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"A Robbery to the Wife":
Culture, Gender and Marital Property in
California Law and Politics, 1850–1890

by

Donna Clare Schuele

B.A. (Case Western Reserve University) 1979
J.D. (University of California, Berkeley) 1985

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requirements for the degree Doctor of
Doctor of Philosophy
in
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Committee in charge:

Professor Harry N. Scheiber, Chair
Professor Franklin Zimring
Professor Marianne Constable

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The dissertation of Donna Clare Schuele is approved:

Harry H. Scheiber 5/10/99
Chair Date

Frank Z... 5/14/99
Date

M. Cole 5/17/99
Date

University of California, Berkeley

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CHAPTER ONE

Introduction: Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California

American marital property law has always been the province of the individual states. During the nineteenth century, for a variety of social, political and economic reasons, this became a particularly volatile area of the law across the nation, with no two jurisdictions treating the subject identically. Nevertheless, marital property schemes did divide into two general categories: those based in the common law, and those situated within the French and Spanish civil law tradition (the community property system). In general, these schemes separated geographically: states east of the Mississippi were common-law jurisdictions, while community property states and territories were located west of the Mississippi.¹

Mostly in connection with the increased attention to women's history over the past two decades, American legal historians have undertaken studies of the development and changes in nineteenth-century marital property law, thereby elucidating transformations in women's legal status as well as changes in domestic

¹The following states and territories operated under the community property system during the nineteenth century: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas and Washington. William Q. deFuniak, Principles of Community Property 72 (1943).

relations. Such studies have properly focused on individual jurisdictions, but by and large, it has been the Eastern common law states that have garnered scholars' interest.² And, when historians have sought to generalize from their individual case studies, community property states and territories have been marginalized or ignored. In addition, the cultural roots of this "different" system, primarily Spanish, has often exercised no more force on their analysis than a footnote.³

²One of the earliest studies was Elizabeth Bowles Warbasse, "The Changing Legal Rights of Married Women, 1800-1862" (Ph.D. diss., Radcliffe College, 1960). The subject finally came into its own in the 1980s, beginning with Peggy Rabkin, Fathers to Daughters: The Legal Foundations of Female Emancipation (1980) (focusing on New York through 1860); Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982) (focusing on New York through 1860); Marylynn Salmon, Women and the Law of Property in Early America (1986) (focusing on the colonies and original states, from 1750 to 1830); Richard Chused, "Married Women's Property Law: 1800-1850," 71 Georgetown Law Journal 1359 (1983) (surveying legal doctrine across jurisdictions). Chused also undertook a brief but focused study of marital property law in Oregon. "Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures," 29 American Journal of Legal History 3 (1985). Undoubtedly due to the heavy reliance on Warbasse's work by these and other scholars, the dissertation was finally published in 1987. Elizabeth Bowles Warbasse, The Changing Legal Rights of Married Women, 1800-1861 (1987).

By the 1990s, this body of scholarship matured to the point of permitting both survey and revision. See Joan Hoff, Law, Gender, and Injustice: A Legal History of U.S. Women, 82-94, 106-116, 121-135 (1991); Carole Shammas, "Re-Assessing the Married Women's Property Acts," 6 Journal of Women's History 9 (1994).

³Even when a community property state has been the subject of study, the focus has for the most part remained on the common law, with historians seeking to explain the development of marital property law in that jurisdiction as a product of common law influence. Kathleen E. Lazarou undertook a study of marital property law in Texas from 1840-1913, primarily focusing on doctrine in order to discern the connection between Texas developments and the national experience. Consequently, she did not search for potential regional differences, both in legal and political cultures, which may have been unique to Texas. Rather, she undertook her study from a common law perspective with the community property system being viewed as deviant. Kathleen E. Lazarou, Concealed Under Petticoats: Married Women's Property and the Law of Texas, 1840-1913 (1986).

Susan Westerberg Prager's study of California was also focused on the common law manifestations in that state's marital property system, but, unlike Lazarou, she adopted a critical stance towards these as legally indefensible deviations. She concluded that California's system came to operate no differently than a common-law marital property regime modified by Married Woman's Property Acts (MWPAs). However, in her greater attention to the separate property aspect of California's system, Prager failed to appreciate that, although the term "separate property" had meaning in both marital property systems, it did not hold the same meaning in both.

Yet, if for no other reason than the fact that a different scheme was in place, there is room to suspect that the evolution of marital property law in the West was distinctive enough to warrant separate study today.⁴ Moreover, historians of women have demonstrated the distinctive experience of women on the western frontier. Differing social, economic and political experience, combined with a different set of laws, lead one to question the validity of generalizations about the development of marital property law and women's changing legal status in the nineteenth century, from studies based only on the record in common law jurisdictions.⁵

Thus, she underappreciated the significance of these deviations. Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975" 24 UCLA Law Review 1 (1976). Moreover, Prager's work was somewhat handicapped by the fact that it was undertaken in advance of the above-cited works on the common law jurisdictions.

Other recent work, concluding that the retention or adoption of community property systems in the American West can be traced to the growing interest in reforming married women's property rights in the common law states, again shortchanges the distinctiveness of the community property system and the potential it might have held for increasing women's legal status. Ray August, "The Spread of Community-Property Law to the Far West," 3 Western Legal History 35 (1990); Carol Shammas, Marylynn Salmon and Michael Dahlin, Inheritance in America from Colonial Times to the Present (1987). Finally, Shammas' reassessment of the effect and import of the MWPA's views community property law as merely another flavor of this statutory reform, ignoring altogether the Spanish/Mexican lineage. Shammas at 9,94.

One modern scholar, Joseph W. McKnight, has studied the community property system on its own terms, focusing on Texas. McKnight has published extensively on the Spanish/Mexican roots of the law as well as its development in Texas. See e.g., "Texas Community Property Law - Its Course of Development and Reform," 8 California Western Law Review 117 (1971); Texas Matrimonial Property Law (1983) (with William A. Reppy, Jr.); "Texas Community Property Law: Conservative Attitudes, Reluctant Changes," 56 Law and Contemporary Problems 71 (1993). However, McKnight's work tends more towards traditional doctrinal history, rather than socio-legal history, making it less accessible to historians of women.

⁴Mari Matsuda, "The West and the Legal Status of Women: Explanations of Frontier Feminism," 24 Journal of the West 47 (1985). See also, Gloria Ricci Lothrop, "Rancheras and the Land: Women and Property Rights in Hispanic California," 76 Southern California Quarterly 59, 79 (1994).

⁵See Joan M. Jensen and Darlis A. Miller, "The Gentle Tamers Revisited: New Approaches to the History of Women in the American West," 49 Pacific Historical Review 173 (1980); Virginia Scharff, "Else Surely We Shall All Hang Separately: The Politics of Western Women's History," 61 Pacific Historical Review 535 (1992).

Theoretically, the Eastern trend towards the adoption of Married Woman's Property Acts (MWPAs), whether to provide family protection or to achieve female independence, should have had no effect on community property jurisdictions. In its purest form, community property law was nearly gender-neutral, treating men and women alike. Moreover, because wives retained their legal identity, principles of coverture had no place. Nevertheless, MWPAs swept over the West as well in the nineteenth century. Yet, it would be unwarranted to conclude from this that the community property states' experience with marital property reform was identical to that of the eastern common law states. Thus, those studies of community property jurisdictions, which highlight continuities and commonalities with common law jurisdictions, simply are not framed in a way to demonstrate the true regionality of nineteenth-century marital property developments. Moreover, most historians have failed to discuss the problems which arose when a community property jurisdiction would enact MWPAs growing out of the common law system. Thus, throughout these analyses, that which is truly distinct about these "different" systems, the category of common property, implying joint property ownership between husband and wife, has been swept aside, in favor of focusing on the similarities between the treatment of the "wife's separate property" in the common law and the "separate property of the wife" in the civil law. The promise that the legal entity, common property, held for female equality likewise has been lost.

A full understanding of any jurisdiction's marital property law can be achieved only by situating it within American legal, political, economic and social history, as was ably recognized by Norma Basch in her path-breaking study, In the Eyes of the Law. While Basch described the doctrinal changes in mid-nineteenth century New York marital property law, focusing on early instances of the modification of common law doctrine through specific legislative enactments, her study reached further. She incorporated into her analysis the tale of the leadership roles that women, such as Elizabeth Cady Stanton, played in the political maneuverings which produced these reforms.⁶ Previous accounts of women as political actors in the nineteenth century, which had focused on the suffrage movement, tended to show women as outsiders agitating for an avenue into the male political arena.⁷ Basch's work reminded us that the woman suffrage movement was born of a broader-based women's rights movement, in which increased property rights for married women were an important part of the agenda, as evidenced in the 1848 Seneca Falls Declaration of Sentiments. In

⁶Basch at ch. 6 passim.

⁷Some historians, notably Ellen Carol DuBois, acknowledged the tremendous value of the abolitionist experience for many suffragists, yet DuBois focused on the tactical adjustments this experience required of female suffrage workers as they became political actors in their own right later in the century. See Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869 22, 182-184 (1978). But see Paula Baker, "The Domestication of Politics: Women and American Political Society, 1780-1920," 89 American Historical Review 620 (1984), arguing that reform-minded women created their own political culture prior to suffrage, and worked separately from men.

addition, Basch portrayed women in the pre-suffrage era as moving successfully within traditional politics to bring about self-interested reform.⁸

This study attempts to correct the overwhelming preoccupation with eastern common law states in writings on the history of nineteenth-century marital property law in America. At the same time (and following Basch's lead) it also examines the role of women's rights activists within the political system as they worked to effect an improvement in and equalization of women's legal status, within and outside of the family. In particular, it hones in on middle-class Anglo women residing in the young State of California during the 1870s and 1880s, and their efforts to alter and reform community property, probate, and divorce laws that had been instituted just twenty years before with the establishment of the state government.

However, of necessity the story reaches back further, because, unlike some other western U.S. jurisdictions, California did not simply "become" a community property state overnight. Rather, the history of the region prior to statehood together with the formation of California's state government reveals a complex process. In some respects, California appeared to be retaining the community property system, which had been introduced by Spain and continued after Mexico

⁸More recent studies of women and politics in the nineteenth century are beginning to challenge both the notion that women operated nearly entirely outside of the male world of party politics, and the notion that the suffrage movement was distinctive in drawing women into this world. See e.g., Rebecca Edwards, Angels in the Machinery: Gender in American Party Politics from the Civil War to the Progressive Era (1997); Elizabeth R. Varon, "Tippecanoe and the Ladies, Too: White Women and Party Politics in Antebellum Virginia," 82 Journal of American History 494 (1995).

gained its independence; alternatively, however, the state seemed to be newly adopting its own sort of community property system. This issue was not merely academic, especially to the judiciary in the period following achievement of statehood. How and when California acquired its marital property system had significant consequences for initial statutory interpretation and assessments of the exercise of legislative power, especially during the formative years of the 1850s and 1860s. As a result of actions taken by the legislature and rulings handed down by the California Supreme Court, the law was made, upheld and interpreted in such a way that the State of California in the nineteenth century failed to operate within a true community property framework.⁹

Even if one subscribes to the notion that California created, rather than adopted, its marital property system, it did not do so out of whole cloth. Meanwhile, a statutory system can never be complete - there will always be gaps which will have to be filled in, and this was particularly true for the State of California's marital property system in its earliest years. The legislature and the political process cannot always be relied on to anticipate and fill in these gaps. The judiciary thus plays a vital role. This raises the question of where the

⁹deFuniak noted that commentators before him often mistakenly believed that California had "adopted" the community property system, in the sense that they believed that it was the acts of the first legislature that gave force to the system. deFuniak pointed out that, both theoretically, under international law, and actually, based on the actions of United States military governors, the community property system continued in force from the Mexican period to the time of statehood. "Thus, even the absence of any action by the legislature would not have affected the existence of the community property system Legislative action could only have the effect, so far as permitted by constitutional limitations, of defining certain provisions of the existing community property system." deFuniak at 110 n. 33. Notwithstanding the force of this reasoning, it does not describe the consciousness of participants in nineteenth-century law and politics.

judiciary should search for substantive law to fill in these gaps. Even if the California constitution did not require a continuance of the system in place during the territorial stage, there were many arguments that could be made for seeking substantive law in the old Spanish/Mexican system. Little else would make sense. As a result, this dissertation begins with a consideration of the cultural roots of the State of California's marital property system.

During the Spanish and Mexican periods, the territory of Alta California was governed, at least formally, by a civil law regime which included the community property system.¹⁰ Marriage was said to create a partnership in which economic benefits and burdens were shared equally by the spouses, who retained their individual identities under the law.¹¹ This system acknowledged economically the wife's contribution to the marriage, valuing her contribution no differently than that of the husband.¹² For the vast majority of marriages, the community property system probably mattered most as an instrument of succession, and there is no evidence that the law failed to achieve its purpose of providing for the surviving spouse, in this agriculturally-based society.

Although California became part of the United States in 1846 under the terms of the Treaty of Guadalupe Hidalgo, initially the indigenous Spanish/Mexican legal system was left in place. However, many Americans,

¹⁰deFuniak at 40. See Chapter Two for more extensive discussion.

¹¹Id. at 6.

¹²Id. at 167.

especially late-arriving gold seekers, were displeased with this arrangement, and successfully pressed for the calling of a state constitutional convention in 1849.¹³ Following the lead of the State of Texas,¹⁴ California made marital property rights a part of its organic law, and, again as with Texas, the Constitutional provision recognized the category of common property, but, as well, also referred to the wife's separate property. Even before Anglo women were demographically significant in California, their presence was felt in the constitutional convention, which, through the considerations of marital property law, provided a forum for debating crucial questions of family protection and individual female independence.¹⁵ Meanwhile, the convention left it for the first legislature to determine the state's jurisprudential basis: either common law or civil law. The legislature adopted the common law but nevertheless enacted a marital property scheme based on the categories of "common" and "separate" property. In doing so, the legislature may have failed to appreciate the difficulty inherent in merging just one portion of the civil law into common law jurisprudence.

