte Newman* appears to be the only instance in which a state supreme court struck down a Sunday closing law. Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 Journal of Church and State 13, 16 (1994).

11 *Ex Parte* Andrews, 18 Cal. 678, 685 (1861).

12 *Ex Parte* Burke, 59 Cal. 6, 19 (1881); *Ex Parte* Koser, 60 Cal. 177, 189 (1882).

13 *Koser,* 60 Cal. at 189.

nineteenth century the people of California clung to a belief that their state's Sunday closing law was inextricably tied to religion.

In the United States, laws banning Sunday work date back to the colonial era.[14] In 1610 the Virginia Colony enacted a law commanding attendance at religious services on Sunday.[15] Forty years later, the Plymouth Colony followed suit and passed a law forbidding its citizens to participate in servile work, unnecessary travels, and selling alcoholic beverages on Sunday.[16] By the time of the Revolutionary War essentially all the colonies had a Sunday closing law.[17] This trend continued after independence when the new states both adopted their own constitutions guaranteeing some form of religious freedom, and also passed statutes banning Sunday work.[18]

Throughout the states there were many challenges to the constitutionality of local Sunday closing laws.[19] Each one of these failed.[20] Prior to

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[14] David N. Laband & Deborah Hendry Heinbuch, Blue laws: the history, economics, and politics of Sunday-closing laws 29 (1987). The Sunday closing laws, like many aspects of Anglo-American culture, has biblical roots. "Remember the Sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work: but the seventh day is the Sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: for in six days the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore, the Lord blessed the Sabbath day, and hallowed it." Exodus 20: 8–11.

[15] *Id.* at 29 (Virginia modeled this law after an English act passed by the twenty-ninth Parliament of Charles II).

[16] McGowan v. State of Md., 366 U.S. 420, 433 (1961).

[17] Laband, *supra* at note 34, 30–37.

[18] Andrew King, *Sunday Law in the Nineteenth Century*, 64 Alb. L. Rev. 675, 685 (2000). During the early republic era, the states repealed statutes providing for mandatory church attendance. Virginia acted first in 1776. Connecticut, however, had a statute requiring Sunday church attendance as late as 1838. Note, *State Sunday Laws and the Religious Guarantees of the Federal Constitution*, 73 Harv. L. Rev. 729, 746 (1960).

[19] At this time, the substantive rights within the United States Constitution's Bill of Rights did not bind the actions of the state governments. Barron v. Baltimore, 32 U.S. 243, 247 (1833). Not until the 1947 case, *Everson v. Bd. of Education*, were the protections of religion within the First Amendment of the United States Constitution incorporated against the states. 330 U.S. 1, 16 (1947).

[20] Early nineteenth-century decisions defended Sunday closing laws as a legitimate means to encourage religious practice. In 1811, for example, New York's highest court stated that bans on Sunday work served to "consecrate the first day of the week, as

the California Supreme Court's decision in *Ex Parte Newman*, every state court that reviewed a Sunday closing law held that its prohibitions complied with constitutional protections of individual religious rights. In 1858, when the California Legislature took its turn and declared Sunday to be the state's official day of rest, contemporary constitutional jurisprudence provided a strong foundation for this law.

California enacted its Sunday closing law eight years after the state entered the union. In the preceding Gold Rush years the California electorate apparently lacked much interest in reserving Sunday as a day of rest. Rather, in these nascent days of statehood, "more business was done on Sunday than any other day of the week."[21]

For the more responsible of California's early white inhabitants, Sunday was the day to obtain provisions, wash and prepare for the next week in the mines. Others disposed of Sunday in a less productive manner. These Californians found the first day of the week to be an ideal time for watching a horse race or dog fight, drinking in the local saloon or "risking part or all the week's earnings against the luck and skill and percentage of the professional dealer of faro or monte."[22] During the first decade of

holy time." People v. Ruggles, 8 New York (Johnson's) 290, 297 (1811). Similarly in 1817, the Pennsylvania Supreme Court held that the state's Sunday closing law did not violate constitutional protections of religion because, "the rights of conscience" were never "intended to shelter those persons, who, out of mere caprice, would directly oppose those laws, for the pleasure of showing their contempt and abhorrence of the religious opinions of the great mass of the citizens." Commonwealth v. Wolf, 3 Serg. & Rawle 48, 51 (1817). As the nineteenth century wore on, state supreme courts ceased to accept open endorsement of religious practice as an acceptable constitutional justification for the law. In 1843, North Carolina's renowned Chief Justice Edmund Ruffin declared that working on Sunday could not qualify as a common law nuisance because, "it is not so in the sense that an act contrary to the precepts of our Savior or of Christian morals, is, necessarily, indictable," as acts "against God and religion were left to the correction of conscience, or the religious authorities of the State." State v. Williams, 26 N.C. 400, 407 (1843). By 1848 the Pennsylvania Supreme Court had chosen to uphold a Sunday closing law as legislation that fulfilled non-religious needs for the "absolutely necessary" day of rest "at stated intervals, so that the mass of which the community is composed, may enjoy a respite from labour at the same time." Specht v. Commonwealth, 8 Pa. 312, 322 (1848).

[21] *The Sunday Law: Address by Judge Nye Before the Home Protection Society*, The Morning Call, Jan. 15, 1882.

[22] Arnold Roth, *Sunday "Blue Laws" and the California State Supreme Court*, 55 Southern California Quarterly 43, 43 (1973).

California's statehood many of its residents enthusiastically patronized businesses on Sunday, and took advantage of both the practical and licentious products for sale.

By 1858 California had changed. Most notably, diverse economic activity displaced bonanza mining as the primary way of making a living in the state. Soon, permanent communities, replete with women, children, and an array of businesses, replaced the mining camp as the center of California's communal life. As more established American social and business practices took hold in the state, support for enacting a venerable Sunday closing law surged.[23]

In 1855 California's legislature took a preliminary step toward meeting the "propelling force that has been moving California forward in its march on moral advancement" and declared that participating in noisy activities on Sunday was a nuisance violation.[24] This effort culminated in 1858 when the Legislature passed a law banning all Sunday business.[25]

Many Californians would have been happy to voluntarily shut their shops on Sunday.[26] For the vast Christian majority of California, Sunday was the natural day of rest, and thus a law forbidding business during that time was of no great consequence. The specter of competition from their own less pious and Jewish counterparts left some in the majority hesitant to close up on their own accord. During the Assembly's debate over the law, an opponent of the proposed act pointed out that it "would act more for the protection of certain merchants of Santa Cruz and Santa Clara, who found their trade interfered with, because the Jew merchants saw fit to open their shops on a Sunday."[27]

During this same legislative debate, all in the Assembly seemed to be aware that the Sunday closing law burdened those whose religion did not require resting on Sunday. In one such discussion Assembly Speaker William W. Stow declared that he had "no sympathy with the Jews," who were "a class

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[23] *Id*. at 42 (In 1853 the Legislature received a number of petitions from Californians urging the passing of Sunday closing laws).

[24] *Roth*, at 44.

[25] *Newman*, 9 Cal. at 503.

[26] *Roth*, at 43.

[27] 13 Occident and Am. Jewish Advocate 124 (1855) (excerpted in Jewish Voices of the California Gold Rush: A Documentary History, 1849–1880, 408 (Eva Fran Kahn ed., 2002)).

of people who only came here to make money, and leave as soon as they had effected their object." In regard to the Sunday closing law, the Jewish preference for the Saturday Sabbath was irrelevant to Stowe as the Jews "ought to respect the laws and opinions of the majority."[28]

In 1858, popular support for a Sunday closing law reached its apex. That spring the Legislature passed "An Act for the better observance of the Sabbath," so making it a crime for any Californian to "keep open any store, warehouse, mechanic-shop, work-shop, banking-house, manufacturing establishment" or sell "any goods, wares, or merchandise" on Sunday.[29] Sunday was now the state-mandated day of rest in California.

Almost immediately after the Sunday closing law passed, the California Supreme Court was given an opportunity to review this statute's constitutionality. In *Ex Parte Newman* the Jewish shopkeeper convicted under the Sunday closing law contended that this act clashed with the California Constitution article I, section 4 guarantee of the individual right to practice religion free of government discrimination or preference.[30] From this case two conflicting perspectives on the constitutionality of the Sunday closing law emerged.

Justice David Terry's majority decision took exception with California's Sunday closing law from the start. Even the name of the very statute drew his ire. With a scorching tone, Terry disputed that any law entitled 'An Act for the better observance of the Sabbath'" whose "prohibitions in the body of the act are confined to the 'Christian Sabbath'" could be an acceptable exercise of the state's normal police powers.[31] Instead, Terry held that by requiring the closing of business on the Christian day of rest, the state preferred "the observance of a day held sacred by the followers of one faith, and entirely disregarded by all the other denominations within the State."[32]

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[28] *Id*. Stow also argued the religious roots of Sunday closing laws. "The Bible lay at the foundation of our institutions, and its ordinances ought to be covered and adhered to in legislating for the state."

[29] *Id*. at 519 (Field, J. dissenting).

[30] *Newman*, 9 Cal. at 503.

[31] *Newman*, 9 Cal. at 504–5.

[32] *Id*. at 505.

Ex Parte Newman held that article I, section 4's guarantee of "free exercise and enjoyment of religious profession and worship, without discrimination or preference" provided an absolute right for individual Californians to practice their religion free from interference from the state.[33] "When our liberties were acquired, . . . we deemed that we had attained not only toleration, but religious liberty in its largest sense — a complete separation between Church and State, and a perfect equality without distinction between all religious sects."[34] In Terry's opinion, the Sunday closing law violated this constitutional protection because it granted sanction to the Christian day of rest while denying this same benefit to Californians whose religions mandated a different time for the Sabbath.

Justice Field's dissent in *Ex Parte Newman* took a contrary view of the Sunday closing law. Field held that the statute was merely an exercise of the state's police power to regulate the health, safety and morals of the community. Consequently, Newman could not claim to be the victim of state-sanctioned religious discrimination. "The petitioner is an Israelite, engaged in the sale of clothing, and his complaint is, not that his religious profession or worship is interfered with, but that he is not permitted to dispose of his goods on Sunday." In Field's opinion, the law did not impinge on Newman's religious rights because this act only made it so "his secular business is closed on a day on which he does not think proper to rest."[35] The Sunday closing law's mandate of a universal day of rest on Sunday was thus, "only a rule of civil conduct . . . limiting its command to secular

[33] *Id.* at 508. Terry's promotion of individual rights over the Legislature's expression of the collective will did not confine itself to the realm of religion. *Ex Parte Newman* also held that even if devoid of religious elements, a Sunday closing law would still violate California Constitution article I, section 1's protections of individual property rights. For Terry, an individual's decision to "seek cessation from toil" was a matter of personal choice — not communal consensus as "the amount of rest which would be required by one-half of society may be widely disproportionate to that required by the other." The Sunday closing law annulled a person's ability to choose to engage in economic activity on a particular day of the week, leading Terry to find that the act "infringes upon the liberty of the citizen, by restraining his right to acquire property." This argument would again rear its head during the *Lochner* era of American law. Joseph R. Grodin, *The California Supreme Court and State Constitutional Rights: The Early Years*, 31 Hastings Const. L.Q. 141, 153 (2004).

[34] *Newman*, 9 Cal. at 506.

[35] *Id.* at 519. (Field, J., dissenting).

pursuits," and "as to the forms in which that profession or worship shall be exhibited, the law is silent."[36] Because this act neither required nor prohibited any particular religious practice, Field found that the statute did not conflict with article I, section 4's protection of individual religious rights.[37]

In 1861 the California Legislature passed another Sunday closing law.[38] The newly resurrected law, known as "An Act for the Observance of the Sabbath," mirrored the earlier iteration of this statute. This new version did, however, provide for a few exceptions allowing boarding houses, stables, and retail drugstores to stay open on Sunday. The law still mandated that most stores, saloons, and banks shut down on Sunday.[39]

Soon after this act came into being, another San Francisco challenge made its way to the California Supreme Court. With the Court only three years earlier declaring the Sunday closing law to be unconstitutional, it would seem that this defendant could depend on the rule of *stare decisis* to liberate him from the clutches of the law. He would be sorely disappointed.

At this time the *Ex Parte Newman* Court, which had ventured out on uncharted legal grounds when it struck down the Sunday closing law in 1858, no longer existed. By 1861 Justices David Terry and Peter Burnett, the two members of the California Supreme Court who had found the Sunday closing law to be unconstitutional, had left the bench.[40] With two new members and Justice Field now serving as its leader, the newly constituted bench was eager to amend the ways of its predecessor.

This case, *Ex Parte Andrews*, marked a complete reversal of *Ex Parte Newman*. The Court's unanimous decision held that the Sunday closing law was a legitimate extension of the state's police power and accordingly

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36 *Id.* at 520.

37 *Id.*

38 *Ex Parte* Andrews, 18 Cal. 678, 678 (1861).

39 *Id.*

40 Justice Terry's exit from the court was dramatic. In 1859 Terry became embroiled in a dispute with California's United States Senator David Broderick and Terry challenged him to a duel. Although Terry had a few months left in his term on the Court, he resigned his seat and made himself busy with preparation to restore his honor. When Terry and Broderick met, the judge's aim was superior to that of the senator's. The shot Terry landed mortally wounded Broderick. Paul Kens, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age 86 (1997).

complied with all constitutional protections of religion. The decision expressed disdain for both the legal reasoning within, and even the mere presence of, *Ex Parte Newman*. Indeed, *Ex Parte Andrews* did not even mention the contrary precedent of *Ex Parte Newman* by name, instead only stating that "[t]hese sections were commented upon by the several Judges of this Court at the April term, 1858, when the law of that year upon this general subject was under review."[41] The California Supreme Court had broken away from its sister courts when it struck down the Sunday closing law in *Ex Parte Newman*. In *Ex Parte Andrews*, the state's highest court returned California law to the fold.[42]

The Court now held that California Constitution article I, section 4's protections of religion did not conflict with California's Sunday closing law because these protections only prohibited legislation "that invidiously discriminates in favor of or against any religious system." The Sunday closing law fell within this constitutionally acceptable space because it "requires no man to profess or support any school or system of religious faith, or even to have any religion at all . . . ."[43] Accordingly, *Ex Parte Andrews* held the statute to be a proper manifestation of the state's police power. "The operation of the act is secular, just as much as the business on which the act bears is secular; it enjoins nothing that is not secular, and it commands nothing that is religious . . . ."[44]

In order to separate California law from Justice Terry's legal principles, this curt, six-page decision ended by stating that the Court "did not deem it necessary to pursue the discussion" anymore as "the opinion of Mr. Justice Field in *Ex Parte Newman* . . . discusses the main question involved, and more fully expresses our views."[45] The decision was clear. In *Ex Parte Andrews*, the California Supreme Court deemed the Sunday closing law to be a constitutionally permissible exercise of the state's police power to

41 *Andrews*, 18 Cal. at 681.

42 *Id.* *Ex Parte Andrews* began its defense of California's Sunday closing laws by reiterating the broad acceptance of Sunday closing laws in America. For the *Ex Parte Andrews* court, the constitutionality of Sunday closing laws was such a settled legal issue that "[p]robably such strong concurrence of opinion on one leading question affecting the general community, cannot be found in the history of American jurisprudence."

43 *Id.* at 684.

44 *Id.* at 685.

45 *Id.*

regulate the health, welfare, and morals of the community. It would continue doing so.[46]

In the wake of *Ex Parte Andrews*, future challenges to the state's Sunday closing law also failed before California's highest court.[47] In an 1881 case, the California Supreme Court quickly disposed of a defendant's challenge claiming that the Sunday closing law violated his constitutionally protected religious rights.[48] This decision expanded on the precedent set forth in *Ex Parte Andrews* and declared that the Sunday closing law "was purely a secular, sanitary, or police regulation . . . in no manner influenced by sectarian or puritanical ideas."[49] Contrary to its earlier fickleness, the California Supreme Court did not again waver in its opinion of the Sunday closing. As the nineteenth century entered its last decades, settled California law dictated that the state's police power justified the ban on Sunday work.

One year later, in 1882, yet another defendant attempted to argue that California's Sunday closing law was unconstitutional. Here, the majority of

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[46] *Ex Parte Andrews* also held that California Constitution article I, section 1's protection of individual property rights did not conflict with the Sunday closing law. This court held that the clause "did not deprive the Legislature of the power of prescribing the mode of acquisition, or of regulating the conduct and relations of the members of the society in respect to property rights." *Id*. at 682. A few months after the *Ex Parte Andrews* decision, the California Supreme Court rejected another challenge to the Sunday closing law in a brief one-page decision. *Ex Parte* Bird, 19 Cal. 130, 130 (1861).

[47] *Ex Parte* Burke, 59 Cal. at 19.

[48] *Id*. Since the 1861 decision in *Ex Parte Andrews*, the wording of California Constitution article I, section 4 had been slightly changed. During the 1879 constitutional convention the delegates revised the section so that the last phrase now read, "forever guaranteed in this state." Cal Const. art. I § 4. (1879); David A. Carrillo, *California Constitutional Law: The Religion Clauses*, 45 U.S.F. L. Rev. 689, 718–21 (2011) (providing a thorough history of the religion clauses in the California Constitution). *Ex Parte Burke* held that the slight differences in language did not affect the substantial protections afforded by article I, section 4, as the original and revised provision were "precisely same, *totidem verbis*." *Burke*, 59 Cal. at 13.

[49] *Burke*, 59 Cal. at 13–16. Burke also challenged the law under the new constitutional provision in article IV, section 25, which mandated that "the legislature shall pass no local or special laws." Impermissible special laws apply to one individual segment of the population rather than the whole community. Burke argued that the Sunday closing law's exceptions for business such as hotels and stables made this statute special legislation. The *Ex Parte Burke* court rejected this argument before reaching the merits of this issue by holding that the new constitutional ban on special legislation was prospective and thus could not reach the Sunday closing law passed in 1861. *Id*. at 8.

the California Supreme Court did not even consider it necessary to waste ink discussing the Sunday closing law's harmony with the state's police power or individual religious rights as "most of the questions arising in this case were passed on in *Ex Parte Andrews*."[50]

On three separate occasions the California Supreme Court had affirmed the constitutionality of the Sunday closing law as a proper exercise of the state's police power. By 1882 judicial opinion concerning the Sunday closing law had settled. No longer could opponents of this statute make any plausible claim in court that the Sunday closing law abridged constitutional guarantees of individual religious practice.

San Francisco Police Chief Patrick Crowley had a frightfully full day ahead of him. On Sunday, March 19, 1882, San Francisco's leaders decided to resume rigorous prosecution of the state's Sunday closing law.[51] San Francisco's efforts to enforce the statewide prohibition on Sunday work were somewhat novel. During its two decades of existence, the Sunday closing law did not always inspire local authorities to action. By 1882 it had become apparent that local authorities varied in their devotion to the Sunday closing law.

To be sure, some communities enforced the Sunday closing law with vigor. A report from Woodland in 1873 indicated that on Sunday "every saloon in town as well as every store (drug stores excepted), being closed . . . the streets presented a quiet and Christian like appearance and

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[50] *Koser*, 60 Cal. 177, 189–90 (1882) In *Ex Parte Koser*, the Supreme Court also rejected the defendant's claim that the Sunday closing law was special legislation. Koser actually did have some reason to believe that the Court would strike down the law on this ground because it had recently found a regulation banning the opening of bakeries on Sunday to be an impermissible special law. *Ex Parte* Westerfield, 55 Cal. 550, 551 (1880). Here, the appeal to the constitutional prohibition on special legislation did not sway the California Supreme Court. *Ex Parte Koser* held that these exemptions for certain lines of work and the corollary mandate that saloons, banks, and stores remain closed on Sunday was permissible because these two categories of business were different "in their essential features, as regards society and the health and comfort of those who constitute a community . . . ." *Koser*, 60 Cal. at 190.

[51] *The Sunday Law: Result of the First Day's Enforcement,* S.F. Chronicle, Mar. 21, 1882.

the churches were well filled."[52] Such strict observance to the law continued into the next decade around some parts of the state. In the spring of 1882, for example, the authorities in San Luis Obispo continued to demand "the closing of every business house" and issued a harsh warning that anyone conducting business on the Sabbath would be arrested and prosecuted.[53]

Other communities paid little heed to the Sunday closing law. Reports from Bakersfield found that "no attempt has been made here to enforce the Sunday law since its constitutionality was affirmed by the Supreme Court."[54] At the same time in the Calaveras County town of San Andreas both the people and the authorities demonstrated little appetite for enforcing the law. Dispatches from one Sunday in this town disclosed that all the saloons and restaurants continued to operate on Sundays as the local prosecutor had announced that the practice of continuing business on the first day of the week was "sanctioned by the community" and the law itself to be "regarded as a failure of the Supreme Court."[55]

Against a degree of public apathy, Chief Crowley had to attempt to enforce the state's Sunday closing law in San Francisco. This mission, bestowed on Crowley by San Francisco Mayor Maurice Blake, was herculean. In the four decades since the Gold Rush, San Francisco had grown into California's largest city, sporting a population of approximately 234,000.[56] San Francisco's size did not erase its rugged edge.[57] At this time, 2,000 saloons dotted the city's streets, providing one place of libation for every 117 men, women, and children within San Francisco.[58] It was the city's many saloonkeepers who became one of the main targets of renewed efforts to enforce the Sunday closing law.[59]

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[52] *The Sunday Law: Its Observance in Different Parts of the State*, S.F. Chronicle, Jan. 16, 1873.

[53] *The Issue of the Day: Saloon Keepers as a Rule, Bid Defiance to the Sunday Law*, The Morning Call, Mar. 20, 1882.

[54] *Id.*

[55] *Id.*

[56] R. Hal Williams, The Democratic Party and California Politics: 1880–1896 4 (1973).

[57] Carl Nolte, *100 Years Ago: The Great Election of 1882*, S.F. Chronicle.

[58] *Id.*

[59] *The Issue of the Day, supra* note 53.

Chief Crowley met his responsibilities with zeal. After dividing San Francisco into multiple districts, he assigned parties of ten officers and one commander to gather evidence of any business operating on Sunday. The authorities devoted most of their time to inspecting the city's saloons, cigar shops, and groceries, and avoided citing small places of business such as fruit peddlers, and newsstands.[60] Even though they could not cover the entire city, their labors were fruitful. In one district, the police collected evidence of 114 places of business open on Sunday even before Crowley's men were able to investigate two thirds of the area.[61]

Sorting the mounds of evidence against San Francisco's mischievous businessmen nearly overwhelmed the city's prosecuting attorney.[62] Crowley's sweep had yielded enough evidence to make out 800 viable arrest warrants. On the following Monday a flurry of activity swept through the local courthouse as the police and judges attempted to issue arrest warrants. One witness to the scene claimed that "[a]s fast as the warrants and complaints were filled out they were laid before the Judges for signing, the officers swearing to them in batches of fifty."[63] Even with this expedited process, the court was unable to finish issuing the warrants before nightfall, and as a result no arrests were made until the next day.[64]

This attempt to enforce the Sunday closing law divided Californians. After hundreds of San Francisco businessmen eventually had received arrest warrants, doubts emerged about the feasibility of holding trials for the putative violators of the Sunday closing law. Contemporary predictions were pessimistic. One report surmised that because of "the prominence Sunday law cases have obtained, and the feeling that people have for and against the law" the courts would struggle to field a neutral jury in any Sunday closing prosecution. Due to the deep rifts in people's opinions of the law, this critic anticipated that the authorities would require initial jury pools "of at least one hundred persons" in order to eventually empanel

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60 *Id*. One contemporary report noted that the grocers of San Francisco's outskirts only complied with the Sunday closing law to the extent that they shut their front doors. *Id*.

61 *Over Five Hundred Warrants Issued for the Offenders*, The Morning Call, Mar. 21, 1882.

62 *The Sunday Law, supra* note 51.

63 *Over Five Hundred Warrants, supra* note 61.

64 *Id*.

twelve "good and true" San Franciscans capable of hearing a Sunday closing case without bias.[65] As 1882 turned from spring to summer, the people of California had yet to collectively decide whether to support or oppose the state's constitutionally valid Sunday closing law.

During the spring of 1882, both friends and foes of the Sunday closing law took measures to turn California's public toward their side. A group known as the Ministerial Union took their ardent support for the Sunday closing law directly to the halls of power.[66] This group of Protestant leaders implored Mayor Blake of San Francisco to enforce the existing state ban on Sunday business. The Ministerial Union referred to the political clout of its members, assuring San Francisco's authorities that it represented "a large, calm and determined constituency," who "resolved to do what they may in every legitimate way to defeat the machinations of rebellion, and prevent such a triumph of conspiracy as would blast the good name of the city . . . ."[67]

In San Francisco and the neighboring communities, opponents of the Sunday closing law also drew on their collective power. The League of Freedom, an association of saloonkeepers and other businessmen, supplied the primary organized opposition to the law.[68] The League employed multiple methods to resist the Sunday closing law. Operating as a mutual protection society, the League collected fees from its members and in exchange advocated against the Sunday closing law, represented its members in court, and made bond payments for those who had violated the law.[69]

The fissures in Californians' opinions of the Sunday closing law soon rose to the top of state politics. During the spring of 1882, both the Republicans and Democrats staked out positions on the Sunday closing law in advance of the upcoming fall election. The Republicans, who had carried

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[65] *Id.*

[66] *Id.*; *About Sunday Law: The Questions Discussed by Ministers*, S.F. Chronicle, Aug. 19, 1890.

[67] *The Sunday Law, supra* note 51.

[68] *The Issue of the Day, supra* note 53. The League of Freedom's strategy to bring about public opposition to the law was clever. Instead of calling for immediate abrogation, the League promoted "impartial enforcement of the law" and "the arrest of anyone and all that violated it" so that the "people would rise up *en masse* and call for its repeal." *Id.*

[69] *Id.*

the governor's office four years earlier, threw their support behind sustaining the legal prohibition on Sunday work. Representatives from California's churches had advocated fiercely for the law and warned the politicians to "be careful of their platform in this direction" because "[a]ny yielding or temporizing on this and kindred subjects will be resented by the better class of our citizens, who, in all cases, are the power of the land."[70] Although the Republicans did not embrace the same pious language as the churchmen, they did endorse renewing the Sunday closing law.

In late August the Republicans convened their party convention. There they adopted a plank that recommended "preserving one day in seven as a day of rest from labor" if victorious at the polls.[71] In their announcement to the electorate, the Republicans hewed closely to the police power reasoning utilized by the California Supreme Court. Like California's courts, the Republican Party portrayed the Sunday closing law as a non-religious means to promote the health and welfare of the people. "We are in favor of observing Sunday as a day of rest and recreation, and while we expressly disavow the right or the wish to place any class of citizens [under compulsion] to spend that day in a particular manner, we do favor the maintenance of the present Sunday laws, or similar laws, providing for the suspension of all unnecessary business on that day." Whatever their motivations for preserving the Sunday closing law may have been, Californians in favor of the ban now had a statewide political party to support them.

The Democrats took a contrary view of the Sunday closing law.[72] Recent turmoil within this political party had left the Democrats ripe to oppose the Sunday closing law. After losing a considerable share of their

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[70] Warren L. Johns, Dateline Sunday, U.S.A.: The story of three and a half centuries of Sunday-law battles in America 90 (1967).

[71] *Republican Convention,* S.F. Evening Bulletin, Aug. 31, 1882.

[72] Within the Democratic Party, especially among those most influenced by Jacksonianism, opposition to Sunday closing laws had a long history. Jacksonian political thought was always vigilant to promote *laissez faire* policies, and thus saw Sunday closing laws as yet another pernicious instance of state interference with individuals' lives. As early as the late 1820s Democratic politicians, such as the orator Theophilius Fisk, were denouncing Sunday closing laws as the work "of a proud and aspiring priesthood, [possessed of] a determination to establish an Ecclesiastical Hierarchy, and to reduce us to a worse than Egyptian bondage." Theophilius Firsk, *Priestcraft Unmasked* (excerpted in Manuel Cachán, *Justice Stephen Field and "Free Soil, Free Labor Constitutionalism": Reconsidering Revisionism*, 20 Law & Hist. Rev. 541, 556 (2002)).

constituents to the Workingmen's Party in the previous decade, the Democrats were in need of resurgence by 1882.[73] One of the men who would bring the Democratic Party back to power was a San Francisco political leader known as Christopher "The Blind Boss" Buckley.[74]

Buckley operated a political machine out of the Alhambra Saloon on the corner of Bush and Kearny Streets in San Francisco, and controlled Democratic politics with "a power bordering on absolute despotism."[75] Buckley expanded his political power by extending patronage networks into San Francisco's Italian, French, Jewish and German communities. Always in search of new avenues of power, Buckley even formed an alliance with a Chinatown boss known as Little Pete who affectionately referred to Buckley as the "the Blind White Devil."[76] Buckley, along with mining millionaire George Hearst formed a group representing the "anti-monopolist" wing of the California Democratic Party.[77] At the Democratic Party Convention in June 1882, the anti-monopolists won the nomination for the former Union general George Stoneman as the party's candidate for governor.[78] A few months later, Stoneman led the legislative push to end California's Sunday closing law.[79]

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[73] In the 1870s the Democrats had lost substantial support to Dennis Kearney's populist Workingmen's Party. The Workingmen appealed to mass rage against both the monopoly of the railroad and newly arrived Chinese immigrants. In the election of 1879, the Workingmen displayed themselves as a powerful political force in California. That year's election saw the Workingmen candidate win 28 percent of the gubernatorial vote, just behind the 30 percent claimed by the Democratic candidate and in shouting distance of the victorious Republican's 48 percent share. Although by 1880 internal disputes within the Workingmen's Party had stalled the party's political rise, many of its members joined the Democrats but continued to hold onto many of their ideals. Williams, *supra* note 56, at 19–20.

[74] Buckley was a fascinating character. After losing his eyesight during adulthood, Buckley took advantage of his other assets and was able to "marshal men and matters into a formidable phalanx with unnerving precision." His "illimitable and infallible" memory was reportedly so sharp that Buckley could recognize visitors by the grip of their handshakes. Nolte, *supra* note 57.

[75] *Id.*

[76] *Id.*

[77] Williams, *supra* note 56, at 21.

[78] *Id.* at 25–27.

[79] Johns, *supra* note 70, at 92–93.

At this same convention, the Democrats also resolved to officially oppose the Sunday closing law.[80] Chairing the committee considering the Sunday law was none other than former California Supreme Court Justice David Terry. Despite Terry's avowed opposition to the law, some Democrats feared opposing the law would rob them of the support of religious folk.[81] Terry, however, condemned the law as "a religious holiday," which only represented a "parcel of nonsense put up by the judges."[82] By a vote of eight-to-one at the convention, the Democrats committed themselves to repealing the Sunday closing law if the electorate so chose to empower them.

The result of the election of 1882 was clear. That November, Stoneman carried 55 percent of the gubernatorial vote while his fellow Democrats claimed the majority of seats in the Assembly and Senate.[83] Now ascendant in the politics of California, the Democrats quickly moved to repeal the Sunday closing law. In early 1883, Governor Stoneman called on the Legislature to end the Sunday closing law. Both houses complied, and soon California became the first state in the nation to entirely eliminate legal prohibitions on Sunday business.[84]

At this time the California Supreme Court, following Field's dissent in *Ex Parte Newman*, had taken multiple occasions to affirm that the state's police power provided the lone legal justification for the Sunday closing law. By embracing this constitutional theory, the judiciary had largely excised the question of religious preference from legal debate over the Sunday law. This view did not, however, define the whole of the political sphere. When the people and politicians of California evaluated the Sunday closing law, the issue of the state's permissible interaction with religion again took the forefront.

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80 *Id*.

81 *Id*. at 91.

82 *Democratic Convention*, S.F. Evening Bulletin, Jun. 21, 1882.

83 Paul Kens, Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age 26 (1997). (Stoneman won 44 of California's 52 counties and 23,500 more votes than the Republican candidate.)

84 Alan Raucher, *Sunday Business and the Decline of Sunday Closing Laws: A Historical Overview*, 36 Journal of Church and State 13, 18 (1994).