While seemingly unrelated, the issues of legal doctrine and jurisprudence, on the one hand, and the role of women in society, on the other, were significantly

¹³Leonard Pitt, Decline of the Californios: A Social History of the Spanish-Speaking Californians, 1846-1890 35-39, 42, 52 (1966).

¹⁴Lazarou at 64.

¹⁵While native-born California women were not ignored in the 1849 constitutional convention debates on marital property law, monopolization of the debate by Anglo delegates marginalized the lifestyles and concerns of native women and families. J. Ross Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849 257-69 (1850).

affected by the cultural upheaval occurring in California, as the Californio way of life was quickly giving way to Anglo dominance. Thus, the new state's legal and political systems were becoming increasingly shaped by Anglo-Americans steeped in common law culture, while at the same time, woman's legal and political status was coming under critical scrutiny not just in California but throughout the United States.

Over the next two decades, notwithstanding California's ostensible commitment to a community property regime, legislative and judicial machinations resulted in a marital property law that functioned increasingly like a common law scheme modified by Married Woman's Property Acts.¹⁶ During the marriage, a husband's reach over the community property became indistinguishable from his rights to his separate property, and his reach over the wife's separate property was nearly as extensive. Meanwhile, on her husband's death, a widow in California was treated similarly to a widow living in the East.¹⁷ As a result, it could be said that California's law not only failed to deliver what it purported to guarantee in the way of rights to married women, but in some ways actually offered less than a modified common law system would have provided. Would this arrangement be protested, and if so, by whom, on what basis, and to what end?

¹⁶Prager at 46.

¹⁷Id. at 46-47; deFuniak at 7-11.

The reaction of Anglo California women¹⁸ to the state's marital property scheme would have depended first on their level of legal consciousness. Many of them, having reached adulthood in the East, might not have realized that California's marital property law supposedly differed from that in much of the rest of the nation; moreover, the vast majority of wives would have had little opportunity during marriage to experience the workings of the marital property law in any jurisdiction.¹⁹ However, by 1870, a critical mass of women had become aware not only that California operated under the community property scheme, but that the scheme had been skewed in ways unfair to them. This awareness coincided with and – was advanced by – the formation of an organized woman suffrage movement, which began in the summer of 1869, and this movement

¹⁸Native-born Californio women's voices were altogether absent from the movement for marital property law reform during the period of this study.

¹⁹Examining a common law-based marital property scheme, Basch noted the difficulty with assessing lay understanding of common law principles affecting the marital relationship, but did find "considerable evidence . . . that the parroting of common law classifications and designations for married women went beyond legal abridgments to popular books and magazines." Basch at 67.

In a related vein, Ronald Schaffer raises the issue of the development of political consciousness in the California woman suffrage movement in the early twentieth century. Ronald Schaffer, "The Problem of Consciousness in the Woman Suffrage Movement: A California Perspective," 45 *Pacific Historical Review* 469 (1976). Schaffer implies that historians have paid insufficient attention to the issue of consciousness in studying the early woman's rights movement. *Id.* at 470 n.2.

It is difficult to assess Californio wives' consciousness regarding marital property law in the new state. The few marital property cases which came to the California Supreme Court during the first two decades of statehood in which the parties were Californio involved situations where the wife had predeceased the husband. An examination of trial court records might be the only way to determine whether these women believed that the Spanish/Mexican law in all its particulars was retained.

provided the locus for agitating for marital property reform.²⁰ In addition, California's suffragists may have had direct experience with the workings of marital property law by then. Many of the activists had experienced disruption in their marital lives in the form of widowhood, divorce or desertion, and still others had been affected merely by the unstable economy of California's frontier. As a result, many activists had had to work to support themselves and their families. Thus, these women had the opportunity to come to know all too well the inequalities built into marital property law.

Such experiences with the law may have been personal, but the women's reaction to them was organized and political. Inasmuch as California's marital property law was, from the start, firmly based in statute, born of the legislative process, rather than (as was the case in the East) being the product of judicially determined common law, the connection between the political process and the legal process was far clearer in California than in the East. Moreover, this situation allowed women to see a connection between political equality and legal equality, resulting in a unified program of advocacy for suffrage and marital property rights. Although lack of legal training at first hindered the women from personally agitating for specific changes in the property laws, they were quickly

²⁰For discussions of the woman suffrage movement in California during the 1870s, see Elizabeth Cady Stanton, Susan B. Anthony, and Matilda J. Gage, eds., 3 History of Woman Suffrage 740-746 (1881); Reda Davis, Woman's Republic: The Life of Marietta Stow, Co-operator 201-232 (1969); Robert J. Chandler, "In the Van: Spiritualists as Catalysts for the California Women's Suffrage Movement," 73 California History 189 (1994); Roger Levenson, Women in Printing: Northern California, 1857-1890 (1994), esp. ch. 6.

assisted by some dedicated male lawyers, judges, and legislators.²¹ In addition, these women were probably familiar with the philosophy of the marital community, embodying as it did notions of joint property ownership. Legal historian Reva Siegel has demonstrated, for example, that joint property rights had been advocated, albeit unsuccessfully, within the women's rights movement back East for at least the previous twenty years.²²

Aware of the laws, Anglo women activists might nevertheless have lobbied for elimination of the warped community property system in favor of a system that recognized property rights simply in the individual husband and wife - especially considering their Eastern, common law roots. However, the concept of common property appeared to hold particular promise for women's empowerment and equality, and this promise would certainly be compromised in a switch to a reformed common law system. Moreover, by the 1870s California's marital property regime, with its Spanish/Mexican roots, not only nicely fit with the joint property rhetoric which had been developing in the woman's rights movement for

²¹Not too many years later, two women who were mainstays in California's woman's rights movement, Clara Shortridge Foltz and Laura deForce Gordon, fought for the right of women to be admitted to the bar, and gained admission themselves after a period of private study. Barbara Allen Babcock, "Clara Shortridge Foltz: Constitution-Maker," 66 Indiana Law Journal 849 (1991); Barbara Allen Babcock "Clara Shortridge Foltz: 'First Woman'," 30 Arizona Law Review 673 (1988). Babcock connects the relative ease with which women were admitted to the practice of law in the West with the fact that woman suffrage was first adopted there. Barbara Allen Babcock, "Western Women Lawyers," 45 Stanford Law Review 2181 (1993).

²²Siegel, "Home as Work: The First Woman's Claims Concerning Wives' Household Labor, 1850-1880," 103 Yale Law Journal 1073, 1112-1146 (1994).

about twenty years, it also resonated well with important aspects of both legal and popular American culture of the Victorian era.

Two aspects of Anglo-American legal culture during the last third of the nineteenth century could have served to sensitize Californians, and especially lawmakers, to the inconsistencies and contradictions which had developed in that state's version of the community property system. First was the increasing characterization of the common law by courts and legalists as a "science" striving for internal consistency.²³ Related to this was the codification movement, with its greatest successes in the West, particularly in California beginning with the adoption of the Civil Code in 1872 (during a legislative session which also included consideration of community property law reform).²⁴ According to legal historian Lawrence Friedman, law reformers of the time operated under the theory that the legal system is at its best when it "conforms to the ideal of legal rationality - the legal order which is most clear, orderly, systematic (in its formal parts), which has the most structural beauty."²⁵ Conversely, then, a legal system riddled with inconsistencies and contradictions would have been vulnerable to the charge that it

²³This view, which, according to Lawrence M. Friedman was "in the air" beginning in the late 1860s, can be connected to the ideas of Christopher Columbus Langdell, whose educational reforms at Harvard Law School most notably treated common law as a science. History of American Law 405 (2nd ed. 1985).

²⁴Id. at 394-95, 405-406. Friedman specifically mentions the civil law tradition of the western states as an explanatory factor for this success. For a discussion of the roots of the codification movement, and its connection to marital property reform, see Peggy A. Rabkin, "The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and its Contribution to the Passage of the Early Married Women's Property Acts," 24 Buffalo Law Review 683 (1974).

²⁵Friedman at 407.

lacked legitimacy. Thus, for example, in support of on-going efforts to equalize the common property succession law during the period, the anti-suffrage San Francisco Chronicle reasoned that "[t]he community property is, in theory, the result of the joint efforts of the wedded pair." The existing law was, therefore, "partial and unjust." Accordingly, the newspaper felt that those legislators who would oppose the equalization of marital property rights bore the burden of explaining why they would support a system inconsistent with its theoretical basis.²⁶

Meanwhile, by this time the ideal of companionate marriage had become firmly fixed in American culture, and, as historian Karen Lystra has argued, it "provided a powerful counterbalance to male dominance in nineteenth-century male-female relationships."²⁷ Consistent with this ideal, a partnership vision of marriage which included joint ownership of property acquired during the relationship had been promoted by the Eastern-based women's rights movement since its reception. According to Siegel, who has documented the development of this claim, what antebellum advocates sought was recognition of the wife's concrete contribution to the family's well-being, which could be accomplished

²⁶"Husband and Wife in California," Woman's Journal, March 18, 1876, at 91, reprinting article from the San Francisco Chronicle.

²⁷Karen Lystra, Searching the Heart: Women, Men, and Romantic Love in Nineteenth-Century America 233 (1989). See also Carl N. Degler, At Odds: Women and the Family in America from the Revolution to the Present 50 (1980).

through the creation of legal right to share in the wealth resulting from that contribution.²⁸

When suffrage issues moved to the foreground of the woman's rights movement after the Civil War, however, joint property claims took on a decidedly different cast. According to Siegel, now "joint property conversations began to revolve around questions of social roles rather than legal rights. . . . [T]he joint property concept appeared as a species of marital therapy, rather than a claim of right."²⁹ However, the antebellum approach to joint property appeared to survive on the western frontier, with the emphasis remaining on the wife's actual contribution to the maintenance of the family. No doubt the fact that the community property system formed a part of the legal framework of California, and other Western and Gulf State jurisdictions, helped keep the stronger, rights-based rhetoric alive in the West.³⁰

In fact, California farm wives provide an interesting example of the vitality of the argument for valuing wives' actual contributions to the marriage. The California Grange, which developed at the same time as the woman's rights movement in the 1870s, decreased the isolation of farm wives and was ostensibly dedicated to equality of the sexes in recognition of the farm wife's necessary and

²⁸Siegel at 1112-1135.

²⁹Id. at 1166.

³⁰Id. at 1161, 1164-1165. However, with her focus on Eastern women, Seigel's work does not give proper attention to the fact that the joint property claims of women in community property jurisdictions were not nearly so radical.

significant contribution to the family economy. Thus, the Grange provided at once an explicit gender consciousness and something of a feminist consciousness.³¹ Evidencing this awareness, the organization's newspaper, the California Patron, contained a women's section called "The Matron", which published contributions regularly from a member in San Diego, Flora M. Kimball, who was also a leading suffragist. In September, 1878, she offered this small fable. A candidate for Congress had given a speech condemning monopolies for robbing citizens of their "inherent rights of equality." Later, when his wife inquired whether he meant also equality for women, he responded in the negative, asserting that, instead, women were "queen of the domestic realm". Whereupon the wife requested a say in architectural plans for a new house which her husband had had drawn up. He refused, on the basis that he had already paid for the plans. But the wife argued that that money "'was what they call common property, and I don't see why I shouldn't be suited too.'" In addition, the wife threatened to make a will and leave everything to their children. Her husband replied, "'Maria, dear - impossible! A married woman cannot make a will. The common property belongs to the husband, you know.' 'But isn't that monopoly, Enoch?'"³²

These forces – the characterization of law as a science and the related codification movement, as well as the rise of the companionate marriage along

³¹Donald B. Marti, Women of the Grange: Mutuality and Sisterhood in Rural America, 1866-1920 (1991).

³²California Patron, September 7, 1878, at 2. Not only was Mrs. Kimball educating farm wives on the concept of common property, but was also pointing out the theoretical inconsistency in women's lack of ownership and control over this property.

with the women's rights movement's call for legal recognition of joint property ownership – converged in the 1870s to cause women's rights activists in California to focus on reforming the state's marital property regime only twenty years after it was enacted. These women sought to secure equal, rather than special, rights for women, in both the common and separate property, through gender-neutral statutes which treated husbands and wives identically. In doing so, they placed marital property reform on a par with political reform. The marital property system in California clearly treated women differently, and more poorly, than men; the system was statutory in origin, and thus the legislature was clearly the appropriate place for seeking reform; and the system, with its category of common property, held radical promise for equality between the sexes, if only theoretical consistency could be imposed.

In some ways, the property rights agenda was less threatening than the political rights agenda: no one could deny that the legislature held the power to reform the law and thereby decree equal property rights. Meanwhile, the authority of the legislature to grant equal political rights remained a contested issue throughout the nineteenth century, as the overwhelming weight of opinion regarded suffrage as a matter for Constitutional amendment only. However, the reform of property rights was potentially more far-reaching and hence more radical than the provision of voting rights. While there was no guarantee that a statute would gain favorable judicial interpretation (and indeed, the California Supreme Court's track record in this regard was quite dismal), if the law were

changed to grant the spouses equal ownership rights in the common property after the death of one, this could translate quite directly into real power for women, power backed by the force of the legal system. Meanwhile, if women were granted the right to vote, either by statute or amendment of the organic law, nothing would require women to vote, and moreover, it could never be clear whether women's vote would translate into actual political power to enable women to seek increased status.

Despite the rather astounding persistence of women activists over so many years, unfortunately theirs is not a story of great success. California never strenuously resisted the national, common law-based trend of carving out special, individual property rights for married women, and by 1890 California's scheme operated little differently than a modified common law system.³³ Instead, when the legislature was in the mood to provide enhanced property rights to women, it did so almost exclusively in the realm of separate property. And when the California Supreme Court was willing to rule in favor of women (but especially when it was not), the Court continually looked to the common law and the doctrine of coverture to decide cases, even those involving common property. Moreover, the enhancement of martial property rights was often somewhat illusory, providing more family protection than female autonomy.³⁴

³³Prager at 46.

³⁴Id. at 47; Siegel at 1179.