Ever since the Legislature first passed a Sunday closing law, public critics of the law complained that this state-sanctioned ban on work impermissibly interfered in their religious affairs. One 1866 article argued that the Sunday closing law conflicted in spirit with the state's existing religious diversity.[85] For this observer of San Francisco life, his community was "one of the most cosmopolitan cities in the world" where a "great liberality of thought and feeling prevails." Thus, the city welcomed "all religions and creeds and no-creeds, from the strictest form of Calvinism now in existence, to Spiritism, Atheism, and Materialism." Here, a wide variety of individual religious practices met "not only with toleration, but with tolerance, which is a much rarer phenomenon."[86] Upon this diverse population, bans on Sunday business seemed to be the work of puritanical forces, representing nothing less than "narrowness and bigotry, and petty tyranny, as were ever developed in Connecticut under the *regime* of the Blue Laws."[87]

While this critic did not dispute the beneficial results of dedicating Sunday to rest and prayer, he disapproved of the state's enforcing such behavior. "The evil of all this is not apparent to that class of well-meaning persons who look no further than the *end in view* . . . a class incapable of understanding that the violation of the personal rights of the citizen as a free moral agent, upon the mere ground of compelling him to be virtuous against his inclination, is in its tendency subversive to all liberty."[88] This rebuke of California's Sunday closing law avoided delving into whether the law actually benefited the people's welfare. Rather, it condemned the law's mere attempt, be it beneficial or not, to interfere with Californians' religious choices.

In another tract against the Sunday closing law, a critic humorously contended that the true preferences of many San Franciscans lay outside of church services on the weekend. This writer argued that participating

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85 *Blue Law Legislation*, Daily Dramatic Chronicle, Nov. 23, 1866.

86 *Id.*

87 *Id.* (emphasis in original).

88 *Id.* (emphasis in original). Utilizing comparisons between Sunday closing and sumptuary laws, this writer warned that a government that maintained a Sunday closing law could, "on the same principle . . . legislate as to what people should eat and wear; make it a penal offense to eat mussels, on the ground they are indigestible; to smoke, because it injures the nerves; to wear corsets, because they produce disease and shorten life." *Id.*

in public recreation was the ideal way to spend a California Sunday. "It does them more good to go to Hayes Park, or the Cliff House, or Bay View, or to take a trip to Oakland, and enjoy themselves according to their tastes and inclinations than to go to church."[89] In this tract's opinion it was wrong for the state to push citizens toward religious observance and it asserted that there should be no Sunday closing law so that "the church-goers enjoy the liberty of acting according to their own convictions and tastes; but let the theater-goer possess the same liberty."[90]

The declaration that emerged from the Democratic Convention in the spring of 1882 further demonstrates that much of the opposition to the Sunday closing law stemmed from a fear of state interference in religious affairs. This plank framed the Sunday closing law as wrongfully interfering with individual religious choice:

> That the Democratic Party, inheriting the doctrine of Jefferson and Jackson, hereby declares its unqualified enmity to all sumptuary legislation, regarding all such exercise of the law-making power as against the just objects of free government, and that all laws intended to restrain or direct a free and full exercise by any citizen of his own religious and political opinion, so long as he leave others to enjoy their rights unmolested, are antidemocratic and hostile to the principles and traditions of the party, create unnecessary antagonism, cannot be enforced, and are a violation of the spirit of the republican government; and we will oppose the enactment of all such laws and demand the repeal of those now existing."[91]

This plank plainly states that the Sunday closing law impinged on individual religious preferences and employed many of the arguments first stated by Justice Terry in *Ex Parte Newman*. The Democrats warned the public that the law would "restrain or direct a free and full exercise by any citizen of his own religious and political opinion." The apparent truth that the Sunday closing law did not explicitly impel religious practice or criminalize spiritual belief mattered little. Even though the law permitted religious minorities "to enjoy their rights unmolested," compelling those

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89 *The Sunday Law*, S.F. Chronicle, Mar. 6, 1867.

90 *Id.*

91 *Democratic Convention*, S.F. Evening Bulletin, Aug. 31, 1882.

who lacked a spiritual compunction to rest on Sunday was still in "violation of the spirit of the republican government." Terry and others of the same opinion had failed to convert the California Supreme Court to their belief that the Sunday closing law violated individual religious rights. In 1882 they brought their same case to the people.

After the Democrats' victory in the election of 1882, the newly elected governor quickly acted to repeal the Sunday closing law. Governor Stoneman's remarks to the Legislature show a preoccupation with the statute's effect on religious practice. Besides acknowledging that it was "unwise to cumber the statute books with an enactment which experience has proven cannot be enforced," Stoneman proclaimed that the Legislature must repeal the law because "the right to worship free from hindrance or molestation should always be carefully guarded."[92] The paths of the people and courts had departed from each other. The judiciary had held the Sunday closing law to be a pure manifestation of the state's police power. The people, believing that the Sunday closing law negatively interfered with their own religious practice, declared the same law to be poor policy.[93]

Political debates over the Sunday closing law did not only concern religion. Both opponents and proponents of the law marshaled a variety of arguments to promote their view of the law. For example, the League of Freedom's primary complaint focused upon the fact that the Sunday closing law detracted from their ability to profit financially from keeping their saloons open every day of the week. This economic distaste for the law was apparent when the League's leader denounced the prohibition of Sunday work as an "obnoxious and unpopular law" and swore they had "the whole

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92 *Stoneman's Address*, S.F. Evening Bulletin, Jan. 10, 1883.

93 Later attempts to pass Sunday closing laws also aroused the people's concerns over the state's granting religious preference. An 1883 *San Francisco Chronicle* article evaluated a proposed Massachusetts ban on Sunday railroad shipping and found that "[t]o Californians accustomed to nearly the full freedom of Continental cities, it seems strange that objections should be made to the running of railroads on Sundays" and that "to declare as a violation of the Sabbath the running of trains, the delivery of bread, milk, newspapers and other articles indispensible to the modern breakfast, is a relic of barbarianism which will soon find as few defenders as the Massachusetts legislation against witchcraft or the old Blue Laws of California." *Sabbatarianism*, S.F. Chronicle, Dec. 27, 1883.

mercantile community, both wholesalers and retailers, to back them up" in this opposition.[94] Other critics of the Sunday closing law found this regulation to be undesirable because it was simply impractical. One editorial argued for repeal because it believed the authorities lacked the will to enforce it. "[S]uch laws are more than useless: they are absolutely mischievous and demoralizing in their tendency by engendering a disrespect for law in general. Whatever tends to disassociate the idea of law from an idea of justice in the popular mind is a public evil of the greatest magnitude."[95] This opponent expressed little concern that the Sunday closing law could interfere with individual religious rights. It campaigned against continuing the legal restriction on Sunday work purely because this law was unpopular.

Those who supported the Sunday closing law contended that civil concern, falling under the province of the state's police power, justified the act. During public debate over the law, these Californians provided many reasons why the electorate should back the statute as an act "founded on consideration of the public good . . . health and material prosperity."[96] In many ways these arguments fit well into the template of police power legislation that the California Supreme Court had employed when it found the Sunday closing law to be constitutional.

Support for the Sunday closing law melded with larger efforts to promote temperance. The union of these two movements was natural, as saloons were one of the primary targets of the Sunday closing law. Many of those in favor of the Sunday closing law stressed how increasing access to the saloons, by allowing them to stay open on Sunday, imperiled California with the "ravage of the rum curse which is capturing the people every day."[97] At a meeting of a pro-Sunday closing group known as the Home Protection Society, a speaker urged support for the law because the state needed to restrict the dangerous greed of the saloonkeeper who claimed the right "to open the gilded gates of hell even on a Sunday."[98] While this

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94 *The Issue of the Day, supra* note 53.

95 *Unpopular Laws*, S.F. Chronicle, Jun. 12, 1876.

96 *The Issue of the Day, supra* note 53.

97 *The Sunday Law: A New Batch of Arrests To-Day: Notes and Discussion*, S.F. Chronicle, Mar. 27, 1882.

98 *Id.*

speaker's message utilized religious symbolism, his message expressed concern for the people's health rather than their souls.

Even some voices from California's churches specifically called for maintaining the Sunday closing law as a means to counteract the social harms of liquor. One San Francisco religious leader, for example, lamented that the consumption of liquor was the primary public evil in California. Saloons, said the Reverend Dile, "take more money than the Chinese, the Land League, fires, floods and crime and more that is required for orphans, paupers, railroads and war." To his congregation Dile bemoaned the saloonkeeper who continued to flaunt the law and, in a moment of retributive hyperbole, requested: "Oh! would to God we had General Jackson here to hang these rebels who openly avow the purpose to not abide by law of the land, and Ben Butler [a notoriously tough Union general] to close up the saloons at the point of the bayonet."[99] The link between Sunday closing and temperance was both strong and natural. Even when preaching to their congregations, California's ministers found it persuasive to promote the Sunday closing law as a means to protect society from the harms of liquor. Through appealing to a desire to rid the state of the harms of alcohol, proponents of the closing law offered the public a reason to support the law that did not touch upon religion.

Some California ministers also promoted the Sunday closing law as a means to improve working conditions. Reverend Simmons of St. Paul's Church in San Francisco urged his flock to support the Sunday closing law because "there are thousands of laboring men and women all over the state that have no control of their time having sold that to their employers for that upon which they and their families subsist."[100] Across the city at Grace Church, Reverend Needham similarly reasoned that the people should continue to support the act "not so much from a religious as from a sanitary point of view."[101]

Despite the use of civil rationales, proponents of the Sunday closing never entirely abandoned religious justifications for the Sunday closing law. A sermon given by Dr. Beckwith at the Third Congregational Church in San Francisco illustrates how some Californians, even as late as 1882, believed

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99 *The Issue of the Day, supra* note 53.

100 *Id.*

101 *Id.*

the Sunday closing law's primary purpose was promoting religion.[102] Beckwith urged the people to support the law because no one "has any right to come between me and my season of restful communion" and, "having inherited the Sabbath from God, we have a right to it just as God made it." This argument did not rely upon the state's broad police power to justify the law. Beckwith believed California should have a Sunday closing law because his religious beliefs dictated so.

Beckwith's religious defense of the Sunday closing law conflicted with the civil rationales offered by the judiciary and other public supporters of the law. Unlike them, Beckwith rejected that a Sunday closing law properly could serve as a regulation on working conditions. "Men do not need one day in seven for carousels and picnics. If the Sabbath is to be put in these uses it would be better for men's health and prosperity for all the seven days to be consumed by honest labor." For Beckwith, a week without a day of rest was preferable to devoting the Sabbath day to secular activities. "This perverted use by some, prevents its full enjoyment by those who treat it as a day of worship and rest." Instead "it would be better to drive toll through every day than to stop one day to give more time to run a wearier and swifter race of sin." Beckwith further avowed that it "would be false to God, to ourselves, to the Sabbath-breakers themselves, if we did not oppose the secularization of one day of rest." By offering religious rationales for the Sunday closing law, this supporter of the act opposed both those citizens who wished to keep Sunday open for business and the California courts that had declared the law to be a constitutional reflection of the state's broad police powers to legislate for the health, welfare, and morals of the people.

The aftermath of the Sunday closing law's repeal further demonstrates how far popular and judicial opinions had diverged. In 1893 a new statute was enacted that guaranteed each California employee one day of rest in seven.[103] Instead of mandating a statewide closure of businesses on Sunday, this new measure gave each employer the discretion to choose

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[102] *Id.* Beckwith also stated that there were civil rationales for sustaining the Sunday closing law. "We need it for our financial prosperity, our public morals, our social security, our intellectual culture, the perpetuity of our free government."

[103] Johns, *supra* note 70, at 176. The Assembly approved of this Act by a vote of 56–4, the Senate by a tally of 29–0.

the day of rest.[104] Californians treated this new legislation quite differently than the old Sunday closing law. One decade earlier the Legislature had enthusiastically repealed the Sunday closing law, despite strong arguments that its purpose was to promote the public welfare by ensuring that Sunday would be a day of rest for all. Now, once the law had been stripped of its association with Sunday, the Legislature did not hesitate to approve it. The same police power justifications that had failed to convince the California Supreme Court to uphold the Sunday closing law in 1858 carried the day once the specter of religious preference ceased to encumber the law.

SUMMARY

In *Ex Parte Newman* the California Supreme Court departed from contemporary constitutional notions of individual religious rights and declared the state's Sunday closing law to be unconstitutional. This novel legal perspective, however, failed to attain any lasting impact on California jurisprudence. Starting with Justice Field's dissent in *Ex Parte Newman*, the California Supreme Court continually held that this statute did not clash with constitutional protections of religious exercise. By 1882, the Sunday closing law enjoyed an unassailable legal foundation within the state's authority to regulate health, welfare, and morals through its police power.

The citizens of California held a contrary opinion of the Sunday closing law. While the need for labor regulation and temperance certainly had a place in the public's understanding of the law, questions of religious preference never abated. Indeed, during the election of 1882 the victorious opponents, and to some degree the defeated supporters of the Sunday closing law, relied on overtly religious arguments to convince the population to join their cause.

The legal justification, based on the state's police power, has endured.[105] By 1882 it had become settled California law that the prohibition on Sunday

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104 *Id.*

105 Field's doctrine also proved influential when the United States Supreme Court considered a Sunday closing law's constitutionality under the United States Constitution, as one justice declared that "Justice Field's dissent in this case has become a leading pronouncement on the constitutionality of Sunday laws." *McGowan*, 336 U.S. 420, 511 nt. 96 (Frankfurter, J. concurring).

work was "purely a secular, sanitary, or police regulation . . . in no manner influenced by sectarian or puritanical ideas."[106] Time has, however, proved this statement to be only partially correct. During the second half of the nineteenth century, the judiciary excluded questions of religious preference from their opinion of the Sunday closing law. The people of California did not.

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[106] *Burke*, 59 Cal. at 13.

ALL THE OTHER DAISYS:

Roger Traynor, Recrimination, and the Demise of At-Fault Divorce

CATHERINE DAVIDSON*

> *Novel legal problems need not take [a judge] by storm if he makes a little advance, uncloistered inquiry into what people most want out of their lives and how they wish to live with one another. It is from the stuff of their relationships with one another and with the state that the common law develops, ostensibly from the cases that formalize their quarrels, but under the surface and over the years, from the values that formalize their aspirations.*[1] — Roger Traynor

I. INTRODUCTION

In 1949, Mrs. Daisy DeBurgh filed suit for a divorce from her husband, Albert, claiming the grounds of cruelty.[2] She alleged that her husband was

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[1] Roger Traynor, *Better Days in Court For a New Day's Problems,* 17 VAND. L. REV. 109 (1963–1964).

[2] *See generally* DeBurgh v. DeBurgh, 39 Cal. 2d 858 (1952).

a philandering drunk; that he was jealous and cheap; and that he had beaten her on several occasions, once so severely she had attempted suicide by way of sleeping pills.[3] Albert, for his part, countersued, claiming that Daisy had ruined his reputation by sending vicious letters to his business associates alleging that Albert was a homosexual.[4] Clearly their marriage was a failure, and yet the trial court refused to grant them a divorce. At that time, California was one of a vast majority of states refusing to grant a divorce where both parties were at fault for the destruction of the marriage relationship. Known as the doctrine of recrimination, it was a complete bar to recovery in divorce actions. However, the DeBurghs appealed to the California Supreme Court and they won their case. That decision, which took the air out of recrimination doctrine and led the way to California's becoming the first state to have a no-fault divorce system, sent shockwaves through American society. This paper will examine the case and its context, and will attempt to answer the questions: why then, why California?

In 1970, California became the first state in the nation to change from a fault system of divorce to a no-fault system.[5] The California no-fault divorce statute "removed consideration of marital fault from the grounds for divorce, from the award of spousal support, and from the division of property."[6] Before the switch to a no-fault system, the law simply did not recognize consensual divorce involving an agreement between spouses to end their legal marriage relationship.[7] Rather, historically, divorce was only granted as a privilege to an "innocent spouse."[8] In order to obtain a divorce, the plaintiff would have to file a lawsuit against his or her spouse, the defendant, and proceed to allege and then prove "grounds" for the divorce[9] such as adultery, cruelty, or desertion.[10] That is, the plaintiff would

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3 *Id.* at 871.

4 *Id.* at 871–72.

5 Herma Hill, *An Appraisal of California's No-Fault Divorce Law*, 75 Cal. L. Rev. 291, 291 (1987).

6 *Id.*

7 Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective,* 63 Or. L. Rev. 649, 653 (1984).

8 *Id.*

9 *Id.*

10 Barbara Armstrong, *The California Law of Marriage and Divorce: A Survey,* 19 J. St. B. of Cal. 160, 174 (1944).

need to show the defendant was at fault. Further, under the doctrine of recrimination, if the defendant could show that the plaintiff had also been at fault, the divorce would be automatically denied.[11]

These state divorce systems were generally statutory, and purposefully inefficient, in order to serve as "compromises between two genuine social demands, which were in hopeless conflict. One was a demand that the law lend moral and physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations."[12] Divorce law has historically been awkward and complex because it has so many different meanings and consequences for both the families involved and for society as a whole. Divorce "has economic meaning and economic consequences"[13] in that it "consists of the rearrangement of claims to property and other valued goods. But it also has moral and symbolic meaning. It touches on the basics: sex, romance, family, children, love, and hate."[14]

Divorce, and specifically divorce law, is controversial because it is a deeply personal, frequently devastating and almost always unfortunate event that involves the government in citizens' most private lives. Californians (and Americans in general) had, long before 1970, begun to find ways to circumvent the fault system, encumbered as it was by moral judgments and fraught with procedural hoop-jumping.[15] They had been using every conceivable method to separate themselves from unwanted spouses, even where neither was legally at fault. For example, in California, where one of the more popular grounds was cruelty, the plaintiff would often merely claim the defendant was "'cold and indifferent,'" the defendant would not even bother to show up in court to contest the suit, and the judge would simply rubber stamp the divorce.[16] In the end, no-fault divorce "statutes were a delayed ratification of a system largely in place; a

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[11] George D. Basye, *Retreat From Recrimination — DeBurgh v. DeBurgh,* 41 Cal. L. Rev. 320, 320 (1953).

[12] Friedman, *supra* note 7, at 653.

[13] *Id.* at 651.

[14] *Id.*

[15] *See* Hill, *supra* note 2, at 297–98.

[16] Elayne Carol Berg, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions,* 7 Loy. L.A. L. Rev. 453, 454 (1974).

system that was expensive, dirty, and distasteful, perhaps, but a system that more or less worked."[17]

California Supreme Court Justice Roger Traynor paved the way for California's change to no-fault divorce with his 1952 majority opinion in *DeBurgh v. DeBurgh*.[18] In that case, the Court did away with one of the major bulwarks of the at-fault system: the defense of recrimination.[19] In pruning away what he saw as an outdated and often unjust doctrine, Traynor's decision confronted the reality of a growing divorce rate brought on in large part by changing gender roles following the Second World War. He acted on his own judicial instincts that led him in this case and many others to make what he believed was a thoughtful, well-timed, and necessary modification to the common law in order to meet the challenges of a rapidly changing society. Traynor's hallmark as a judge was his endeavor to make a reasoned and careful decision to initiate a change, and then to craft his opinion in a way that made his thought process clear to lower courts as well as to the legal community at large.[20] While some have accused Traynor of being an activist, he likened himself more to the tortoise than the hare.[21] Far from autocratically transforming the law from the highest bench in the state, Traynor's decision in *DeBurgh* only articulated in the common law that which already existed in practice.

II. *DeBURGH V. DeBURGH*

Plaintiff, Daisy DeBurgh, and Defendant, Albert DeBurgh, moved to California together in 1944.[22] They were living together in Manhattan Beach and were married on October 27, 1946.[23] They separated on February 13, 1949,[24]

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17 Friedman, *supra* note 7, at 666.

18 39 Cal. 2d 858.

19 *See generally id.*

20 *See, e.g.,* Roger Traynor, *La Rude Vita, La Dolce Giustizia; or Hard Cases Can Make Good Law*, 29 U. Chi. L. Rev. 223, 230 (1962).

21 Roger Traynor, *The Well-Tempered Judicial Decision,* 21 Ark. L. Rev. 287, 291 (1967).

22 Brief for Appellant at 4, DeBurgh v. DeBurgh, 240 P.2d 625 (1952) (Civ. 18581) [hereinafter *Brief for Appellant*].

23 *Id.*

24 *Id.*

and Daisy filed suit for divorce on February 15, 1949, citing cruelty as the grounds.[25] On March 16, 1950, after Daisy had considerable difficulty serving him with process, Albert filed an answer and cross-complaint, also claiming cruelty as the grounds.[26] The two-day trial began on September 18, 1950, and on September 19, the court found neither party was entitled to a divorce because each was guilty of cruelty toward the other.[27] This was a classic case of recrimination, in that Daisy had accused Albert of cruelty and he had simply responded "you, too." Because both parties were thus legally at fault, neither could be granted a divorce. Unsatisfied with this result, Daisy appealed to the Second District Court of Appeal,[28] and that court affirmed the decision of the trial judge on February 18, 1952.[29]

To support her claim for cruelty, Daisy alleged five different ways in which her husband had been cruel to her, with specific instances of each.[30] Those five general categories included: "1. Physical force and assault. 2. Continuous reference to plaintiff's former suitor. 3. Continuous reference by defendant to defendant's former girl friends and 'conquests.' 4. Derogatory statements concerning plaintiff's daughter. 5. Acts indicating a tendency toward homosexuality."[31] As to the physical abuse, she testified at trial to seven separate instances in which her husband struck her.[32] For example, she testified that the defendant had knocked her down in November, 1946, resulting in bruises, cuts, and a permanent scar.[33] She provided corroboration for this incident from several other witnesses.[34] She was likewise able to point to specific instances of the other four categories of defendant's cruelty, and was able to provide corroborating witnesses for each.[35]

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[25] *Id.* at 1.

[26] *Id.*

[27] *Id.* at 2–3.

[28] *Id.* at 3.

[29] Appellant's Petition for Hearing After Decision by District Court of Appeal at 1, DeBurgh v. DeBurgh, 39 Cal. 2d 858 (1952) (L.A. 21986) [hereinafter *Appellant's Petition*].

[30] *Brief for Appellant, supra* note 22, at 4.

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.* at 5–6.

"Defendant's answer to these cruelties was to minimize, depreciate and deny them."[36] His cross-complaint was based on one alleged act of cruelty that occurred immediately before the separation: that Daisy had sent letters to Albert's business associates accusing her husband of being a homosexual.[37] The trial court denied both parties a divorce on the basis of the recrimination doctrine.[38] That is, Daisy could not get a divorce from Albert because she was at fault, and Albert could not get a divorce from Daisy because he, too, was at fault.

In her petition for a hearing by the Supreme Court of California, Daisy argued that provoked acts of cruelty should not be allowed to defeat a cause of action for divorce.[39] The trial court had found that Daisy's letters, while cruel, were provoked by her husband's many acts of cruelty.[40] The Supreme Court of California granted her petition, and, in doing away with recrimination, the court went considerably above and beyond what Daisy was asking for. Hers was the perfect case in which to take the larger step of eliminating the defense entirely, in that here was a woman who had been beaten throughout her short-lived marriage to a brutish man. Or at least her story could be packaged that way.

The opinion, indeed, paints Albert DeBurgh as a mean, cheating, lying drunk.[41] In formulating his opinion, Traynor first laid out the facts as found by the trial court and then deftly framed the issue as one solely of recrimination rather than, as Daisy suggested in her brief, provocation.[42] He pointed out that while Albert may have provoked Daisy's act of cruelty, she certainly did not provoke his, so the trial court could not have found in Abert's favor on these grounds, which it did by denying Daisy a divorce.[43] Turning then to recrimination, Traynor began by explaining that the trial judge erred by failing to consider that recrimination only applies where the guilt incurred is for something that would "bar" that

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36 *Id.* at 6.

37 *See* DeBurgh v. DeBurgh, 240 P.2d 625, 626 (Cal Ct. App. 1952) vacated, 39 Cal. 2d 858 (1952); *Appellant's Petition, supra* note 29 at 6.

38 *Brief for Appellant, supra* note 22, at 7.

39 *Appellant's Petition, supra* note 29, at 4.

40 *Brief for Appellant, supra* note 22 at 7.

41 *DeBurgh,* 39 Cal. 2d at 861.

42 *Id.* at 861–62.

43 *Id.* at 862.

party's suit for divorce.[44] Traynor went on to explain that, while "it has sometimes been assumed that any cause of divorce constitutes a recriminatory defense," the relevant statutory language — California Civil Code sections 111 and 122 — suggests that not just any cause will do to show recrimination.[45] Rather, courts "are bound to consider the additional requirement that such a cause of divorce must be 'in bar' of the plaintiff's cause of divorce." Traynor's statutory interpretation argument was that, because the statute provides that "'[d]ivorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff, in bar of the plaintiff's cause of divorce,'" the Legislature could not have meant to make every cause of divorce an absolute defense.[46] If the Legislature had wanted to do so, "it could easily have provided that: 'Divorces must be denied upon . . . a showing by the defendant of any cause of divorce against the plaintiff.'"[47] Traynor did not list which acts would meet this heightened requirement of being "in bar" to a divorce, but the message is clear: recrimination was no longer to be the wooden, automatic defense that it had been construed to be in prior cases. Rather, the trial judge was to use his own discretion to determine whether certain acts would trigger the defense.[48]

With that in mind, Traynor went on to distinguish one such case: *Conant v. Conant*,[49] decided in 1858, which, according to Traynor, had erroneously stated that the recrimination defense was "based on the doctrine that one who violates a contract containing mutual and dependent covenants cannot complain of its breach by the other party."[50] Traynor used this case as a springboard for his overall policy argument that Conant's "deceptive analogy to contract law ignores the basic fact that marriage is a great deal more than a contract. It can be terminated only with the consent of the state."[51] Traynor went on to explain:

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44 *Id.* at 862–63.
45 *Id.* at 863.
46 *Id.*
47 *Id.*
48 *Id.* at 871.
49 10 Cal. 249, 1858 WL 905 (1858).
50 39 Cal. 2d at 863.
51 *Id.*

> In a divorce proceeding the court must consider not merely the rights and wrongs of the parties as in contract litigation, but the public interest in the institution of marriage. The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life.[52]

Traynor argued that marriage provides important benefits: "It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; [and] it establishes continuity from one generation to another. . . ." He went so far as to declare that marriage, as an institution, "nurtures and develops the individual initiative that distinguishes a free people," and thus deserved every legal effort for preservation.[53] But in the end, he admitted, "when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted."[54]

Traynor continued on, pointing out the basic illogic of the recrimination doctrine: that "[t]he chief vice of the rule enunciated in the Conant case is its failure to recognize that the considerations of policy that prompt the state to consent to a divorce when one spouse has been guilty of misconduct are often doubly present when both spouses have been guilty."[55] In other words, two wrongs do not make a right, and it "is a degradation of marriage and a frustration of its purposes" when the state is allowed to use its power to deny divorce as a punishment for couples whose marriages have failed.

Traynor shored up his argument with several more minor points. He argued that the Conant case included an inaccurate and irrelevant historical discussion of older English cases,[56] and that the California Legislature purposefully declined to follow the Conant holding in writing the recrimination provisions of the Civil Code.[57] He also pointed out that the relevant precedent on the issue of recrimination was unclear and thus ripe for review

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[52] *Id.* at 863–64.
[53] *Id.*
[54] *Id.* at 863–64.
[55] *Id.* at 864.
[56] *See id.* at 864–66.
[57] *Id.* at 866.

and clarification.[58] He then went on to note that the state legislature was already moving toward reforming the doctrine in response to the rising divorce rate. Traynor believed that the national surge in divorce "had compelled a growing recognition of marriage failure as a social problem and correspondingly less preoccupation with technical marital fault," and that the California Legislature had followed that trend by, for example, adding insanity and prolonged separation as grounds for divorce.[59] He argued that this showed a recognition on the part of the legislature that "[m]arriage failure, rather than the fault of the parties, is the basis upon which such divorces are granted."[60]

Traynor finished his analysis with a lengthy reiteration of his public policy argument that courts must recognize that "a marriage in name only is not a marriage in any real sense."[61] He noted that current legal scholarship supported ending the use of recrimination as a defense,[62] and he ended the discussion by neatly distinguishing Albert's precedents.[63] The holding is rather complex, but boils down to the following: the relevant Civil Code section, 122, "imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded as 'in bar' of the plaintiff's cause of divorce based upon the fault of the defendant."[64]

The Court also officially disapproved of any cases that "support a mechanical application of the doctrine of recrimination,"[65] thereby discarding the common law rule treating recrimination as an automatic bar to divorce wherever the defendant could show fault on the part of the plaintiff. For the *DeBurgh* situation, Traynor argued that "[t]echnical marital fault can play but little part in the face of the unhappy spectacle indicated by this evidence," and he supported this claim with a long list of some of the individual acts of cruelty alleged by both parties.[66] Traynor held

58 *Id*. at 867.
59 *Id*.
60 *Id*. at 868.
61 *Id*.
62 *Id*. at 870.
63 *Id*. at 870–71.
64 *Id*. at 871.
65 *Id*.
66 *Id*. at 871–72.

the evidence was "ample to support a finding that the parties' misconduct should not bar a divorce"[67] and reversed the Court of Appeal, remanding back to the trial court for a decision as to the divorce.[68]

The decision was complicated by Traynor's announcement that there could "be no precise formula for determining when a cause of divorce shown against a plaintiff is to be considered a bar to his suit for divorce." However, he listed four major considerations which the trial court should use to aid that finding: the likelihood of reconciliation; the effect of the marital conflict on the parties; the effect of that conflict on third parties, with special consideration for the welfare of any children; and comparative guilt.[69] Thus, after *DeBurgh*, recrimination would be in the discretion of the trial court rather than an automatic bar to divorce whenever each party could show some fault in the other. Recrimination was not excised, per se, but its effectiveness was cut to the bone.

III. ALL THE OTHER DAISYS

Traynor was not only addressing one woman's problems when he handed down his opinion in *DeBurgh*. Daisy was just one of a generation of women who had married quickly in the years before, during, and after the war and realized too late that marriage was not the idyll being portrayed by society as the norm, and indeed the goal, for every woman.[70] Daisy's case was simply not at all unusual for the time. Due to rapidly changing gender politics and fluctuation of the feminine role after the war, divorce rates skyrocketed, becoming a huge strain on a legal structure that had been developed in a 'simpler' time. One of the major reasons that the postwar period saw such a surge in divorce was because men and women (and husbands and wives) frequently no longer related to each other the same way they had before 1940. Traynor addressed this reality with his opinion in *DeBurgh*: hoping to free men and women from strained marriages that were not all they were promised to be.

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67 *Id.*

68 *Id.* at 874.

69 *Id.* at 872–73.

70 Marilyn Yalom, A History of the Wife 350 (2001); Stanley Mosk, *Ingredients of the Divorce Test Tube*, 29 L.A. B. Bull. 163, 179 (1954).

The gender role balance was upset[71] when, during World War II, there was a sudden, massive demand for workers.[72] With so many men gone off to fight, women workers took their place, resulting in a 50 percent increase in the female labor force.[73] Especially significant was the fact that the number of married women working doubled. Interestingly, rather than condemning women who worked as deserters of their homes, the government and the media began to encourage women enthusiastically to enter the badly diminished labor force.[74] The July 1942 issue of the *Woman's Home Companion*, for example, exhorted, "'Mrs. John Doe We Need You!'"[75] Propaganda posters assured women that their husbands wanted them to do their part.[76] Women were also being treated with more respect at their new jobs, and, as they began to show that they could do good work, their male coworkers frequently began treating them as equals.[77] Married women, especially, enjoyed a new and dominant place in the workforce.[78] By the time the war ended in 1945, the proportion of married women who worked had jumped to over 24 percent, up from 15.2 percent in 1940.[79]

This change was reflective of not just a pure necessity for bodies, but also of the changing values and attitudes that developed to justify the existence of a new female workforce. For example, Margaret Hickey, head of the Women's Advisory Committee to the War Manpower Commission, pointed out in 1943 that "'employers, like other individuals, are finding it necessary to weigh old values, old institutions, in terms of a world at war.'"[80] Hickey's astute observation reflected the massive changes occurring at the

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71 There is a great deal of historical scholarship devoted to changes in gender politics during the postwar period. *See*, for example, William H. Chafe, The Paradox of Change: American Women in the 20th Century (1991); Annegret S. Ogden, The Great American Housewife: From Helpmate to Wage Earner, 1776–1986 (1986); Yalom, *supra* note 70; Elaine Tyler May, Homeward Bound: American Families in the Cold War Era (1988).

72 See Chafe, *supra* note 71, at 121.

73 *Id.*

74 *Id.*; May, *supra* note 71, at 59.