But the agitation for marital property rights in California in the 1870s and 1880s was unrelenting, and was placed upon a different basis than that in the East. Western reformers were able to begin from the point that marriage was a partnership, not simply because they believed it to be so, but because the marital property system chosen by male lawmakers was fundamentally based on that notion.³⁵ While those who gathered at the California constitutional convention in 1849 may have intended at best to enact a marital property system that would protect wives and families from the fluctuations in the state's economy, they left women with a powerful tool in the form of the legally recognized concept of common property. California's marital property law may have quickly come to function like a modified common law system, nevertheless the nominal designation of common property provided a politically valuable rhetorical tool which Eastern woman's rights agitators lacked. Siegel has noted of advocates of joint property rights, "In their view, marital property reform was not about protecting economically dependent women from men, but instead was about empowering economically productive women to participate equally with men in managing assets both had helped to accumulate."³⁶ The recognition of joint property in California's law thus gave woman's rights activists in the Golden State a critical

³⁵Meanwhile, in attempting to convince their jurisdictions to enact marital property laws based on the notion of joint property ownership, Eastern women necessarily sought not just a wholesale overthrow of legal doctrine, but also a redefinition of the relationship of the wife to the state, a far more radical proposal. For a consideration of the connection between marriage and women's citizenship, see Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830-1934," 103 American Historical Review 1440 (1998).

³⁶Siegel at 1116.

advantage over their Eastern sisters. Eastern women had, by the 1870s, focused their efforts primarily on seeking the ballot, as well as on gaining gender-specific marital property rights. By contrast, in California joint property advocacy remained a politically potent force for much longer. Most importantly, this meant that the focus remained on reforming marital property law so as to empower women, rather than merely to protect them. In the end, the actual radical nature of this program probably best explains its lack of success during this era.

CHAPTER TWO

The Roots and Development of Marital Property Law in California, 1820-1870

Marital Property Law in the Spanish-Mexican Legal System: Doctrine and Practice

As David Langum notes in his exploratory essay, "The Legal System of Spanish California," there are significant gaps in our knowledge about the legal system which operated in Alta California during the time it formed part of the Mexican territory of Spain, from 1769 to 1821.¹ More is known about the source and substance of legal doctrine, given that legal authority was derived from the Spanish system, based in the tradition of the civil law.² Spanish holdings in America (the "Indies") were under the exclusive jurisdiction of the Crown, which

¹David Langum, "The Legal System of Spanish California," 7 Western Legal History 1 (1994) [hereinafter, Langum, "Legal System"]. Other works which have examined the legal system in place at this time include Iris Engstrand, "The Legal Heritage of Spanish California," 75 Southern California Quarterly 205 (1993); Theodore Grivas, "Alcalde Rule: The Nature of Local Government in Spanish and Mexican California," 40 California Historical Society Quarterly 12 (1961), and Francis F. Guest, O.F.M., "Municipal Government in Spanish California," 46 California Historical Society Quarterly 313 (1967). Other than Guest's work, these studies for the most part rely on doctrinal and anecdotal sources. A comprehensive primary source study relying on judicial documents has yet to be undertaken. Langum, "Legal System," at 2.

²See William Q. deFuniak, 1 Principles of Community Property 47-69 (1943) [hereinafter, deFuniak] for a concise summary of Spanish legal history through the early nineteenth century. A more extended treatment of Spanish doctrine can be found in John Thomas Vance, The Background of Hispanic-American Law: Legal Sources and Juridical Literature of Spain (1943).

meant that, technically, legal authority resided only in the King.³ The Crown promulgated laws specifically applicable to the Indies, including the Mexican territory, so that "only the laws set forth in the Laws of the Indies would apply in the Indies, except in matters for which provision had not been made, and in such cases the laws of the Kingdom of Castile were to be observed."⁴ In substance, the Laws of the Indies were "exclusively administrative and political in nature," highly detailed and "designed primarily for the attainment of political stability and royal control while the process of conversion and civilization of Indians was carried out."⁵ As a result, this code contained no "private" law, which for the purposes of this study meant that Spanish marital property law technically was in force in Alta California.⁶

However, there was little if any opportunity for that doctrine to be applied. Truly private landholding was insignificant, because the area was dominated by the military, which exercised a great deal of control as well over the civilian population, sparse as it was.⁷ Towns existed only to serve a military purpose, primarily to provide food for the presidio,⁸ which meant that land, and its use, was

³Engstrand at 207. Yet, "[l]egislation concerning America maintained the spirit and intent of the laws of Castile with the principles inherent therein influenced by the customs and traditions of the Iberian peninsula." *Id.* at 208.

⁴*Id.* at 209.

⁵*Id.* at 213.

⁶deFuniak at 67.

⁷Langum, "Legal System," at 3-4.

⁸Guest at 313.

too important to leave to private control. Initially, the military doled out land, farming implements and livestock to civilians, and the devolution of that land to the descendants of these civilians was highly regulated.⁹ Thus, rules regarding inheritance were included in these provisional laws, which were mostly of a "public" nature.¹⁰ There was no testamentary control over the lands doled out by the military. Rather, property was to be entailed in perpetuity upon descendants, and acreage could not be divided.¹¹

This structured system no doubt helped to prevent inheritance disputes, but when they did arise, their resolution was not left to ordinary channels. Usually, the legal system for civilians functioned through the authority of a local official, the *alcalde*,¹² and the *comisionado*, the governor's appointed military representative, who was charged with supervising municipal government.¹³ However, when it came to inheritance disputes, an "extraordinary procedure" was resorted to whereby a military officer, the commander of the *presidio* nearest to

⁹*Id.* at 307-310, 313-314, 325.

¹⁰Langum, "Legal System," at 5, 22.

¹¹Guest at 307.

¹²The plan had been for the military to appoint *alcaldes* initially, after which the townspeople could choose their own. However, poor choices leading to corruption forced the military to continue to exercise control over civilian government. *Id.* at 310-312.

¹³*Id.* at 313, 315-316, 318-320. Due to serious limitations placed on the *alcalde's* authority during this period, Grivas considered the *comisionado* to hold the "real authority in the town." Grivas at 12.

the relevant pueblo, would resolve the dispute,¹⁴ which is not surprising given the very public place land held in this society.

When Mexico won its independence from Spain in 1821, Alta California became a Mexican territory. While the formal substantive and procedural legal framework changed little from the Spanish period, law became more of a "living force" as a result of civilian colonization now released from military control.¹⁵ For one thing, a thoroughly civilian dispute resolution process had to be established. Procedures based on compromise and avoidance of litigation evolved, although the frontier environment prevented much formality from taking hold.¹⁶ These were nourished by the high degree of cultural, if not ethnic, homogeneity which existed into the 1840s.¹⁷ In modern language, Mexican dispute resolution involved "the application of a paternalistic process to heal the breach in a community caused by a dispute."¹⁸

¹⁴Langum, "Legal System," at 5, 22.

¹⁵David Langum, Law and Community of the Mexican California Frontier: Anglo-American Expatriates and the Clash of Legal Traditions, 1821-1846 33-45 (1987) [hereinafter, Langum, Law and Community].

¹⁶Id. at 131-132. The entrenchment of a dispute resolution system based on conciliatory procedures can actually be traced to "profound changes in Spanish law" which occurred in 1812. Langum, "Legal System," at 4. Langum notes that, although these reforms probably had little immediate impact in most of the Spanish borderlands and probably none in Alta California, "they would greatly influence the law of independent Mexico and its practice in Alta California." Id. at 4-5.

¹⁷The territory's population was ethnically diverse, being composed of Californios (native-born with Spanish blood), indigenous Indians and Americans and Europeans (overwhelmingly male). However, a single religion, Catholicism, united the region, and the Americans were highly assimilated. They Hispanicized their names, converted to Catholicism, and married Californio women. Langum, Law and Community, at 21, 232.

¹⁸Id. at 133.

With the elimination of the position of comisionado, alcaldes assumed a position of greater power in municipalities,¹⁹ and were most often responsible for driving this paternalistic process. Acting in their judicial capacity,²⁰ these magistrates conducted conciliation hearings based on oral complaints.²¹ There is some dispute among scholars today as to just how much the alcaldes availed themselves of written substantive law during this period. Some records contain cites to authority,²² although there was no professional bar in the territory and neither were alcaldes trained in the law.²³ Langum, who contends that little use

¹⁹Grivas at 12-13.

²⁰Alcaldes served executive, legislative and administrative, as well as judicial, functions. From an Anglo-American frame of reference, they could best be described as benevolent village elders, without formal law training. Langum, Laws and Community, at 33, 126. However, it was difficult for later-arriving Americans to understand or accept this lack of separation of powers. Grivas at 15.

²¹The conciliation hearing was the cornerstone of the Mexican civil dispute-resolution process. Each party was required to attend with his or her hombre bueno, a respected man from the community, and the process was recorded in the Book of Conciliations. Langum, Law and Community, at 97, 98. The hombres buenos, also without formal legal training, did not play the part of advocates or attorneys. Instead, in some ways they resembled today's special master, or even a jury; as their task was to recommend a just settlement to the alcalde, they appeared to function as a conduit for community input. Id. at 97.

²²According to Langum, who relied mostly on records from Monterey, appeals would be made to vaguely-defined "rights," and the justice actually dispensed "was largely of the curbstone variety." Id. at 97, 125-6. Taking issue with this conclusion, Miroslava Chavez, employing alcalde records from Los Angeles, did find evidence of reference to written legal authority. "'Pongo mi demanda': Challenging Patriarchy in Mexican Los Angeles," in Over the Edge: Mapping Western Experiences (Valerie Matsumoto and Blake Almendinger, eds.) 272, 274 (1999) [hereinafter Chavez, "Challenging Patriarchy"] Examining complaints brought by wives against errant husbands, Chavez found that alcaldes "familiarized themselves with the relevant codes on marriage and the family," derived from the Laws of the Indies as well as ordinances and degrees issued by the governors of Alta California. Id. at 274.

²³During the 1830s, a few trained and licensed Mexican lawyers lived in Alta California, but the government never took advantage of their training by appointing them to judicial office, so most returned to Mexico. Langum, Law and Community, at 45-46.

was made of legal doctrine,²⁴ nonetheless concluded that the decisions rendered by alcaldes were not capricious or nonsensical. Rather, because the alcaldes were so closely tied to the community, decisions which could have appeared to be exercises of individual discretion actually reflected community mores.²⁵

A judgment rendered by the alcalde became binding only if accepted by the parties. Decrees were often tailored to the defendant's ability to meet the terms, and were modifiable upon changed circumstances, which made compliance easy.²⁶ More importantly, however, enforcement of these mediated agreements was achieved, not through formal procedures (absent in this system), but rather, structurally, through the nature of both the legal system and the society in which it operated. A public conciliation process at work in a homogenous community meant that compliance could be gained without direct coercion.²⁷ According to Langum, "the Mexican California legal system reflected the values that history and

²⁴Langum argues that "Mexican statutes that described how the legal system ought to operate had little relationship to how it actually functioned in far-off California." David Langum, "Sin, Sex and Separation in Mexican California: Her Law of Domestic Relations," 5 The Californians 44, 50 (1987).

²⁵According to Langum, this "was the system's greatest merit." Langum, Law and Community, at 138.

²⁶Thus, it is not surprising that Langum found that 85% of cases he examined were disposed of through the conciliation process. Id. at 98-99. However, if one or the other or both parties refused to accept the recommended judgment, a lawsuit could be filed before a more senior, but still professionally untrained, judge in the community, where more formal procedures would be invoked. Id. at 46, 102-103.

²⁷Further, the ever-present sense of honor, "a precious value in the Hispanic scheme of things," kept parties to their word. Id. at 135-136. See also, Ramon A. Gutierrez, When Jesus Came, the Corn Mothers Went Away: Marriage, Sexuality, and Power in New Mexico, 1500-1846 (1991), esp. chs. 6 and 7.

culture had given to its people. Therefore, the Californios respected the legal system, and because of its perceived legitimacy, most Californios obeyed the system's decrees."²⁸

Another manifestation of Mexican independence, along with increased civilian population and decreased military presence, was the use now of marital property law to govern the property dealings of husbands and wives, which use became more visible over time. In accord with the civil law tradition, property was categorized and governed by the community property regime.²⁹ Under this system, marriage was said to create a partnership in which economic benefits and burdens were shared equally by the spouses, who retained their individual identities under the law.³⁰ Accordingly, what mattered in determining the rights

²⁸Langum, Law and Community, at 138.

²⁹deFuniak at 40. The community property system was derived from Germanic law, but early commentators, believing that the system had Roman roots, subsumed the Spanish marital property system under the rubric of civil law. Id. at 23-24. Later, in giving voice to Anglo-American lawmakers, I will sometimes speak of the Spanish marital property system as being part of the civil law.

³⁰deFuniak observed, "[t]his recognition of the wife as a person in her own right is one of the outstanding principles of the civil law and is one of those in which it diverges sharply from the common law." Id. at 6.

This treatise is a valuable resource for a cultural inquiry into the subject of California's marital property law. Its stated goal was to provide the bench and bar with information regarding the Spanish sources of community property law, on the basis that this formed the foundation of California's marital property law, which made it unique for its time (1943). Post-publication, deFuniak's assumption was met with skepticism, as judges and lawyers, according to deFuniak, even went so far as "to deny that the Spanish law and its principles have anything to do with the present day community property system." Id. (1948 Supplement) at 5. See e.g., Albert Levitt, The Law of Community Property in California: An Analysis of the Statutes iv (1950) (acknowledging deFuniak's work but noting that he was "intentionally avoid[ing]" any comparison with the law of Spain because he "believes that there is no historic or organic relation between the community property systems of any other State or Country. The so-called 'community property law' of California seems to be sui generis"). Compare Gordon Morris Bakken, "The Influence of the West in the Development of Law," 24 Journal of the West 66, 68 (1985) (asserting, 35 years later, that

of each spouse to property was the time, method and type of acquisition; title - always crucial under the common law - was not determinative.³¹ Common property consisted of "acquests and gains by the spouses during the marriage while they are living as husband and wife,"³² with each spouse holding equal ownership rights.³³ Thus, this system acknowledged economically the wife's contribution to the marriage, and valued it equally with the husband's contribution.³⁴ Anything

"the California Constitution of 1849 had maintained the community-property system derived from Spanish civil law") (emphasis added). Not surprising, deFuniak adopted a critical stance towards the Anglocentric attitudes of California judges and lawyers, trained in the common law, which he contended had led to the law's warped development. deFuniak at iv.

Meanwhile, this description of the community property system, in which the wife is treated equally with the husband, is not meant to imply somehow that Mexican society was free of gender discrimination or patriarchy. Rather, laws regulating family life were permeated with "the widely held tenet of paternal authority (*patria potestas*)." Chavez, "Challenging Patriarchy," at 274. Spanish law compilations dating back to the thirteenth century located familial authority exclusively in male heads of households, on the basis that this assured a well-ordered family and stable society. However, this authority was qualified by obligations enforceable by the community. Women, as members of the community, had the right to hold men responsible for familial neglect or for exceeding their power and authority. Id. at 275.

³¹deFuniak at 3. As deFuniak noted, "Indeed, the civil law generally has given primary consideration to the question of ownership, in contradistinction to the English common law which developed to such an extent the technical importance of title that it had to be offset by the development of equitable principles." Id. at 142.

³²Id. at 136-137.

³³Id. at 159.

³⁴Id. at 167. According to deFuniak, this position was easily justified even when the wife herself acquired no earnings or similar gains. Any acquisition made by the husband was made "at the expense of the community in that the [husband] is furthered therein . . . by the joint efforts of the [wife], which may consist . . . in maintaining the home and rearing the children, for that is a sharing of the burdens of the marital partnership and a contribution to the community effort." Id. at 146-147. For a more sustained treatment of the history of the idea of joint property ownership, particularly as part of the nineteenth-century women's rights movement, see Reva Siegel, "Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880," 103 Yale Law Journal 1073 (1994).

not part of the community was designated as separate property, leaving gifts, legacies and inheritances in this category.³⁵

While the husband alone was given management control of the common property during the marriage, he was required to operate within limits to protect the wife's ownership interest.³⁶ Yet, for the vast majority of marriages, the community property system probably mattered most as an instrument of succession.³⁷ Each spouse was entitled to make testamentary disposition of his or her respective properties, including a portion of his or her share of the common property.³⁸ Intestate succession also operated in a gender-neutral fashion to pass both common and separate property to the deceased's heirs.³⁹ Upon the death

³⁵deFuniak at 137, 136-137 n.4.

³⁶*Id.* at 284-285. This was the most significant gender-based rule in the system. However, according to deFuniak, "even during the marriage [the wife's] ownership [of the common property] was so full and complete that she might vigorously oppose and seek to correct any administration by the husband that was in fraud or prejudicial to her interest, and upon occasion the administration of the entire community property might be shifted to her." Actions "in fraud or prejudicial to her interest" included any acts of management "which deprived or tended to deprive her of the benefit and enjoyment of half the community property or to deprive her of such half without adequate consideration." *Id.* at 298-299.

³⁷*Id.* at 623-625. In Spanish and Mexican California, marriages ended legally only at death through annulment. Consistent with those countries' Catholic heritage, formal divorce was not available.

³⁸*Id.* at 554. However, Spanish law placed restrictions on the disposition of common property, such that four-fifths of the property had to descend to close blood relatives, if any. Although this restriction applied to limit bequests to spouses, the law made it clear that a bequest to the wife of common property in no way affected her ownership of the other half. *Id.* at 557-558.

³⁹*Id.* at 558-559. The spouse succeeded to the deceased's property only if there were no descendants, ascendants or collateral relatives. Lest this sound too harsh for the surviving spouse, the law provided that he or she have a usufructuary interest in the property inherited by the children, which was retained until death or remarriage. *Id.* at 560-561.

of one spouse, the surviving spouse was treated the same, whether husband or wife.⁴⁰

The regime appeared to operate successfully, there being no evidence that it failed to achieve its purpose of providing for the surviving spouse. In fact, although historians' work in this area remains suggestive, it was not uncommon for widows to amass large land holdings, which, through their active management, provided them with the independence to engage in their own business and commercial transactions.⁴¹ The system also operated smoothly, as little use of the

⁴⁰Id. at 554. On the other hand, traditional common law rules governing marital property and devise and descent were highly gendered. Once a woman married, her legal identity merged with that of her husband. He took ownership of any personal property she brought into the marriage, as well as any acquired thereafter, and gained management control of her real property. Thus, in order for the wife to gain ownership of assets from the marriage upon the husband's death, title to property would have to be transferred to her, under the guise of dower rights or by virtue of the terms of the husband's will. Dower rights were meant to protect a wife from the husband's inter vivos and testamentary caprices, but the extent of these rights did not depend on when the husband's property was acquired (before or after the marriage), or the length of the marriage. The status of wife, even for an instant, could give her significant rights in the property of an already-wealthy husband. In addition, under traditional common law, dower rights could not be defeated by a husband acting without the wife during the marriage. Moreover, some jurisdictions provided for private judicial examination of the wife in order to guarantee that any renunciation of dower rights was freely given. But dower rights did not restore property which a wife had brought to the marriage, nor were they nearly as generous or as autonomous as the one-half full ownership provided by the Spanish system. Life estates in land, as well as a lack of dower rights in personal property, functioned to keep widows dependent, usually on grown children. Marylynn Salmon, Women and the Law of Property in Early America 142-47 (1986).

⁴¹See Miroslava Chavez, "Mexican Women and the American Conquest in Los Angeles: From the Mexican Era to American Ascendancy," ch. 3 (Ph.D. diss., UCLA 1998) [hereinafter, Chavez, "Mexican Women"]. Other studies examining female land ownership during the Mexican period include Gloria Ricci Lothrop, "Rancheras and the Land: Women and Property Rights in Hispanic California," 76 Southern California Quarterly 59, 68-70 (1994), and J.N. Bowman, "Prominent Women of Provincial California," 39 Southern California Quarterly 149 (1957). Women came to own land not just through widowhood, but also as original grantees of the government. This was true of married women as well. Lothrop at 63. Lothrop determined that nearly 13% of the 700 ranch grants made in Alta California during the Spanish and Mexican periods were to women. This did not include ranches women gained upon widowhood. Lothrop at 68. As a result, land ownership by married and once-married women was anything but unusual in this society.

dispute resolution process was made due to contested wealth transmission.⁴² For

Chavez's examination of landholding records for Los Angeles revealed that women were somewhat underrepresented as landowners, yet slightly over 18% of ranch grants went to women. Chavez delved deeper into the circumstances of those grants, and found that the vast majority (25 of 27) of women acquired their interest, not directly from the governor as men did, but through "inheritance," although most of these women nonetheless had military and political ties through kinship or marriage. Chavez, "Mexican Women," at 53, 60. (Chavez used the term inheritance indiscriminately, apparently referring to women gaining management control of "their" half of the common property, as well as to the women succeeding to ownership in property through bequest or devolutions.) Yet Chavez discovered that women struggled to retain their inheritances in the face of a governmental requirement that the land be developed and used. *Id.* at 71-72.

⁴²From 1831 to 1846, inheritance litigation and contested probates made up just 1.4 percent of lawsuits filed in what is now Monterey County. Langum, *Law and Community*, at 123. However, see Chavez, "Mexican Women," at 69 (finding that transfers of inherited property to women were sometimes contested, although often long after the husband or other relative had died).

It appeared that families made more use of the dispute resolution process for marital discord. While procedures existed in Mexican California for annulment of marriages and formalized separation of husbands and wives, the Church retained jurisdiction in such cases, and otherwise forbade absolute divorce. This left the *alcaldes* to deal with the initial aspects of marital separations. Langum, *Law and Community*, at 233-234.

When a marital disagreement arose, a complaint was filed, usually by the wife, requesting a separation or change in the spouse's behavior. A conciliation hearing, which included each party's *hombre bueno*, occurred, during the course of which the wife could be ordered to a "safe house" if unwilling to reside with her husband. Such a placement protected the wife from possible abuse while maintaining the honorable reputation of both parties, which was believed to promote reconciliation. The *alcalde* ordered the husband to provide modest support while his wife was residing with the "chaparone", and otherwise could exercise much creativity in fashioning protective orders to govern both the period of separation as well as the terms of reconciliation. *Id.* at 235-236.

Here, the system's fundamental conciliation process steered all concerned towards the goal of ending the separation, rather than facilitating a permanent division. In fact, according to Langum, the high rate of reconciliation, as well as the phenomenon of "repeat players," "strongly suggests that the judicial lawsuit for marital separation served a social function other than the [actual] separation of spouses . . . to allow parties to air grievances in order to reform spousal behavior." *Id.* at 236-237.

While Chavez describes the conciliation process similarly, her interpretation of it varies considerably from Langum's. Chavez more clearly describes the problem as often one of domestic abuse, where "women turned to the courts only after a long period of contentious relations." Chavez, "Challenging Patriarchy," at 276. She concludes that the conciliation hearings often "functioned only as 'quick fixes' that failed to restrain a consistently violent husband," where the goal was to reconcile the couple for the good of the family and society. *Id.* at 275. Moreover, Chavez identifies a phenomenon where women would recant charges based on a husband's promise to reform, due in part to the embeddedness of the belief in "the husband's place as master of the home." *Id.* at 272. Thus, Chavez offers a radically different and more nuanced explanation for the "repeat player" phenomenon identified by Langum, which is far darker and serves to indict rather than celebrate the system.

one, Mexican marital property law, combined with rules of devise and descent, limited the reach of estate administration generally.⁴³ Second, although alcaldes did have jurisdiction over probate matters, the Californio practice of depositing a will with the alcalde before death also helps explain the low level of contested probate and inheritance litigation.⁴⁴ Finally, it only makes sense that the homogenous culture, combined with well-defined succession requirements, served to minimize disputes in this area. Not only was a good deal of common property ineligible to be bequeathed, but testation practices were probably fairly standardized. The result would be wills meeting the expectations of survivors most of the time.⁴⁵

This, then, was the legal system which had developed by the early 1840s, when Mexican California began to see a significant influx of Anglo-Americans. While earlier-arriving Americans, overwhelmingly male, had at least grudgingly accepted this legal system, willing as they were to embrace the Californio culture generally, the same could not be said for the new arrivals. These opportunity-seeking Americans, often with families in tow, resisted assimilation as they banked

⁴³Nevertheless, when conducted, estate administration could be as formal as that under the Anglo-American common law system. Langum, Law and Community, at 54. Apparently forgetting that not all property passed by way of succession, Susan Westerberg Prager wrongly assumed that there was never any need for administration of the decedent's estate under Spanish/Mexican law. Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975," 24 UCLA Law Review 1, 10-11 (1976). See deFuniak at 558-560.

⁴⁴Langum, Law and Community, at 49, 53, 123.

⁴⁵I am unaware of any quantitative studies of testation practices in the Spanish borderlands during this period.

on the possibility that this Mexican territory would soon be a part of the United States.⁴⁶

The research of John Reid and David Langum has demonstrated that these expatriates, be they sophisticated merchants or ordinary overland trail families, brought with them an uncanny internalization of common law legal culture which was quite at odds with the Mexican system.⁴⁷ Langum emphasizes that,

the essence of Anglo-American law of the period was rugged individualism, let the chips fall where they might, and an attitude on the part of litigants and the law alike of whole hog or none. . . . The Anglo-American legal values of predictability and individualism reflected not merely a legal tradition but also the needs and pluralistic views of an atomistic society in the midst of the Industrial Revolution.⁴⁸

At some basic level these American expatriates understood that classic nineteenth-century Anglo-American jurisprudence, based on the adversarial resolution of disputes, fundamentally clashed with a process founded on compromise and an avoidance of litigation. This common law chauvinism left the newcomers ill-equipped to appreciate, much less understand, the operation of the Mexican legal system. Failing to find the certainty, predictability, and efficiency of enforcement they believed requisite to a rising commercial and industrial order, "these foreigners [saw] a lack of clear legal guidelines as lawlessness, and a lack of

⁴⁶Langum, Law and Community, at 22.

⁴⁷John Phillip Reid, Law for the Elephant: Property and Social Behavior on the Overland Trail 11 (1980); Langum at 269-270. Langum notes that "[e]ven the thorough assimilation of the older residents was not deep enough to root out this common law heritage. Id.

⁴⁸Id. at 271, 275.

written laws coupled with judicial accommodation of debtors as necessarily implying corruption."⁴⁹ Moreover, Mexican California's absence of a jury system, a venerated institution in common-law culture, rankled the later-arriving Anglo-Americans.⁵⁰

Nevertheless, Anglo-Americans could not completely ignore the Californios' legal system, inasmuch as common law culture included a respect for legitimately exercised legal power. This, then, presented expatriates with a dilemma. While denouncing the Mexican legal system as illegitimate for failing to conform to their foreign expectations, Anglo-Americans could not ignore native Californio acceptance. This produced, according to Langum, a "schizophrenic" response: the expatriates would use the established system to legitimate their conduct, but only when it served their needs.⁵¹ Thus, while an American might bring a dispute between himself and a Californio to the alcalde, disagreements among Americans were resolved internally, based on a common-law consciousness.⁵²

⁴⁹Id. at 273-4.

⁵⁰Id. at 145. Americans failed to see that the use of *hombres buenos* and the frequent rotation of judges provided the opportunity for similar community input. Id.

⁵¹Id. at 8, 151. The response of Anglo-Americans cannot be attributed to perceived discrimination against a foreign minority, inasmuch as Langum found no evidence of discrimination against Americans when disputes with Californios were handled through official channels. In addition, when using the conciliation process, Americans played by the rules, conforming to its particularities and abiding by its results. Id. at 129.

⁵²This was true even though, throughout the period of Mexican control, many former Americans and British, now Mexican citizens, were appointed or elected to serve as alcaldes. Id. at 47-49. Langum found that they administered their offices indistinguishably from the natives. Id. at 49. Disagreements between unassimilated Americans were resolved either without official interference or by appeal to Thomas O. Larkin, the American consul to the territory. Id. at 269.