75 Yalom, *supra* note 70, at 317.

76 *Id.*

77 Chafe, *supra* note 71, at 124; *see also* May, *supra* note 71, at 59.

78 Chafe, *supra* note 71, at 130.

79 *Id.*

80 *Id.*

time relating to the acceptability of hiring married women to work outside the home.[81] That is, the public and private attitudes had changed from a condemnation of women leaving their homes, children and husbands to fend for themselves, to an outright encouragement of those same married women to do their part for the war effort by taking the place of soldiers gone away.[82]

The transformation did not go unnoticed. Many observers considered women's work experience in the war years to be a social and gender revolution. The Women's Bureau considered it to be "one of the most fundamental social and economic changes" of the time.[83] Women were suddenly being recognized as independently valuable to the nation and as first-class citizens capable of earning their own keep without their husbands to depend on financially.[84] The exigencies of the war had done away with the established ways of doing things.[85] Women seamlessly took the place of men in many fields, and barriers against married women's employment were broken down.[86] Millions of American women were discovering for the first time the economic and psychological independence that could be achieved from earning (and spending) the family bread, themselves.[87]

But the change was not without critics. Those who opposed married women working outside the home warned that in order for children's lives to remain stable, their mothers needed to be at home all day.[88] These conservatives, fearing for the stability of American families, were only willing to tolerate married women's working outside the home "as a temporary necessity," and certainly not as a "permanent reality."[89] In other words, married women — and women, in general — entering the workforce during the war raised serious concerns about the evolution of male–female relations and a possibly permanent disruption of the existing social order.[90]

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81 *Id.*; *see also* May, *supra* note 71, at 59; and Yalom, *supra* note 70, at 320–22..

82 Chafe, *supra* note 71, at 130; May, *supra* note 71, at 59.

83 Chafe, *supra* note 71, at 133.

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* and Yalom, *supra* note 70, at 350; *see also* May, *supra* note 71, at 73–74.

88 *See* Chafe, *supra* note 71, at 134; *see also* Yalom, *supra* note 70, at 323–24.

89 Chafe, *supra* note 71, at 134.

90 *Id.* at 135; May, *supra* note 71, at 71.

Those concerns would become apparent in the postwar years leading up to *DeBurgh*, during which women and society tested the boundaries of the new female sphere.[91]

The dimensions of this transformation became clear once the war was over and there was no longer any need for women to be working in the now-defunct munitions factories. Car factories stopped making tanks and started making cars again.[92] Thus, between government pressure on businesses to hire returning veterans[93] and social pressures on women to return home,[94] the exodus began with alacrity.[95] And yet, even with women being fired to make room for the returning soldiers,[96] twice as many California women were employed in 1949 as were in 1940.[97] Married women were included in this statistic, and in 1952 about ten million wives across the nation held jobs.[98] This was two million more than at the height of the war and almost three times more than in 1940.[99] Part of the reason for this was that there were simply more married women in general, with the greatest number of marriages in United States history occurring in 1946.[100]

These millions of working, married women were facing a dilemma, though: they were expected to fully shoulder two burdens at once. These women were expected to work outside the home from nine to five and still manage the many duties of a housewife who was home all day long.[101] Even though the ideal was still that of the suburban housewife, economic realities did not bode well for the traditional model of the individual male breadwinner.[102] The 1952 issue of the *Journal of Home Economics* made a shocking announcement: that the American economy would be unable either to sustain or expand productivity without the entry of an even larger

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91 Chafe, *supra* note 71, at 154; Yalom, *supra* note 70, at 348.

92 *Id.* at 155.

93 *See id.* at 158–59.

94 *Id.* at 156–57; Ogden, *supra* note 71, at 166.

95 Chafe, *supra* note 71, at 158–59.

96 *Id.*

97 *Id.* at 161.

98 *Id.*

99 *Id.*

100 *See* Ogden, *supra* note 71, at 166; Quintin Johnstone, *Divorce: the Place of the Legal System in Dealing With Marital-Discord Cases,* 31 Or. L. Rev. 297, 298 (1952).

101 Chafe, *supra* note 71, at 175.

102 Ogden, *supra* note 71, at 172.

number of women in the workforce.[103] Thus, with ideal and reality conflicting, American women received two equally strong but hopelessly opposing messages from society: one was to stay at home and gain fulfillment from caring for husband and children, and the other was, "Get a job."[104] The effect, some argued, was a rise in the national divorce rate from 2.8 percent in 1948 to 10.4 percent in 1951.[105]

For example, *Life* magazine editorialized on this issue in 1947 when it published a thirteen-page special on the "American Woman's Dilemma."[106] The editors revealed that contemporary (middle-class) women were suffering from confusion and frustration due to a conflict that they perceived between the tradition and reality of gender norms.[107] That is, in the old days, a woman simply had no choice but whom to marry, while in 1947 she had a far more complicated set of decisions to make.[108] Should she stay at home? Should she work? If it were financially necessary to do both, where would she find the time? And if she somehow managed to balance the conflicting demands on her time and energy, what would her neighbors think of her? Her in-laws? The article characterized this identity crisis as a direct consequence of the war.[109]

The social commentary on this issue ranged from feminists, who claimed these women were unhappy because they were trapped inside the home and their traditional roles, to anti-feminists, who argued just the opposite: that women were unhappy when they strayed too far from both.[110] Betty Friedan, for example, wrote in her 1963 book, *The Feminine Mystique*, that American women in the 1950s were unhappy because they had been told that they should find all their happiness at home, through fulfillment of the roles of wife and mother.[111] But regardless of which side one was on, everyone agreed that there was a problem: that many women, especially married women, were deeply unhappy, because they were struggling

103 *Id.* at 172–73.
104 *Id.* at 173.
105 *Id.* at 171.
106 Chafe, *supra* note 71, at 175.
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.* at 176.
111 *Id.* at 195.

to find their proper place in their homes and in the outside world.[112] With the relationship between men and women in such a state of flux, ideologically as well as personally, divorces were bound to occur. The reason divorce rates rose was, according to Betty Friedan, that "for the first time, some women had enough independence to want out of bad marriages."[113]

One of the biggest and most immediate issues that arose between husbands and wives during this era was that women often relished the economic freedom and sense of independence they had attained from working during the war years.[114] They were not necessarily willing to give up that feeling and stop working once their husbands came home.[115] The husbands, for their part, worried that they would lose power within the family if they were no longer acting as providers.[116] These men were used to the tradition of a breadwinning man's taking pride in his ability to support a stay-at-home wife and children.[117] As one contemporary commentator opined, " 'Few men ever amount to much when their wives work.' "[118]

Even the legal procedures of divorce reflected the new tension surrounding gender roles. According to one legal historian, divorce suits at this time often reflected old gender stereotypes. In many of the California cases, "[t]he women described themselves as delicate plants, married to insensate brutes, men who cared nothing for the tender feelings and feminine sensibilities of their wives."[119] The problem with this is that "ideas about women's delicacy and refinement trap women in a web of stifling mock-protection."[120] That is, using the old, outmoded gender stereotypes to end a marriage put women in the position of having to subjugate themselves that one final time in order to get out of a marriage already characterized by subjugation.

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112 *See id.* at 176; Yalom, *supra* note 70, at 351

113 Betty Friedan, *The Crises of Divorce*, in It Changed My Life: Writings on the Women's Movement 318, 322 (1st ed. 1976).

114 *See, e.g.,* Yalom, *supra* note 70, at 350.

115 *Id.*

116 *See id.* at 350.

117 *Id.*

118 *Id.* at 151.

119 Lawrence Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault,* 86 Va. L. Rev. 1497, 1527 (2000).

120 *Id.* at 1528.

IV. BACKGROUND OF CALIFORNIA DIVORCE LAW IN 1952

Traynor addressed this problem by changing the focus of divorce law from the fault of either party to the simple fact of the breakdown of their marriage. He did so because, as the divorce rate grew, the cracks in the system began to show. The old story of the brutish man and the fainting woman was frequently nothing more than a charade, and with his decision in *DeBurgh*, Traynor played a large part in bringing the common law up to speed not just with the realities of divorce in practice, but also with postwar changes in gender politics.

Indeed, divorce as it actually existed in 1952 and that which the legal fault system prescribed were two very different things. The "divorce charade," as Lawrence Friedman refers to it, "paraded before the courts an endless procession of men, and mostly men, who confessed by their silence to adultery, cruelty, gross neglect of their obligations, and other deep-stained sins. But everybody knew the allegations were often or mostly lies."[121] In fact, while the "official line was that marriages ended because of adultery, desertion, cruelty, or intolerable indignities . . . this was out of step with a growing sense in society . . . that marriages ended because they 'didn't work out,' because the spouses were 'incompatible.'"[122] Such was the case nationwide, and certainly in California.

Historically, California divorce law followed the national tradition of promoting a general policy against granting a divorce, favoring instead preservation of marriage at almost any cost.[123] That view held that "[f]ault is the basic tenet of . . . divorce law" and that a divorce was only to be granted if the defendant, and the defendant alone, was at fault.[124] Again, under the recrimination doctrine, if the plaintiff had also been at fault, there could be no divorce.[125] Divorce was seen as an action between not two, but three parties: the plaintiff, defendant, and the state as a third party with a vested interest "in the maintenance of the marriage tie."[126] A

121 *Id.* at 1530.
122 *Id.* at 1531.
123 Armstrong, *supra* note 10, at 178.
124 Johnstone, *supra* note 100, at 301.
125 *Id.*
126 Armstrong, *supra* note 10, at 178.

commentator in 1944, however, wrote that by that year there was "growing evidence . . . that the [courts] believe that the state's interest in conserving the marriage tie may well be limited to cases where the marriage is a real and functioning husband–wife relationship and not a mere legal concept accompanied by separated, estranged parties."[127]

The Legislature, too, was making changes in the historically moralistic and disapproving tone of divorce law. One commentator noted that in the years leading up to *DeBurgh*, "American legislatures have made statutory changes in the law of divorce that materially weaken the basic doctrine that divorce will be granted only upon proof of marital fault of defendant, and blamelessness of plaintiff."[128] Examples included "statutes permitting divorce for insanity or continuous separation, which have produced basic changes in other accepted elements of American divorce, and, perhaps more significantly, indicate a legislative interest in making American divorce law coincide with contemporary mores." What's more, that author argued that "the prevailing judicial interpretation . . . indicates that as to [certain grounds of divorce such as desertion] the doctrines of fault and recrimination are abolished, and . . . there has been acceptance of the fact that the divorce decree is only a ratification of the private agreement of the spouses to end the marriage."[129] Still, even with this clear judicial and legislative movement away from reconciliation at any cost, California in 1950 remained a fault state, and the doctrine of recrimination remained alive and well.

In the years leading up to *DeBurgh*, California was a relatively liberal state in terms of divorce, allowing for seven possible grounds: adultery, cruelty, desertion, willful neglect, habitual intemperance, conviction of a felony, or incurable insanity.[130] In order to claim desertion, neglect, or intemperance, a plaintiff would have to show that the condition persisted for at least one whole year, without interruption.[131] To claim insanity as grounds for divorce, a showing of three years' institutional confinement

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127 *Id.*

128 Thomas Carver, *Divorce: Statutory Abolition of Marital Fault,* 35 Cal. L. Rev. 99, 99 (1947).

129 *Id.* at 100.

130 Armstrong, *supra* note 10, at 174.

131 *Id.* at 174–75.

was required.[132] Adultery and cruelty were somewhat easier to prove, in that a single act of either would be enough, although continuous conduct would suffice as well, of course.[133] What's more, a plaintiff could allege mental rather than physical cruelty by showing that s/he experienced "grievous mental suffering" as a result of "conduct that reasonably could be believed to have such a result."[134]

Plaintiff did not even need to show any physical manifestation of said suffering, and a multitude of types of mental cruelty were being accepted by the courts as sufficient for a grant of divorce. The California Supreme Court stated the test in the 1941 case *Keener v. Keener*, writing that in "each case the infliction of 'grievous mental suffering' is a question of fact to be deduced from the circumstances of the case, in the light of the intelligence, refinement and delicacy of sentiment of the complaining party."[135] Cruelty was thus in many cases the easiest ground to plead and prove, which was reflected in its popularity.[136] There were certainly instances of "real" cruelty,[137] but as one contemporary observed, the "legal theory of the innocent suffering spouse has long been regarded as a myth. In actual practice, divorce today is usually but a judicial ratification of prior agreement between the parties."[138] While it does appear as though Daisy DeBurgh suffered real cruelty at the hands of her husband, in deciding her case Traynor was surely also addressing the fact that her situation was not necessarily the norm.

Some judges were less willing than others to go on with the charade. One example is San Francisco judge Walter Perry Johnson, who in 1934 "more or less dropped the mask of ignorance, and talked openly about realities."[139] In yet another cruelty case, the plaintiff, Jessie Trower, alleged that her husband's cruelty consisted of his "'absence from home without explanation, his statement that he did not love her, and his objection to her music studies.'"[140] Johnson remarked that this did not "'really constitute

132 *Id.* at 175.
133 *Id.*
134 *Id.*
135 18 Cal. 2d 445, 447 (1941) (referenced in Armstrong, *supra* note 10, at 175).
136 Hill, *supra* note 5, at 297–98.
137 Friedman, *supra* note 119, at 1530.
138 35 Cal. L. Rev. at 99.
139 Friedman, *supra* note 119, at 1519.
140 *Id.* at 1519–20.

cruelty in the proper meaning of the term.' It amounted to nothing more than 'incompatibility.' But that was true of most of the 'cruelty' charges, he said, and, in his view, 'incompatibility' should be grounds for divorce. Of course, the legislature had never made such a move."[141] Johnson granted the divorce, regardless.[142]

Another San Francisco judge, the Honorable Thomas M. Foley, took the opposite approach in his court in 1946.[143] He announced that as far as he was concerned, "'cruelty, extreme or otherwise, mental or physical,'" would not constitute legally sufficient grounds for divorce unless "'backed up with solid evidence.'"[144] The judge believed that divorce law at the time was "far too lenient," and that generally, "'differences between married couples' . . . were 'trivial.'"[145] He feared that "easy divorce" was "'destroying the fabric of the home,'" and he was going to do his part to stop it.[146]

However, evidence from the California case files shows that Judge Foley was losing that battle.[147] One contemporary posited that, despite the rigid party line of the statutes, "any divorce judge will admit that he rarely denies a divorce."[148] It is of course true that there were legitimate stories of actual cruelty and abuse, both physical and psychological, like Daisy DeBurgh's.[149] However, many California plaintiffs "also told stories that were essentially nothing more than stories of unhappy marriages — stories of nagging and cursing, and general marital misery."[150] But regardless of how minor these offenses were, California "courts were willing to pin the label of 'extreme cruelty' on all sorts of behavior . . . . '[E]xtreme cruelty,' as Roscoe Pound remarked in 1943, was a 'convenient legal phrase to cover up . . . incompatibility.'"[151]

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141 *Id.* at 1520.
142 *Id.*
143 *Id.*
144 *Id.*
145 *Id.*
146 *Id.*
147 *Id.*
148 Johnstone, *supra* note 100, at 300.
149 *Id.*
150 *Id.*
151 *Id.*

Indeed, Superior Court Judge Frank G. Swain wrote, in a 1945 article on default divorce: "It is impossible to formulate any hard and fast rules as to what constitutes extreme cruelty because of the varying degrees of sensibility of plaintiffs. The law recognizes the fact that what causes great mental anguish to a lady of refinements will not faze a Tugboat Annie."[152] He remembered a time at the beginning of his practice when there were "stalwarts on the bench . . . who did not grant divorce decrees on the ground of cruelty unless serious misconduct of the defendant was proven."[153] But by the time Judge Swain was writing, he saw a trend of judges shrugging, "what is the use of denying a default decree, the parties know best, if they can't get along they are better off divorced."[154] While he himself did not ascribe to that practice,[155] he admitted that, at the time, there was "little or no uniformity among judges as to what amounts to extreme cruelty."[156]

As a result of this uncertainty, Californians were unsatisfied with the state of divorce law, generally.[157] Experts, like academics and legislators, "looked through the peephole, and what they saw was fraud and rot."[158] Lawyers, for their part, "hated taking part in a disgraceful travesty."[159] Laypeople were split between those thinking divorce was too easy to obtain, and those who believed it "was too hard, too expensive, too dirty."[160] The legal academy "kept trying to reform the official law, to make it conform to what they considered social realities. They wanted, naturally enough, to get rid of the perjury, the chicanery, and the lying."[161] Traynor, seeing this problem, set about to do just that: to reform the common law by getting rid of the old recrimination doctrine which was an obstacle to the change to no-fault divorce.

With so much demand for divorce and such rampant deception besmirching the legal system surrounding it, a doctrinal change had to be

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152 Frank G. Swain, *Default Divorce,* 21 L.A. B. Bull. 52, 53 (1945).
153 *Id.*
154 *Id.*
155 *Id.*
156 *Id.* at 56.
157 Friedman, *supra* note 119, at 1531.
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*

made in order to bring the common law up to speed with what trial courts were already doing not so secretly. Traynor had already made a name for himself as an 'activist' with cases like *Escola v. Coca Cola*[162] and *Perez v. Sharp.* In *Escola,* he made the rather startling argument that manufacturers should be held strictly liable whenever their products injured consumers, and in *Perez* he completely invalidated the California statutory ban on interracial marriages.[163] But Traynor was no activist, really, at least in the area of divorce law. He did not generate the changes himself. Rather, he put his name, and that of the Supreme Court of California, on what had already been decided by the people of that state. This fit perfectly with his judicial philosophy of pruning the hedges and ridding the common law of those ancient doctrines that had long since worn out their welcome. Traynor did not believe in making decisions hastily or without cause, and his opinion in *DeBurgh* was no different.

By 1940, jurists across the country were not only calling for divorce reform generally, but also specifically for an end to the doctrine of recrimination.[164] The basic argument was that the requirement under the recrimination scheme that one, and only one, party must be blameworthy should no longer apply.[165] The reality was "that the marital life of a married couple might be so stormy, so disagreeable, and so fraught with unhappiness that it would be in the public interest to grant a divorce," even though both were at fault.[166] According to one judge, about half of all contested divorce actions involved wrongdoing by both parties at some point in the marriage, often serious enough to constitute grounds for divorce, thus precluding divorce if the recrimination rules were applied strictly.[167] Yet, that jurist argued, "no fair-minded person would contend that in such circumstances any public interest could be served by forcing the parties to remain as man and wife."[168]

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162 24 Cal. 2d 453 (1944) (Traynor, J., concurring).

163 32 Cal. 2d 711 (1948); *see also* G. Edward White, Tort Law in America, 197–200 (1980); G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges, 243–66 (2007).

164 *See, e.g.,* Everett C. McKeage, *More Flexible Procedure Urged for Divorce Actions,* 15 St. B.J. 158, 159–60 (1940).

165 *Id.* at 159.

166 *Id.*

167 *Id.*

168 *Id.*

Traynor thus had all the evidence he needed to face the reality that continuing to apply recrimination as an automatic defense to divorce was no longer in the public interest — that, as one female lawyer put it, "the old ecclesiastical theory that divorce could be granted only on the basis of penalty, and that one party must be innocent . . . and the other guilty" was contrary to contemporary mores;[169] that these "restrictive laws of the 19th Century . . . on the statute books . . . have no application to modern conditions;"[170] and that the law must be changed in order to "recognize and utilize modern attitudes, inventions and creations . . . [and] recognize that of all the ties which in previous ages held families together only the affectional tie remains unchanged, and that to be successful today, marriage must contribute directly to the satisfaction of the individuals."[171]

The author of an article on the *DeBurgh* decision in the *California Law Review* in 1953 noted that, while the case may appear "to be a dramatic reversal by the California court in its position on recrimination," it was really "not quite so startling when viewed against the background of recent developments in California and elsewhere."[172] He pointed out that while the "majority of jurisdictions still adhere to recrimination in its traditional form," courts had recently been weakening it, such that there was a discernible and "marked trend away from the automatic application of the doctrine."[173] He noted three specific ways in which courts had been pruning the doctrine.[174]

First, courts would frequently apply a "comparative rectitude" analysis, in which recrimination would only bar a divorce where the plaintiff's degree of fault was equal to or greater than the defendant's.[175] Second, courts developed new grounds for divorce that were not based on fault.[176] Finally, even before *DeBurgh*, jurisdictions outside of California were beginning to consider recrimination to be a discretionary, rather than an absolute bar to

169 N. Ruth Wood, *Marriage and Divorce Laws,* 33 Women Law. J. 23, 27 (1947).
170 *Id.* at 29.
171 *Id.*
172 Basye, *supra* note 11, at 320.
173 *Id.* at 320–21.
174 *Id.* at 322.
175 *Id.*
176 *Id.* at 322–23.

divorce.[177] This contemporary commentator thus characterized *DeBurgh* as "a well-reasoned opinion which . . . brought California into the small but growing group of jurisdictions" that gave trial courts the discretion to apply recrimination more or less rigidly according to the circumstances at hand.[178] It was Traynor's judicial philosophy that gave him the freedom to make this change in California common law.

V. ROGER TRAYNOR ENTERS THE FRAY

In 1940, when Traynor was appointed to the California Supreme Court, the role of courts as lawmakers was in transition.[179] From the mid-nineteenth century until the turn of the twentieth, the legal academy had promoted a variety of judicial formalism that required judges to simply "find" the law.[180] The assumption was that the law was predetermined but somewhat hidden, and that judges, having great legal minds, were singularly capable of discovering it. Then, at the beginning of the twentieth century, a new school of thought arose known as legal "realism," which promoted judicial creation of the law.[181] Realists promoted the idea that the people — via judges — could make the law as they saw fit for society as it existed at the time, creating a backlash in the mid-twentieth century as commentators began to decry what they saw as unrestrained judicial lawmaking power.[182]

Coming to the Court at this moment of instability, Traynor had made his own feelings on the subject of law and judicial lawmaking known early

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177 *Id.* at 324.

178 *Id.* at 326.

179 Edmund Ursin, *How* Great *Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 Buffalo L. Rev. 1267, 1290 (2010). For more information on the differing schools of thought on the judicial role, see Lawrence M. Friedman, American Law in the Twentieth Century (2001); Morton J. Horwitz, The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy (1992); William E. Nelson, The Legalist Reformation: Law, Politics and Ideology in New York, 1920–1980 (2001); Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value (1973); James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United States (1956).

180 *See* White, *supra* note 163, at viii–ix.

181 *Id.* at xi.

182 *Id.* at xii.

on.[183] "Unlike the [formalist] scholars, Traynor's goal was not to limit judicial lawmaking. It was to encourage it."[184] But he did not believe that judges should make the law as they saw fit. Indeed, from his first years on the Supreme Court, Traynor urged his fellow justices "to engage in policy-based lawmaking," and by "the 1950s he converted the California Supreme Court to his view," thus altering "the norms of judicial decision making and opinion writing for his court, which served as an example for courts across the nation."[185] Under Traynor's tutelage, in "the 1950s and 1960s the California Supreme Court left . . . [formalist] . . . thinking in the dust as it emerged as the most innovative court in the nation."[186]

According to one commentator on Traynor's judicial philosophy, "Traynor's process of decision making combined reason with intuition."[187] Others have argued that Traynor was not guided by intuition, but by "a cohesive conception of the public interest."[188] Traynor himself, though, gave his own definition of what drove his innovative decisions, writing that judges "do a great disservice to the law when [they] neglect that careful pruning on which its vigorous growth depends and let it become sicklied over with nice rules that fail to meet the problems of real people."[189] In 1956, Traynor lamented:

> In no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. The withered dogma that divorce can be granted only for marital fault . . . is rendered still more irrational by the widespread rule that recrimination is an absolute defense. The result has been a triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys with the tacit sanction of the courts.[190]

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183 Ursin, *supra* note 179, at 1327.

184 *Id.*

185 *Id.* at 1335.

186 *Id.*

187 Ben Field, Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor (2003) at iii.

188 *Id.*

189 Roger Traynor, *Law and Social Change in a Democratic Society,* 1956 U. Ill. L.F. 230, 236 (1956).

190 *Id.*

This glimpse into the justice's mind provides ample evidence of his reasons for deciding *DeBurgh* as he did: that it was merely a recognition of what was already happening in courts across the state.

And yet, despite the absurdity that clearly would have resulted if recrimination remained as it had been, Traynor did not strike at it lightly. He was fully aware of the obligations of stare decisis, but he was just as acutely aware of the need to make changes to precedent that had outlived its use or, even worse, its fairness. He discussed this conflict in a 1962 article, writing that while "[a] judge coming upon a precedent that he might not himself have established will ordinarily feel impelled to follow it to maintain stability in the law . . . [t]here are of course precedents originally so unsatisfactory or grown so unsatisfactory with time as to deserve liquidation."[191]

Traynor saw it as his duty to heal the breach between stare decisis on the one hand and progress on the other. He believed that pruning retrograde precedent required "forthrightness," and that leaving it to fester still further showed a lack of "the wit or the will or the courage to spell out why the precedent no longer deserves to be followed. Such dogmatic adherence to the past perpetuates bad law."[192] Traynor, far from being an activist throwing caution (and precedent) lightly to the winds, believed that the greatest common law judges move "not by fits and starts, but at the pace of a tortoise that explores every inch of the way, steadily making advances though it carries the past on its back."[193]

While change was not to be undertaken thoughtlessly, it was surely necessary in order to "stabilize the explosive forces of the day."[194] According to one commentator, "Traynor . . . saw the world in rapid flux. This was not simply a world view, but an empirical truth: Traynor sat on the California Supreme Court during one of the most dynamic periods in California's history."[195] That is, Traynor believed that he himself initiated nothing. Rather he only responded according to what he saw were new fact patterns that did not fit the old precedents. The world was changing around

191 Traynor, *supra* note 20, at 229–30.

192 *Id.*

193 Traynor, *supra* note 21, at 291.

194 Traynor, *supra* note 1, at 124.

195 John W. Poulos, *The Judicial Philosophy of Roger Traynor,* 46 Hastings L.J. 1643, 1700 (1994–1995).

him, and Traynor believed that it was his duty, as a justice of the highest court in the state, to "keep the inevitable evolution of the law on a rational course."[196] He wrote:

> A reasoning judge's painstaking exploration of place and his sense of pace give reassurance that when he takes an occasional dramatic leap forward he is impelled to do so in the very interest of orderly progression. When he has encountered endless chaos in his long march on a given track, the most cautious thing he can do is to take a new turn. He does so though he knows that ours is a profession that prides itself on not throwing chaos lightly to the winds.[197]

Traynor believed that he did not initiate change because he personally felt it was the right change to make, but because it was his job to make law that applied to the world as it existed in his day. He rid California common law of recrimination because the realities of the time demanded it. He would have seen it as a dereliction of his duty to leave an unjust and outmoded law on the books.

VI. CONCLUSION

Daisy DeBurgh presumably got her divorce, in the end. Her story, at least the written record, ends with her case, but given the court's opinion, she likely managed to escape what was evidently an abusive and deeply unhappy marriage. She was not the only miserable spouse who benefited from Traynor's decision in *DeBurgh*. In fact, the justice was probably not as concerned with her particular story, pitiable as it was, as he was concerned with the collective plights of all the other miserable spouses in California: people who were trapped by the ancient rule precluding relief for the slightest smudge of dirt on their hands. Unhappy marriages had become a common thing in the years surrounding the Second World War. Gender roles were in transition, women were overburdened, ideologically as well as literally, by conflicting duties to work and stay home. Men were just as

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196 Roger Traynor, *The Limits of Judicial Creativity,* 63 Iowa L. Rev. 1, 7 (1977–1978).

197 *Id*. at 6.

confused about their roles as breadwinners at a time when it was no longer necessarily feasible for them to keep the family afloat all on their own.

Unhappy marriages meant even unhappier divorce battles, stymied by an antiquated set of laws that punished people for failing to keep their sacred unions intact. Rampant perjury and deception ensued, often needlessly, for the trial judges recognized the inevitable truth before the Legislature did. Enter Traynor, who observed the untenable situation and performed what he saw as his duty: to change the law to meet the demands of reality. Traynor's decision in *DeBurgh* is the perfect example of his judicial philosophy in action: "Things happen fast in our small world and we who tend the law must keep pace . . . . The law will never be built in a day, and with luck it will never be finished."[198]

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[198] Traynor, *supra* note 20, at 236.

THE STORY OF THE CALIFORNIA AGRICULTURAL LABOR RELATIONS ACT:

How Cesar Chavez Won the Best Labor Law in the Country and Lost the Union

DAVID WILLHOITE*

After many months of political wrangling, and after Governor Jerry Brown had staked his first year in office on bringing peace to the historically violent struggle for workers' rights in California agriculture, the Alatorre–Zenovich–Dunlop–Berman Agricultural Labor Relations Act was signed into law in the first week of June, 1975.[1] One would be hard

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[1] For contemporary reports of the event immediately preceding passage, *see*: *California Farm Bill Backed By Panel as Unionists Fight*, United Press International, May 14, 1975; Leo Stammer, *Farm Labor Bill OKd by Assembly Panel*, L.A. Times, May 13, 1975; *Parade Here Backs Efforts by Chavez To Unionize Farms*, N.Y. Times, May 11, 1975; Harry Bernstein, *McCarthy Joins Unions in Seeking Farm Bill Change*, L.A. Times, May 15, 1975; —, Pact on Farm Bill Rejected by Teamsters, L.A. Times, May 17, 1975; *2,800 Rally at Capitol to Back Farm Measure*, L.A. Times, May 19, 1975; Harry Bernstein, *Agreement Reached on Farm Labor Bill*, L.A. Times, May 20, 1975; —, *Farm Labor Accord Sets Stage for Special Session*, L.A. Times, May 20, 1975; *Teamsters Back Farm Labor Accord*, N.Y. Times, May 21, 1975; Jerry Gilliam, *Farm Bill Clears Senate Panel 4–1, Faces One More,* L.A. Times, May 22, 1975; —, *Senate Passes Farm Labor Bill*, L.A. Times, May 27, 1975; —, *Farm Labor Bill Moves Quickly Toward Passage*, L.A. Times, May 28, 1975; —, *Assembly Sends Farm Bill to Brown for Signing*, L.A. Times, May 30, 1975.

pressed to overestimate the significance of this legislation, which remains the only state law in the nation to govern the rights of farm workers to act collectively and engage in union activity.[2] In 1975, few could have predicted that this new legal order would lead to the disintegration of the farm worker movement in California.

Ever since the Delano grape strike a decade earlier, Cesar Chavez had grasped and utilized a national mood of social and legal transformation taking place across the country. This was, of course, a period of great social turmoil, including racial violence, police repression and armed military intervention that culminated in the passage of landmark legislation, massive student and youth activism, a War on Poverty, and what many have argued to be the high-water mark of judicial liberalism in America.

Chavez was a keen student of the civil rights movement and King's and Gandhi's incorporation of religion and nonviolence as a means of organizing. As an alumnus of the Community Service Organization started by Saul Alinsky and trained by the famous organizer Fred Ross, Sr., he had worked across California and Arizona to register hundreds of thousands of Hispanic voters and witnessed citizens of all races coming together to fight injustice. As the urban movements to register voters, oppose unconstitutional laws, and challenge stereotypes and bigotry expanded across the country, it became more difficult to separate issues of race and class. Claims of racial injustice in America became enmeshed with claims of economic justice. The federal government started initiatives addressed to poverty; Catholics and Jews, once excluded from the middle class, turned to help the entre of others; and young people began to focus on these issues in their own communities. By uniting the issues of fair pay and fair treatment in a demand for dignity, Chavez and his farm worker movement focused the nation's attention on some of the most invisible and vulnerable workers in the country.

However, Chavez's effort was not solely directed at consciousness-raising or the repeal of racist laws or even gaining legislative protection; he and the countless others who dedicated themselves to this struggle aimed to empower workers to form a union and bargain collectively with their employers for better wages and working conditions. These two goals, creating a farm

[2] Hawaii's state labor code includes agricultural workers along with the rest of the state's employees, but the code extends no special provisions to this sector of work.

worker union and creating a social movement focused on issues of the working poor, proved difficult to hold aloft simultaneously. Competing social and legal strategies had also led to conflict within the civil rights movement between the efforts of the NAACP and more radical groups like the Student Non-violent Coordinating Committee or Malcolm X's Nation of Islam.[3]

John Lewis, president of the SNCC and a future congressional leader, spoke at the March on Washington for Freedom and Jobs alongside Martin Luther King, Jr. and United Auto Workers president, Walter Reuther, among others.[4] March organizers excised several phrases from his controversial speech including one about the proposed Civil Rights Act introduced by President Kennedy: "The revolution is a serious one. Mr. Kennedy is trying to take the revolution out of the streets and put it into the courts."[5] This conflict between a revolution and a legal order, between gaining public support and gaining legislative victories, between organizing a union and organizing a social movement would prove to be a defining one for Chavez and the UFW.

In this article, I will address the tension between a movement for social justice and a legal regime designed to deliver that justice as manifested in the efforts to organize California farm workers and the passage and subsequent administration of the Agricultural Labor Relations Act (ALRA). I will describe how balancing the needs and priorities of maintaining a broad social movement for the vulnerable and dispossessed and a focused legal fight for good contracts and union rights ultimately led to the collapse of the United Farm Workers' organizing efforts. Ironically, winning the strongest, most protective labor law in the country produced new organizing victories at the same time it exacerbated the internal conflict between these two missions.

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Although the events leading to the passage of the ALRA started with the "Great Delano Grape Strike" and the signing of the first contract with

[3] *See* Doug McAdam, Political Process and the Development of Black Insurgency, 1940–1970 (1999).

[4] It is interesting in this context to note that the name of the march at which Dr. King gave his most famous speech nodded at this dual goal of economic and racial justice and that the speakers included civil rights and union leaders.

[5] John Lewis, Walking With the Wind (1998).

DiGiorgio, farm worker organizing in California had begun almost a century earlier. From the 1890s to 1960, there were several waves of farm worker organizing, all involving some admixture of ethnic workers' groups, traditional AFL-style unionism, and radical elements such as the International Workers of the World (IWW).[6] Large-scale farming in California is nearly as old as the state itself. Ranchers and farming interests received large parcels of land in as much as 35 million acre "bonanza farms" because of exemption from the Homestead Act. With the new railroad and investments in irrigation, farming soon became more lucrative than ranching. Beginning with the hiring of thousands of Chinese, unemployed after the completion of the transcontinental railroad, the history of field labor in California agriculture can be told through various immigrant groups.[7] In the end, several salient factors led to the failure of farm workers to successfully form a union or win lasting contracts: the transience and vulnerability of an immigrant workforce, the exclusion of agricultural workers from the National Labor Relations Act (NLRA), the introduction of the *Bracero* program, and the general unfamiliarity with and lack of interest in the agricultural sector by traditional AFL-CIO unionism — all set against a backdrop of employer violence and hostility toward organizing efforts backed by law enforcement, judges and politicians.

Field labor in California was initially performed by Asian immigrants, followed by Mexican and Filipino workers, with a brief interlude of white workers during the Depression. Early on, growers learned to recruit a workforce of non-citizen, newly-arrived immigrants who were often barred from other sectors of employment.[8] But in 1882, with the passage of the Chinese Exclusion Act, huge tracts of newly irrigated land lay fallow,

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[6] Marshall Ganz, Why David Sometimes Wins 23 (2009). For the summary of California farm worker organizing, I have used the following sources: Carey McWilliams, Factories in the Field: The Story of Migratory Farm Labor in California (1939); Stuart Marshall Jamieson, Labor Unionism in American Agriculture, Bulletin 836 (Bureau of Labor Statistics, U.S. Department of Labor; reprint 1975); Juan Gomez-Quiñones, Mexican American Labor, 1790–1990 (1994); Majka & Majka, Farm Workers, Agribusiness and the State (1983). Although there are many others of high quality, these provide a concise account of the activity of the time and are sufficient for this survey.

[7] McWilliams, *supra* note 6, at 66–67.

[8] Ganz, *supra* note 6, at 24.

requiring a new source of cheap labor. Growers looked west and south. With the planting of sugar beets, large numbers of Japanese with specialized cultivation skills learned in Hawaii began arriving in California.[9] With early organizing successes centered around a system in which crew bosses acted as agents of the workers rather than growers, the Japanese won season-long contracts and higher wages.[10] The strategy was to accept below-market wages and corner the labor market in a certain crop, and then when the crops were ready to harvest, they would threaten to strike unless wages were raised.[11] Through ethnic solidarity and high-demand agricultural skills, as well as their accommodation to local market forces, this strategy proved successful from season to season; however, it never amounted to a stable labor organization.[12] Although two outside organizations attempted to recruit Japanese workers, both efforts ultimately failed. The AFL knew little about farm worker life or how to organize in the fields, and proved racially hostile. The IWW, on the other hand, was more concerned about revolutionary politics than about the concerns of workers, many of whom sought higher wages and entry into the landowning classes. Indeed, despite racist laws restricting land sales, many Japanese farmers became successful as growers. As Carey McWilliams wrote, "it is impossible to even approximate the enormous contribution the Japanese made, in the course of a quarter century, to California agriculture."[13]

With the start of World War I, organizing in the fields came to a halt. In the postwar period the "red scare" in California led to the arrest of more than 500 IWW activists, prosecuted under the Criminal Syndicalism Act, and open-shop, anti-union campaigns led to the loss of a quarter of AFL membership and labor movement demoralization.[14] After the war, with labor militancy all but vanquished, California growers looked to Mexico to provide the supply to meet the increase in agricultural labor requirements. Under pressure from the growers, Congress exempted

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9 McWilliams, *supra* note 6, at 103.

10 Jamieson, *supra* note 6, at 53; Ganz, *supra* note 6, at 26.

11 *Id*.

12 For example, the Japanese and Chinese were favored for their ability to provide their own food and shelter, as well as disappearing after the harvests were over, thus saving growers considerable expense. *See* Jamieson, *supra* note 6, at 51.

13 McWilliams, *supra* note 6, at 110.

14 Ganz, *supra* note 6, at 30.

Western Hemisphere nations from immigration quotas established in 1921, and Mexican immigration soared to about 9 percent of all immigrants in the first half of the decade.[15] This source of cheap labor was exploited by the growers — the Mexican workers were organized in work gangs much like the Japanese, only the loyalties of the contractors were with the bosses. The workers were paid piece rate, and so the contractors could increase their earnings by keeping the hourly wages down.[16] This system worked to the advantage of the growers because organizing was hampered as workers were confused about for whom they were in fact working and a few contractors were able to set wages and conditions for their whole harvest.[17] There was, however, intense opposition to this vast increase in Mexican labor, as reflected by the Box and Harris bills in Congress, which took up the same racist and nativist language used against the Chinese and Japanese and reflected racial divisions within the working-class population.[18] To hedge against possible statutory limitations on the Mexican labor supply, growers also began recruiting Filipino workers from the Philippines and Hawaii — both U.S. territories and thus not subject to immigration quotas.[19]

In addition to exploiting the vulnerability of immigrant workers, who spoke little or no English, lacked knowledge of the legal system, and were often reliant on their employer for food and shelter, the growers received an added benefit with the passage of the NLRA in 1935. Because of the massive waves of unemployment caused by the Depression, the labor market was thrown into upheaval with plummeting wages and increased labor strife across the country. Senator Robert Wagner of New York introduced the NLRA with the purposes of bringing industrial peace and encouraging union organizing to raise wages. The Act gave workers and unions powerful organizing tools and protection from employer retaliation. It also established the National Labor Relations Board, an independent agency charged with overseeing the administration of the Act, running union elections, and certifying unions as the exclusive bargaining representative

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15 *Id.* at 31; Gómez-Quiñones, *supra* note 6, at 104.

16 Gómez-Quiñones, *supra* note 6, at 130.

17 Ganz, *supra* note 6, at 32.

18 Majka & Majka, *supra* note 6, at 64.

19 Jamieson, *supra* note 6, at 74.

of employees.[20] The NLRA initially proved quite successful, as union membership soared throughout the next twenty years. It unfortunately had quite the opposite effect for agricultural workers. In order to get the bill through Congress, Wagner and other northern New Deal Democrats were forced to compromise with conservative western and southern senators, who succeeded in excluding agricultural and domestic workers from the law's protections — both groups largely comprising people of color. So as it became clear that it was the Mexican and Filipino field workers, rather than the white packing shed and cannery workers who fell under the agricultural exception, AFL and CIO organizers took little interest organizing those not within the law's protective reach. It also meant that farm workers could only use unprotected strikes and slowdowns to achieve recognition.[21]

The great wave of organizing took place in the first twelve years after the Act's passage. In 1947, Congress, over the veto of President Truman, passed the Taft–Hartley Act. Also known as the Labor Management Relations Act, or the "slave-labor act" by labor leaders, Taft–Hartley amended the NLRA with many provisions hostile to unions, taking away many of their most potent weapons.[22] The NLRA originally only provided for unfair labor practices committed by employers; now it included many that could be committed by unions. It prohibited wildcat strikes, jurisdictional strikes, and solidarity or political strikes. It outlawed the closed shop, and restricted the union shop by allowing states to pass "right-to-work" laws, which prohibited union-security clauses in contracts requiring employees to obtain union membership. It restricted political contributions by unions and required union officers to sign affidavits repudiating communism. Most importantly for the subsequent farm worker movement, it outlawed the secondary boycott. This involves a union engaging in picketing or other activity against a separate employer, who has no labor dispute, doing

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[20] Exclusive representation means that, once certified, the employer must bargain with the union in good faith to arrive at a contract governing wages, hours, and other conditions of employment. The employer cannot deal directly with employees. Additionally, only one union may represent a certified group of workers, or bargaining unit at a time. Other unions are barred from running an election for the duration of the collective bargaining agreement.

[21] Majka & Majka, *supra* note 6, at 95.

[22] *See* 29 U.S.C. §§ 141–197.

business with a struck employer, with the goal of the secondary employer's pressuring the primary employer to settle its strike or dispute. While Taft–Hartley ultimately had a negative effect on unions' ability to organize, the fact the agricultural workers were excluded from the protections of NLRA, but were allowed to keep the economic weapons taken away from industrial unions with the LMRA would prove critical to the UFW's organizing success as well as its later decision to seek legislative protection and what kind.[23]

The *Bracero* Program and undocumented workers presented further challenges to efforts to organize farm workers. The Depression saw a major contraction in the farm labor market, and the government began repatriating workers by the thousands to Mexico. During World War II, the demand for manual labor surged, and, in a series of diplomatic agreements with Mexico, the government began bringing in several hundred "guest" workers for the fields and railroads.[24] At the behest of growers, the program in agriculture was extended and would continue to be renewed every two years until 1964. Between 1942 and 1964, about 4.6 million Mexicans were admitted to do agricultural work. Many Mexicans returned year after year, but the one to two million individual workers who participated in the program gained U.S. work experience and wages, and some decided to remain illegally in the country.[25] Although the program stipulated that no *braceros* could replace domestic workers (and so could not be used as strikebreakers), the law was rarely enforced, and growers would replace workers with *braceros* after firing them.[26] The program gained a new lease on life when it was renewed and extended as PL–78 in 1952. Although the program would end in 1964, Chavez, the UFW, and other unions would continually struggle against the wealth and political connections of growers, and their ability to utilize cheap, surplus labor.

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[23] Joseph Shister, *The Impact of the Taft-Hartley Act on Union Strength and Collective Bargaining*, 11 Industrial and Labor Relations Review 339, Apr. 1958.

[24] *See* Michael Snodgrass, *The Bracero Program, 1942–1964*, in Mark Overmyer-Velásquez, ed., Beyond the Border: The History of Mexican–U.S. Migration 79 (2011).

[25] *Braceros: History, Compensation*, 12 Rural Migration News, Apr. 2006.

[26] Deborah Cohen, Braceros: Migrant Citizens and Transnational Subjects in the Post-War United States 154 (2011).

And so, it was against this background of racism, exclusion from political and legal protection, and violent strikebreaking tactics that Cesar Chavez began organizing farm workers, founding the National Farm Workers Association (NFWA) in 1962. As this brief sketch shows, for over seventy years, efforts to organize field workers were met by growers and their allies in the courts, the Legislature and law enforcement with extreme hostility, violence, injunctions and arrests, anti-union ordinances and the importation of workers with no rights and no affiliations. Such efforts were also rewarded by tepid support from organized labor, which, even when finally fully engaged, found it difficult to win on the growers' turf.

By the time the Delano strike was called in 1965, Chavez had already formulated his response to many of these issues. It is impossible to understand the formation of this strategy apart from the context of the civil rights movement and the end of the *Bracero* program. In 1963, amid intense grower opposition, Congress voted to allow the *Bracero* program to end without further extension. This enraged California growers, who embarked on a propaganda campaign to consumers predicting soaring produce prices as a result of fewer crops and a dire labor shortage. In an effort to compromise, the Department of Labor allowed growers to bring in emergency green card workers under the condition that they raise wages.[27] The labor market contraction caused by the new absence of vulnerable nonresident workers created a new organizing opportunity, which Chavez would seize. The question remained how to effectively mobilize farm workers and avoid the fate suffered by earlier efforts. He would draw on three tactics utilized by civil rights leaders to achieve this: a broad base of support from the people actually facing injustice, massive mobilization of outside supporters and the media, and strategic utilization of the legal system.

After ten years of working as a director for the CSO, Chavez (along with Huerta and Padilla) resigned to start an organization focused on agricultural labor and the injustices of the *Bracero* program when the CSO convention voted not to go in that direction.[28] He established his new NFWA in Delano in the San Joaquin Valley, the heart of the table grape industry and the center of California's agricultural belt. Because of its prime

[27] Ganz, *supra* note 6, at 96.

[28] Majka & Majka, *supra* note 6, at 170.

location near year-round farming, Delano offered Chavez the opportunity to gain initial support among more stable residents rather than the difficult to organize and vulnerable migrant populations. He believed that many earlier efforts had failed due to a lack of a stable organizational base engendered by traditional union organizing strategies of focusing on one contract or workplace at a time.[29] For the next two years, the organizers solidified their base of support using the community organizing methods common to the CSO, such as orchestrating house meetings, constructing community service centers and establishing a credit union for farm workers.[30] Chavez began building allies for his movement with growing confidence of a potential victory, remarking "the reason the farm worker organizing drive could win was because they could ally themselves with a new feature in American social and political activity — the movement for civil rights, the movement of the youth, and the movement of the poor."[31] Chavez thought that the union should be a service-oriented movement, with organizers taking only the money donated to them by farm workers, and not organizing along a traditional AFL-CIO-style "business" model.[32]

In 1965, when Filipino grape workers in the Coachella valley, led by AWOC director Larry Itliong, demanded the $1.40 per hour prevailing wage set by the Secretary of Labor, the growers initially refused. After a short strike, however, management conceded the extra $0.15. When the harvest moved north, the growers again refused the higher wage and ultimately prevailed. With the work now moving to Delano, and the growers repeating the low-ball offer, Filipino workers staged a sit-down strike, refusing to leave their camps. Although Chavez felt his fledgling union insufficiently prepared for a strike, the Mexican workers (many of whom toiled in the same fields as the Filipinos) voted to join the strike. At the center of the strike were two large ranches encompassing 10,000 acres, and ultimately more than 3,000 AWOC and NFWA workers participated in "La Huelga."[33] The growers, quickly recognizing the size and enthusiasm of the strike and lacking *bracero* replacement workers, saw this as a battle for control over California agriculture, and

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29 *Id.* At 171; Gómez-Quiñones, *supra* note 6, at 244.

30 *Id.*

31 Quoted in Sam Kushner, The Long Road to Delano 122 (1975).

32 Gómez-Quiñones, *supra* note 6, at 244.

33 Majka & Majka, *supra* note 6, at 173.

would not give in easily. The traditional methods were used. They evicted workers from the camps, sprayed picketers with pesticides, assaulted striking workers, and illegally brought in 2,000 undocumented strikebreakers from Juarez.[34] Local courts issued injunctions of the strike and local law enforcement staged mass arrests of strikers.

Recognizing that it would be difficult to outlast these powerful interests, Chavez took a page from the civil rights playbook and looked outward for support. The involvement of the federal government, the grower outcry over labor shortages and the end of the *Bracero* program, and efforts in the Assembly to pass legislation favorable to farm workers generated a great deal of press coverage and interest from the general public. Chavez staged a rent strike after the local housing authority raised rent in the migrant encampments by forty percent. He also used the media attention to craft a message of social injustice and moral imperative, and called on all segments of society for support — many of the images from the rent strike evoked those of the march that had taken place in Selma, Alabama, just three months earlier, with workers surrounded by police refusing to move. The Mexican trade union and the UAW gave generously to support the strike, with UAW president Walter Reuther making a nationally publicized appearance in Delano. Chavez started a farm worker newspaper, *El Malcriado*, contacted local civil rights leaders in Los Angeles about nonviolent protest training, and continued to orient the union alongside the larger civil rights struggle. In a July 9 editorial in *El Malcriado*, the union reiterated its message: "[E]very day more and more working people prove their courage as the Negroes are doing in their movement. The day we farm workers apply this lesson with the same courage the Negroes have shown in Alabama and Mississippi, on that day the misery of the farm worker will come to an end."[35] Unlike the AWOC, the NFWA defined itself as a farm worker civil rights movement. And as the strike issue of *El Malcriado* read:

> Sometime in the future they will say that in the hot summer of California in 1965 the movement of the farm workers began. It began with a small series of strikes. It started so slowly that at first it was only one man, then five, then one hundred. This is how a

[34] Ronald Taylor, Chavez and the Farmworkers, 146 (1976).

[35] Quoted in Ganz, *supra* note 6, at 115.

> movement begins. This is why the Farm Workers Association *is a movement more than a union*.[36]

Clergy and students began to arrive on the picket lines and national media attention increased as a result. Students involved in the Free Speech Movement at Berkeley had politicized the population, including a law student named Jerry Cohen. Up to this point, the NFWA had relied on pro bono work from Bay Area labor lawyers, who turned out to be so mired in the NLRA restrictions on union activity that they could not approach the problems presented to the fledgling union through any other lens, despite the fact that farm workers were exempt from coverage.[37]

However, this exemption allowed the union to take advantage of tactics unavailable to industrial unions. In October, the union called on the general public to boycott grapes. Both the Teamsters and the ILWU honored the picket lines at the points where the grapes were loaded for transport.[38] Reuther's visit to Delano helped spread support for the boycott throughout organized labor across the country. Importantly, Chavez declared that the strike would be for union recognition, not just a wage increase — serving as a reminder to labor, the clergy, and the public that farm workers, unprotected by the NLRA, had to strike for recognition and hence needed public support.[39] In order to garner further sympathy for the boycott and to remain in the national media spotlight, Chavez and the union staged a 280-mile march to the Capitol in Sacramento. The march was intended to stress the nonviolence of the strikers, evoking not only the Selma march, but also religious pilgrimages so familiar to the Catholic Mexican and Filipino workers. By this point, the boycott began to take its toll as liquor stores across the country cleared products from Schenley, the other grower targeted along with DiGiorgio, from their shelves.

Marching to Sacramento served another purpose: to put pressure on Governor Pat Brown in an election year to support the union. Ronald

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[36] Quoted in Ganz, *supra* note 6, at 126 (emphasis added).

[37] Jennifer Gordon, *Law, Lawyers and Labor: The United Farm Workers Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today,* 8 U. Pa. J. of L. & Emp. 14 (2005).

[38] Majka & Majka, *supra* note 6, at 174.

[39] Ganz, *supra* note 6, at 125.

Reagan had announced his candidacy and his platform involved a return to the *Bracero* program. Although Brown had been an ally of farm workers in the past, his support took the form that all governors had taken going back to Hiram Johnson in 1912. By giving public funds to housing commissions and service centers for agricultural workers, politicians in the governor's mansion had framed the issue as a social problem rather than a labor problem. By treating the issue as one of providing social services, the politicians could avoid taking a side against the growers or the workers. Chavez sought to rectify this dichotomy. Workers picketed the 1966 State Democratic Convention, and supportive delegates introduced a unanimous resolution calling for the establishment of collective bargaining rights in agriculture, support of the boycott, and intervention by the governor.[40] The governor responded by saying that he would not intervene because "we have collective bargaining laws to take care of differences between workers and employers." He clearly had not read the NLRA.

Just as the march was beginning, at the urging of Reuther, the Senate subcommittee on migratory and farm labor arrived to hold hearings on SB 1866 which would bring agricultural workers under the purview of the NLRA.[41] Chavez at this point had not seen the ultimate effectiveness that the boycott would go on to have, and so supported inclusion at this date, which would, of course, end his ability to utilize secondary activity such as picketing grocers. The growers vehemently opposed the plan, claiming over and again that there was no strike, no labor problem, and that the workers did not support this group of radicals.[42] Within five years the tables would be turned.

Before the march reached Sacramento, Schenley, fearing further negative press coverage and an illegal Bartenders Union boycott, agreed to recognize NFWA and negotiate a contract. The next day, DiGiorgio had agreed to hold secret-ballot elections for recognition. However, Chavez wanted NLRB rules to protect the election and the workers from unfair

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40 *Id*. at 150.

41 *Id*.; Majka & Majka, *supra* note 6, at 175. Senator Robert Kennedy also attended at the urging of Reuther. He would go on to become the farm workers' most outspoken supporter in national politics.

42 *Id*.

labor practices; without this guarantee, the union would neither suspend its pickets or boycotts.[43]

Winning a contract with DiGiorgio would require not only bargaining with the grower, but also competing against another union for the votes of the workers. Strengthened by the passage of the NLRA and masters of secondary activity, the International Brotherhood of Teamsters (IBT) had spent the past three decades expanding their power base on the West Coast from the trucking and shipping at the ports, to the agricultural warehouses and packing sheds of the growers.[44] The Teamsters were a conservative union, which viewed unions as a business organization for the sale of labor services, not as a force for social change as did the Longshoremen or the Miners. The IBT had never sought to organize in the fields, and early on decided to leave the farm workers out of any agricultural organizing efforts.[45] As early as the thirties, the Teamsters took advantage of growers' anxiety about the radical CIO and the power of union field workers allied with the white women of the canneries and packing shed, and they employed a strategy that they would use against farm workers for four decades — they appealed to the employers rather than the workers, and growers signed contracts to avoid the social movement side of labor unionism.[46]

Prior to the negotiations with DiGiorgio, the IBT had supported the farm workers from the shipping and packing sheds they represented. Yet, they had a rivalry with the AFL-CIO, having been expelled years prior for corruption. The reason the Teamsters decided to enter the fields, whether it was because they already had extensive contracts with growers including DiGiorgio in canneries, packing sheds, and cold-storage warehouses or because they were a conservative group that disfavored radical social unionism, or because there was a rift within the Teamsters leadership against its then-president Jimmy Hoffa, has never been fully understood.[47]

But the Western Conference of the IBT decided, either on their own or at the behest of the bosses, to go into the fields and challenge the NFWA in the DiGiorgio elections. This signaled the beginning of a decade of strife

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43 Ganz, *supra* note 6, at 160.

44 Majka & Majka, *supra* note 6, at 37–40.

45 Jamieson, *supra* note 6, at 144.

46 *Id.* at 152–154; McWilliams, *supra* note 6, at 270–273.

47 Majka & Majka, *supra* note 6, at 180.

and conflict between the two unions. DiGiorgio then held a surprise election that the Teamsters won and the NFWA challenged. Under pressure, Brown's investigator recommended a new election, and DiGiorgio responded by firing 200 workers, most of whom were NFWA supporters. None of this would have been possible under the NLRA. As soon as the issues became focused on union recognition and long-term contracts rather than single-season wage increases, the protection of labor laws became much more appealing. Because the election represented the future of the union and fearing a loss of support for the boycotts in the case of a loss, Chavez agreed to merge the NFWA with AWOC and affiliate with the AFL-CIO, losing some of his cherished independence, to form the UFWOC.[48] Although the merger brought strength and capital, Chavez worried that the union would lose its image as a democratic, grassroots organization fighting for the freedom of an oppressed minority.[49] Now, however, the ethnic leaders, radical organizers and the AFL were on the same side for the first time in California history.

Despite DiGiorgio's pressuring its workers to vote Teamsters, the UFWOC won the election 530 to 331.[50] Though it had taken three quarters of a century, farm workers finally had a union contract. However, the UFWOC could neither have won the election without the secondary boycott nor without the NLRB-style election rules and the supervision of an arbitrator. Thirty years after the passage of the NLRA, and after several failed legislative attempts, the pieces — the secondary boycott, the IBT rivalry, the AFL-CIO affiliation, and union elections — were now in place to begin moving the nascent farm worker movement toward legislation. Would this revolution be taken out of the streets and placed in the courts, as John Lewis had feared?

After the success of the Delano strike, the UFWOC began targeting individual companies using a table-grape boycott to win union contracts. Growers soon consolidated their efforts and the union was essentially battling the entire industry. With the administration of contracts, the multiplicity of pickets and a nationwide secondary boycott of supermarkets, legal matters became considerably more complex. Chavez hired a young

48 Jacques Levy, Cesar Chavez: Autobiography of La Causa 239–244 (1975).

49 Ganz, *supra* note 6, at 128–130.

50 Gómez-Quiñones, *supra* note 6, at 246.

lawyer named Jerry Cohen who had been working at the California Rural Legal Assistance nonprofit for only a few months when he met Chavez.

With no background in labor law, Cohen worried that he would be of little assistance to Chavez.[51] He very quickly proved his worth. The pro bono lawyers had had a practice of signing consent decrees with the NLRB on the union's behalf stating that they would not engage in secondary boycotts because that's what the NLRA said, thus taking away the union's biggest and most strategic weapon. Although the NLRA excludes farm workers, if even one worker in the union is in fact a covered employee as defined by the Act, the union becomes a labor organization under the Act, and subject to prohibitions on the secondary boycott.[52] So when Cohen discovered that nine workers in a peanut-shelling shed were NLRA employees, he quickly created the "United Peanut Shelling Workers of America," a new union under the AFL-CIO, successfully divesting the UFWOC of any NLRA covered employees.[53] As a result of this and other efforts, Cohen's role expanded quickly, and Chavez began using the law for the first time to his advantage — using discovery motions to gain access to bargaining unit information, and fighting back against restrictive legislation, as well as negotiating contracts with growers. The California Supreme Court handed down a case in 1968, *In re Berry*, holding that the violation of an order of the court, such as an injunction or temporary restraining order, which is unconstitutional, cannot result in a valid judgment of contempt.[54] This led Cohen and Chavez to a strategy where an injunction would be issued against the union, for example for the use of bullhorns, the union would then violate the injunction, and Cohen would challenge the order in court. This would result in case law explicitly granting the union their First Amendment rights, which Cohen would then wave in the face of local judges the next time they attempted to restrict the union's activities.[55]

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51 Gordon, *supra* note 37, at 15.

52 *See* NLRA § 2(5).

53 Gordon, *supra* note 37, at 15.

54 68 Cal. 2d. 137, 147 (1968).

55 Gordon, *supra* note 37, at 17. *See* Jerry Cohen, *Gringo Justice* (The Jerry Cohen '63 Papers at Amherst College), https://www.amherst.edu/media/view/314670/original/Gringojustice.pdf (last visited Oct. 11, 2012).

In 1968, with the boycott in full swing, Chavez and the UFWOC were put in a difficult position after the assassination of Robert Kennedy. Kennedy had been a loyal supporter since his first trip to Delano in 1965, and the UFW repaid him with a significant voter registration and turnout effort, which many attribute to putting him over the top in the important California primary. Both Chavez and Dolores Huerta attended the victory celebration at the Ambassador Hotel in Los Angeles where Kennedy was shot and killed. Now hesitantly backing the AFL-supported candidate, Hubert Humphrey, Chavez demanded that Humphrey pressure growers to negotiate.[56] He would not. Humphrey was convinced that the strife in California and the grape boycott resulted from the fact that agricultural workers were exempted from the NLRA.[57]

Consensus in Washington began to build around bringing agricultural workers under the Act. Prior to 1968, Chavez and Larry Itliong had supported such legislation. Now, however, Chavez witnessed the benefits reaped by organizational strikes and secondary boycotts, both now prohibited by the NLRA. He also observed that few CIO unions had emerged after Taft–Hartley had stripped unions of many such weapons, placed damages provisions into the law creating union liability, and authorized the President to end strikes. Accordingly, he determined that such legal protection was no protection at all.[58] Furthermore, because of delays in the enforcement mechanisms, Chavez felt that the NLRA could not accommodate agricultural labor with its short harvesting periods and migrant work force.[59] According to Cohen, one of the most important reasons for opposing inclusion under the NLRA was the nature of bargaining units, which, after the AFL trade model, were organized by a community of interest, meaning by craft. The UFWOC wanted an industrial unit.

> [U]nder the craft unit approach different groups of the work force, such as truck drivers, tractor drivers, irrigators, could be in different units from weeders, hoers, and pickers. Under an industrial unit approach all the grower's workers would be in one unit and

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56 Majka & Majka, *supra* note 6, at 191.

57 *Humphrey Charges Nixon is Engaging in 'Razzle Dazzle, Frizzle Frazzle,'* United Press International, Sep. 26, 1968.

58 *Id.*

59 Ronald Taylor, *Why Chavez Spurns the Labor Act*, The Nation, Apr. 12, 1971.

> have an opportunity to move to the more skilled, higher paying jobs. For example, a picker could aspire to drive a tractor or a truck. Given the racism of some growers, the craft unit approach could relegate Mexicans, Filipinos and other minorities to the harder, lower paying jobs. Therefore, craft units would create legislatively mandated ghettoes in the fields.[60]

Instead, Chavez envisioned a union where all agricultural workers on a ranch were in the same unit, under the same contract regardless of their job. Without UFWOC support, no efforts to incorporate farm workers would succeed. At this point, it seemed that the law might not even be necessary.

By 1970, the boycott had had a tremendous impact, resulting in the UFWOC's holding contracts with 85 percent of the table-grape ranches. When the Delano strike officially ended and the boycott on grapes was called off, farm workers' wages had nearly doubled, the union had established hiring halls for the ranches, a ban on DDT, and a health and welfare trust fund with accompanying medical clinics had been created.[61] During this time Cohen and Chavez continued to use innovative legal strategies to pressure growers into negotiating. Because of the setting in state courts that historically favored growers, coupled with the fact that court decisions often came years after judicial action would prove an effective measure, Cohen had little interest in winning cases.[62] Instead they focused on bringing cases regarding the lack of protection that workers had against toxic pesticides, the health and sanitation conditions in the fields, law enforcement assaults on picketers, antitrust violations and illegally utilizing federally subsidized water.[63] This litigation had the effect of putting pressure on regulators to step up enforcement, maintaining a presence in the press, continuing to convince consumers not to buy grapes or other boycotted products, and costing the growers significant money in legal

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60 Cohen, *supra* note 55, at 17–18.

61 Gómez-Quiñones, *supra* note 6, at 247.

62 Jennifer Gordon interview with Jerry Cohen. Professor Gordon was kind enough to share with me all of the original transcripts of her extensive interviews with UFW legal personnel, and for this I thank her.

63 Gordon, *supra* note 37, at 24; Gordon, *supra* note 62, at 306. For a list of cases, *see* https://www.amherst.edu/media/view/69688/original/Case-summaries.pdf.

expenses. The pesticide case in particular captured the public attention when tests conducted on grapes at Safeway stores, the target of a secondary boycott, revealed levels of the pesticide Aldrin far above government safety levels — linking the workers interests with those of the consumer.[64] The UFW now wielded the law as another organizing weapon in its arsenal. And indeed, the organizing priorities always took precedence over any individual legal victory.

As the pesticide cases continued, Cohen continued to file suits over back pay, torts for workers injured on the job, Section 1983 civil rights claims, and any cases he could find arising under the California Labor Code. This was a new kind of organizing, unprecedented from the growers' standpoint. They had previously done battle with their own employees and union organizers, which, given the sympathies of county courts and sheriffs, allowed them play to avoid legal constraints upon their conduct. Now they were forced to play by a different, much costlier, set of rules. This legal strategy, combined with the effectiveness of the boycott and religious support garnered by Chavez's fast for nonviolence eventually made growers eager to negotiate. The Teamsters sought to take advantage of the willingness to sign contracts, and their efforts to form a farm worker union of their own would drive a series of violent confrontations and create pressures on the UFWOC that would ultimately lead to a legislative solution.