Langum demonstrates that this common law chauvinism extended from the legal process to the legal doctrine of the Spanish/Mexican system. Thus, Anglo merchants entered into contracts, extended credit and collected on debts in accordance with common law doctrine, even though there was no formal legal process for enforcing reliance on this doctrine.⁵³ Additionally revealing, Protestant Anglo-Americans even entered and exited marriages outside of official channels in a manner not inconsistent with developing common law norms. Langum noted of ordinary expatriates, "[t]hey married by contract and divorced by rescission, thereby demonstrating a knowledge of the only then developing contractual theory of the marriage relationship."⁵⁴ Given this, it would have been odd indeed if later-arriving Anglo couples had employed Spanish/Mexican marital

Upon American military occupation of the territory, Californio alcaldes began to be replaced by American appointees, for whom no doubt divorce was acceptable. Engstrand at 231. At this point, alcaldes began granting divorces and continued to do so until the State of California enacted a divorce statute in 1851. Langum, Law and Community, at 252. The California Supreme Court retroactively approved of this pre-statehood exercise of authority where the marriage had been between two non-Catholics. Hartman v. Hartman, 1 Cal. 215 (1850).

⁵³Langum, Law and Community, at chs. 6 and 7, passim. Expatriates "had such strongly internalized understandings of the common law that they had brought with them to California that they constantly acted in reliance on that law in their dealings with one another." Id. at 186.

⁵⁴Id. at 270. Inasmuch as there was no provision in Catholic California for marriage between non-Catholics, Protestant expatriates wishing to wed each other often resorted to nonsolemnized common-law marriage, which had gained recent acceptance in parts of the United States. Along with this informal coupling came informal separation and divorce. At first, expatriates freed themselves to remarry by declaring, and sometimes advertising, that they were thereby rescinding their marriage contracts. While naive, this thinking was certainly consistent with accepted notions of informal marriage. Id. at 245, 249, 253-254. (Further, Americans may have also avoided using the alcaldes upon marital breakdown because they realized that the Californios themselves rarely if ever used that system to finalize the terms of a permanent separation.)

property law to manage and bequeath family wealth, or had exhibited any other familiarity with that body of doctrine.⁵⁵

Despite the fact that an increasing number of Anglo-Americans were disengaged from the indigenous legal system of the Californios towards the end of the Mexican territorial period, U.S. military governors left the Mexican legal system intact following the signing of the Treaty of Guadalupe Hidalgo in 1848.⁵⁶ Ordinarily, the military government would have been expeditiously replaced by a U.S. territorial government, thereby providing some measure of authorized self-government for Americans, however, the vagaries of sectionalist politics kept this from occurring in California. As a result, Americans exhibited their displeasure with the military imposition of the Mexican legal system by continuing to engage in extra-legal dispute resolution, despite the fact that the military appointed Americans to alcalde positions.⁵⁷ More significantly, however, Americans put pressure on the military government to call a constitutional convention.⁵⁸

⁵⁵In fact, when surveying legal practices prior to statehood, in order to determine whether California should operate under the civil law or common law, Senator Elisha O. Crosby noted that Anglos had conducted estate planning and distribution according to the common law. "Report of Mr. Crosby on the Civil and Common Law, Senate Committee on the Judiciary," Journal of the California Senate, Appendix O [hereinafter, "Report of Mr. Crosby"].

⁵⁶Leonard Pitt, Decline of the Californios: A Social History of the Spanish-Speaking Californians, 1846-1890 35-39, 42 (1966); Prager at 10-11.

⁵⁷Grivas at 20. Interestingly, although the Mexican law was left in force, American alcaldes were virtually unfamiliar with it, and unashamedly so. Stephen Field, later Chief Justice of the California Supreme Court, recalled of his days as an alcalde, "I knew nothing of Mexican law; did not pretend to know anything of it," but he believed that administering the office according to American legal norms was acceptable. Stephen J. Field, Personal Reminiscences of Early Days in California 27 (1893); Grivas at 27.

⁵⁸Pitt at 42; Prager at 11.

Especially under these unusual circumstances, California's admission to the Union would require more than a customary legal order adhered to by only part of the population, with an informal, common law-based system operating in its shadow. Thus, the larger task of the constitutional convention would be to formulate a legal and political order which would be accorded legitimacy by both natives and the increasing number of American Californians. It was within this context that the convention took up the issue of marital property rights.

Constitutionalizing Marital Property Law in the State of California: A Janus-Faced Provision

The locally-elected delegation which gathered in Monterey in September 1849 was quite diverse; it included native Californios, long-assimilated Americans and Europeans, relative newcomers, and not a few '49ers, who had been in the territory for only a matter of months. More populous areas were permitted more delegates, thus most of the forty-eight members were from the north; however, none of the ten districts sent fewer than two delegates. Predictably, the Anglo north tended to elect Anglos; the native south, Californios or assimilated Anglos.⁵⁹

⁵⁹David Alan Johnson, Founding the Far West: California, Oregon and Nevada, 1840-1890 104-108 (1992); Pitt at 43-44. See listing of members along with various attributes, J. Ross Browne, Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849 478-479 (1850) [hereinafter, Browne's Debates]. Jacob Snyder, a pre-gold rush emigrant elected from Sacramento, wrote: "all the old settlers are anxious that their own people should represent them." Prager at 11 n. 52, quoting letter from Jacob Snyder to Thomas O. Larkin, June 9, 1849, in 8 The Larkin Papers 241 (1962).

Early in the convention it was decided that matters would be presented to the entire delegation by way of a Select Committee on the Constitution, in order to ensure the production of a smooth, consistent document.⁶⁰ On Thursday evening, September 27th, the Select Committee reported out the following proposal, denominated Section 13 of the Article on Miscellaneous Subjects:

All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.⁶¹

What were the origins of this provision and what did the Committee intend it to accomplish? This is not an idle inquiry, as the resolution of these questions impacted the development of California's marital property system, especially over the next twenty years. However, because no records exist for the work of the Select Committee, other than the polished proposals presented to the delegation, the answers to these questions have to be teased indirectly from other sources.

There is nothing to indicate that the Committee put forth this proposal because it envisioned the State of California retaining the legal system then in

⁶⁰Browne's Debates at 19-23; Prager at 9 n. 41. The suggestion of dividing portions of the Constitution by subject matter, for consideration by various committees prior to presentation to the whole, was rejected because of the fear that such a process would lead to a disjointed document. According to one committee member, Henry W. Halleck, "The principal discussion was in this committee which did most of the thinking as well as the work." Prager at 9 n. 41, quoting letter from H.W. Halleck to Dr. Francis Lieber, July 5, 1867. However, at times during the convention, non-Committee members complained that this group wielded too much power. Browne's Debates at 31-32, 59.

⁶¹Id. at 257 (emphasis added).

force. The convention did not dismiss the possibility that the state would choose to operate within a civil-law jurisprudential framework, and thereby indirectly determine the particulars of the marital property law.⁶² But, oddly enough, the delegation left this far more fundamental issue, of whether to retain entirely the civil law system or instead adopt the common law, for the first legislature to decide.⁶³ Moreover, other than with this proposal, Anglo delegates expressed no concern for Californios who had ordered their affairs according to Spanish/Mexican legal doctrine.

However, this is not to say that the Committee might not have been motivated to retain indigenous law in this particular area, given the relative degree to which it impacted ordinary families.⁶⁴ Supporting this explanation is the fact that Californios were disproportionately represented here. Because the committee was comprised of two delegates from each district, this meant that just about every delegate from the lightly-populated south was a member, including most of the

⁶²One delegate did realize that if California were to become a common law state, the Committee's proposal was of considerable importance, and he argued that the provision was imperative for the just treatment of married women. *Id.* at 265-267 (remarks of Mr. Norton). See also Donald E. Hargis, "Women's Rights: California 1849," 37 *Southern California Quarterly* 320, 332 (1955) ("[b]ut, unquestionably, the problem of whether it was legal to insert a provision of the civil law in the Constitution, while the common law was embraced generally, was pondered by the representatives").

⁶³*Browne's Debates* at 258-61, 265-67.

⁶⁴Moreover, the Committee may have been motivated by the Treaty of Guadalupe Hidalgo, which guaranteed continuation of the property rights of those in the Mexican territory. Prager at 10 n. 45.

Californios.⁶⁵ This overrepresentation might have allowed the Californios to exert unusual power on this issue, where they could not elsewhere.⁶⁶ Professor Susan Westerberg Prager is persuaded that the proposal can be explained in part by the numbers of Californios on this committee, particularly given the first legislature's treatment of Section 13.⁶⁷

Yet, evidence points to a non-Californio member, New Yorker Henry W. Halleck, as the scrivener. Halleck, as Secretary of State to the military governor for three years, had been instrumental in the call for the convention, and later claimed that it was he who had drafted most of the articles which were submitted

⁶⁵Prager at 29 n. 143. Most of the Californios elected to the delegation found themselves on this committee. Of the eight non-Anglo delegates (six native, one Spanish and one French), six were members of the Select Committee of the Constitution. Five of these were necessarily members, as they represented districts with only two delegates available. Five of these eight Committee members were from southern California. Browne's Debates at 29.

⁶⁶Without records of the committee, there is no way to know the actual participation level of these members. However, we do know that, when it came to debating this proposal on the floor, Californio delegates proved reticent, even though translators were available for those who did not speak English. Prager at 15, 23-24. While this may have been a tactical move to avoid calling attention to the connection between the Select Committee's proposal and the Spanish/Mexican law, an American delegate, Elisha O. Crosby, attributed their reticence on the convention floor to "embarrassment" tied to a lack of "confidence to declaim in a body like that," rather than to a "want of knowledge of the English language," or anything else. Charles Albro Barker, ed., Memoirs of Elisha O. Crosby: Reminiscences of California and Guatemala from 1849 to 1864 37 (1945) [hereinafter, Memoirs of Crosby]. At the least, then, it seems that the Californios' reticence in floor debate should not be taken to indicate a lack of involvement in this proposal at the committee level. In fact, Crosby recalled later that most of the real work of formulating the constitution took place "perhaps more by consultations outside [the convention] than by public debate" and "by discussions in Committees," owing to the short time available (the convention lasted a mere six weeks). Id. at 45. Crosby observed that, typically, those who were "most active and influential in the making of the Constitution hardly appeared as debaters on the floor," himself included. Id.

⁶⁷Prager at 29 n. 134, 30-31.

to the Select Committee for consideration and revision.⁶⁸ There may be good reason to believe he penned this one in particular, based on its pedigree. That the proposal was identical to the provision which had been inserted in the Texas constitution four years earlier is not what ties it to Halleck. Rather, what matters is that the Texas provision had found its way to New York, of all places.

The State of Texas had been the first to embed its marital property scheme in organic law.⁶⁹ After Texas had gained independence from Mexico, the Republic enacted marital property legislation which more or less reflected the Spanish/Mexican system, by at least retaining the category of "common" property.⁷⁰ When Texas joined the Union, it continued to employ a scheme based on common property, and the constitutional provision reflected the use of this term.⁷¹ But while Texas was drawing on its Spanish legal heritage, at the

⁶⁸Johnson at 106; Prager at 9 n. 41. But see Memoirs of Crosby at 45, asserting that committee member Myron Norton "was one of the hardest workers in the body" and "did much" in assembling the draft of the constitution. Meanwhile, Crosby makes no mention of Halleck's role in the Select Committee.

⁶⁹Kathleen E. Lazarou, Concealed Under Petticoats: Married Women's Property and the Law of Texas, 1840-1913 64 (1986).

⁷⁰James W. Paulsen, "Community Property and the American Women's Rights Movement: The Texas Connection," 32 Idaho Law Review 641, 644 (1996). However, Professor Joseph W. McKnight described the end product as a "debased reminiscence" of the Spanish/Mexican law in force prior to independence. "Texas Community Property Law - Its Course of Development and Reform," 8 California Western Law Review 117, 119 (1971).

⁷¹Paulsen at 689 (setting forth Texas Constitution of 1845 art. VII, sec. 19).

same time the constitutional provision was consistent with a national interest in altering the common law's treatment of wives' property rights.⁷²

A constitutional convention was called in New York in 1846, at a time when lawmakers were becoming interested in altering the "feudal" common law treatment of married women and their property.⁷³ As a result, New York considered following Texas' lead, not only by constitutionalizing its marital property law, but also by adopting a scheme based on notions of joint property ownership.⁷⁴ The proposal put before the New York delegates was nearly identical to that enacted in Texas, except that instead of using the phrase "held in common with her husband," which was rooted in Spanish/Mexican law, the New York proposal spoke of property "held by her with her husband."⁷⁵ New York's version was nonetheless understood to import notions of joint property ownership

⁷²As Paulsen indicates, some historians, such as McKnight, attribute the provision to Texas' Spanish/Mexican roots, while others, such as Lazarou, have focused on the reform aspect of the system, seeing the Texas experience, according to Paulsen, "as little more than an eddy in the current of national legal developments." *Id.* at 643.

⁷³Peggy A. Rabkin, "The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and Its Contribution to the Passage of the Early Married Women's Property Acts," 24 *Buffalo Law Review* 683, 716-741 (1974).

⁷⁴Paulsen traces the national dissemination of the Texas plan, and especially notes its positive reception in New York just prior to the opening of the convention. Paulsen at 659. Not only did the Texas provision gain national attention at the point of annexation, it gained additional exposure when it was considered by the Territory of Wisconsin, drafting its inaugural constitution in late 1846. Paulsen at 658-660, 667-679. Meanwhile, Basch virtually ignored the joint property aspect of the provision in her description of the New York debate. Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* 150-155 (1982).

⁷⁵Rabkin at 737.

along the lines of the civil law.⁷⁶ However, rather than being seen as a radical departure from the common law, the proposal was viewed as an enlightened reform, and was even promoted as "merely allow[ing] more people to do directly what a few people were doing indirectly" through use of complicated equity procedures.⁷⁷ Interestingly, the proposal was rejected by only a small margin, 50 to 59, and apparently more because delegates opposed enshrining marital property rights in the constitution, than because they were dissatisfied with the substance of the provision.⁷⁸

Thus, the Select Committee's proposal can be explained as the result of two very separate factors, happening to come together at the right time and in the right place. On the one hand, there was at this time a widespread interest in reforming common law marital property rules, possibly through the use of joint property ownership principles, which resulted in a New York proposal almost

⁷⁶*Id.* at 737, 739; Paulsen at 660. Rabkin ignored the Texas connection in her description of the debates over this proposal, although Paulsen notes that one delegate clearly identified Texas as having supplied the drafting model. Paulsen at 660. Paulsen, however, only mentions the Texas-California connection, without recognizing New York's possible role. *Id.* at 682.

⁷⁷*Id.* at 740. Regarding the role of equity to mitigate the harshness of common law marital property provisions, see *id.* at 692-694; Basch at ch. 3 *passim*; Joan Hoff, Law, Gender, and Injustice: A Legal History of U.S. Women 124-127 (1991).

⁷⁸Rabkin at 740-741. Basch, however, attributed the defeat to the substance of the proposal. Basch at 155. Actually the delegation had voted a few days earlier 58-44 in favor of including this provision in the New York constitution. However, that vote could not survive a second motion to reconsider, and a crucial few delegates changed their positions after additional debate. Paulsen at 661-662; Basch at 153, 155.

identical to the Select Committee's Section 13.⁷⁹ On the other hand, the committee was operating in a jurisdiction which had been employing a joint property ownership scheme rooted in Spanish/Mexican law, based on the notion of "common" property. As a result, the proposal appears as a Janus-faced hybrid - at once both the retention of the law of the old regime and the adoption of forwarding-looking reforms.

This did not mean, however, that the delegates would view this provision, with such a complex foundation, in precisely the same way. If even part of the Select Committee's intent had been to retain the marital property system in place, framing the section in terms of married women and their separate property rights (hardly central to a community property regime), as well as failing to define common property,⁸⁰ certainly obscured this lurking concept. "Common property"

⁷⁹See Reva B. Siegel, "Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880," 103 Yale Law Journal 1073, 1135-1146 (1994). If indeed Halleck was the source of the Select Committee's proposal, he apparently did view the provision as a reform. In the ensuing debates, he revealed an interest in empowering women through this resolution. Browne's Debates at 259 ("I do not think we can offer a greater inducement for women of fortune to come to California").

⁸⁰This proposal appeared to imply that common property was simply what was left over after the designation of certain property as separate. According to deFuniak, such thinking exhibited common law bias, which persisted into the twentieth century. deFuniak commented, "[s]ome American writers have remarked that it is easier to define separate than community property and that the difficulty of defining the latter is avoided by saying that all that is not separate is community property Indeed, the practice of the Spanish law . . . was to define the community property first." deFuniak at 136-37.

In fact, this proposal illustrates deFuniak's theory that Anglo-American definitional problems with the term "common property" were actually motivated by concerns over what constituted separate property, and more specifically, what constituted the wife's separate property. deFuniak observed that community property jurisdictions had been "most careful" about defining the wife's, and the only wife's, separate property, even though these definitions actually accomplished nothing more than to repeat well-settled principles of the Spanish system. He attributed this to "training in the English common law," which caused a fixation on the wife's separate property. Id. at 145-46, 173.

within marriage had a specific, essential meaning in Spanish law, but none in the common law. Even more, the concept of common property provided the foundation upon which the Spanish/Mexican regime was built. It embodied the philosophy driving the system, i.e., that marriage constituted a partnership, at least economically. Furthermore, within the civil law, the category of separate property carried with it no characteristics of gender. Rather, the concern there was with distinguishing separate property from what was otherwise presumed to be common, and not (as in the common law) in fencing off the wife's separate property from the rest, which was under the husband's ownership and control. As a result, the wording of the Committee's proposal probably served to steer the debate in an unintended direction.

Delegates did realize that this proposal was linked in some way to the Spanish/Mexican system (although there is no indication that the delegates were aware of the Texas, or New York for that matter, connection).⁸¹ Kimball H. Dimmick asserted that the proposal "only reiterat[es] that which is already the law of the country."⁸² And some delegates even went to far as to maintain that the State of California had an obligation to the Californios to retain this law. Henry A. Tefft, representing San Luis Obispo, urged the convention to "take into

⁸¹Orrin K. McMurray, "The Beginnings of the Community Property System in California and the Adoption of the Common Law," 3 California Law Review 359, 369 (1915) (concluding that none but the scrivener realized the source of the Select Committee's proposal). However, Elisha Crosby later noted that Section 13 was taken from the Texas constitution. Prager at 21 n. 109.

⁸²Browne's Debates at 262.

consideration the feelings of the native Californians, who have always lived under this law," arguing that it was the delegates' "duty to give a favorable consideration to any proposition . . . which deeply concerns [their] interests."⁸³ Surveying the debate, one historian concluded that "certain delegates were desirous to make concessions to the feelings of the native Californians when the matter was not too vital, [and thus] the argument that the section should be included for their benefit was regarded seriously."⁸⁴

But only a few delegates focused on that aspect of the proposal which sought progressive reform through the notion of joint property ownership. Francis Lippett, an attorney last residing in New York before coming to California in 1847,⁸⁵ viewed the proposal as an experiment, at first arguing that the reform embodied in Section 13 might be acceptable if enacted by the legislature, but ought not to be "introduced at once into our Constitution, and form part of the

⁸³*Id.* at 258. Tefft and Dimmick represented "the older settled areas on which the Californian culture still predominated at the time of the convention." Prager at 16 n. 79. Interestingly, however, while Dimmick, who represented San Jose, was concerned with the possibility that wives would lose property rights overnight, he focused on only their separate property rights, paying no attention to common property rights. In this way, for all his concern for the native population, Dimmick nonetheless evidenced a common-law mindset. *Id.* ("it would be an unheard of invasion, not to secure and guaranty the rights of the wife to her separate property").

However, an opposing delegate viewed this as akin to class legislation, *id.* at 259 (remarks of Mr. Botts), and yet another flexed his American muscles, asserting that "the smaller party, the Californians, must yield." *Id.* at 26 (remarks of Mr. Lippett). While native Californios may have already been in the minority by the time of the opening of the convention, they were certainly outnumbered, four to one at that, by the time the first legislature convened a mere four months later. Prager at 29 n.143.

⁸⁴Hargis at 332.

⁸⁵Browne's Debates at 478-79.

fundamental irrevocable law of the land." Lippett explained, "I do not say that the experiment is not worth trying; . . . [w]hat I contend against is, trying the experiment in our Constitution."⁸⁶ However, Lippett was actually quite against the "experiment" regardless, and it was in voicing this opposition that he became the only delegate who approached acknowledging the radical potential of "common property":

I have lived some years in countries where the civil law prevails, and where such a separate right of property is given to the wife. . . . [I]f there is any country in the world which presents the spectacle of domestic disunion more than another, it is France. . . . There the husband and wife are partners in business . . . raising [the wife] from head clerk to partner. The very principle . . . is contrary to nature and contrary to the interest of the married state.⁸⁷

Other speakers who were in favor of the "experiment," if that it be, exhibited an understanding of that aspect of Section 13 which was forward-looking and reformist. James M. Jones, an attorney who had last hailed from Louisiana and thus presumably had experience with the civil law system of marital property, painted the civil law as a reform of the common law. Apparently referring to the common law system, he argued that law which gave the wife no rights "had its origin in a barbarous age," but that "in this age of civilization, it has been found that the wife has certain rights."⁸⁸ However, in focusing on the property rights of

⁸⁶*Id.* at 257-58. Tefft saw this as an instance of the "common cry to leave all these things to the Legislature," but he was not willing to assume that the legislature "will look upon matters as we do." *Id.* at 258. Meanwhile, Dimmick pointed out to the Anglocentric Lippett that, given the Spanish/Mexican system then in place, "we are not stepping upon untried ground." *Id.* at 262.

⁸⁷*Id.* at 261 (remarks of Mr. Lippitt).

⁸⁸*Id.* at 264, 478-479.

the wife, Jones exhibited a common-law mindset similar to other delegates.⁸⁹ On the other hand, Dimmick argued that "adopting" a marital property system based in the civil law would be consistent with the codification movement sweeping state legislatures at that time,⁹⁰ having also asserted that the Select Committee's version represented a "retention" of the status quo. While Jones failed to connect the Select Committee's proposal with indigenous law, or focus his approval on the common property aspect of the system, it was Dimmick who reflected (perhaps unconsciously) the Janus-faced nature of the committee's proposal.⁹¹

Due to his opposition to the civil law-based proposal, Lippett introduced a substitute which eliminated the "experimental" joint property category:

Section 13. Laws shall be passed more effectually securing to the wife the benefit of all property owned by her at her marriage, or acquired by her afterwards, by gift, demise [sic], or bequest, or otherwise than from her husband.⁹²

One might expect that Lippett's substitute would specifically draw the debate towards the ramifications of joint property ownership, inasmuch as this provided the stark difference between the two versions. Paradoxically, however, the counter-proposal only contributed further towards veering the debate away

⁸⁹Id. at 263-264.

⁹⁰Id. at 262, 263. For a discussion of the codification movement, especially with regard to marital property law reform, see Rabkin.

⁹¹According to one historian, "Dimmick and Jones suggested a gradually evolving independence for women, which permitted the enactment [of the Select Committee's version] at that time." Hargis at 333.

⁹²Id. at 257 (submitted by Mr. Lippitt).

from the concept of common property and thus away from the hybrid nature of the committee's version.⁹³ The debate was instead steered towards that language which the versions had in common – providing for wives' rights in separate property. However, the similarity was something of an illusion. The debates reveal that the Anglo delegates were aware of this means of using the wife's separate property to mitigate the harsh effects of the common law, but they were probably unaware of the subtle but radical difference between the community property system, with ungendered notions of separate property, and the common law system, always gender-based, which was just beginning to carve out distinct property rights for women. In short, the fact that the same term, "separate property," could be used to describe two very different concepts, was probably lost on these delegates. As a result, they framed the issue before them as, on the one hand, either of the Section 13 proposed reforms of the common law, against, on the other hand, pure common law.⁹⁴

⁹³Prager at 22 ("[s]ignificantly, the community property aspect of the provision is nowhere discussed").

⁹⁴Hargis at 331. The Texas constitutional convention experience differed in important ways from that of California, thereby allowing historians to conclude that those delegates were more aware of the provision's ties to the Spanish/Mexican system, and were more aware of the sorts of rights which the provision accorded wives. The difference lie in the greater focus of the Texas delegates on the notion of common property and what that entailed. In Texas there had been an original proposal, and then a substitute version, which were quite detailed in setting forth wives' property rights, and specifically indicated that the wife had an inter vivos interest in the common property. Paulsen at 645 n.21, 646 n.27. Moreover, the committee report accompanying the original proposal clearly called on the legislature to enact a marital property scheme "upon a principle of community of property between husband and wife." *Id.* at 646 n.23, quoting William F. Weeks, Rep., Debates of the Texas Convention 277 (1846). In addition, the ensuing debate focused, much more so than in California, on the ramifications of joint property ownership. Paulsen at 647-648.

Nevertheless, the focus on married women's property rights did at least help to demonstrate the nature of the reform sought by the convention. This issue really involved two concerns, sometimes overlapping, but more often conflicting: whether women ought to be empowered by the law, and whether families ought to be protected by the law. Some delegates actually argued for increased legal power for women,⁹⁵ Henry W. Halleck quaintly admitting:

[H]aving some hopes that some time or another I may be wedded . . . I shall advocate this section in the Constitution, and I would call upon all the bachelors in this Convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduced into the Constitution.⁹⁶

However, this position engendered vociferous opposition.⁹⁷ Charles T. Botts managed to wrap up essentialism, misogyny, exaggeration, romanticism and hysteria in one colorful response:

I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature. . . . This doctrine of women's rights, is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe. . . . It is often the case that the union takes place between a man of little or no property, and a woman of immense landed estate. But do you mean to say that, under such circumstances, the husband must remain a dependent upon his wife? a dependent upon her bounty? would you, in short, make Prince Albert's [sic] of us all?⁹⁸

⁹⁵*Id.* at 258, 259 (remarks of Mr. Tefft); 259 (remarks of Mr. Halleck); 263 (remarks of Mr. Dimmick); 265 (remarks of Mr. Jones).

⁹⁶*Id.* at 259 (remarks of Mr. Halleck).

⁹⁷*Id.* at 259-260, 268 (remarks of Mr. Botts); 261 (remarks of Mr. Lippett).

⁹⁸*Id.* at 259-260 (remarks of Mr. Botts).

And he later added:

[I]f [woman] had a masculine arm and a strong beard, who would love her? She had just as well have them as a strong purse; she is rendered just as independent by the one as the other, and as little lovable.⁹⁹

More immediately, however, the delegates knew that gold rush California was a place where fortunes could be made and lost in a day. Tefft explained:

[A]ny cool, dispassionate man, who looks forward to California, as she will be in five years to come, who does not see that wildness of speculation will be the characteristic of her citizens, as it has been for some time past, is not, I think, gifted with the power of prophecy.¹⁰⁰

As a result, according to Tefft, there was a "peculiar necessity" for inserting a marital property provision in the constitution, "owing to the inducements for wild and hazardous speculations, and the probability of frequent and sudden losses, which would otherwise involve families in ruin."¹⁰¹ Tefft proclaimed "that it is due to every wife, and to the children of every family, that the wife's property should be protected."¹⁰²

In addition, it was obvious that the new state would be in no position to provide for the economic welfare of dependent inhabitants. The goal then was to shield the wife and family from the misfortunes of an unlucky or unscrupulous husband, without creating a reliance on scarce public resources. Doing so by

⁹⁹Id. at 268 (remarks of Mr. Botts).

¹⁰⁰Id. at 258.

¹⁰¹Id. at 259.