In 1965 and 1966, the IBT, along with the ILWU, had supported the Delano strike and the grape boycott by refusing to pack, load, or ship non-union grapes and wines in areas where they controlled labor in the sheds, on the roads, or in the warehouses. In 1967, the two unions had even reached a temporary agreement: the UFWOC had jurisdiction over the fields and the Teamsters over the canneries, packing sheds and warehouses, trucking and processing facilities. Between 1970 and 1973, the Farm Workers initiated a campaign to organize lettuce workers from Salinas to Coachella. The UFWOC put intense effort and major resources into strikes in the fields, subsequently initiating another secondary boycott on lettuce in major grocery chains. This campaign occurred while other Teamster contracts were up for renegotiation. Fearful of what took place in the grape fields, growers reached out to the Teamsters to represent field workers as

64 Majka & Majka, *supra* note 6, at 194.

well. Within days, the twenty-nine largest growers in the Salinas Valley had signed and negotiated sweetheart contracts with the Teamsters.[65] This was a major blow to both the UFWOC and the workers. These contracts were signed "without worker knowledge or input, and had few mechanisms for worker participation, no protection from pesticides, and inadequate grievance procedures. Workers who refused to agree to Teamster representation were immediately fired."[66] This arrangement reaped benefits for both the Teamsters, who could collect dues without engaging in any organizing, and the growers, who could now exclude the UFW and count on a union that would not generate any problems.

The UFW called on growers to renounce the unfair contracts and sign with the UFW, but in August, when the president of the Grower–Shipper Vegetable Association announced that he would maintain the Teamster contracts and had received assurances that they would be honored, the strike was called. Cohen remarked that ironically the sweetheart contracts had organized the workers for them.[67] A general strike involving 10,000 workers swept through Salinas and down to Santa Maria. The *Los Angeles Times* called it the "largest strike of farm workers in U.S. history,"[68] virtually shutting down the fields. The courts, at the request of the growers and believing the conflict to be a jurisdictional dispute between unions, responded with a general injunction against picketing. This created huge problems leading to mass arrests and a restriction of UFWOC organizers to the strikebreakers that the growers brought in.[69] The Teamsters again responded with violence: attacking picketers, opening fire on UFWOC headquarters, bombing the Watsonville office, assaulting Jerry Cohen, and shooting three picketers.[70]

During this time the Teamsters, the growers and their political allies placed a measure on the California ballot in 1972, which would have prohibited secondary boycotts and other agricultural-union activity. A

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65 *Id.* at 201. A sweetheart contract is a contract made through collusion between management and labor, which contains terms beneficial to management and unfavorable to union workers.

66 Gordon, *supra* note 37, at 26–27.

67 Cohen, *supra* note 55, at 22.

68 Quoted in Majka & Majka, *supra* note 6, at 203.

69 *Id.* at 204.

70 *Id.*

massive effort to defeat Proposition 22 was undertaken while Cohen was fighting consolidated cases to overturn the injunctions against UFWOC pickets. Although the measure was defeated and the California Supreme Court overturned the injunctions and held the picketing to be legal, these efforts in addition to the strike and the boycott and false starts with growers who claimed they would relinquish their Teamster contracts, took a huge toll on the union's resources.[71] To administer over 100 contracts and incorporate tens of thousands of workers required training farm workers as stewards and ranch committee members. In addition to running the vegetable boycott across the country, grievances had to be pursued, hiring halls and benefit programs managed, and medical care facilities coordinated, which in turn required an ever-increasing staff.[72] In short, in addition to functioning as a grassroots, social justice movement, the UFW now had the traditional responsibilities of a union. With this growth, its income from dues and fundraising increased to the point where the AFL-CIO determined the union was no longer an organizing committee and chartered the union as the United Farm Workers of America. The union now had to revise its 1963 constitution, hold new executive board elections, and hold a constitutional convention.[73]

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Between the spring of 1972 and the end of 1973 the conditions came together that would ultimately force Chavez and Cohen to advocate for a farm worker labor law. First, around the country the Nixon administration, in alliance with growers and state governments spearheaded legislative initiatives, like that of Proposition 22, many of which banned secondary boycotts, harvest-time strikes, and collective bargaining over pesticide control.[74] In Oregon, Washington, Arizona, New York, Florida, and California, the UFW was forced to expend significant energy fighting these bills. Although the UFW efforts proved largely successful not only in defeating these measures through the political process, but also in registering and mobilizing many Chicano voters, they drained time, resources, and

71 *See* Englund v. Chavez, 8 Cal. 3d 572 (1972); Gómez-Quiñones, *supra* note 6, at 248.

72 Ganz, *supra* note 6, at 230.

73 *Id.* at 231.

74 Majka & Majka, *supra* note 6, at 208.

precious attention — particularly from the administration of contracts and the management of their hiring halls.

Second, during this time many of the original contracts signed with the Delano grape growers were expiring, and the Teamsters' president Fitzsimmons urged the growers to sign with the Teamsters.[75] The growers wanted assurances that the hiring halls would be abolished and that the Teamsters would not negotiate over pesticide use. They received such assurances. When the contracts did expire, 90 percent of the grape growers signed contracts with the IBT.[76] The Teamsters, having been expelled from the AFL, were free to raid other AFL unions. As a result, the UFW lost a significant portion of its membership and thus important dues income. The workers across the valley, on all but the two ranches that re-signed with the UFW, were called out on strike.

Third, this conflict predictably grew violent. The Teamsters sent armed members to guard the fields as security personnel and prevent UFW organizers from speaking to the workers.[77] A superior court judge issued an injunction without providing notice to the parties, and just as quickly the UFW violated it. By the time the union called off the strike in August "two strikers were murdered, while picketers endured 44 shootings, 400 beatings, and 3,000 arrests . . . . [W]hen it was all over, the UFW was left with 10 contracts, 6,000 members, a shattered dues income, and a fight for its life."[78] The boycott of grapes, lettuce, and Gallo wine was reactivated.

Fourth, becoming charted by the AFL-CIO did not come without strings. When the AFL-CIO president George Meany contributed $1.6 million to the UFW strike fund, it came on the condition that the union pursue some kind of labor relations law. Meany saw all the UFW activity as disruptive and sapping energy. For the AFL-CIO, victory was not defined in terms of changing social consciousness through a movement, it was

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[75] The NLRA, which governed the Teamsters, provides for exclusive representation of workers by bargaining representatives. This means that only one union can represent a unit of workers at a time. The Teamsters thus had to wait until the UFW contracts expired to attempt to represent those same workers, unless workers held an election to "decertify" a union as their representative.

[76] Gordon, *supra* note 37, at 29.

[77] Miriam Pawel, The Union of Their Dreams: Power, Hope, and Struggle in Cesar Chavez's Farm Worker Movement 108 (2009).

[78] Ganz, *supra* note 6, at 232.

defined in terms of winning contracts, adding members, collecting dues, and gaining political leverage.[79] Cohen saw this correctly as an "NLRB" mentality, but there was no other legal way to protect the UFW from the Teamster raids on their contracts and for UFW organizers to gain access to workers on ranches. Additionally, in 1974, the Safeway boycott was ended in exchange for backing of the grape and lettuce boycott, in part to placate unionized grocery workers.[80]

For many years, the UFW staff, particularly Chavez and Cohen, had struggled with whether to seek the protection of a law for farm workers. They had run up against problems with access to workers and private property issues with growers, conflicts with the Teamsters, and the lack of a method to protect workers who were fired for union organizing. However, there were far too many problems with the NLRA, such as inadequate remedies, the prohibition on secondary activity, and the structure of bargaining units, to seek its protection. Additionally, the political climate in California, with a Republican governor in office and strong grower support in the Senate, bode poorly for the passage of any good legislation. Chavez had observed what the Taft–Hartley Act had done to industrial unions once they lost some of their more potent weapons still available to the UFW, and he believed that legislative victories had quelled the momentum of the civil rights movement in the South.[81] Cohen also believed that "legalizing" the farm worker struggle would come at a cost. He had not taken labor law in school, but he knew that it was only a matter of time before an industry of capable anti-union lawyers formed and began to use the law to erect barriers to organizing efforts.[82] Most of the staff, and especially Chavez, wanted to maintain the social movement aspect of the UFW. They feared that being bogged down in an "administrative nexus" — in a lawyer's game — threatened to sap the power the movement had worked so hard to build.[83]

Nevertheless, the political dynamic in California was shifting. In 1974 two major political events coalesced to make passage of a favorable law seem feasible. The Democratic secretary of state, Jerry Brown, succeeded

79 Gordon, notes from interview with Sandy Nathan.

80 Gómez-Quiñones, *supra* note 6, at 249.

81 Taylor, *supra* note 59; Levy, *supra* note 48, at 529.

82 Gordon, Cohen interview.

83 Gordon, interviews with Cohen and Nathan.

Ronald Reagan as governor, and had run on a platform of bringing peace to the fields.[84] A year earlier, the California Supreme Court had ordered reapportionment that ended decades long rural domination of the state Senate.[85] New, pro-farm worker senators from Southern California, Howard Berman and Richard Alatorre, were recently elected and commanded a majority in the Legislature ready to work with the governor. The union decided that its best chance to regain many of the workers it had lost, prevent sweetheart contracts, run fair elections and have structured bargaining lay in legislative action.[86] So Cohen began taking stock of all the innovations and protections needed to craft a law that would benefit farm worker organizing.[87]

> [W]e figured we needed elections in seven days. We needed an industrial unit. We needed access [to the fields] somehow. We needed some basic things like, for the workers who couldn't read and write, symbols on the ballots . . . . I went around and talked to some law professors just to find out what elements they would want if they were going to change the NLRB and things like the "make whole" remedy, which I didn't know about, came up. And we learned about some of those remedies and decided, "We'll just load up — we'll ask for everything. We'll ask for the whole damn thing."[88]

Chavez remained ambivalent about seeking a law governing the fields. His primary concern was losing the boycott. With the kitchen sink approach, Cohen reassured Chavez that "we'll introduce a bill that can't be passed . . . . see what reasonable sounding things we can put in there that are impossible."[89] This strategy would either yield a powerful set of rights

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84 Ganz, *supra* note 6, at 234.

85 In 1971 the governor vetoed the Legislature's reapportionment act following the decennial census. The California Supreme Court appointed three Special Masters to recommend to the Court plans for possible adoption together with their underlying rationale. The Special Masters report was adopted by the Court in November 1973.

86 Gordon, *supra* note 37, at 30.

87 Gordon, Cohen interview.

88 *Id*.

89 Tape of NEB meeting, Dec. 17–23, 1973, UFW, Wayne State, quoted in Pawel, *supra* note 77, at 148.

and protections or at the least appease Meany and the AFL and Governor Brown that the UFW had attempted to seek a legislative solution. The union would then try to place the law on the ballot and win a constitutional amendment.[90] Cohen took up residence in Sacramento, and, over a period of months wrangled with Brown, his secretary of agriculture, Rose Bird, and numerous attorneys and legislators. Cohen attempted to convince Brown to support a version of the bill authored by Richard Alatorre that contained most of the union's demands, and promised UFW support.[91]

Rather than a wave of unified opposition, support for the measure came from expected sources as well as their traditional enemies. Both supermarket chains and rural county government advocated for the measure. Economic concerns from the boycott and from mass arrests and continual picket-line violence respectively had convinced them to support whatever measures would restore stability to agriculture.[92] The Teamsters were ambivalent, fearing on the one hand that the law would nix their sweetheart contracts, and hoping that regulated elections could legitimize and stabilize their union in the fields on the other. Although most growers opposed the bill, some, including large ranches like Gallo, favored it because much of the economic harm they had suffered as a result of UFW activities had come from the boycott rather than a cadre of organized workers. They felt that they could win an election and free themselves from the burdensome tactics of the union.[93] Others felt that with the secondary boycott itself banned, they would be able to negotiate with the union terms more favorable to the employer.

By early in 1975, Chavez had resigned himself to the inevitability of legislation. The UFW applied considerable pressure on Brown to support Alatorre's bill rather than his original bill drafted by Rose Bird and based on the NLRA.[94] In 1975 there were six bills on agricultural labor relations introduced into the Assembly, and when a showdown in the labor relations committee

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90 Pawel, *supra* note 77, at 149. The main point of this would be to protect the law from the changing of political tides.

91 Gordon, *supra* note 37, at 31. *See* Levy, interview with Cohen, Nathan and Gaenslen.

92 Ganz, *supra* note 6, at 234.

93 Gordon, *supra* note 37, at 32. *See* Levy, interview with Cohen, Nathan and Gaenslen.

94 Majka & Majka, *supra* note 6, at 238.

seemed inevitable, Brown amended his bill to include provisions more favorable to the UFW. The union and Alatorre endorsed the bill. After calling a special legislative session at Chavez's urging so that the bill could go into effect by late summer, the bill passed the Assembly and Senate without grower-backed amendments that would have removed key protections.[95]

Certainly the bill did not give the union everything it wanted. It included a ban on recognition strikes, no secondary boycotts at delivery doors, and it maintained the Teamster contracts until elections were held.[96] Nevertheless, the bill gave the farm workers a powerful set of organizing tools, and its preamble began with an endorsement of farm labor organizing and a stated goal of "guaranteeing justice for all agricultural workers."[97] Although the ALRA was crafted around premises of the NLRA and required the Agricultural Labor Relations Board, created by the Act, to follow applicable NLRA precedent, it contained significant customized changes tailored to the nature of agricultural work.[98]

The law significantly altered NLRA election rules by providing for elections within seven days of the filing of an election petition, essential for a workforce composed of many migrant laborers. It also required conducting elections within a 48-hour period during a labor dispute such as a strike. Additionally, elections had to take place during peak-season with more than 50 percent of the workforce present to prevent a small number of year-round employees loyal to the grower from determining an election outcome.[99] Unlike the NLRA, the ALRA contained a prohibition on voluntary employer recognition of any non-certified labor organizations.[100] The UFW insisted on such a restriction to prevent future sweetheart contracts with the Teamsters or any other union that did not have the support of the workers. In contrast to the NLRA's determination of bargaining units by craft or a community of interest-based job-specific issues, the ALRA created wall-to-wall or industrial units of all of an employer's "agricultural

95 *Id.* at 239.

96 Levy, interview with Cohen, Nathan and Gaenslen.

97 1975 Cal. Stat. and Amendments to the Code, 3d Extraordinary Sess. c. 1, § 1, at 4013, quoted in Gordon, *supra* note 37, at 33.

98 Cal. Lab. Code § 1140, et seq.

99 Cal. Lab. Code § 1156.3(a)(1)–(4).

100 Cal. Lab. Code § 1153(f).

employees." This permits tractor drivers, irrigation employees, harvest employees, thin and hoe workers, mechanics and others to be covered by the same contract.[101] This operated to the benefit of the union by disallowing the segregation of workers of color into lower paid units and by facilitating organizing among all workers on a ranch. It benefited growers because there could not be a series of staggered strikes continually halting production, nor year-round contract negotiations draining resources. The ALRA also expanded the NLRA's make-whole remedies from reinstatement and back pay to include the loss of pay resulting from an employer's refusal to bargain in good faith.[102] Indeed, under existing labor law, the NLRB does not have the authority to award damages for an employer's refusal to bargain.[103] This change created a powerful incentive for the grower to bargain once a union has won recognition as well as not to refuse to recognize the union in bad faith. Critically, the ALRA did not ban the use of secondary boycotts. Although the law prohibited picketing to support a secondary boycott staged by a union that had not yet been certified to represent the workers in question as well as supermarket delivery door picketing to ask for secondary boycotts, it retained the right to the secondary boycott by a certified union and pickets in support of that boycott at the site of the sale of struck products.[104] Although the ALRA did not specifically grant access to non-employee union organizers in the text of the statute, in 1975 the ALRB quickly adopted a rule to permit such access by a limited number of organizers one hour prior to the start or one hour after the end of the workday and one hour at lunch.[105]

On top of securing rights designed to advance collective bargaining rights for farm workers, the UFW used its political muscle to gain sympathetic appointments to the Agricultural Labor Relations Board. Bishop Roger Mahoney of Fresno was the Board's chair. Joe Grodin, a labor lawyer, law professor and future member of the California Supreme Court; Leroy Chatfield, a former UFW staff member and Brown's director of administration; Joseph Ortega, an attorney for Los Angeles Model Cities

101 Cal. Lab. Code § 1156.2. Agricultural employees are defined in § 1140.4(b).

102 Cal. Lab. Code § 1160.3.

103 Ex-Cell-O Corporation v. NLRB, 449 F.2d 1058 (D.C. Cir. 1971).

104 Cal. Lab. Code § 1154(d)

105 8 Cal. Code of Reg. § 20900 et seq.

Program, and Richard Johnson, a grower attorney, filled the remaining four positions.. After over a century of struggles, and ten years of "organizing, boycotting, striking, people going to jail," by the UFW, California now had a law governing the fields, and one that was arguably the strongest labor law in the country.[106]

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The law signaled a sea change in the way that the UFW had to move forward with its organizing. Cohen hurried about to ensure that the measures that were not included in the law, such as organizer access, were implemented in the form of regulations by the ALRB and to train the union's legal and organizing staff in the new rules of the game. However, Chavez's mind was elsewhere. "'The whole fight is going to change,' he predicted. Until now, his movement had been rooted in the quest for recognition, 'which is the one that appeals to the human mind and the heart more than anything else.' From now on the fight would center on issues Chavez considered more mundane — contracts, wages, benefits and grievances," in short, the administration of a labor law.[107]

In order to turn the ALRA into a tool benefiting workers, the union had to both run and win elections and generate enough pressure through boycotts and strikes to win good contracts. Chavez's commitment to volunteer organizers increased as the union deployed over 200 farm workers who left their jobs to organize elections on ranches across the state, surviving on subsistence wages.[108] Cohen split the legal department in two with one half dedicated to existing litigation and the other, under Sandy Nathan, a young attorney working with Cohen, to ALRA issues. The legal department quickly grew to its height with 17 attorneys, 44 paralegals and numerous volunteer lawyers and law students in various roles.[109] Before the Board opened its doors in early September, the UFW frantically sent organizers and lawyers to ranches across the state to communicate to workers their new rights and to organize them around the power of the new law. The day the Board opened, 30 election petitions were filed, 28 by the UFW. By February of the next year, the UFW shocked the Teamsters,

106 Gordon, Cohen interview. Cohen, *supra* note 55, at 27.

107 Pawel, *supra* note 77, at 156.

108 Ganz, *supra* note 6, at 235.

109 Gordon, *supra* note 37, at 35.

winning over half the elections in which they went head to head. In the first five months of operations, 45, 915 farm workers had cast ballots in 382 elections, with the UFW winning representation in 214 of them.[110]

During the period leading up to the elections until late in 1975, the union faced numerous problems with the Board itself and enforcement of the new law. Many of the field agents and attorneys, including General Counsel Walter Kintz, were brought in from the NLRB, steeped in its ways of doing things and accustomed to its tectonic pace.[111] Growers favored Kintz for the position. Cohen considered his appointment by Governor Brown a concession to their anger once they realized that the law had not banned secondary boycotts.[112] The union experienced immediate problems with Kintz, accusing him of issuing rulings legitimizing the grower–Teamster alliance, failing to take action against violent Teamster and grower tactics during the first 200 elections, and acting in favor of employers rather than with impartiality.[113] According to Sandy Nathan, the growers seemed to simply disregard the law.[114] Kintz allowed the Teamsters to use dues cards as proof of qualification for election ballots. The growers would hire crews simply for the purpose of voting for Teamsters in the elections. And most importantly, growers continued to deny access to UFW organizers for the purpose of organizing for elections and gathering signatures for the ballots.[115] The union filed hundreds of complaints based on sworn affidavits. Eventually the Board began processing unfair labor practice charges against growers and appointed a special enforcement team to oversee election-related activities, which seemed to diminish employer abuses.[116] The union fought with the Board to influence election procedures at any chance possible. "Every step of every election procedure was contested — the order in which regional offices accepted petitions, the scheduling of elections, election rules, worker education, pre-election conference proceedings, unfair labor practice processing, and throwing

110 *Id.* at 39; Ganz, *supra* note 6, at 236.

111 Gordon, *supra* note 37, at 36.

112 *Id.* at 36 n.125.

113 United Farm Workers of America/AFL-CIO, The Sabotage and Subversion of the Agricultural Labor Relations Act: a white paper 4–5 (1976).

114 Levy, interview with Cohen, Nathan, and Gaenslen.

115 UFW White Paper, *supra* note 113, at 6–7; Majka & Majka, *supra* note 6, at 243.

116 Majka & Majka, *supra* note 6, at 243.

elections out. The whole process was political and subject to pressure."[117] Jerry Brown created a task force of independent attorneys to train Board staff and engage in external enforcement against growers.[118] Under extreme pressure from the UFW, Kintz resigned at the end of 1975. As increased enforcement of the law led to more and more election results in the UFW's favor, growers and the Teamsters turned their efforts to attacking the ALRA.

The UFW, with its huge strategic capacity and army of volunteers, overcame many of these problems to win an historic number of election victories further strengthening the continuing boycott. However, in processing the complaints, stepping up enforcement and handling hundreds of elections, the Board had blown through its entire budget in a mere five months. In January of 1976, the Legislature was scheduled to consider additional appropriations to keep the Board functioning through the fiscal year. Advocates in the Legislature failed to receive the necessary two-thirds vote to fund the Board, although they were able to defeat grower initiatives to weaken the law and bring it more into line with the NLRA.[119]

In response, Chavez put considerable resources into a petition drive to protect the law from legislative changes. If passed, Proposition 14 would have placed the ALRA in the state constitution. This would have allowed modification of the legislation only by a ballot initiative, thus insulating the union from political opposition when unfavorable parties came to power as well as AFL-CIO insistence on compromises.[120] Proposition 14 also called for continued legislative funding of the ALRB, enshrinement of the right of access by organizers to the fields, and treble damages against growers for ULPs. In what seemed like a tactic to get lawmakers to restore funding to the Board, legislators buckled when the union turned in twice the requisite signatures to place the measure on the ballot. The Board's funding was restored and it was set to reopen by the end of the year. The measure went down to defeat by a significant margin after growers

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[117] Gordon, *supra* note 37, at 38, from Miriam J. Wells & Don Villarejo, *State Structures and Social Movement Strategies: The Shaping of Farm Labor Protections in California*, 32 Politics & Society 291, 305 (quoting Marshall Ganz).

[118] *Id*.; Majka & Majka, *supra* note 6, at 244–45.

[119] Majka & Majka, *supra* note 6, at 244.

[120] *Id*. at 245.

spent $2 million on an ad campaign focused on private property rights and protecting small farms. The tremendous effort that the union placed on winning the ballot referendum again deprived organizers of precious resources to consolidate gains made in the elections, continue fighting legal challenges in the courts, and preparing for contract renewal campaigns in the following year. Many privately questioned Chavez's pursuit of Proposition 14 and allocation of resources. Nathan would call it one of the worst mistakes the union made.[121] While the union would experience several more fat years, the seeds had been sown for its eventual contraction. Chavez had become paranoid about losing control of the union to the legal department; he ceased allocating resources to new organizing drives; he distrusted the power of new independent citrus strikes near Oxnard; he began purging those who wanted to focus on organizing, like former farm worker and executive board member Eliseo Medina; and he paid little attention to existing contracts — in short, he stopped using the law.[122] By the mid-eighties, the UFW, as well as the ALRB, was all but comatose.[123]

The United Farm Workers of America's efforts in the years immediately following the passage of the ALRA were more successful than any of their previous efforts. Much like the NLRA did for industrial unions, the law seemed to deliver on its promises to support farm worker organizing and bringing peace to the fields. There are many critics of the NLRA who claim that the law de-radicalized the labor movement or that the union would have been better off sticking to the AFL model of controlling the flow of labor.[124] Many of these critics agree that the law eventually came to encumber unions as Taft–Hartley restricted their weapons, and the NLRB and courts came to interpret the law against, rather than on behalf of, union organizing efforts.[125] "This remarkable melding of movement and law did

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121 Gordon, notes from Nathan interview.

122 *See* Pawel, *supra* note 77, at 238–252; Ganz, *supra* note 6, at 241–250.

123 *See* Gordon, *supra* note 37, at 40, n.146.

124 *See* Chris Tomlins, The State and the Unions (1985); Nelson Lichtenstein, The State of the Union (2002); James Atleson, Labor and the Wartime State (1998).

125 Jennifer Gordon, *A Movement in the Wake of a New Law: The United Farm Workers and the California Agricultural Labor Relations Act* 2–3 (Jun. 1, 2005), Fordham Law Legal Studies Research Paper No. 86, available at SSRN: http://ssrn.com/abstract=733424 or http://dx.doi.org/10.2139/ssrn.733424 (last visited Oct. 5, 2012).

not last."[126] Unlike many scholars' accounts of the fall of the New Deal's political coalition and the structural limits of postwar liberalism, where labor unions clashed with other social movements, the UFW survived attacks by the Nixon administration, conservative working-class labor like the IBT and George Meany, and co-opting efforts by politicians to bring it under an established administrative rubric.[127] Perhaps because whites and blacks were not competing for jobs in agriculture, perhaps because of the de facto segregation of Mexican migrant farm workers, perhaps because of their prominent public image as vulnerable, low-wage workers who put food on America's plates, or perhaps because of Chavez himself, *La Causa* enjoyed legislative, labor, and public support for a decade after the conflict between the struggle for independent rights and collective power had rent many liberal alliances asunder. However, the UFW ultimately succumbed to internal struggles.

As a result of incredibly dedicated and creative lawyering by Cohen and other UFW attorneys, in 1977 the UFW settled an antitrust suit with the Teamsters originally filed in 1970 after the initial sweetheart contracts were signed with the growers in exchange for a five-year jurisdictional settlement similar to that of 1967. The Teamsters were out of the fields, Brown was governor, and the Board was open for business. However, with the external competition from the Teamsters gone, Chavez turned inward, and became increasingly worried about his power over the union.[128] As Cohen relates, with the completion of the ALRA victory, Chavez seemed to lose interest in the union as an objective.[129] He was easily bored by the administrative tasks required in running a bureaucratic organization. He was committed to maintaining the original principles of *his* movement — volunteerism, self-sacrifice, and a commitment to the poor. Indeed, he sought to create a poor people's union that would live and worship and work together. That farm workers were demanding higher and higher wages and accumulating real political power seemed to bother him.[130] Yet he would

126 *Id*. at 2.

127 *See* Reuel Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-war Liberalism* 25 Berkeley J. Emp. & Lab. L. 129, 131 (2004).

128 See Ganz, *supra* note 6, at 243–247; Pawel, *supra* note 77.

129 Gordon, Cohen interview.

130 Pawel, *supra* at note 6, at 156.

not let go: "[for Cesar], 'This is *won*. I'm going to go do something else.' And a lot of people didn't understand that element of him, and they expected him to be focused in a way that wasn't interesting to him . . . and I think the shame was that he couldn't then just delegate it. Let us generate the dues money so that he could go do whatever the hell he wanted."[131] As several sources have noted, he turned inward, requiring staff to participate in a cultish psychological game run by the drug-rehab group Synanon.[132] Years previously he had moved union headquarters away from the farm workers to a remote compound called La Paz in the foothills outside of Fresno, while the legal department stayed in Salinas, near the action.[133]

Under the ALRA two sources of independent power began to grow within the union over which he had little control. The legal department had refused to relocate to La Paz from Salinas. As the department grew in numbers, it grew in significance under the ALRA, as occurs under any administrative regime that requires a cadre of lawyers. Additionally, lead organizers Marshall Ganz and Jessica Govea had a great deal of success organizing citrus and vegetable growers out of Salinas and Oxnard. Due to the rights granted by the ALRA, the youth of the workers, and their independence from the boycott, the workers were confident in asserting demands for higher wages and improved conditions without support from Chavez. The real break came when the legal department asked for an increase in their monthly salary. In 1977, staff lawyers for the UFW were earning $7,200 a year, in some cases, less than farm workers.[134] Chavez demanded that the lawyers, who up until this time had been exempted from the union's volunteer system, receive the same subsistence wages as organizers. When they refused, he dismissed the legal staff. Those who were not fired quit.[135] Chavez also put down attempts by workers to run their own candidates for the Executive Board and sent organizers like Ganz to far-off places like Toronto to run boycotts.[136] Additionally, by 1977 the UFW had stopped organizing and moved to direct mail and marketing campaigns. Between 1979 and 1981, almost all voices

131 Gordon, Cohen interview.

132 Ganz, *supra* note 6, at 243–250.

133 Pawel, *supra* at note 77, at 80–82.

134 *Id.* at 240–41.

135 Ganz, *supra* note 6, at 246. Pawel, *supra* note 77, at 265.

136 Gordon, *supra* note 37, at 43.

that disagreed with the direction Chavez was taking the union, including farm worker representatives, had been purged from the union.[137]

By the early eighties, the union organized few workers under the law and allowed many contracts to lapse unattended.[138] Things got so bad that when George Deukmejian, elected governor in 1982, appointed an anti-union general counsel to the ALRB and gained control of the Board in 1986, the UFW actively sought to de-fund the agency it had once tried to protect with a constitutional amendment.[139] By the time of Chavez's death in 1993, the union clung to between 5,000 and 10,000 members and fewer than 40 contracts.[140] The UFW was no longer functioning as a farm workers union, but rather as a series of nonprofit organizations run by the Chavez family.[141] It operates radio stations in Phoenix, builds affordable housing in Bakersfield and Texas, runs political campaigns for Indian casinos, and attempts to organize workers in some other sectors ranging from furniture factories to construction; but, it engages in little to no activity with farm workers.[142] In fact, it eliminated any reference to farm workers in its constitution in an effort to appeal to a broader Latino constituency.[143] When the union organized a group of furniture assemblers in Bakersfield who qualified as employees under the NLRA, it even gave up its right to the once cherished secondary boycott that Jerry Cohen early on so innovatively protected by creating the United Peanut Shelling Workers union.

In recent years, amendments to the ALRA have been made in response to a more conservative California Supreme Court's limitations on the ALRB's make-whole remedy, including adding mandatory mediation for first contracts in 2002 and, most recently in 2011, giving the Board the power to certify a union after an employer has corrupted the environment for an election such that a re-run would be presumptively unfair. However, these provisions will be of little use if unions are not running representation campaigns. In fact, rather than ushering in a new era of farm labor

137 Ganz, *supra* note 6, at 246–49.

138 Gordon, *supra* note 37, at 43.

139 *Id.* at 44.

140 *Id.*

141 Miriam Pawel, *Farm Workers Reap Little as Union Strays from its Roots*, L.A. Times, Jan. 8, 2006.

142 *Id.*

143 *Id.*

organizing, the mandatory mediation provision has only been utilized eight times since it went into effect nine years ago, most of the time by the United Food and Commercial Workers at dairy farms.

Now in California, as we drive down Cesar Chavez boulevards, past Cesar Chavez middle schools and celebrate Cesar Chavez's birthday, the labor organizer from Yuma, Arizona has been memorialized in much the same way as Martin Luther King, Jr., as a civil rights leader, with relatively little public emphasis on the UFW or the ALRA. Yet farm workers in the state remain some of the most vulnerable workers in the country, the labor contractor system has returned in force, and little but changing national economic conditions has stemmed the flow of undocumented immigrants into the fields. Out of the some 250,000 farms in California, fewer than 1 percent are working under a union contract. During the peak season, the minimum wage earned by the 650,000 to 800,000 farm workers, most of them undocumented, is less in today's dollars than that earned by workers under UFW contracts in 1970.[144] California remains the only state in the country, with the exception of Hawaii's general labor code, to have passed a law giving its farm workers the right to bargain collectively. In a great irony of California legal history, a fledgling farm worker union used the strategies of the civil rights movement and the early labor movement to achieve sufficient political influence to win powerfully protective legislation that their attorney didn't think they could get passed, and that their leader neither wanted at the time, nor vigorously employed as it matured. Ultimately, the great wave of farm worker organizing, like that of industrial workers before them, receded, leaving many to continue to question the extent to which the process of a legal regime must necessarily displace the energy of a social movement.

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144 Philip Martin, *Labor Relations in California Agriculture: Review and Outlook*, http://giannini.ucop.edu/media/are-update/files/articles/V15N3_2.pdf (last visited Oct. 5, 2012).

CALIFORNIA v. CALIFORNIA:

Law, Landscape, & the Foundational Fantasies of the Golden State

ELAINE KUO*

According to the venerable Wikipedia, there are approximately 900 popular songs about California (including at least 76 simply titled "California").[1] There are, perhaps, just as many — and frequently contradicting — cultural perceptions about this Golden State.