¹⁰²Id.

legally sequestering from creditors certain property otherwise available to the family seemed politically astute.¹⁰³ In particular, safeguarding that which was defined as the wife's separate property was fast becoming the conventional way to protect the American family.¹⁰⁴ That the delegates were primarily interested in securing family protection through the constitutionalization of marital property law is bolstered by the fact that, just after choosing to do so, the delegates immediately voted in favor of placing a homestead provision in the constitution. The homestead set-aside was another method of family protection coming into vogue in the mid-nineteenth century.¹⁰⁵

¹⁰³One delegate pointed to the limitation of such a provision in its ability to shield the state from welfare responsibilities: "[Y]ou may give the right and control of separate property to the wife - but every wife who habitually yields to her husband, will yield to him in all cases relative to the disposition of that property, and the husband will have control of it, just as if no such enactment existed." *Id.* at 261 (remarks of Mr. Lippitt). Meanwhile another delegate maintained "that the husband will take better care of the wife, provide for her better and protect her better, than the law," however Tefft believed that it was false pride which led a man to see legal protection of the wife "as a reproach upon himself." *Id.* (remarks of Mr. Botts, remarks of Mr. Tefft).

¹⁰⁴Anglo-American legal culture made room for the notion of sequestering women's property from the debts of the husband (even when these debts were contracted for the benefit of the family) beginning with equitable marriage settlements, and later moving on to Married Women's Property legislation. Implied throughout this historical evolution appear to be three correlative beliefs: first, that a wife would be less likely to waste property to the detriment of her family, and that protecting her property would thus achieve the goal of family protection; second, that it was somewhat acceptable for a husband to waste property brought to the marriage by him or acquired during marriage, or at least it was acceptable (even laudable) for him to speculate with this property to improve his family's position; and third, that it was contrary to accepted norms of masculinity to permit men to be paternalistically protected. Hoff at 119-124.

Hoff argues that, "[t]he Married Women's Property Acts before the Civil War represented a necessary afterthought in the ensuing codification process that was based on protecting, not granting,[sic] equality [,] to females." *Id.* at 120.

¹⁰⁵Browne's Debates at 269-271; Paul Goodman, "The Emergence of Homestead Exemption in the United States: Accommodation and Resistance to the Market Revolution, 1840-1880," 80 Journal of American History 470 (1993). After discovering these two distinct strands in the Texas convention debate, historian Ray August found that California's debate proceeded along similar lines. Raymond C. August, "The Spread of Community Property Law to the Far West," 3 Western

The delegates thus appeared to believe that both versions of Section 13, with their identical language regarding wives' separate property rights, would equally serve the purpose of family protection. Certainly, their disinterest in discussing the meaning and ramifications of common property both evidenced and facilitated this thinking. But the thinking was incorrect. Not only did the concept of separate property differ as between the community property system and the common law system, but, more importantly, the vehicle of common property, which provided married women with joint property ownership rights, could actually do more to empower women than to protect their families. Thus, in the end, when the convention adopted the Select Committee's version of Section 13,¹⁰⁶ complete with its reference to commonly held property, it unwittingly opened the door to female empowerment, when all it probably wanted to do was engineer protection of the family, in a frontier state with both a volatile economy and an inability to take on welfare responsibilities.¹⁰⁷ Moreover, what the

Legal History 351-52, 53 (1990) (hereinafter August, "Community-Property Law"). However, while he concluded that Texas delegates were persuaded by the protective, rather than the empowerment, strand of debate, August asserted that California delegates, on the other hand, were more interested in providing an advantageous climate for women. Id. at 52, 56. Although there was a scarcity of marriageable Anglo women in California at this time, this position gives undue emphasis to Mr. Halleck's above-quoted comment, which August himself notes was derided when made as a "light and trivial argument." Browne's Debates at 259 (remarks of Mr. Botts); August, "Community-Property Law" at 54, 56.

¹⁰⁶The debates do not reveal how many or which delegates voted for the proposal. Section 13 was renumbered to Article XI, Section 14 of the ratified constitution. For ease of reference, however, I will continue to refer to this section as Section 13.

¹⁰⁷Prager argues that "the debates amply indicate that the convention viewed its choice [of the Select Committee's version] as continuing the civil law with regard to the property rights of married people." Prager at 22. According to Prager, Anglos who supported this version did not believe that they were simply establishing a system based on reformed common law. Id. I disagree

delegates intended in adopting the Select Committee's version of Section 13 was probably something very different than what that committee had envisioned.

To summarize, then, the committee put forth a proposal that at the same time looked back to California's Spanish/Mexican civil law heritage and looked forward towards progressive reform of the common law system. However, the committee appeared not to concern itself with whether the legislature would be able to serve two masters at once when working out the details of the state's marital property system. Meanwhile, not only did the delegation also ignore the possible contradictions embedded in this mandate to the legislature, but it as well virtually ignored the basis for the contradictions, the vehicle of common property. In focusing almost completely on the issue of granting wives separate property

with Prager's conclusions on a number of grounds. First, it assumes that the Select Committee intended Section 13 to require a continuation of Spanish/Mexican law. Second, it fails to recognize that the debate came to center on the choice between some version of Section 13, on the one hand, and unmodified common law on the other hand, rather than on a choice between the two versions. Third, even while Prager argues that delegates "understood that the existing marital property law was to extend into the new legal system, she acknowledges that "it is not so clear . . . that Anglo delegates comprehended further aspects of the law beyond the separate property guarantees." *Id.* However, the delegates probably understood the separate property guarantee of the common law, which was different than the separate property guarantee of the civil law. Prager's error is in failing to understand that one term, separate property, had different meanings under the civil law and common law systems. Prager's interpretation of the convention experience led her to be "mystified" by "how quickly the legislature and the courts undercut the purposes of the constitutional mandate." Prager at 24. However, the subsequent treatment is not so mystifying if the convention experience is viewed as having produced unclear and conflicting mandates.

rights, and providing those rights in order to protect the family, the delegates adopted a constitutional provision at least facially inconsistent with their intent.¹⁰⁸

¹⁰⁸A number of historians have examined the constitutional convention debates to discern what was meant by the inclusion of Section 13 with its reference to common property in California's organic law, and how and why the state settled on the community property system. Shammass, et al., reject out of hand any explanations based on ethnic and cultural traditions, finding the pre-existing Spanish system a necessary, but not sufficient condition. Instead they argue simply that "the debates on married women's property were what swung legislators [sic] over to acceptance of the community property system," while assuming otherwise a disinclination to support that scheme. Carole Shammass, Marylynn Salmon, and Michael Dahlin, Inheritance in America from Colonial Times to the Present 291-92 n.2 (1987) [hereinafter, Shammass, et al.]. Ray August documented the correlation suggested by Shammass et al., between the growing interest in married women's property rights in the common law states and the increasing number of community property states. According to him, initial common law reform, which took place in Mississippi, can be traced to the Louisiana community property system. In turn, the Mississippi reforms influenced Texas' formulation of a marital property system. August, "Community-Property Law," at 49, 57. However, neither Shammass, et al., nor August acknowledged Prager's work. Shammass, et. al, instead relied on McMurray's less comprehensive 1915 analysis of the debates. August's failure to consider Prager's work, in either his Western Legal History article or his dissertation, weakens his conclusions regarding the subsequent development of California's community property system. August, "Community-Property Law," at 57; Raymond C. August, "Law in the American West: A History of its Origins and its Dissemination" (Ph.D. diss., University of Idaho, 1987).

Susan Westerberg Prager provides a more nuanced analysis, arguing that the delegates saw what they were doing as a reform, granting wives separate property rights, but not much more. According to Prager, while some delegates may have supported the Select Committee's version out of solicitude for the Californios, most supported the version out of ignorance or apathy. Prager noted a spirit of conciliation toward the "conquered" Californians, although no other aspect of the Spanish civil law was retained by virtue of constitutional imperative. Prager at 9-10. More important, though, Prager contended that, had the delegates truly understood the philosophies behind the community property system, they would have opted for the common law system, enhanced by married women's property reforms. At the least, the debates, as well as the Supreme Court's and legislature's later handling of marital property issues, indicate an inability on the part of those trained in the common law to appreciate the ramifications of adopting the community property system. Id. at 10. Finally, Prager pointed out that delegates may simply not have cared much about this provision, seeing it as mostly irrelevant to the functioning of individual marriages. Id. at 18.

The focus, by Shammass et al. and August, on a connection between Married Women's Property Acts and the community property system caused these authors to conflate the two very different concepts of separate property operating under each, and thus to fail to notice those points where the nineteenth-century lawmakers were doing the same. Notwithstanding the above-noted strengths of her analysis, Prager evidenced the same faulty thinking when she concluded that "the separate property concept was not simply dependent on a civil law ancestry; rather it reflected concern for married women's property rights substantially similar to social policies voiced in reform common law states." Prager at 32 (emphasis added).

Thus, the first legislature was presented with a mandate to protect but not empower women through the use of a marital property system that nevertheless was based upon a vehicle of empowerment. Further, the legislature was charged with looking backward to a marital property system which had been developed to serve the needs of a pre-industrial culture, while at the same time looking forward to establishing a system that embodied progressive reforms called for in a rapidly changing society. In attempting to fulfill this probably impossible mandate, the lurking word "common" could not be ignored. Lawmakers were required to face head-on the issue of whether California would retain the Spanish marital property system, or adopt a set of progressive reforms loosely based on the civil law, or enact nothing more than a common law scheme mitigated by married women's separate property rights.

The First Legislature and the Constitutional Mandate of Section 13

Initially the legislature of the new State of California had to consider a fundamental issue which had been avoided by the Convention, that is, whether California would be a common law or civil law jurisdiction.¹⁰⁹ Support for the

¹⁰⁹While the convention's decision does not conclusively indicate where the delegates stood on this issue, it at the least strongly suggests that the Anglo delegates could not have easily imposed their beloved common law in that venue. One delegate, Elisha O. Crosby, later admitted that he believed adoption of the common law to be "vastly important." Memoirs of Crosby at 58. Given the rapid demographic changes occurring in the state between the close of the convention and the opening of the first legislature, delaying this decision (on an issue which appears to be quintessentially one for the framers of organic law) proved to be a very astute move. The gold rush migration, occurring in the months surrounding the convention, had boosted the number of Americans in California over 900%, to the point where they outnumbered native Californians more than four to one by January, 1850. Prager at 29 n. 143.

civil law came from somewhat unexpected corners. First, in an address to the new legislature, Governor Peter H. Burnett recommended the adoption of Louisiana's Civil Code and Code of Practice, while suggesting that crimes, evidence and commercial transactions be controlled by the common law.¹¹⁰ This proposal appeared to draw howls of protest from most of the San Francisco bar, which met to enact a resolution recommending instead the adoption of only the common law. In turn, this encouraged a splinter group (about one-fifth of the members) to file a formal petition with the State Senate praying that the civil law be substantially retained. This off-shoot was led by John W. Dwinelle, who had authored an early history of San Francisco based on his role in pre-statehood litigation.¹¹¹ Interestingly these two sources of support for the civil law together approximated the Select Committee's dual intentions in putting forth Section 13.

Under the auspices of the Senate Judiciary Committee, former constitutional convention delegate Elisha O. Crosby issued a report in February, 1850, purporting to give serious, balanced consideration to the matter.¹¹² While

¹¹⁰McMurray at 373. Burnett was a close friend of James M. Jones, delegate to the constitutional convention and attorney from Louisiana, who spoke strongly there in favor of the civil law. He was with Jones on his deathbed in 1851. Letter from Peter H. Burnett to the editors of the Alta California, January 1, 1852, J.M. Jones Manuscript Collection, Bancroft Library, Berkeley, California.

¹¹¹McMurray at 374.

¹¹²"Report of Mr. Crosby on the Civil and Common Law," Journal of the California Senate. As a delegate at the constitutional convention, Crosby presumably had been in on the decision to delay consideration of California's jurisprudential basis. Later, in his memoirs, Crosby admitted, "There was quite an element of civil law in the legislature, and many wanted that adopted as a rule Of course, being from the common law states, I thought it was vastly important that we should adopt the common law." Memoirs of Crosby at 58.

Burnett appeared to be touting the civil law as a progressive reform,¹¹³ Crosby's tactic was to focus on the proposal as calling for the retention of Spanish/Mexican law, or at least the adoption of a legal order simply unsuited to the Anglo-American character. According to Crosby, this was a backward system employed by a backward people.¹¹⁴ His report was quite an exercise in not only common law, but also Anglo-American Protestant, chauvinism.¹¹⁵

Crosby celebrated the common law as "that system of jurisprudence which . . . has grown up . . . under the reformed religion and enlightened philosophy and literature of England, and has come down to us, amended and improved by American Legislation, and adapted to the republican principles and energetic character of the American people. To that system the world is indebted for whatever it enjoys of free government, of political and religious liberty, of untrammelled legislation, and unbought administration of justice."¹¹⁶

Meanwhile, according to Crosby, the civil law's pedigree was sorry indeed. It was a system "based upon the crude laws of a rough, fierce people, whose passion was war, and whose lust, conquest," which had descended into a "chaotic

¹¹³Oscar Shuck, "Adoption of the Common Law," History of the Bench and Bar of California 47 (1901).

¹¹⁴Horace Hawes, as prefect of the district of San Francisco, had suggested in September, 1849, that "[i]t is perhaps the abuses and maladministration which may have existed under the former government, rather than any defect in the laws themselves, which have brought them into disrepute." Id. at 48.

¹¹⁵Crosby was quite proud of his efforts, reporting in his memoirs that "I was very much complimented on the work at that time, and my law friends in New York, to whom I sent a copy were so pleased with it that they sent me out a little testimonial." Memoirs of Crosby at 132.