For some, there is Jack Kerouac's (and Dean Moriarty's) California: "wild, sweaty, important, the land of lonely and exiled and eccentric lovers come to forgather like birds, and the land where everybody somehow looked like broken-down, handsome, decadent movie actors."[2]

For others, there is Mark Twain's California, full of a "splendid population":

> [F]or all the slow, sleepy, sluggish-brained sloths stayed at home — you never find that sort of people among pioneers — you can-

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[1] *List of Songs About California*, Wikipedia, http://en.wikipedia.org/wiki/List_of_songs_about_California (last visited May 5, 2012).

[2] Jack Kerouac, On the Road 168 (1976).

> not build pioneers out of that sort of material. It was that population that gave to California a name for getting up astounding enterprises and rushing them through with a magnificent dash and daring and a recklessness of cost or consequences, which she bears unto this day — and when she projects a new surprise the grave world smiles as usual and says, "Well, that is California all over."[3]

Truman Capote, meanwhile, believed that "[i]t's a scientific fact that if you stay in California you lose one point of your IQ every year."[4]

There is the California embodied in the majestic mountains of Yosemite, and the notion of a state that is natural and free and part of the Wild West.[5] There is the California embodied in the box office, and the notion of a state that is all silicone and silicon. All of it is ultimately bound by and built by the same foundational fantasies of a state at the crossroads of backcountry and concrete. This paper explores those fantasies, and discusses the ways in which legal actions over seminal environmental issues of water, travel, and air both mirrored and made the California identity.

California becomes a place not quite as "west of the West" as Alaska, not always as rugged and rural as Washington and Oregon, and yet far

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[3] Mark Twain, Roughing It 282 (1976).

[4] *Truman Capote quotes*, ThinkExist.com, http://thinkexist.com/quotes/truman_capote/ (last visited May 5, 2012).

[5] John Muir's national park movement and Jack London's words on the will, struggle, and power of nature were seen as fighters against capitalist emasculation and the mechanization of modernity at the turn of the nineteenth century. This fight has persisted in San Francisco's resistance to development, and organizations and (grassroots) movements such as the Greenbelt Alliance and Save the Bay.

At the same time, this resistance is arguably an exercise in capitalism and (concentrated) wealth. As Richard Walker puts it, "rich people want a pretty view." But "wanting green space may have the detrimental effect of not making enough low-income housing to more people." *Forum: The History of Bay Area Environmentalism* (KQED radio broadcast Nov. 16, 2007), available at http://www.kqed.org/a/forum/R711161000.

Consider, too, the relationship between San Francisco and Lake Tahoe: industrial leisure under the guise of "outdoorsmanship" has resulted in lake sedimentation and algae fertilization. Contrast that, however, with the (somewhat unexpected) role of hunters and sportsmen (including Teddy Roosevelt) as early and ardent conservationists. *See generally* John F. Reiger, American Sportsmen and the Origins of Conservation (2000) (arguing that "gentlemen" hunters and anglers came together to lobby for laws regulating the taking of wildlife and wilderness preservation, both out of a desire to protect their hobbies and a nineteenth-century sportsman's code demanding that its followers take responsibility for the total environment).

out enough to be a place where "you can't run any farther without getting wet."[6] Perhaps like much of the West, California is a place and people trying to create community and history from scratch. It is as much fiction as it is fact: a place as carefully constructed in courtrooms as it has been by adjoining tectonic plates. Either way, California has more often than not been built by conquering and controlling nature.

> People were here for the jobs, here for their slice of the dream, and natural beauty gilded connections between the two. The Mediterranean climate churned out mild winters, low humidity and long "Indian" summers promoting outdoor life so convincingly, in fact, that many newcomers seemed to overlook the fact that they'd moved into earthquake country.[7]

In many ways, life here is only possible with the manipulation of water and air. So first came the golden climate; then came the Golden State; and then came the lawsuits.

Indeed, for all its perceived "chill surfer" character, contentious litigation underlies some of the most compelling stories of California: "it is also the place where the American Dream is pursued most fiercely, its spoils contested most brutally."[8]

Law acts as both a conscious reflector and a subconscious creator of culture.[9] And this analysis is not limited to abstract ruminations on an intangible ethos. This paper connects law and film, "two of contemporary society's dominant cultural formations, two prominent vehicles for the

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[6] Brian Gray, *American West*, class lecture at UC Hastings College of the Law (2012); *Neil Morgan quotes*, ThinkExist.com, http://thinkexist.com/quotation/california_is_where_you_can-t_run_any_farther/217039.html (last visited May 5, 2012).

[7] Chip Jacobs & William J. Kelly, Smogtown: The Lung-Burning History of Pollution in Los Angeles 24 (2008). Consider, too, UC Berkeley's decision to build its Memorial Stadium directly atop the Hayward Fault — against the wishes and warnings of geologists — because that was where the best view would be. It is currently undergoing a massive renovation and seismic retrofit, such that the fault line that runs "from goal post to goal post" will not literally split the stadium in two. *The Hayward Fault at UC Berkeley*, http://web.archive.org/web/20110716064610/http://seismo.berkeley.edu/seismo/hayward/ucb_campus.html (last visited Sep. 7, 2012). (NB: It is nevertheless this writer's opinion that it does make for the best view and is well worth it.)

[8] R.C. Lutz, *On the Road to Nowhere?: California's Car Culture*, 79 Cal. Hist. 50 (2000).

[9] *See generally* Lawrence M. Friedman, American Law in the 20th Century (2002).

chorus through which society narrates and creates itself."[10] Both law and film alike are "dominant players in the construction of concepts such as subject, community, identity, memory, gender roles, justice and truth; they each offer major socio-cultural arenas in which collective hopes, dreams, belief, anxieties and frustrations are publicly portrayed evaluated, and enacted."[11] Whether art has imitated life and the law in the Golden State or vice versa, lawsuits have built California based on a "double mystery" of erasure and positive reinvention: blessed by nature, yet having to battle against it in order to grow and flourish.[12]

Call it "California v. California."

WATER WARS

"Forget it, Jake — it's Chinatown."

First and foremost, the story of California is a story of water.[13] There are the ocean waves along California's 840 miles of coastline, from the seaside cliffs of Mendocino to the surf and sand of San Diego. There is the snow melting off of the Sierra Nevada. There is a flooded valley and an

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[10] Orit Kamir, *Why 'Law-and-Film' and What Does it Actually Mean?: A Perspective*, 19 CONTINUUM: J. OF MEDIA & CULTURAL STUD. 255, 256 (2005); *see also* JOHN DENVIR, LEGAL REELISM: MOVIES AS LEGAL TEXTS (1996). In fact, the entire fledgling field of "law-and-film" is arguably an exercise in Friedmanism.

In fact, much of American history has been shaped by popular fictions; the nation is built upon stories of "cowboys and Indians" and war. In the couple centuries of its existence, the United States has used these tales of absolute victory of its "Goodness and rosy plumpness" to justify its birth, its expansion, and, indeed, its empire. GORE VIDAL, IMPERIAL AMERICA 6 (2004); STANLEY CORKIN, COWBOYS AS COLD WARRIORS 3 (2004).

[11] Kamir, *supra* note 10, at 264.

[12] *See generally* CAREY MCWILLIAMS, CALIFORNIA: THE GREAT EXCEPTION (1999) ("Is there really a state called California or is all this boastful talk? [. . .] Like all exceptional realities, the image of California has been distorted in the mirror of the commonplace. It is hard to believe in this fair young land, whose knees the wild oats wrap in gold, whose tawny hills bleed their purple wine — because there has always been something about it that has incited hyperbole, that has made for exaggeration."); —, SOUTHERN CALIFORNIA: AN ISLAND ON THE LAND (1946).

[13] The "history of California in the twentieth century is the story of a state inventing itself with water." WILLIAM L. KAHRL, WATER AND POWER 1 (1983). Simply put, California is a "hydraulic society." DONALD WORSTER, UNDER WESTERN SKIES: NATURE AND HISTORY IN THE AMERICAN WEST 53 (1994).

aqueduct that turned a desert into a metropolis. And they are all part of a complicated water system that "might have been invented by a Soviet bureaucrat on an LSD trip."[14] Indeed, ingrained in California's very identity is drought and [artificial] abundance. (Or, conversely, artificial drought: "[t]he concomitant reallocation of water away from consumptive uses as needed to fulfill these environmental commitments has created for some users a 'permanent regulatory drought.' "[15]) In California — a place where north and south alike face challenges in rainfall, storage, and distribution — water is power.

Broadly speaking, California has a dual system of water rights which recognizes both appropriation and riparian doctrines.[16] The appropriation doctrine, which originated during the Gold Rush days, allows for diversion of water and applies to "any taking of water for other than riparian or overlying uses."[17] The riparian doctrine, by contrast, "confers upon the

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[14] Peter Passell, *Economic Scene; Greening California*, N.Y. Times, Feb. 27, 1991.

[15] Brian E. Gray, *Dividing the Waters: The California Experience*, 10 Hastings W.–Nw. J. Envtl. L. & Pol'y 141, 144 (2004). Indeed, water and environmental legislation has at times caused further water shortage problems. This places the state in a bit of a bind: also ingrained in California's identity is a deep connection to the land and the environment (specifically, this has been created and reflected in landmark interpretations on the public trust and reasonable use doctrines). As such, California faces unmatched resource challenges, as it must grapple with issues both personal and principled.

For better or worse, California has always been on the "cutting edge" in both contention and conservation: the state was built on limited resources. The rest of the nation, meanwhile, did not feel the squeeze until the post–World War II/Cold War period, at which point America — as a rising "empire" — realized that "the special imperatives of maintaining economic and political dominance on a global scale required a degree of planning that helped promote conservationism." Thomas Robertson, *"This Is the American Earth": American Empire, the Cold War, and American Environmentalism*, 32 Diplomatic Hist. 561, 562 (2008). Perhaps — in somewhat maudlin terms — with great power did come great responsibility, as suddenly America's resources had to extend further and beyond its borders.

[16] Lux v. Haggin, 69 Cal. 255 (1886), recognized both the appropriation and the riparian systems. While this put the doctrines on equal legal footing, however, the two in their essentially inverse relationship will perhaps always be in conflict. Nonetheless, both systems are in turn viewed through the lens of the reasonable use doctrine. *See, e.g.*, Peabody v. City of Vallejo, 2 Cal. 2d 351 (1935); *see also* Cal. Const. art. X, § 2 (codifying the reasonable use doctrine); Cal. Penal Code § 370.

[17] City of Pasadena v. City of Alhambra, 33 Cal. 2d 908, 925 (1949) (citations omitted). The California Supreme Court first articulated the doctrine — adopting it from de facto miner's laws — in *Irwin v. Phillips*, 5 Cal. 140 (1855).

owner of land contiguous to a watercourse the right to the reasonable and beneficial use of water on his land."[18] Thus this dual system is one that can be internally contradictory and certainly complicated.[19] At its most basic, the conflict is often one between landowners and those who simply seek to use the water connected to a given piece of land.

Amidst all the complicated doctrines, fact becomes stranger than fiction. Law, culture, and the water system — "labyrinthine and convoluted, full of double-crosses, triple-crosses, and twists piled upon twists" — converge in Roman Polanski's *Chinatown* (1974), which tracks the California Water Wars at the turn of the twentieth century.[20] Water and power lie at the root of all evil in a neo-noir Los Angeles — a Los Angeles both fictionally and factually devoid of natural resources and a natural port; a Los Angeles that essentially has "no geographic reason to exist."[21]

Yet exist it does, in large part (if not entirely) due to William Mulholland and the Owens Valley. In the late 1800s, Los Angeles had started to outgrow its already-limited water supply. City representatives identified the Owens Valley as a reliable source of water and began to quietly buy up parcels of land there. At first they did so secretively, for fear of driving up the cost of land.[22] When word got out, however, they unapologetically made known their true intentions. Meanwhile, Mayor Frederick

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[18] *Pasadena*, 33 Cal. 2d at 943.

[19] In fact, "large-scale water transfers [in California] more closely resemble complex international diplomatic negotiations than they do simple market exchanges." Gray, *supra* note 11, at 146.

To clarify: the state (as trustee to its people) owns, controls, and regulates the physical water while the people simply enjoy rights to the use of water under state law. Eddy v. Simpson, 3 Cal. 249, 252 (1853); Kidd v. Laird, 15 Cal. 161, 180 (1860); Cal. Water Code § 102. As such, "no water rights are inviolable; all water rights are subject to governmental regulation." United States v. State Water Res. Control Bd., 182 Cal.App.3d 82, 106 (1986).

[20] Josh Spiegel, *Classic Movie Review: Chinatown*, Box Office Prophets (Aug. 2, 2010), http://www.boxofficeprophets.com/column/index.cfm?columnID=13075; Chinatown (Paramount Pictures 1974).

[21] Richard Walker, *The American City*, class lecture at UC Berkeley (2008). The same can actually be said of Napa Valley, which is not necessarily conducive to growing grapes save for the wonders of water engineering.

[22] As Jack Nicholson's Jake Gittes says in *Chinatown*, "Do you have any idea what this land would be worth with a steady water supply? About $30 million more than they paid for it."

Eaton had tapped his friend, Mulholland, to be superintendent of the newly-created Los Angeles Department of Water and Power.[23] Together, they employed what some saw as "chicanery, subterfuge, spies, bribery, a campaign of divide-and-conquer, and a strategy of lies to get the water [the city] needed."[24] There were allegations that Eaton, Mulholland, and the city's power brokers "conspired to snatch water for their own enrichment."[25] The fact was that Los Angeles did indeed acquire all land and water rights relating to Owens Valley through decades of smart (or, perhaps, sly) legal, legislative, bureaucratic, and economic action.[26] Eaton even lobbied President Teddy Roosevelt to halt a federal irrigation project for farmers in the Owens Valley.[27] And though everything the city did was technically legal, even Catherine Mulholland (William Mulholland's granddaughter) wrote: "Few seemed to care about the action's moral niceties."[28]

Nevertheless, William Mulholland's "engineer's eye plotted the Los Angeles Aqueduct and brought the water over 230 miles to these dry valleys by gravity alone, an engineering marvel and a civic triumph, albeit at the expense of the Owens Valley, which quickly turned to dust."[29] As the

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[23] The department has been the source and subject of contention and controversy every since. *See, e.g.*, Cnty. of Inyo v. Los Angeles, 78 Cal.App.3d 82 (1978). In fact, Inyo County and the department are at it again as of last year in a battle over groundwater.

[24] Marc Reisner, Cadillac Desert 48 (1993).

[25] *William Mulholland's Gift: Modern L.A.*, L.A. Times, Jul. 10, 2011, http://articles.latimes.com/2011/jul/10/opinion/la-ed-mulholland-20110710.

[26] These actions included bond measures and a lot of court time for Mulholland. Reisner, *supra* note 24, at 62–66.

[27] Jacobs & Kelly, *supra* note 7, at 23.

[28] *Id.* As its 1974 *New York Times* movie review put it, *Chinatown* — and the events on which it is based, in which fact is every bit as strange as fiction — is a "melodrama that celebrates not only a time and a place (Los Angeles) but also a kind of criminality that to us jaded souls today appears to be nothing worse than an eccentric form of legitimate government enterprise." Vincent Canby, *Chinatown*, N.Y. Times, Jun. 21, 1974.

[29] Jacobs & Kelly, *supra* note 7, at 23. In fact, Mulholland "had demonstrated that a city could bend nature to meet its interests. Before and after this water-grab, men here dredged massive harbors from silt, dragged a cosmos-searching observatory onto a mountaintop, smashed flight-speed records, and harnessed ocean currents for electricity. A near-religious devotion to technology had made Southern California's nature seem malleable." *Id.* at 24.

first gush of water rushed down the aqueduct, Mulholland famously proclaimed: "There it is. Take it."[30]

Take it they did. And this would not be the last battle of the water wars: in its eternal thirst, Los Angeles would attempt — though ultimately unsuccessfully — to divert water from Mono Lake.[31] Starting in 1940, after purchasing riparian rights pertaining to Mono Lake, the city applied for permits to appropriate the waters of four tributaries feeding into the lake. By 1941, the city had extended its aqueduct system into the Mono Basin. By 1970, the city had completed a second aqueduct designed to increase the total flow into the aqueduct by 50 percent. Each year over the next decade, the city would divert a combined 156,647 acre-feet of water from the Mono Basin and cause Mono Lake's surface level to recede at an average of 1.1 feet.[32] Though the "ultimate effect of continued diversions [was] a matter of intense dispute . . . there seem[ed] little doubt that both the scenic beauty and the ecological values of Mono Lake [were] imperiled."[33]

In 1979, the public interest groups led by the National Audubon Society brought suit against the city of Los Angeles, arguing that the Department of Water and Power's diversions violated the public trust doctrine. The doctrine stands, broadly, for the idea that each state is "trustee of the tide and submerged lands within its boundaries for the common use of the people" — that state waters are a public resource equally owned by all citizens.[34] As such, the state has a duty to ensure equal access to and enjoyment of those waters.

The case eventually made its way to the California Supreme Court. While the Court recognized that common law public trust actions had thus far been focused on navigation, commerce, and fishing, it went on to

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[30] *Id.*

[31] Mono Lake is the second largest lake in California, and sits at the base of the Sierra Nevada near the eastern entrance to Yosemite National Park. Historically, most of its water supply comes from snowmelt in the Sierra Nevada carried in by five freshwater streams. The lake is saline; it contains no fish but supports a large population of species. Nat'l Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 424 (1983).

[32] *Id.* at 428.

[33] *Id.* at 424–25.

[34] Cal. State Lands Comm'n, *The Public Trust Doctrine*, http://www.slc.ca.gov/policy_statements/public_trust/public_trust_doctrine.pdf; *see also* Martin v. Waddell, 41 U.S. 367, 410 (1842). The public trust doctrine can be traced back to Roman laws of common property.

rule that the "recreational and ecological" "principle values" the plaintiffs sought to protect — "the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds" — were "clear[ly] . . . among the purposes of the public trust."[35]

The Court ultimately concluded:

> The public trust doctrine serves the function in [California's integrated water system] of preserving the continuing sovereign power of the state to protect public trust uses, a power which precludes anyone from acquiring a vested right to harm the public trust, and imposes a continuing duty on the state to take such uses into account in allocating water resources.[36]

Thus the plaintiffs succeeded in imposing upon the state "the duty . . . to protect the people's common heritage of streams, lakes, marshlands and tidelands." In short, they saved Mono Lake.

And perhaps the courts deserve some credit too, "for they are the ultimate guardians of the rights secured by the common law, statutes, the California Constitution, and in some cases the Fifth and 14th amendments to the United States Constitution."[37] Indeed, as Brian Gray has argued, the California Supreme Court has actively adapted the development and division of water resources to changes in the state's economy, demographics, resource base, natural environment, and social values.[38]

In its interpretation of the public trust doctrine in *Audubon*, the California Supreme Court subjected state water rights to "the requirement that they be exercised in accordance with contemporary social values."[39] On one level, the Court ensured that environment, law, and society would al-

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[35] *Audubon*, 33 Cal. 3d at 435 (internal citations omitted). In fact, a decade earlier, the California Supreme Court had expressly held that public trust protects "the preservation of those lands [covered by the trust] in their national state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area." Marks v. Whitney, 6 Cal. 3d 251, 259–60 (1971).

[36] *Audubon*, 33 Cal. 3d at 452.

[37] Gray, *supra* note 15, at 147.

[38] *Id.*

[39] Brian E. Gray, *"In Search of Bigfoot": The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 Hastings Const. L.Q. 225, 228 (1989). Thus, the last two centuries of California Supreme Court jurisprudence have been an exercise

ways be inexorably intertwined. On another level, the decision confirmed that they always were.[40]

California water rights have always been "a peculiarly fragile species of property rights, heavily dependent on judicial perceptions that the private right is consistent with the broader public interest."[41] Every water case and every water right in the state of California is examined through the lens of the reasonable use doctrine. Enacted by initiative in 1928, article X, section 2 of the state constitution provides that all uses of water resources must be "exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."[42] As a whole, this represents "one of the most forceful and interventionist definitions of reasonable use in the western United States."[43]

Yet "reasonable use" is as flexible as it is forceful. After all, "[w]hat constitutes a reasonable use of water is dependent upon not only the entire circumstances presented but varies as the current situation changes . . . . [R]easonable use of water depends on the circumstances of each case, [and] such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance."[44] Water rights, resources, and law in California are, then, necessarily products of culture. As such, courts are in a position to articulate and enforce cultural values. Indeed, a "principal responsibility (which will be exercised only on rare occasions) will be for the courts to hold the parties' feet to the fire — to apply the established law

in "shap[ing] and, where appropriate . . . reshap[ing] water rights as necessary to facilitate the economic and social development of the state." *Id*. at 253.

40 Indeed, with common law doctrines such as public trust, reasonable use, and public nuisance, common citizens have as much control over California's environmental law and enforcement as do the courts. This is coupled with the already-heightened sense of environmentalism of California's political culture. As Carey McWilliams put it, "the lights came on all at once" in California. See, also, the next section on air pollution lawsuits for further discussion on the importance and implications of common law in conservation and culture.

41 Gray, *supra* note 39, at 227.

42 Cal. Const. art. X, § 2.

43 Gray, *supra* note 15, at 146.

44 Joslin v. Marin Mun. Water Dist., 67 Cal. 2d 132, 140 (1967). "What is a [reasonable and] beneficial use at one time may, because of changed conditions, become a waste of water at a later time." *Tulare Irrig Dist. v. Lindsay-Strathmore Irrig. Dist.*, 3 Cal. 2d 489, 567 (1935).

to present clearly to the competing interests the consequences of adhering to hardline positions and refusing to negotiate in good faith to achieve fair and creative solutions to the problems and challenges Californians face."[45]

Thus, on one hand, California used the law to create the identity of "adventure, indulgence, romance, [and] delight" on which it has always prided itself.[46] In the last couple of centuries of California history, the manipulation of water has allowed for gold mining, wine country, and the continued existence and bragging rights to a place fondly known as "the Bay Area" to the north, and for orange groves, palm trees, and the Beach Boys' "Surfin' Safari" to the south. On the other hand, California laws protecting public interests in the environment reflect the will of a people that have always had a special affinity with the land unspoiled by such developments. To choose between the two explanations is an endless exercise in "chicken or egg?"

In the end, the California water system requires constant vigilance and occasional vitriol from courts and citizens so that they may separate fact from fiction in facing the state's resource challenges. Or perhaps the people must simply roll with the proverbial punches and accept the tangled web of water rights and injustices they have woven. Perhaps it is better to simply "[f]orget it, Jake — it's Chinatown."

TOONS, TRAINS, & AUTOMOBILES

"Who needs a car in L.A.?"

The story of another California emblem — the automobile — belies similar legal drama and deep disquiet. California law has on one hand protected

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[45] *Id.* at 149–50.

[46] *Life in California*, VisitCalifornia, www.visitcalifornia.com/Life-In-California (last visited May 15, 2012). "California: Find Yourself Here" commercials happily perpetuate the stereotype that "board meetings" here necessarily involve surfboards and snowboards. *California: Find Yourself Here*, YouTube, http://www.youtube.com/watch?v=Md69zCJKD1c (last visited May 5, 2012). In the beginning, boosters sold the state as an Eden of gold and orange groves, images built upon the mythical Argonaut tales to the north and the romanticizing of *Ramona* and the Spanish missions to the south. *See, e.g.*, Jack London, The Call of the Wild (1903); Ramona (1910) (based on the eponymous novel by Helen Hunt Jackson). Indeed, in many ways, "California" is a brand unto itself, the "sale" of which has led its people to actively seek and artificially create the pieces necessary to fit into notions preconceived on storyboards.

the state's legendary car culture and on the other hand been at the forefront of the fight against vehicle emissions.

Distinctly fashioned after *Chinatown* and loosely disguised as a Disney "kid flick," *Who Framed Roger Rabbit?* (1988) tells the story of Los Angeles's automotive industry and the so-called General Motors conspiracy from the 1920s to the 1960s.[47] The first ten minutes of *Roger Rabbit* show a Los Angeles where protagonist and private investigator Eddie Valiant takes the train everywhere and proudly proclaims: "Who needs a car in L.A.? We've got the best public transportation system in the world!"

And perhaps they did. By 1910, Los Angeles boasted 1,164 miles of track, the largest electrical transit system in the world. Each day, 600 trains passed through the Los Angeles Terminal alone, which stood as the largest building west of the Mississippi. Behind its identity as a sprawling suburban autopia — "indeed inherent in it — was the historical creation of Los Angeles by the [b]ig Red Cars of the Pacific Electric Co. and the [Y]ellow [C]ars of the Los Angeles system." At its peak in 1946, the average Los Angeles resident rode transit 424 times in a year. By 1950, however, transit ridership had decreased 41 percent. By 1955, in an attempt to solve problems in rail transit and reduce traffic congestion, trains had been abandoned in favor of buses. Cars had already caught on, and all the more so with the introduction of public transportation that was arguably worse than its railway predecessor.

Moreover, this was a deliberate business move: Pacific Electric had sold its passenger rail cars and buses to the Metropolitan Coach Lines bus company; Los Angeles Railway had sold its controlling interest to National City Lines, a Chicago-based company whose investors included General Motors, Firestone, Standard Oil of California, and the Mack Truck Company.[48] By 1963, the last Yellow Car (the last train standing) made its last run from Vermont Avenue to Pico Boulevard.[49]

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47 Who Framed Roger Rabbit? (Touchstone Pictures 1988).

48 *See* United States v. Nat'l City Lines, 186 F.2d 562, 566 (7th Cir. 1951). The case eventually reached the United States Supreme Court, twice, but on procedural issues. *See* United States v. Nat'l City Lines, 334 U.S. 573 (1948); United States v. Nat'l City Lines, 337 U.S. 78 (1949).

49 *Los Angeles Transit History*, L.A. Metro, http://www.metro.net/about/library/about/home/los-angeles-transit-history/ (last visited May 5, 2012).

So the conspiracy theory goes something like this: "the evil auto giant, General Motors bought up the beloved Los Angeles transit company, replaced its charming red streetcars with soot-spewing GM buses" (that, incidentally, used Standard Oil gas and Firestone tires), and "greedily pocketed profits while transforming L.A. from a balmy paradise into a smoggy, congested parking lot" by making transit so unattractive that eventually there were so few riders that GM could abandon transit and drive people to cars instead.[50]

It would seem *Roger Rabbit* was on to something. In 1946, the Department of Justice filed an antitrust suit against National City Lines for conspiracy to monopolize the transit industry. The parties agreed that "in 1938, National conceived the idea of purchasing transportation systems in cities where street cars were no longer practicable and supplanting the latter with passenger buses."[51] They disagreed, however, on whether this constituted a "concerted conspiracy by the City Lines defendants and supplier defendants to monopolize that part of interstate commerce which consists of all the buses, all the tires and tubes and all the gases, oil and grease, used by the public transportation systems of some 45 cities owned and controlled by the City Lines companies."[52] The court found against the defendants, ruling that "by their united and concerted action" they had contracted to "exclude competitors from selling buses, tires, tubes and petroleum products" in violation of the Sherman Act.[53] Each company paid a fine of $5,000 while seven key executives each paid a $1 fine for the elimination of a system that "in order to reconstitute today would require maybe $300 billion."[54] Over the next twenty-five years, there would

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[50] Christine Cosgrove, *Roger Rabbit Unframed: Revisiting the GM Conspiracy Theory*, ITS Rev. Online 3 (2004–2005), http://americandreamcoalition.org/transit/rrunframed.doc (last visited Sep. 7, 2012). Cosgrove goes on, however, to criticize the conspiracy theory and offer alternative explanations for the demise of the Los Angeles rail system.

[51] *Nat'l City Lines*, 186 F.2d at 567.

[52] *Id.*

[53] *Id.* at 571.

[54] Taken for a Ride (New Day Films 1996). The documentary purports to expose "how things got the way they are. Why sitting in traffic seems natural. Why [Los Angeles's] public transportation is the worst in the industrialized world. And why superhighways cut right through the hearts of our cities."

be three more major investigations into GM's alleged monopoly practices: two settled out of court; one was eventually dropped.[55]

Yet to make conspiracy the controlling narrative here is perhaps to put a romantic gloss over the realities of a transit system that had been fraught with problems (and arguably needed a conspiracy to save it). They had been "streetcars not desired."[56] Instead, some had reviled the transit companies as "monopolistic and greedy operators whose trolleys were filthy and so slow that sometimes it was faster to walk."[57] And all monopoly and greed aside, the companies had struggled even before GM entered the market: they had first tried and failed to procure government subsidies before selling to the likes of GM out of necessity.[58]

Conspiracy or not, railroads opened the door to the car culture that would eventually drive them out. The vast transit network spurred suburbanization and, in turn, the rise of the automobile. Car culture sold and signaled visions of suburbia: of home ownership, of constructing a string of villages rather than a city, of moving ever outward in a new iteration of Manifest Destiny — of something synonymous with the American Dream.[59] The post–World War II period saw the construction of highways and the

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[55] *Id.*

[56] Cosgrove, *supra* note 50. Many transit companies made far more money as real estate developers and as such encouraged families to move from the city to the suburbs. This resulted in longer commutes that made automobiles all the more attractive and efficient methods of transportation.

[57] *Id.* Under this analysis, the rise of the automobile becomes nearly inevitable, especially accompanied by certain cultural shifts. For example, the rise of middle class income (in conjunction with a decrease in automobile pieces) gave suburban families the means to buy the cars they had always desired in the first place. Moreover, the car was simply an easier and better way for married women in these families to juggle work (as the number of women entering the work force had been steadily increasing since 1920), household duties, and childcare.

[58] *Id.*

[59] *See generally* Kenneth T. Jackson, Crabgrass Frontier: the Suburbanization of the United States (1985). Indeed, "[t]he car culture that emerged in Southern California had a profound impact on American culture, as other cities began to develop along similar lines, with the automobile at the center of regional planning, and the oil industry essential for that growth. Los Angeles had the oil and the cars at the start of the 20th century, a combination we are still paying for." *'Oil!' and the History of Southern California*, N.Y. Times [online edition], Feb. 22, 2008, http://www.nytimes.com/2008/02/22/timestopics/topics_uptonsinclair_oil.html?pagewanted=all.

Interstate Highway Act of 1956 to "protect the nation." The war effort had required the movement of men and materials, and this mobility evolved into the sense of individual freedom, industrial progress, and consumerism with which "the democratic automobile" was imbued after the war was over. Thus, "[w]ith the nation exploding in wealth . . . the car quickly became the hottest of the new consumer items, and nowhere was the apotheosis of the car more pronounced than in the Golden State."[60]

In fact, prior to the war, Los Angeles had already pioneered the incorporation of cars into everyday life: "Los Angeles during the 1920s was a laboratory of the future. It was the first city created to serve the needs of the automobile — it's where the car culture was born."[61] It was the first city to adopt a simplified traffic code (one that included a "Jaywalking Ordinance" solidifying certain "car rights"), the first to install an interconnected signal system, and the first to have pedestrian-activated signals.[62]

Even now, the Los Angeles freeway experience can be described as the mystical marriage of man and machine. Joan Didion describes driving in the city as an exercise in letting go and submitting to "the only secular communion Los Angeles has."[63] She certainly has a point about commuting as community: Didion's comments came in the context of backlash against efforts by the California Department of Transportation (Caltrans) to reduce the number of drivers on Los Angeles freeways in the 1970s by

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60 Lutz, *supra* note 8, at 50. Consider, too, nostalgia-inducing drives up and down a small town street in George Lucas's *American Graffiti* (1973), a tribute to his hometown of Modesto; or James Dean and his iconic — and ultimately deadly — Porsche-powered tear down a rural stretch of Highway 46.

In California, cars are a part of both state and personal identity. As one auto consultant told the *New York Times*, "In other states, you do not see or hear, 'I want it to say something about me.'" Brian Alexander, *Almost as Many Vehicles as People, and Every One Says, 'Me!'*, N.Y. Times, Oct. 22, 2003.

61 *'Oil!' and the History of Southern California*, *supra* note 59.

62 John E. Fisher, *Transportation Topics and Tales: Milestones in Transportation History in Southern California* 2, Los Angeles Department of Transportation, available at http://ladot.lacity.org/pdf/PDF100.pdf.

63 Joan Didion, *Bureaucrats*, *in* The White Album 79, 83 (1979). "Anyone can 'drive' on the freeway . . . . Actual participants think only about where they are. Actual participation requires a total surrender, a concentration so intense as to seem a kind of narcosis, a rapture-of-the-freeway. The mind goes clean. The rhythm takes over."

creating a new Diamond (carpool) Lane.[64] "Citizen guerillas" covered the Diamond Lanes with splattered paint and scattered nails, and even hurled objects at maintenance crews.[65] They formed the Citizens Against Diamond Lanes organization to lobby against the project.[66] And Caltrans received several thousand letters on the matter, ninety percent of which opposed Diamond Lanes.[67] Ironically enough, it was the desire to protect the right to drive alone that brought people together.[68] It caused, Didion observes, "large numbers of Los Angeles County to behave, most uncharacteristically, as an ignited and conscious proletariat."[69]

On the opposite end of the spectrum, Joel Schumacher's *Falling Down* (1993) depicts a drive-home-gone-amok, in which William Foster (better known as "D-Fens," by his vanity plate) is literally driven mad by Los Angeles — and its infamous traffic — like an Odysseus or Dorothy gone bad.[70] Indeed, the film opens with the irony of rush-hour gridlock in a city that is supposed to be about mobility. D-Fens simply wants to get home in time for his daughter's birthday party, but he cannot. In fact, his entire life is — as the movie posters put it — a "tale of urban reality" in which he is "an ordinary man at war with the everyday world." As this terrible truth sets him free (in all the worst ways), D-Fens's rampage through the streets shows turf wars and freeway politics where roads cut through poor, ethnic neighborhoods.[71]

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64 *Id.*

65 *Id.* at 82.

66 Everett M. Rogers, Diffusion of Innovations 401 (1962).

67 *Id.*

68 Paul Haggis's *Crash* (2004) takes this idea to its logical extreme in its opening lines: "It's the sense of touch. In any real city, you walk, you know? You brush past people, people bump into you. In L.A., nobody touches you. We're always behind this metal and glass. I think we miss that touch so much that we crash into each other just so we can feel something." Crash (Lions Gate Films 2004).

69 Didion, *supra* note 63, at 83.

70 Falling Down (Warner Bros. 1993).

71 The same might be said of the Embarcadero Freeway that ran through downtown San Francisco (torn down following the Loma Prieta Earthquake of 1989) and the double-decker Central Freeway that used to run through Hayes Valley (and whose concrete form created a dark underbelly for drugs and prostitution). Raymond A. Mohl, *Stop the Road: Freeway Revolts in American Cities*, 30 J. of Urban Hist. 674 (2004).

Out of its arguably schizophrenic love for both cars and conservation, Californians have fought against cars every bit as vehemently as they have protected them. This has most notably played out in the form of air pollution litigation. It was California that first discovered the link between automobiles and air pollution, and it was California that first took measures to control it. As a direct result of these measures, "the state came to occupy a unique position in vehicular emission control."[72] Indeed, California state efforts have been a major influence in shaping the federal approach to emissions and pollution.[73]

To start at the very beginning:

> Something happened in Southern California in the early 1940s. In the first year of that decade . . . the area experienced a brownish, hazy, irritating, and altogether mysterious new kind of air pollution that was more persistent than, and quite different from, the isolated instances of irksome smoke that had troubled major urban centers from at least the mid-1800s. The new problem was, of course, smog.[74]

In contrast to the Didion's car-loving community, in October 1946 "hundreds of 'aroused' Pasadenans held a protest march [over the inability of existing law to deal with smog]. It wasn't a full-scale uprising, but the message from the suburbs was powerful: united they stood, wheezing they'd fall."[75] Meanwhile in nearby Altadena, the district attorney's office, "acting then as both smog cop and public guardian, had advised the Altadenans to relax; the 'obnoxious fumes' had mainly a psychological effect. [Property-rights leader James] Clark, responding cleverly, invited the D.A. to travel there, then, to 'get [his] lungs full of psychology.' "[76] In the people's minds,

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[72] Jacobs & Kelly, *supra* note 7, at 2.

[73] *Id.*

[74] James E. Krier & Edmund Ursin, Pollution & Policy: A Case Essay on California and Federal Experience with Motor Vehicle Air Pollution, 1940–1975 1 (1977). The focus on the 1940–1975 is notable: the time period is bookended first by World War II and then by the creation of the federal environmental regime. The result is a purely state story in a post-Progressive era.

[75] Jacobs & Kelly, *supra* note 7, at 22.

[76] *Id.* at 20. Lest Los Angeles's prosecutors get short-changed here, however, the District Attorney's office did, "in a blast at . . . manufacturers, file[ ] thirteen smoke-abatement lawsuits, including two against well-known outfits — Standard Oil's coastal refinery and Vernon's Bethlehem Steel Corporation." *Id.* at 29.

smog was still just a temporary problem though: "Los Angeles had rearranged nature in the past, why not again?"[77]

Rearrange it did: in 1947, the city established the Los Angeles County Air Pollution Control District, the first of its kind in the nation (the Bay Area Pollution Air Control District was subsequently established in 1955).[78] Between 1947 and 1950, the state adopted the Ringelmann System, which measured the quantity of smoke rising from stacks and other resources, and limited smoke accordingly. In 1960, the passage of the Motor Vehicle Pollution Control Act "brought the state into the active role of control for the first time" under the first piece of motor vehicle emission control legislation in the country.[79] All in all, California started the nation's first air quality program more than a decade before the passage of the Federal Clean Air Act.

Yet even before the landmark legislation, litigation had already been under way in California. Starting before 1940, citizens annoyed with the growing "smoke nuisance" had been seeking redress through civil suits. The public nuisance doctrine has provided the basis for air pollution cases ever since (including, in most recent jurisprudence, lawsuits over greenhouse gases, global warming, and even challenges over whether alternative energy sources such as wind turbines end up creating more — albeit different — environmental problems than solutions).

A longstanding common law notion, the public nuisance doctrine protects the public against "a substantial and unreasonable interference with a right held in common by the general public, in use of public facilities, in health, safety, and convenience."[80] The California Penal Code defines "public nuisance" as anything injurious to health, offensive to the senses, or obstructive to free use of property so as to interfere with comfortable enjoyment or free passage by the public.[81]

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77 *Id*. at 23.

78 *Id*. at 8.

79 Jacobs & Kelly, *supra* note 7, at 8.

80 Dan B. Dobbs, The Law of Torts 1334 (2000).

81 "Anything which is injurious to health, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway . . . " Cal. Penal Code § 370.

In practice, public nuisance has been in many ways the "inland" or "atmospheric" version of the public trust doctrine employed in water cases.[82] Both aim to protect communal interests in the environment and natural resources; "they protect collective interests against the excesses of private activity, operating flexibly as common law backstops to political failures."[83] It would seem that the use of common law doctrines — such as public nuisance and public trust — that enforce societal norms also demonstrates how environmental issues are very much a part of California's fabric.

Indeed, cultural voices have sounded alongside litigious ones even in the early days of air pollution litigation. Heading into the 1950s, at a time when smog and sparing the air were still new, the *Los Angeles Times*, "as the loudest voice around, was the world's first environmental soldier, and [publisher Norman] Chandler was its General Patton."[84] As the smog swirled over the next few months (and ever after), the *Times* "chaperoned readers through trash heaps, refinery boilers, chemical factories and every other operation unofficially indicted for the scourge."[85]

Some argue that this model of mutual reinforcement between common law and culture better protects the environment than the sweeping federal legislation that has followed — and at times tried to replace — it:

> [T]he common law enforces the norms of society, whereas the administrative state tries to impose intellectually generated norms on society. Common law rules tend to limit liability to conduct that

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[82] William H. Rodgers, Jr., Environmental Law § 2.16 173 (1977).

[83] Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 Davis L. Rev. 1075, 1078 (2012). Still, the two differ in scope, function, and legal foundation, resulting in differing applications to different environmental challenges. Nevertheless, there have also been water lawsuits based on public nuisance, especially early on in California's history. *See, e.g.*, People v. Glenn-Colusa Irrig. Dist., 127 Cal. App. 30 (1932) (enjoining diversion from Sacramento River into an unscreened canal as a public nuisance on the ground it killed many fish species in the area); People v. Russ, 132 Cal. 102 (1901) (enjoining construction of dams in the Salt River area as a public nuisance because the dams' diversion of water obstructed the public's free use of a navigable stream).

[84] Jacobs & Kelly, *supra* note 7, at 28. Yet, ironically, Chandler's family had been at the forefront of the diversion of water away from the Owens Valley.

[85] *Id.*

> society deems unjust, whereas the administrative state imposes liability where the state deems it useful to achieve its objectives.[86]

Certainly the common law — which, as a practical matter, mobilizes and relies on the actions of ordinary citizens rather than politicos — is a "bottom up" approach that may be "more likely to draw upon existing social understandings and norms in the development of law, which may in turn be more effective."[87] Others, however, argue that reliance on ever-changing cultural trends actually weakens rights (reliance which, in turn, gives rise to a litigious approach that is neither effective nor efficient in creating long-term solutions) and that public nuisance suits are improper means of environmental enforcement.[88]

Legal theory aside, California has led the way in environmental protection, particularly where air pollution is concerned. In fact, California continues to occupy a special place in environmental protection even under the federal regulatory scheme. While federal laws such as the Clean Air Act generally preempt state law, California is — and always has been — permitted to set more stringent standards in certain instances (usually through waivers issued by the Environmental Protection Agency). This means, of course, the relationship between state and federal law has sometimes been rocky: "[t]he time since 1970 has been one of struggles in California . . . to cope with these bold new breaks, struggles that put — are still putting — the federal system to a fine test."[89] Still, the "California exception" exists in part to enable the state to cope with its exceptionally severe problems (especially in Los Angeles).[90] At the same time, "it was also motivated by California's pioneering experience in the field (an experience, like

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[86] David Schoenbrod, *Protecting the Environment in the Spirit of the Common Law*, in The Common Law and Environment: Rethinking the Statutory Basis for Modern Environmental Law 17–18 (2000).

[87] Frank B. Cross, *Identifying the Virtues of the Common Law*, 15 Supreme Court Economic Review 21, 26 (2007).

[88] *See* Gary D. Libecap, *The Battle over Mono Lake*, 6 Hoover Digest (2006), available at www.hoover.org/publications/hoover-digest/article/6467 (arguing for a market approach to resource allocation); *Am. Elec. Power v. Connecticut*, 131 S. Ct. 2527 (2011) (declining, essentially, to allow interstate nuisance to supersede the current regulatory regime under the Clean Air Act).

[89] Krier & Ursin, *supra* note 70, at 10.

[90] *Id.* at 2.

most pioneering ones, characterized as much by failure and frustration as by grand accomplishment), and by the accompanying purpose to employ California as a testing ground for new approaches to control."[91]

In 2002, California adopted the Clean Cars Law (Assembly Bill 1493), the world's first law targeting global warming pollution from new cars and trucks.[92] Successive legislation required automakers to cut their carbon emissions 30 percent by 2016. In 2004, thirteen Central Valley car dealers and the Alliance of Automobile Manufacturers (which represents, among others, GM, Ford, DaimlerChrysler, and Toyota) sued the state to stop implementation of the Clean Cars program.[93] Undeterred, the state brought a public nuisance suit against the six biggest automakers in the country.[94] The automakers' claims were ultimately denied, and the state suit dismissed. Most recently in January, the California Air Resources Board unanimously passed the so-called "Advanced Clean Cars" package. The plan mandates a 75 percent reduction in smog-forming pollutants by 2025 and that one in seven of new cars sold in California in 2025 be an electric or other zero-emission vehicle.[95]

Again, as with water, California deliberately and eagerly used the law to embrace car culture. At the same time, reactions to and regulation of car

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91 Krier & Ursin, *supra* note 74, at 2. "[T]he state's efforts have been a major influence in shaping the federal approach to vehicular pollution control, and have also of late been much shaped by the federal approach." *Id.* at 3.

92 AB 1493 amended Cal. Health & Safety Code § 42823 and added § 43018.5; *California Clean Car Law Prevails over Big Auto Challenge*, Natural Resources Defense Council, www.nrdc.org/globalwarming/fauto.asp (last visited May 15, 2012).

93 *Cent. Valley Chrysler-Jeep v. Goldstene*, 529 F. Supp. 2d 1151 (E.D. Cal. 2007); *Cent. Valley Chrysler-Jeep v. Goldstene*, 563 F. Supp. 2d 1158 (E.D. Cal. 2008).

94 *California v. General Motors*, 2007 WL 2726871 (N.D. Cal. 2007). Meanwhile, the United States Supreme Court had held in *Massachusetts v. EPA*, 549 U.S. 497 (2007), relevant part, that the Clean Air Act gives the EPA authority to regulate tailpipe emissions of greenhouse gases and that such gases fell within the Clean Air Act's definition of "air pollutant."

95 *California passes sweeping auto emission standards*, Fox News (Jan. 28, 2012), http://www.foxnews.com/politics/2012/01/28/california-passes-sweeping-auto-emission-standards/ (irony of citing to Fox News for a global warming story intended); *see also* Katrina Schwartz, *California's "Clean Car" Rules: A Historical Perspective*, KQED News (Jan. 27, 2012), http://blogs.kqed.org/climatewatch/2012/01/27/californias-clean-car-rules-a-historical-perspective/.

culture's environmental impacts show a people and a place trying to ease its conscience.

Perhaps California is destined to be a state of irreconcilables where law stands at the intersection:

> What, for example, is an auto executive to make of the fact that Californians bought more Hummer H2's from January to July [2003] . . . than any other state, yet drivers have also bought so many gas-electric hybrids that Detroit has been forced to play catch-up with the Japanese? On one hand, the Hummer sales say Californians are rich and therefore entitled to two parking spaces, but the new hybrids say the state is full of environmental advocates. Both pictures are true.[96]

Perhaps over the last few decades, Eddie Valiant's train-filled town has given way to a sprawling state more accurately and at best embodied in Roger Rabbit's Car Toon Spin at Disneyland. Perhaps that is California all over:

> We've been on the run
> Driving in the sun
> Looking out for number one
> California, here we come
> Right back where we started from[97]

CONCLUSION

". . . where we run out of continent."

California has always been the main character — and sometimes even a caricature — in its own stories. It is paradoxically the most populous state and yet a "new frontier." It is "a world that is simultaneously old and new. The public trust doctrine and the Endangered Species Act have been laid down alongside one-hundred-year-old water rights, and we somehow have to figure out how they can, and should coexist."[98]

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96 Alexander, *supra* note 60.

97 Phantom Planet, *California, on* The Guest (Epic 2002).

98 Gray, *supra* note 15, at 151.

These are the plots and the protagonists that underlie the creation of California, both in legal facts and in social and silver screen fictions. Foundational fantasies, after all, "seem to have originated as a way of giving human form to all that is titanic and inchoate about nature."[99] In California's "dynamic and utilitarian conception" of water rights, "we have our Bigfoot. He is more than a myth. Inhabiting our remote mountain canyons, wild rivers, high desert lakes, and bays and estuaries, he is also a vital part of our legal imagination."[100] This Bigfoot has at times allowed politicians and engineers to pillage the Owens Valley and at other times save Mono Lake from the same fate. Indeed, California's water laws and litigation have been aptly fluid in allowing for very different endings to very similar stories.

In California's roadways, road rules, and anxiety over air pollution, there is an attempt to reclaim nature in the unnatural — an attempt to recast a manmade exercise into the ultimate form of wilderness and freedom (picture, for a moment, hugging the California coastline on the Highway 1 or winding through the snowy peaks en route to Lake Tahoe, perhaps even in a hybrid car). Of course, these days, "Californians do not cruise much anymore, nor do they hang out at drive-ins. . . . Still, the car culture persists because drivers continue to spend a lot of time sitting on freeway on-ramps, imagining they could be doing these things instead of waiting for the two-cars-per-green-light-meter light to join the herd on Interstate 5."[101] Dreams of the state with the most cars having the smallest carbon footprint turn ignoble smog and traffic into something decidedly noble.

Taken together, California has indeed been a frontier for environmental law and culture. On one level, the lack of a federal system prior to the 1970s forced California into this role out of necessity; on another level, California gladly filled that role. Its ability to operate, unconstrained, using common law doctrines allowed California to mold itself into the "Golden State®" it wanted to be by manipulating the environment in the name of the

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99 Gray, *supra* note 15, at 272 (quoting D.R. Wallace, The Klamath Knot 137 (1983)). Such myths affirm "a desire for human power over wilderness. [. . .] They link us to lakes, river, forests, and meadows that are our homes as well as theirs. They lure us into the wilderness . . . not to devour us but to remind us where we are, on a living planet. If [they] do not exist, to paraphrase Voltaire, it is necessary to invent them." *Id.* at 272–73.

100 *Id.* at 273.

101 Alexander, *supra* note 60.

public good, and also to actually protect the public good. Sometimes the two have meant the same thing; sometimes they have not. The result has been creative yet complicated.

Perhaps this makes California a place every bit as crazy and sun-addled as outsiders make it out to be. Yet out of these lawsuits, California is also a place that 37,691,912 people have created and called "home" where once there was none.[102]

More than anything, as "native daughter" Didion notes:

> California is a place in which a boom mentality and a sense of Chekhovian loss meet in uneasy suspension; in which the mind is troubled by some buried but ineradicable suspicion that things had better work here, because here, beneath the immense bleached sky, is where we run out of continent.[103]

But only if the continent and the California landscape — so capable of both bounty and bust — do not run out on us first.

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[102] *State & County QuickFacts: California*, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/06000.html (last visited May 15, 2012).

[103] Joan Didion, *Notes from a Native Daughter*, *in* Slouching Towards Bethlehem 171, 172 (1968).

THE *CAL FED* CONTROVERSY:

Distinguishing California's Pregnancy Leave Law and the Family and Medical Leave Act

JENNIE STEPHENS-ROMERO*

In the modern history of the United States, the feminist movement has been marked by a great divide between those women favoring formal equality and those favoring substantive equality.[1] While supporters of formal equality believe that men and women should be treated the same, including under the law, supporters of substantive equality believe that where men and women are actually situated differently, different rules may be needed in order to achieve equal results.[2] The debate rose to a peak in the 1970s and 1980s in a national debate over pregnancy discrimination and benefits in the workplace.[3] After two devastating U.S. Supreme Court decisions in the 1970s, the divide appeared most prominently between

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[1] Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harvard C.R.-C.L. L. Rev. 415, 417–20 (2011).

[2] Katherine T. Bartlett & Deborah L. Rhode, Gender And Law: Theory, Doctrine, Commentary 1, 127 (5th Ed. 2010).

[3] Joan Williams, *Do Women Need Special Treatment? Do Feminists Need Equality?*, 9 J. Contemp. Legal Issues 279 (1998). Williams also provides a comprehensive analysis of the theoretical debate between feminists in the different ideological camps.

California women's activists and those working on the national level. For the most part, California women's groups came out in support of a substantive approach to equality which provided leave specifically to pregnant women while not specifically mandating leave for other temporarily disabled employees.[4] On the other hand, national women's groups generally favored a formal approach where pregnant women would receive the same leave benefits as any other employee.[5]

In 1987, a Supreme Court case involving California's substantive approach to equality showcased the feminist debate to everyone in the country.[6] *California Federal Savings & Loan Association v. Guerra* truly illuminates the main figures in the leave debate and their beliefs on the issue.[7] But the debate was not over then — national women's groups worked in Washington to promote their formal view. The long-standing feud between supporters of formal and substantive equality can perhaps best be observed in the history of pregnancy and parental leave statutes in the U.S.

"IT NEVER OCCURRED TO ME THAT I MIGHT LOSE MY JOB BECAUSE I'D HAD A CHILD."[8]

In 1982 Lillian Garland, an employee at California Federal Savings & Loan Association (Cal Fed), took maternity leave to have a cesarean section.[9] When she returned to work, she had been replaced, and her job was no longer available.[10] Garland filed a complaint with the California Fair Employment and Housing Commission (FEHA) claiming that Cal Fed had violated California's Pregnancy Disability Leave Law.[11] She was among 300 other women who had filed complaints for violations of that law in

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4 *See, infra*, text associated with fns. 110–119, for more detail.

5 *Id.*

6 California Federal Sav. & Loan Ass'n v. Guerra (*Cal Fed*), 479 U.S. 272, 278 (1987).

7 *Id.*

8 Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. Times, Jul. 22, 1984, at F1 (quoting Lillian Garland).

9 Ronald D. Elving, Conflict and Compromise: How Congress Makes the Law 17 (1995).

10 *Id.*

11 *Cal Fed*, 479 U.S. at, 278.

1982.[12] Before the administrative hearing date with FEHA, Cal Fed filed suit in the Federal District Court for the Central District of California seeking a declaration that California's Pregnancy Disability Leave Law had been preempted by the federal Pregnancy Discrimination Act.[13] Cal Fed was joined by the Merchants and Manufacturers Association and the California Chamber of Commerce in what the business community saw as an opportunity to attack the leave law.[14]

In 1984, the District Court characterized the California law as requiring "preferential treatment" for pregnant employees, and agreed with Cal Fed that the Pregnancy Disability Leave Law was preempted by the Pregnancy Discrimination Act.[15] In his opinion, Judge Real not only invalidated a law aimed at helping women achieve equality, but he did so by using another law aimed at the same purpose.[16] The decision caused consternation among many women activists.[17]

"DEBATE OVER PREGNANCY LEAVE"[18]

Cal Fed wound its way through the courts and in October of 1986, the case reached the U.S. Supreme Court.[19] Amicus briefs were filed in support of various points of view — Cal Fed's stance was supported by business and commerce associations, California women's groups supported the Pregnancy Disability Leave Law, and national women's groups supported Lillian Garland's right to leave, but not the Pregnancy Disability Leave Law itself.[20] If the debate between different camps of feminist thought was not

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12 ELVING, *supra* note 9, at 18.

13 *Cal Fed*, 479 U.S. at 278–79.

14 *Id. See* ELVING, *supra* note 9, at 18.

15 *California Federal Sav. & Loan Ass'n v. Guerra*, 34 FAIR EMPL. PRAC. CAS. (BNA) 562, 1 (1984).

16 *Id.*

17 ANNE L. RADIGAN, CONCEPT & COMPROMISE: THE EVOLUTION OF FAMILY LEAVE LEGISLATION IN THE U.S. CONGRESS 6 (1988).

18 Title of a *New York Times* article describing *Cal Fed*. Tamar Lewin, *Debate Over Pregnancy Leave*, N.Y. TIMES, Feb. 3, 1986, at D1.

19 *Cal Fed*, 479 U.S. at 272.

20 *See, e.g.,* Brief for the Chamber of Commerce of the United States as Amicus Curiae in Support of the Petition, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Brief of Equal Rights Advocates, the California Teachers Ass'n, the Northwest Women's Law

clear before, Cal Fed's amici highlighted the internal dispute. While both California and national women's groups called for Lillian Garland's right to leave, they did so with significant differences.

First, California women activists pointed out that the Pregnancy Disability Leave Law was not inconsistent with Title VII and the Pregnancy Discrimination Act; in fact, they shared the same goals of ending discrimination against women in the workplace.[21] While Title VII preempted legislation which relied on stereotypical notions of women's proper roles, California's legislation simply recognized an objective difference between the sexes, namely pregnancy.[22] Accordingly, different policies are necessary to ensure equal opportunities for women.[23] For example, the Equal Rights Advocates Brief suggested comparing men who have engaged in reproductive behavior to pregnant women.[24] That way any difference in treatment between the two groups could be seen as manifestly unjust.[25] Title VII, their brief pointed out, prohibits facially neutral policies that result in adverse impacts on women, and that is what happens when pregnant women are treated the same as everyone else.[26] True to their ideological underpinnings, the California women's groups were not afraid to point out the differences between men and women, and they were not afraid to demand a right to equality while taking that difference into consideration.[27]

Center, the San Francisco Women Lawyers Alliance as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *Equal Rights Advocates Brief*]; Brief for the National Organization for Women, Now Legal Defense and Education Fund, National Bar Ass'n Women Lawyers' Division Washington Area Chapter, National Women's Legal Defense Fund as Amici Curiae in Support of Neither Party, *Cal Fed*, 479 U.S. 272 (1987) (No. 85-494) [hereinafter *NOW Brief*].

21 *Equal Rights Advocates Brief, supra* note 20.

22 *Id.*

23 Brief for California Women Lawyers, Child Care Law Center, Jessica McDowell, Lawyers Committee for Urban Affairs, Mexican American Legal Defense and Education Fund, Women Lawyers' Association of Los Angeles, and Women Lawyers of Sacramento as Amici Curiae in Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *California Women Lawyers Brief*].

24 *Equal Rights Advocates Brief, supra* note 20.

25 *Id.*

26 *Id.*

27 *See infra*, text associated with fns 110–119.

California women were also quick to point out that their legislation did not give women special or protective treatment. First, the Pregnancy Disability Leave Law's intent was different. While protective legislation attempted to bar women from doing men's work, California's legislation was attempting to allow women access to that work.[28] In a similar argument, the California Women Lawyers Brief stated that the legislation was not an effort to put women in a superior, or special, position, but rather just an equal opportunity to compete with men in employment.[29] The Pregnancy Disability Leave Law, then, was just a form of recognition that facially neutral policies do not always provide equality.[30]

Alongside the California groups in favor of the Pregnancy Disability Leave Law, stood Betty Friedan, a nationally-recognized feminist, who was one of the founders of the National Organization for Women (NOW) in 1966, and 9 to 5, another national women's rights organization.[31] Like the California organizations, Betty Friedan and 9 to 5 argued in their brief that gender-neutral policies failed to provide equality in procreative choices between men and women.[32] Additionally, the authors went out of their way to show that the Pregnancy Disability Leave Law was not protective legislation.[33] But what was most interesting about this brief was the fact that Betty Friedan was one of the signatories. NOW, like Friedan, had also submitted an Amicus Brief for the *Cal Fed* case — only it was for the different argument of extending leave to all temporarily disabled workers, rather than solely pregnant women.[34]

Also in support of California's Pregnancy Disability Leave Law were the states of Connecticut, Hawaii, Montana, and Washington, all of which

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28 *Equal Rights Advocates Brief, supra* note 20.

29 *California Women Lawyers Brief, supra* note 23.

30 *Id.*

31 Brief of the Coalition for Reproductive Equality in the Workplace, Betty Friedan, 9 to 5 National Association of Working Women, Congressman Howard Berman, et al. as Amici Curiae In Support of Respondents, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494); Rita Kramer, *The Third Wave*, The Wilson Quarterly (Autumn 1986), at 115.

32 *Id.*

33 *Id.*

34 *NOW Brief, supra* note 20.

had similar leave laws on their books.[35] Connecticut's statute, for example, allowed women a "reasonable leave of absence for pregnancy" and guaranteed women their same, or substantially similar jobs, upon their returns.[36] The other states also maintained their interest in protecting their statutes and the way they related to Title VII.[37]

National women's groups had the difficult task of upholding Lillian Garland's right to leave while simultaneously disagreeing with California's approach to pregnancy leave generally. Their solution was to argue not that California's pregnancy leave be denied, but that leave be extended to *all* temporarily disabled employees.[38] While they did not agree that California should provide leave solely for pregnant women, these groups stated that the Pregnancy Disability Leave Law did not conflict with Title VII and the Pregnancy Discrimination Act.[39] Cal Fed was in violation of the Pregnancy Discrimination Act where it was providing leave only for pregnant women and not for other temporarily disabled workers, but it was possible for them to comply with both laws by extending leave to all temporarily disabled employees.[40] Therefore, the two statutes were not in direct conflict per se, but only in the way Cal Fed was applying California's law.[41] The two statutes could lawfully coexist.

Looking more closely at the briefs submitted by the national women's organizations, there were other clues marking the divisiveness of the debate even more clearly than their differing stances on the legal issues. NOW's brief was authored in part by Wendy Williams and Susan Deller Ross, the very women Donna Lenhoff called to her side to resist Berman's attempts

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35 Brief of the State of Connecticut, Connecticut Commission on Human Rights and Opportunities, Connecticut Permanent Commission on the Status of Women, State of Hawaii, State of Montana, and State of Washington as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494).

36 *Id.*

37 *Id.*

38 *NOW Brief, supra* note 20; Brief for the American Civil Liberties Union, the League of Women Voters of the United States, the League of Women Voters of California, the National Women's Political Caucus, and the Coal Employment Project as Amici Curiae, *Cal Fed*, 479 U.S. 272 (1986) (No. 85-494) [hereinafter *ACLU Brief*].

39 *Id.*

40 *Id.*

41 *Id.*

at a national pregnancy leave law.[42] At the same time they were submitting this brief, they were continuing their work on Federal gender-neutral leave legislation.[43] The same year that NOW submitted its amicus brief, Deller Ross was actually quoted in the *New York Times* as saying, "We think there is a conflict between the Federal Pregnancy Discrimination Act . . . and the California Law . . . . [W]e think that the correct remedy is not to take away the benefits for women disabled by pregnancy, but to extend those same benefits to any disabled workers."[44] Women on different sides of the debate were openly stating their critiques of the other's approach.

Additionally, while on a national level the American Civil Liberties Union (ACLU) filed an amicus brief to show that it rejected "laws that single out pregnancy, pregnancy-related conditions, or the capacity to become pregnant for ostensibly advantageous treatment," the ACLU of Southern California openly rejected the national organization's stance on the issue.[45] Not only did they refuse to sign on to the amicus brief, but the Southern California branch firmly stated that it agreed with upholding the Pregnancy Disability Leave Law in the same way other California organizations were expressing in their amicus briefs.[46]

The debate among the advocates was also picked up by the general public. A *New York Times* article from 1986 exposed what many people working directly on addressing leave already knew: the leave issue was dividing feminists in the U.S.[47] One article showcased the divide between California and federal law and also the divide between different women's rights organizations. The article summarized what was being said in the amicus briefs — both sides of the debate wanted women to be able to take time off for pregnancy, they just disagreed as to how that should work.[48]

On the one hand, NOW and the ACLU were quoted as taking a stance against gender-specific legislation.[49] They were afraid that labeling

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42 *NOW Brief, supra* note 20.

43 Elving, *supra* note 9, at 60–61.

44 Lewin, *supra* note 18.

45 *ACLU Brief, supra* note 38.

46 *Id.*

47 Tamar Lewin, *Maternity-Leave Suit Has Divided Feminists*, N.Y. Times, Jun. 28, 1986, at 52.

48 *Id.*

49 *Id.*

pregnancy as a "special disability" would allow the use of stereotypes against women.[50] Stereotyping had been used to produce so much harm to women in the past, that the better approach was to remain gender-neutral.[51]

But Betty Friedan and 9 to 5 preferred leave policies aimed at creating equality of procreative choice, and they wanted to do away with the traditional male model for employees.[52] Betty Friedan was quoted as saying, "[T]he time has come to acknowledge that women are different from men, and that there has to be a concept of equality that takes into account that women are the ones who have the babies. We shouldn't be stuck with always using a male model."[53] Like California feminists, they were willing to accept that women were different from men in their ability to become pregnant, but they were not willing to let that hold women back from being gainfully employed.[54]

"THE STATUTE IS NOT PRE-EMPTED BY TITLE VII"[55]

In the end, the U.S. Supreme Court upheld California's Pregnancy Disability Leave Law.[56] Writing the opinion, Justice Marshall first looked to Congress's intent in passing the Pregnancy Discrimination Act in order to determine whether it preempted any state fair employment laws.[57] What the Court determined was that Congress's intent in passing the Pregnancy Discrimination Act was much the same as the California State Legislature's intent in passing the Pregnancy Disability Leave Law, that is "to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[58] Therefore, California's law did not conflict with Congress's intent in passing the Pregnancy Discrimination Act.

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50 *Id.*

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 Majority decision in *Cal Fed.* 479 U.S. at 292.

56 *Id.*

57 *Id.* at 280.

58 *Id.* at 289 (quoting 123 Cong. Rec. 29658 (1977) (Statement of Senator Williams in support of the PDA).

Furthermore, Congress did not show any intent to prevent states from passing statutes granting pregnant women further protection than that provided for in the Pregnancy Discrimination Act.[59] While the record showed that Congress had acknowledged the existence of such state statutes in Connecticut and Montana, nothing was said about any possible conflicts with those and the proposed PDA.[60] As well as having a common goal, state statutes promoting substantive equality were not considered as overstepping the bounds of the Pregnancy Discrimination Act when it was enacted. Indeed, the Court found that Congress had intended the PDA "to construct a floor beneath which pregnancy disabilities may not drop — not a ceiling above which they may not rise."[61]

Justice Marshall, much like California women's rights organizations had done in their amicus briefs, distinguished California's law from historically protective legislation.[62] He did so by pointing out how limited the statute was — it only applied to the period of actual physical disability due to pregnancy.[63] Therefore, it was not analogous to statutes employing "archaic and stereotypical notions about pregnancy and the abilities of pregnant workers."[64] California's law defined a more objective and clearly determined time period that could not be as easily subjected to stereotyping. This seemed to be a blow to the formal equality argument, which had rested on the negative effect of stereotypes found in gender-specific statutes.[65]

"GOOD WOMEN ARE IN DEMAND NOW. . ."[66]

From the 1950s to the 1970s, the rates of both U.S. women who worked and the proportion of the workforce made up of women rose significantly.[67] By 1977, women even constituted 18 percent of traditionally male-occupied blue

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59 *Id.* at 286.

60 *Id.* at 287.

61 *Id.* at 280 (quoting *Cal Fed*, 758 F.2d at 395).

62 *Id.* at 290.

63 *Id.*

64 *Id.*

65 *See* Lewin, *supra* note 47.

66 Quote from a husband with an employed wife, referring to women in the workplace. Georgia Dullea, *Vast Changes in Society Traced to the Rise of Working Women*, N.Y. Times, Nov. 29, 1977, at 77.

67 *Id.*

collar jobs involving heavy manufacturing.[68] This rise in employment held ramifications for both the home and the workplace, playing a role in increased divorce rates, higher reported incidents of sexual harassment, and more out-of-home child care.[69] The last issue became particularly salient in the 1970s.

In the early 1970s, a recession hit multiple sectors of the economy with decreasing levels of both employment and consumer purchasing.[70] Additionally, high rates of inflation were making it more difficult to raise a family on a single income.[71] For many, the only way to afford to have children was if both parents worked outside the home.[72] That meant that women had to work in order to have children, raising concerns regarding the ease with which women could become pregnant, have children, and maintain their employment at the same time.

A number of Supreme Court decisions decided in the 1970s expanded the rights of women in different facets of society. For example, *Reed v. Reed* overturned an Idaho state statute which automatically appointed a father as administrator of a deceased child's estate because it discriminated based on sex.[73] And a mandatory unpaid maternity leave regulation was struck down by the Court in *Cleveland Board of Education v. LaFleur*.[74] For that reason, some may have been optimistic about women in the workplace and their ability to have children.

"SHOCK AND ANGER EXPRESSED"[75]

However, the U.S. Supreme Court shocked women's rights activists around the country with two major decisions in the mid-1970s. First, in 1974 it

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[68] *Id.*

[69] *Id.*

[70] Peter T. Kilborn, *More Sectors of Economy Are Pinched by Recession*, N.Y. Times, Oct. 31, 1974, at 1.

[71] Dullea, *supra* note 66.

[72] Fewer than half of the jobs in the U.S. economy in 1976 were sufficient to reasonably sustain a family. Ellen Goodman, *Pregnancy disability — the battle has just begun*, S.F. Chronicle, Dec. 22, 1976, at 15.

[73] 404 U.S. 71 (1971).

[74] 414 U.S. 632 (1974).

[75] Subheading from a *New York Times* article describing *General Electric v. Gilbert*, *infra* note 185. Lesley Oelsner, *Supreme Court Rules Employers May Refuse Pregnancy Sick Pay*, N.Y. Times, Dec. 8, 1976, at 53.

held that discrimination against pregnant women did not constitute sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.[76] California had developed a disability insurance program for temporarily disabled workers and the program excluded pregnancy from its definition of disability.[77] When the state was sued for discriminating against women by failing to provide insurance for pregnancy while providing it for other temporary disabilities, the Supreme Court held in *Geduldig v. Aiello* that California had not discriminated on the basis of sex, but instead on the basis of pregnancy.[78] According to the Court, they were not one and the same.[79] In the Court's own words, "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition — pregnancy."[80] Excluding pregnancy from state-distributed disability insurance was permissible.[81]

Then, in 1976, the Supreme Court handed down its decision in *General Electric v. Gilbert*, holding that pregnancy discrimination did not amount to sex discrimination under Title VII, either.[82] Until then, the Equal Employment Opportunity Commission (EEOC) had construed the words, "because of sex," in Title VII as protecting against pregnancy as well as other forms of sex discrimination.[83] In *Gilbert*, however, Justice Rhenquist distinguished the discrimination as only against pregnant versus non-pregnant persons, not against women versus men.[84] Therefore, a private company could also exclude pregnancy from its disability benefits while at the same time covering other temporary disabilities.[85]

The two decisions were major blows to the women's rights movement not only because they approved both state and private exclusion of pregnancy benefits, but also because they differentiated pregnancy discrimination

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76 Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

77 *Id.* at 486.

78 *Id.* at 497.

79 *Id.*

80 *Id.* at n.20.

81 *Id.*

82 429 U.S. 125 (1976).

83 29 C.F.R. § 1604.10(b) (1975).

84 *Gilbert*, 429 U.S. at 135.

85 *Id.* at 145.

from sex discrimination. Indeed, they both caused an uproar. There were a wide range of opinions on the issue. Writing on the opinion page of the *San Francisco Chronicle*, Andrew Tully said that while he supported pregnancy disability benefits, including them in disability insurance programs could only be done by Congress, not through the EEOC's "presumptuous guidelines."[86] Ellen Goodman, on the contrary, referred to the *Gilbert* majority as "six upper-class, upper-aged men whose own children were born and weaned long ago" to bring some reason to their "bizarre" decision to distinguish pregnant working women from other women.[87] And James Kilpatrick applauded the decision, going so far to as to call the Burger Court "the girls' best friend" due to some of its decisions on gender equality.[88]

For many who supported the opinions it seemed that feminists wanted it both ways — equality and special treatment. Even though they had gained equality and could work some of the same trades jobs as men, they still wanted female-only pregnancy disability insurance, which many considered special treatment. For example, *Washington Star* cartoonist Pat Oliphant depicted the National Organization for Women (NOW) as electrical workers griping about their lack of pregnancy disability insurance despite gaining equality.[89] Like Kilpatrick, Oliphant's observant insect in the cartoon (facing page) shows that some people believed feminists would never be happy with the state of gender relations no matter what the Court held.[90]

On the other hand, writing in the *New York Times*, Lesley Oelsner pointed out that the Gilbert decision had overruled six different Courts of Appeal in addition to the EEOC's guidelines in its interpretation of pregnancy discrimination under Title VII.[91] Additionally, companies which had provided pregnancy benefits now felt that they could drop them,

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86 Andrew Tully, *Insult to Mothers*, S.F. Chronicle, Dec. 27, 1976, at 33.

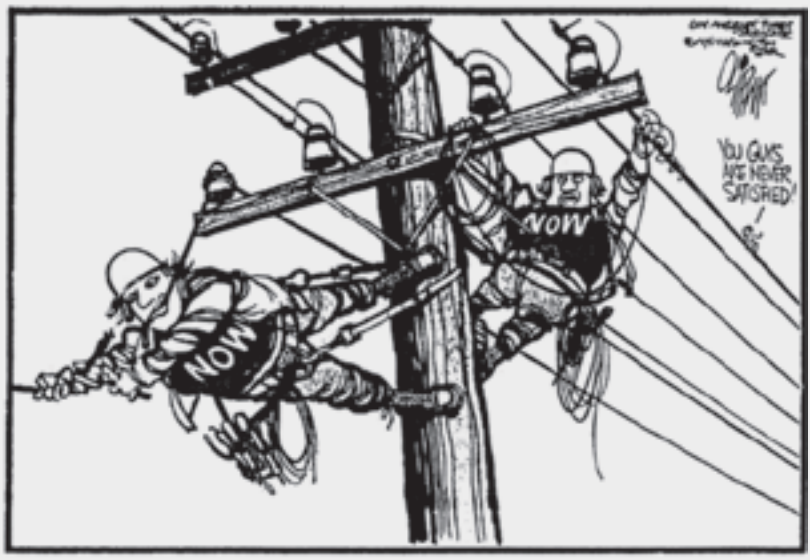
87 Goodman, *supra* note 72.

88 James Kilpatrick, *The Court Was Right*, S.F. Chronicle, Dec. 17, 1976, at 60. *See, e.g., Kahn v. Shevin*, 416 U.S. 351, which struck down a Florida state tax exemption for widows but not widowers because it discriminated on the basis of sex in assuming that women were less economically capable than men; *LaFleur*, 414 U.S. 632.

89 Pat Oliphant, S.F. Chronicle, Jan. 3, 1977, at 38 (via L.A. Times Syndicate).

90 *Id.*

91 Oelsner, *supra* note 75.



©1976, Pat Oliphant, *The Washington Star*[92]
Courtesy The Washington Post

while companies lacking those benefits no longer felt any pressure to adopt them.[93] Oelsner's article certainly hinted at despair when it quoted an attorney at the ACLU's Women's Rights Project claiming that the Court had "legalized sex discrimination."[94]

While the decisions produced a wide range of opinions among the more general populace, women's organizations both in California and on the national level promised to fight back to ensure that discrimination against pregnant women would be legally barred.[95] Their motives to promote equality for women were the same, but their approaches were distinct.

[92] Oliphant, *supra* note 89.

[93] Oelsner, *supra* note 75.

[94] *Id*.

[95] *See* Damon Stetson, *Women Vow Fight For Pregnancy Pay*, N.Y. Times, Dec. 9, 1976, at 19.

"THIS LEGISLATION PROTECTS PREGNANT WOMEN FROM UNFAIR EMPLOYMENT PRACTICES"[96]

In California, discrimination against women may have felt like a bigger problem than almost anywhere else in the country. In 1977, San Francisco had the second highest number of federal employment sex discrimination cases filed in the country at 259.[97] It was well above much larger cities like New York (181) and Chicago (224).[98] Despite the difficulty with time delays, high expenses, and the psychological stress associated with bringing sex discrimination suits, a significant number of people in San Francisco thought it was necessary to take their grievances to court.[99]

Some attorneys working on sex discrimination cases also noticed that many of the complaints they received from women dealt with issues they faced upon becoming pregnant.[100] According to Shauna Marshall, previously a staff attorney at Equal Rights Advocates, one of California's first organizations focusing on women's legal rights, attorneys working with female employees at the time largely saw pregnancy as the main impediment to women's long-term employment.[101] Linda Krieger, then an attorney at the Employment Law Center in San Francisco was also quoted as saying, "I get calls all the time from women . . . who lost their jobs when they took time off for pregnancy or childbirth."[102] More so than equal pay or sexual harassment, pregnancy was not a problem to be ignored.

According to Marshall, women on the West Coast were also more comfortable accepting that women and men were inherently different when it

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96 Summary of AB 1960, the bill for the Pregnancy Disability Leave Law. Governor's Chaptered Bill File: LL Summary, Bill No. AB 1960, Dep't of Industrial Relations (Jan. 17, 1978).

97 Ralph Craib, *How S.F. Sex Bias Suits Are Faring*, S.F. Chronicle, Jan. 7, 1978, at 4.

98 *Id.*

99 *Id.*

100 Interview with Shauna Marshall, Academic Dean, UC Hastings College of the Law, in San Francisco (Apr. 16, 2012).

101 *Id.*

102 Tamar Lewin, *Maternity Leave: Is It Leave, Indeed?*, N.Y. Times, Jul. 22, 1984, at F1.

came to pregnancy.[103] While women's rights activists at the national level were aiming for equal treatment, California women's activists were looking to redefine the model for employment.[104] Instead of treating women as exactly the same as men, California feminists wanted to do away with the straight white male model of an employee and embrace differences among workers.[105] For example, while attorneys working at the national level at the ACLU were afraid that treating pregnancy differently would raise historic issues of discrimination against women, Brian Hembacher, an attorney at California's Department of Fair Employment and Housing (DFEH) who eventually represented Lillian Garland in her suit against Cal Fed, agreed with pregnancy-specific leave, stating, "A lot of things that seem to be unequal on their face actually create equal effects."[106] Furthermore, Linda Krieger, then an attorney at the Employment Law Center in San Francisco, believed that "[t]he point isn't that men and women must be treated alike, it's that they must have equal opportunities."[107] In fact, Krieger was known for frequently debating Wendy Williams, a professor at Georgetown University Law School, on the issue of pregnancy leave.[108] Williams was an outspoken formal equality feminist who opposed pregnancy-specific leave as a form of special treatment that would actually prevent women from entering the workforce.[109]

And while many of these women believed that difference should be embraced, they also believed that both parents should participate in the raising of a child.[110] Passing a leave law addressing only pregnancy was considered by many to be just a first step.[111] The ultimate goal seemed to be passage of a leave law for both parents.[112] In fact, years after California's

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103 Interview with Shauna Marshall, *supra* note 100.

104 *Id.*

105 *Id.*

106 *Id.*

107 Lewin, *supra* note 102.

108 *Id.*

109 *Id. See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984) for more detail on her stance on the equality debate.

110 Interview with Shauna Marshall, *supra* note 100.

111 *Id.*

112 *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H.*

Pregnancy Disability Leave Law was passed, its author, Howard Berman, recognized that "*all* workers face the prospect of needing to take time off due to disability or serious family responsibilities . . . ."[113] Passing a maternity leave statute, many seemed to have thought at the time, was easier than trying to pass a leave law that would apply to all workers.[114]

Soon after the *Gilbert* decision, Howard Berman, then a California Assembly member, began working on a bill that would extend workplace protections to pregnant women.[115] As the legislative history for the bill shows, the *Geduldig* and *Gilbert* decisions were central to the California Legislature's motivation in considering a bill extending pregnancy leave to working women.[116] About half of the documents in the California State Archives concerning AB 1960's legislative history include an analysis of the *Geduldig* and *Gilbert* decisions.[117] Furthermore, California legislators were apprehensive about the possibility that the California Supreme Court might make a similar decision regarding state pregnancy protections.[118] As the Department of Industrial Relations noted, neither the Division of Fair Employment Practices nor the Fair Employment Practices Commission, California's state equivalents to the EEOC, had developed regulations on how to address pregnancy disabilities, and there was fear that the state supreme court might interpret the current state of fair employment law to exclude pregnancy disability due to the cost to employers.[119]

The legislative record also shows that legislators were aware that the California Supreme Court viewed gender in much the same way as the U.S. Supreme Court.[120] A memo from the Department of Industrial Relations recognized that while the U.S. Supreme Court did not recognize sex classifications as suspect and the California Supreme Court did recognize them as

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Comm. on Education and Labor, 100th Cong. 2 (1987) (statement of Howard L. Berman, U.S. Representative, 26th District, California).

113 *Id.*

114 Interview with Shauna Marshall, *supra* note 100.

115 Governor's Chaptered Bill File: Bill No. AB 1960, Office of the Legislative Counsel (Jan. 4, 1977).

116 *See generally*, Governor's Chaptered Bill File: Bill No. AB 1960.

117 *Id.*

118 Governor's Chaptered Bill File: Enrolled Bill Rpt., Bill No. AB 1960, Dep't of Industrial Relations (Sep. 26, 1978).

119 *Id.*

120 Governor' s Chaptered Bill File: Bill No. 1960, Memorandum from the Agriculture and Services Agency to Howard Berman (Sep. 14, 1978).

suspect, "the actual record of the U.S. Supreme Court in sex discrimination cases is not that bad . . . and the record of the California Supreme Court is not that good."[121] In other words, the courts analyzed gender similarly, and that could mean that the California Supreme Court could come out with a decision similar to *Gilbert* in the absence of any contrary legislation.

Additionally, a California case regarding workers' compensation made clear that the California Supreme Court preferred leaving extension of employment benefits to the State Legislature.[122] In *Arp v. Workers' Compensation Appeals Board*, the state supreme court determined that a statute providing workers' compensation benefits to widows whose husbands died on the job, but not to widowers whose wives died on the job, was unconstitutional in its differential treatment of men and women.[123] Instead of automatically extending the benefits to include widowers as well as widows to correct the differential treatment, the state supreme court struck down the entire provision and expressed its belief that the Legislature should be in charge of determining what to do with the now unconstitutional law.[124] Legislators took this to mean that the Court would most likely be unwilling to correct discrimination by extending a benefit because of the potential cost to employers.[125] Instead, it would leave that type of decision to the Legislature, which was better equipped to handle such potentially costly decisions.[126] Therefore it was clear to the 1978 California Legislature that the Court would probably not be willing to extend pregnancy benefits unless the Legislature expressly stated it, and that is what it set out to do.[127]

It may have been fortuitous that California already had a labor code protecting pregnant school employees against discrimination and providing them with leave.[128] The code prohibited discrimination based on pregnancy or a related medical condition in hiring, promoting, discharging, or compensating pregnant employees.[129] AB 1960 was to amend the La-

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121 *Id.*

122 Arp v. Workers' Compensation Appeals Board, 19 Cal. 3d 395, 409 (1977).

123 *Id.*

124 *Id.*

125 *Id.*

126 *Id.*

127 Enrolled Bill Rpt., *supra* note 118.

128 Cal. Labor Code § 1420.2 (1975) (repealed 1980).

129 *Id.*

bor Code to allow pregnant school employees to take maternity leave for a reasonable period of time, and guaranteed that they receive the same benefits and privileges as other employees not affected by pregnancy.[130] Then AB 1960 was to extend those same benefits awarded to pregnant school employees to all pregnant employees throughout the state.[131] In doing so, California would be naming pregnant women a protected class.[132]

California also looked to other states to see what approaches they had taken to address the leave issue. For example, Oregon was looked to for information on its pregnancy disability laws and the problems in passing and implementing them.[133] Oregon, much like California, responded to the *Gilbert* decision by passing subsequent legislation to protect against pregnancy discrimination, and it prohibited employers from failing to provide pregnant women with equal medical benefits, disability benefits, and sick leave as other employees.[134] Furthermore, after the *Gilbert* decision the New York Court of Appeals, the highest court in that state, determined that private employers were required to pay disability benefits under the state human rights law prohibiting pregnancy discrimination.[135] Employer costs were brushed aside in favor of upholding human rights and protection against discrimination.[136]

Interestingly, there were few objections to the substantive changes AB 1960 proposed. One of the major concerns happened to be the fear that new federal changes to Title VII might preempt, and therefore undermine, the California Legislature's efforts.[137] However, one provision was clearly exempt from preemption: the four months of time permissible for pregnancy

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130 Governor's Chaptered Bill File: Bill No. AB 1960, Assembly Committee on Labor, Employment and Consumer Affairs (Jan. 11, 1978).

131 *Id.*

132 *Id.*

133 *See* Governor's Chaptered Bill File: Bill No. AB 1960, Minnesota House Committee on Labor-Management Relations to California Senate Committee on Industrial Relations (Feb. 15, 1978); Governor's Chaptered Bill File: Bill No. AB 1960, Oregon Department of Justice Memo (Sep. 21, 1977).

134 Id.

135 LL Summary, *supra* note 96.

136 *Id.*

137 Memorandum from the Agriculture and Services Agency, *supra* note 120 ("The main objection to the signing of AB 1960 is § 4, the federal preemption of state legislation . . .").

leave.[138] Perhaps this demonstrated the conviction with which California legislators adopted the leave provision above all else. Despite those fears, AB 1960 was passed as California's Pregnancy Disability Leave Law in September of 1978.[139] It provided for up to four months of pregnancy leave, inclusion of pregnancy and childbirth into any employer-administered disability program, and mandatory accommodation upon request for a woman disabled by pregnancy.[140]

"THE TERMS 'BECAUSE OF SEX' AND 'ON THE BASIS OF SEX' INCLUDE . . ."[141]

The California Legislature was correct in anticipating federal legislation addressing pregnancy discrimination. Just a short while after the Pregnancy Disability Leave Law was passed in California, the Pregnancy Discrimination Act was passed in the U.S. Congress.[142] However, Congress took a different path in remedying the *Geduldig* and *Gilbert* decisions. Instead of setting forth affirmative rights to which pregnant women were entitled, the Pregnancy Discrimination Act simply made clear that pregnancy discrimination was tantamount to sex discrimination — they were one and the same.[143] Therefore, the words "because of sex" in Title VII were clarified to include "because of or on the basis of pregnancy, childbirth, or related medical conditions."[144] Furthermore, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."[145] However, there is evidence in the legislative record that Congress did not intend to create any particular

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138 *Id.*

139 Enrolled Bill Rpt. to Governor, *supra* note 118.

140 *Id.*

141 Wording of the Pregnancy Discrimination Act as it amended Title VII in 1978. 42 U.S.C.A. § 2000e(k) (1978).

142 RADIGAN, *supra* note 17, at 5.

143 § 2000e(k), *supra* note 141.

144 *Id.*

145 *Id.*

disability benefits or special treatment for pregnant workers, significantly distinguishing it from California's Pregnancy Disability Leave Law.[146]

"AN ARGUMENT OVER MEANS, NOT ENDS"[147]

Simultaneously with Cal Fed's challenge to California's Pregnancy Disability Leave Law, Howard Berman, the law's author, was campaigning for a seat in the U.S. House of Representatives.[148] The leave law was one of his great successes as a state legislator, and he hailed it during his campaign for representative.[149] He touted his belief that the law would be upheld, but that he would also work toward a similar federal leave law upon arriving at Washington.[150] Soon after the district court decision, Berman, now a member of the House of Representatives, sought help from Donna Lenhoff at the Women's Legal Defense Fund, an organization now known as the National Partnership for Women and Families that works toward ending employment discrimination against women.[151] When she was hired there, Lenhoff had participated in the effort to draft and pass the Pregnancy Discrimination Act, and she was considered a seasoned expert in legislation aimed at guaranteeing equality.[152] Lenhoff, however, did not share Berman's views on how to handle the leave issue.[153] First, Lenhoff disagreed with a legislative reaction to the recent *Cal Fed* decision — she believed the case should be appealed through the courts.[154] Second, she was firm in her support of a leave policy applicable to all workers, regardless of sex, for either a temporary disability or a family medical issue.[155] When Berman requested a written proposal, Lenhoff turned to her Washington colleagues, including Judith Lichtman, Wendy Williams, and Susan Deller Ross, who shared her ideas on how to approach leave.[156]

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146 H. R. Rep. No. 95-948, at 4 (1978).
147 Radigan, *supra* note 17, at 8.
148 Elving, *supra* note 9, at 18.
149 *Id.*
150 *Id.*
151 *Id.* at 19.
152 *Id.* at 19–20.
153 *Id.* at 21–22.
154 *Id.* at 22.
155 *Id.* at 23.
156 *Id.* at 29.

Fresh in these women's minds was not only the recent *Cal Fed* decision, but also a Montana case, *Miller-Wohl v. Commissioner of Labor and Industry*.[157] Montana, like California, had a statute specifically providing pregnancy leave for women, the Montana Maternity Leave Act (MMLA).[158] The statute provided that no employee would be fired due to her pregnancy, and a woman was guaranteed a "reasonable leave of absence for the pregnancy."[159] Tamara Buley, an employee at a store owned by Miller-Wohl, missed time from work due to morning sickness and was shortly thereafter fired.[160] Just like Lillian Garland had done in California, Buley filed a complaint with Montana's Labor and Industry Commissioner, claiming that Miller-Wohl had violated the leave statute when they fired her due to her pregnancy.[161] Miller-Wohl claimed that the MMLA was preempted by the Pregnancy Discrimination Act, and should therefore be invalidated.[162] After being appealed to the Montana Supreme Court, the MMLA was upheld and Miller-Wohl was found to have violated not only the state statute, but also Title VII and the Pregnancy Discrimination Act.[163]

In both cases, employers attempted to pit two pieces of legislation aimed at helping women against one another in order to deny women maternity leave. Only a small number of states had statutes requiring pregnancy leave at this time, and already two such statutes had been seriously challenged.[164] Similar federal legislation, applicable to women and employers all over the country, could have an even more detrimental effect. Moreover, the conservative Reagan administration had given women activists the feeling that they had to fight for long-accepted rights all over again.[165] Passing pregnancy-specific legislation at this time could be politically dangerous,

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157 214 Mont. 238 (1984).

158 Mont. Code Ann. § 49-2-310 (1983).

159 *Id.*

160 214 Mont. at 242.

161 *Id.*

162 *Id.* at 249.

163 *Id.* at 241. Note that the Montana Supreme Court mistakenly refers to the "Pregnancy Disability Act" where it should refer to the "Pregnancy Discrimination Act."

164 Five states, California, Connecticut, Massachusetts, Montana, and Wisconsin, had maternity statutes between 1972 and 1981. Lise Vogel, Mothers on the Job: Maternity Policy in the U.S. Workplace 73 (1993).

165 Radigan, *supra* note 17, at 8.

and any feminist issue presented to Congress should be presented as narrowly as possible if it wished to succeed.[166]

While Lenhoff and her associates worked on a gender-neutral draft of a leave policy, Berman continued in his efforts to create a federal maternity leave law.[167] To him, passing a leave law which would apply to everyone was far-fetched.[168] A maternity leave statute, however, could be spun more easily in order to attract the votes of family-oriented conservatives in Congress.[169] Additionally, as he later stated in a Congressional hearing in 1987, it seemed a maternity leave law could be just a stepping stone to a more broad-spectrum leave law.[170] Much like many California women's activists saw the Pregnancy Disability Leave Law as a gateway to a more expansive leave law, Berman saw the role of a possible federal maternity leave law in the same way. However, after a fateful meeting in June of 1985 with Lenhoff, her associates, and lawyers from the League of Women Voters, the National Organization for Women, the National Women's Political Caucus, and the American Civil Liberties Union, Berman changed course.[171] Observing the strength of women activists in support of a gender-neutral bill, and seeing that some of the congressional staff supported that approach, Berman shifted his position.[172]

Around the same time, the House Select Committee on Children, Youth and Families was preparing legislation of its own based on the importance to children of parents' staying home with them after birth.[173] For the first time, two expert witnesses introduced to a congressional committee scientific research proving that *parents*, and not just mothers, should stay home with their children, ideally for a year after birth.[174] The idea that both parents could and should take part in child-rearing was introduced to Congress.

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166 *Id.*

167 Elving, *supra* note 9, at 30.

168 *Id.*

169 *Id.*

170 *Hearing on H.R. 925, supra* note 112.

171 Elving, *supra* note 9, at 32.

172 *Id.*

173 *Id.* at 23.

174 Sheila Kamerman, Professor at Columbia University's School of Social Work, and Edward Zigler, Professor of Psychology at Yale University's Bush Center in Child

Pat Schroeder, the senior female representative from Colorado and also a member of the Select Committee, was eager to get involved when Berman ceded control of the bill.[175] She was considered the foremost women's rights activist in the House, and she was looking for a big issue to take on herself.[176] In April of 1985, she sponsored the Parental and Disability Leave Act.[177] The bill provided for eighteen weeks of unpaid parental leave, maintenance of existing health benefits during the leave, and the creation of a commission to study the possibility of paid parental leave.[178] Less than two weeks later, the Ninth Circuit Court of Appeals handed down its decision in the *Cal Fed* appeal.[179] The decision brought publicity to the issue of family leave and kept the ball rolling on the federal push for parental leave.[180] While the 1985 bill turned out to conflict with already-existing labor laws, and defined disability in a manner with which disability rights activists disagreed, the Ninth Circuit decision focused enough attention on the issue to allow for revisions.[181] In March of 1986, a new bill addressing disability and labor law issues was once again proposed.[182] After positive votes in two committees, Congress was adjourned before final consideration.[183]

"A WINDFALL FOR THE SUPPORTERS OF THE FAMILY AND MEDICAL LEAVE ACT"[184]

After a long battle, Lillian Garland's right to pregnancy leave was upheld and California's Pregnancy Disability Leave Law was left intact. However, the debate over how to handle leave was not over. A few days after the *Cal*

Development and Social Policy both testified before the House Select Committee on Children, Youth and Families in 1984. *Id.* at 26–28.

175 *Id.* at 26; RADIGAN, *supra* note 17, at 13.

176 *Id.*

177 RADIGAN, *supra* note 17, at 15.

178 THE FAMILY AND MEDICAL LEAVE ACT 4–5 (Michael J. Ossip & Robert M. Hale et al., eds., 2006).

179 California Federal Sav. & Loan Ass'n v. Guerra, 758 F.2d 390 (9th Cir. 1985).

180 RADIGAN, *supra* note 17, at 15.

181 *Id.* at 16.

182 *Id.* at 16–17.

183 THE FAMILY AND MEDICAL LEAVE ACT, *supra* note 178, at 8.

184 RADIGAN, *supra* note 17, at 23 (describing the effect of the Supreme Court's *Cal Fed* decision).

Fed decision was published, the *New York Times* published its own article explaining the decision and proposing an alternative: Schroeder's Parental and Medical Leave Act.[185] Not only did the article display fear that the *Cal Fed* decision would result in companies' refusing to hire women, it also claimed that the proposed act would result in the women's movement doing what it always did: benefiting men by promoting health, job, and family stability.[186] Articles like this one, highlighting leave as it was presented to the Supreme Court, put the issue in the spotlight and brought new energy to those still working on a national leave law.[187]

When the parental leave bill was once again brought before Congress in 1987, many of the same reasons California considered in passing its Pregnancy Disability Leave Law were raised. For example, Howard Berman, Donna Lenhoff, and Karen Nussbaum, then executive director of 9 to 5, all testified about the large percentage of women in the workforce.[188] Nussbaum also emphasized the difficulty of raising a family on one income, which had been a concern in the 1970s as well.[189] However, many of those who testified in 1987 also stressed the bill's modernity in approach — it supported leave for *both* fathers *and* mothers, spotlighting the differences between the California law and the push for a national law.[190]

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185 *Pregnancy Leave for Women, and Men*, N.Y. Times, Jan. 18, 1987, at E28.

186 *Id.*

187 Elving, *supra* note 9, at 80.

188 Statement of Howard Berman, *supra* note 106; *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Donna Lenhoff, Women's Legal Defense Fund); *The Family and Medical Leave Act of 1987: Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Karen Nussbaum, Executive Director, 9 to 5 National Association of Working Women).

189 Statement of Karen Nussbaum, *supra* note 188.

190 *See* Statement of Howard Berman, *supra* note 106; statement of Donna Lenhoff, *supra* note 173 ("[I]t makes leaves available to men and women for . . . a variety of their family needs."); *Hearing on H.R. 925 Before the Subcomm. on Labor-Management Relations and the Subcomm. on Labor Standards of the H. Comm. on Education and Labor*, 100th Cong. 2 (1987) (statement of Eleanor Smeal, President, National Organization for Women) ("This bill is a modern bill . . . that takes into consideration our modern living experiences . . . . This bill goes well beyond maternity leave.")

From this point forward, the fears that national women's activists had held earlier about the conservative politics seemed to ring dangerously true.[191] The parental leave bill suffered a series of delays attributed to its lack of support from conservative politicians. When it was proposed again in 1988, it was defeated by a filibuster.[192] In 1989, after passing through both the House of Representatives and the Senate, the bill was vetoed by Republican President George H.W. Bush in his first year in office.[193] It came even closer to passage in 1991 when, despite President Bush's second veto, the Senate overrode the decision.[194] Unfortunately, the House failed to do the same, and the bill went no further that year.[195] Finally, in 1993 under a new Democratic President, Bill Clinton, and a Democratic-majority Congress, the bill passed and was signed into law as the Family and Medical Leave Act.[196]

The Family and Medical Leave Act provides for twelve weeks of unpaid leave for mothers and fathers in order to take care of children and other close relatives.[197] While the process for passing such a bill was long and difficult, national women's activists achieved the result they were in favor of — a gender-neutral protection that would allow women, and men as well, to take the leave necessary to care for their families.

Probably more than any other women's rights issue in the U.S., pregnancy and parental leave has shown the clear division in ideology that has split American feminists for decades. The "shock and anger" that *Geduldig* and *Gilbert* produced could have been an opportunity for feminists in the U.S. to unite and fight discrimination together. Instead, the pregnancy issue became the centerpiece of the ideological and legal debate, and the conflict among American women's rights activists was openly aired to the public. Despite the conspicuous controversy, both California's Pregnancy Disability Leave Law and the federal Family and Medical Leave Act remain in place. Perhaps that is the testament that both approaches really do have value.

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191 *See, supra* page 25.

192 The Family and Medical Leave Act, *supra* note 178, at 11.

193 *Id.* at 13.

194 *Id.* at 14.

195 *Id.*

196 *Id.*

197 29 U.S.C.S. § 2612 (1993).