¹¹⁶"Report of Mr. Crosby" at 588, 592.

mass" until organized by Justinian. This legal order was obliterated when "wave upon wave of Northern barbarism poured down on the effeminacy of Southern Europe," but was serendipitously rescued in the twelfth century, "and, owing to the arbitrary nature of some of its provisions, as well as to the wisdom and excellence of its general features, it was seized upon with avidity by the clergy, as favorable to their spiritual authority, and by monarchs, as conducive to the support of their despotic power."¹¹⁷

Ignoring Burnett's reformist motivations, Crosby contended that it was far from clear that the civil law had ever actually reigned in Mexican California, concluding instead that the people "seem to have been governed principally by local customs."¹¹⁸ Rather, it was American ingenuity which had saved the day:

[t]he American people found California a wilderness - they have peopled it; they found it without commerce or trade - they have created them; they found it without courts - they have organized them; they found it destitute of officers to enforce laws - they have elected them; they found it in the midst of anarchy - they have bid the warring elements be still, . . . and from the chaotic mass have called forth a beautiful creation.¹¹⁹

As a result, Crosby implied, Anglo-American law should be permitted to triumph officially as well.

The rights and needs of the native Californio population were acknowledged, but quickly and disingenuously dismissed. "[W]e should be the last

¹¹⁷Id. at 592-3.

¹¹⁸Id. at 600.

¹¹⁹Id.

persons in the world to countenance the least infringement upon any of their rights. . . . But if it be meant that it is due to their rights, that they should become recipients of special legislation, or should, for their exclusive benefit, have laws enacted or continued injurious or ill adapted to the best interests of the whole State, we take issue upon the allegation, and deny it."¹²⁰ Crosby saw no reason, historical or theoretical, to believe that the rights of the Californios would not be equally regarded under the common law, as under the civil law.

Referring to American expatriates' rejection of the indigenous legal system, Crosby argued that, "the immense business transactions of a great community," not to mention wills, marriages and estate distributions, had already been conducted in accordance with the common law.¹²¹ Glossing over the fact that this arrangement had occurred extralegally, Crosby concluded that to adopt the common law would simply be to "give authority to what has already been done in anticipation of such authority."¹²² This allowed Crosby to assert, rather ingeniously, that it would be adoption of the civil law which would actually constitute a change.

¹²⁰Id.

¹²¹Id. at 601.

¹²²Id. at 601. Even if Americans weren't to be seen as conquerors, Crosby celebrated their ethnocentricity and inability to adapt to the established social order: "You might as well undertake to eradicate the American character, and plant the Mexican in its stead - to substitute the Catholic for the Protestant religion, by statute - to abolish the English language and sanction none but the Spanish, by legislative enactment [A]ny such attempt, if made, would in due season be answered by the people." Id. Of course, Crosby had in mind the American people, who presumably would possess the political power to enforce their will.

On this basis, it would seem that Crosby would have been antagonistic towards employing the community property system in the State of California. However, in his comparison of domestic relations under the civil and the common law, he did appear to view the two systems as containing somewhat comparable tradeoffs of rights and duties, and certainly he was less hostile towards the civil law here than in his comparisons of other substantive areas. Crosby did dislike the idea that, under the civil law, marriage was treated as a partnership "no more intimate than an ordinary partnership in . . . commercial business." Yet, in asserting that dower rights and the shifting of the wife's debts to the husband provided "ample equivalent for the communion of goods allowed her by the Civil Law," he at least indirectly acknowledged the value of the common property arrangement for women.¹²³ Nowhere else in this report were arguments arranged in such a way that seemed to require the common law to measure up. Interestingly, although Crosby had not taken part in the convention debate over Section 13, he later implied that he had favored adoption of the community property system.¹²⁴

In the end, the common law was made the basis of jurisprudence in the State of California, yet at the same time the inaugural legislature did indeed interpret Section 13, now Section 14, of the Constitution as requiring, if not the continuation of the pre-existing marital property regime, then at least the

¹²³*Id.* at 596.

¹²⁴Prager at 18 n. 91.

institution of a scheme which included the category of common property.¹²⁵ Inasmuch as this involved the superimposition of one portion of civil law on a common law regime, caution ought to have been the watchword as the first legislature hammered out the specifics of California's marital property system. The constitutional convention had considered the idea of forming a committee to draft a complete code which would then be presented to the legislature, but instead decided to rely on the traditional give and take of the legislative process to yield a body of law.¹²⁶ This was unfortunate for the formation of California's marital property law in a number of ways. First, the legislature, overwhelmingly Anglo, had little familiarity with the complexities of the Spanish/Mexican community property system. A committee might have had the time and inclination to study the particulars before drafting statutes based on that law. Second, given the brief time which the legislature had to formulate a code, realistically the body had little choice but to "cut and paste" statutes from other U.S. jurisdictions. In this case, the cutting and pasting led the legislature to include statutes which dealt with the property rights of husbands and wives under

¹²⁵Prager concludes that the first legislature interpreted the constitution as calling for a "continuation of the pre-convention marital property law," but I am not so convinced, given the ways in which some of the initial statutes diverged from Spanish/Mexican law. Prager at 25 (emphasis added).

¹²⁶Id. at 33 n. 160.

the common law. And, not surprising, the legislators failed to consider the anomalies which might arise from mixing common law and civil law provisions.¹²⁷

No debates over statutes affecting marital property were recorded, nor did these enactments attract attention from news reporters. Thus, compared with the constitutional convention, it is even less clear here what was motivating lawmakers, and whether the resulting statutes evidenced "design, or lack of understanding of the Spanish civil law of marital property."¹²⁸ Some aspects of California's marital property law appeared to track the Spanish/Mexican system, but others diverged significantly. More importantly, little if any of this law could be considered reform-minded, and some appeared to go directly against Section 13's mandate, to secure wives their rights in separate and common property. Almost none of the law could be said to empower women, much less even protect them.

If the Select Committee and then the whole of the convention had been unclear about what they intended California's marital property law to achieve, the legislature added a third layer of confusion. While there was probably a sense in the Select Committee both to retain and to adopt a civil law-based marital property system, and while some sort of reformist spirit appeared to guide both the committee and much of the delegation, here common law thinking seemed to

¹²⁷*Id.* at 32-33. For one, an intestacy scheme was enacted without regard to the community property regime, while the community property statute also provided for descent, albeit of only the common property. *Id.* at 26, 33 n. 161.

¹²⁸*Id.* at 25.

take over to an even greater degree.¹²⁹ The result at this level was the disabling of married women in ways wholly antithetical to the Spanish/Mexican community property scheme, and wholly antithetical to a spirit of reform, especially reform based on the civil law, but even based on the common law.

The legislature did fulfill the constitution's mandate of setting forth a scheme based on common and separate property, and much of what was enacted was in accord with the Spanish/Mexican system, but some crucial omissions occurred. No surprise, the Act defining the rights of husbands and wives, as it was known, maintained one of the system's few gender-based differences, by giving the husband management control over the common property.¹³⁰ However, not only did this control lack the safeguards which were built into the Spanish/Mexican system, but also the law affirmatively indicated that the husband could treat this property as if he fully owned it.¹³¹ Interestingly, this position was adopted at the

¹²⁹Id. at 32.

¹³⁰Act of April 17, 1850, ch. 103, section 9, [1849-50] Cal. Stat. 254; deFuniak at 322. After statehood, Anglos in California would wrongly attempt to equate these management rights with the rights of control that the husband held under the common law. The difference between the two systems stems from differing notions of possession and ownership under each system. deFuniak complained that "[m]any lawyers trained in the common law . . . seem to fail to comprehend . . . that the management of the common property placed in the husband was an administrative duty only . . . and not in any sense the equivalent of the common law 'control' by the husband of the wife's property which made him virtual owner and gave him the right to appropriate its use to his own enjoyment and benefit." Id. at 298.

¹³¹Contrary to the Spanish/Mexican system's safeguards, which prevented the husband from defrauding the wife in disposing of the common property, the California provision gave the husband "the like absolute power of disposition" of the common property "as of his own separate estate." Act of April 17, 1850, ch. 103, section 9, [1849-50] Cal. Stat. 254; deFuniak at 338. In other words, the statute included no mechanism to check the husband's power in the event of mismanagement of the property, nor was the wife's involvement required in any transaction regarding this property. Prager at 27.

same time that women in common law states were losing influence over the business dealings of their husbands, due to the erosion of dower rights.¹³² Most basically, though, the Act, like Section 13, failed to provide a definition of common property.¹³³

Meanwhile, the provision dealing with succession to the common property did purport to treat the spouses identically, by providing that, at the death of either spouse, one-half belonged to the survivor, and the other half to the descendants of the decedent, and if there were none, the surviving spouse would take the entire community.¹³⁴ However, the Spanish/Mexican system had permitted some, albeit limited, testamentary control over the common property¹³⁵ and the surviving spouse was given a lifetime usufructuary interest in the entire community.¹³⁶ These provisions, but particularly the latter, allowed the common

¹³²Hoff at 108.

¹³³According to deFuniak, failure to define the term "common property" should have had no bearing on whether a jurisdiction meant to continue the recognition of the community of marital acquests and gains. On the basis that California's marital property system "is that developed in Spain, which clearly and sufficiently defines what is community property," he reasoned that "there is in fact no necessity that our American statutes should have to define what is community property, for that is already clearly established." *Id.* at 137.

¹³⁴Act of April 17, 1850, ch. 103, section 11, [1849-50] Cal. Stat. 255.

¹³⁵deFuniak at 554-557. However, the sheer complexity of Spanish/Mexican law regarding disposition of the common property upon the death of a spouse would have made this provision unattractive to Anglo lawmakers even if they had some understanding of the system.

¹³⁶deFuniak at 560-561. Failure to provide this power may have been mere oversight, but it was oversight no doubt grounded in the common law. The productivity of property of the marriage was not a problem in the common law; the wife's death had no effect on the property inasmuch as it belonged to the husband, while the husband's death also had no significant effect, inasmuch as the widow was given only a life interest in a portion of the property.

property to be managed as a whole during the lifetime of the surviving spouse. There were no similar provisions in the California statute.

Yet, when it came to devising a rule for dividing property in the event of divorce, it was here that the legislature ironically adhered closest to the philosophies and theories underlying the community property regime. This was particularly ironic because divorce was unknown in Spanish/Mexican law. Apparently analogizing divorce to spousal death, and thus termination of the community, the legislature provided for the common property to be divided equally, without taking fault into account.¹³⁷ As a result, California women who divorced appeared to be better off than those in Eastern common law states, where property awards not only depended significantly on the wife's innocence in the breakup of the marriage, but also depended on the discretion of judges.¹³⁸ Interestingly, then, this provision was at once reform-minded and consistent with Spanish/Mexican law, clearly giving some power to women by according them a determinate inter vivos interest in the common property.

¹³⁷*Id.* at section 12, [1849-50] Cal. Stat. 255. This section was not enacted without some opposition in the Assembly, as the vote was recorded, with 17 in favor and 4 opposed. Prager at 32 n. 157. The whole of this area of law apparently proved difficult for the legislature. Although the first legislature declared marriage to be a civil contract (Act of April 22, 1850, ch. 140), and provided for property division upon divorce, it wasn't until the following year that an actual divorce statute was enacted. Act of Mar. 25, 1851, c. 20.

¹³⁸Salmon at 66-71; Glenda Riley, *Divorce: An American Tradition* 46-48, 51 (1991). Eastern states generally proceeded according to intestacy rules, as well, but the fault-based, discretionary nature of the award rendered it far less certain. Nevertheless, research at the level of trial records appears to indicate that, when there was common property to be divided (which was not often) husbands were able to frustrate the operation of this statute by virtue of their management prerogative, which allowed them to sell off common property and abscond with the proceeds before the court could intervene. Bonnie L. Ford, "Women, Marriage, and Divorce in California, 1849-1872," 13, 101-105 (Ph.D. diss., University of California, Davis, 1985).

More broadly, this divorce statute, along with a few other provisions dealing with spousal death, at least implied that the spouses had an equal, identical ownership interest in the common property during the life of the marriage. In addition, to the extent that California law was seen as a continuation of the Spanish/Mexican scheme, wherein equal, inter vivos ownership was an integral component, this right could be implied,¹³⁹ and there was nothing about the California scheme which precluded such a conclusion. Thus, the fact that there was no statutory language specifically providing that the wife held an ownership interest in the common property,¹⁴⁰ was not necessarily fatal to the existence of that principle. However, the language of the succession statute, indicating vaguely that half the common property would "go to" the survivor, imported an ambiguity regarding the extent of ownership before the other spouse's death, inasmuch as it was unclear whether the survivor took as an owner or as some sort of heir.

Nevertheless, when it came to formulating provisions dealing with the spouses' separate property, the legislature approached this task with the same thoroughly gendered mindset that the convention delegation had exhibited. The Spanish/Mexican system dealt with the separate property of each spouse

¹³⁹See Dow v. Gould & Curry Silver Mining Co., 31 Cal. 629, 644 ("[i]t is not expressly declared what right or title she shall possess in the common property, nor is common property defined; but at the time of the formation of the Constitution, it was a term of well-known signification in the laws then in force, and a right on the wife's part in property of that character was recognized by the Constitution").

¹⁴⁰Prager at 27.

identically, however, those steeped in common law tradition knew of only one kind of separate property, the wife's separate property. And, given that Section 13 was framed in terms of the wife's separate property, there was little to prevent the legislature from injecting common law coverture doctrine to what was supposed to be a Spanish/Mexican category of property. As a result, the wife was disabled in a number of ways in her dealings with her separate property, where the husband was not. Moreover, the wife's loss of power was the husband's gain. The wife was not allowed to manage her property; this power was given to her husband.¹⁴¹ And the wife was not permitted to devise this property, except with the permission of her husband.¹⁴² While these provisions may have accorded with traditional common law, they were wholly antithetical to the Spanish/Mexican system, and seemingly in derogation of Section 13's mandate.

Thus, it seems, the legislature interpreted Section 13 in a manner different than either the delegation or the Select Committee had intended. Clearly, the legislature did not view the constitutional provision as strictly requiring the continuation of indigenous law. According to Prager, those circumstances which served to motivate at least the committee to retain the Spanish/Mexican marital property system had quickly changed, whereby deference to the Californios had turned to outright hostility for that "foreign" population. "Fear created by

¹⁴¹Act of April 17, 1850, ch. 103, section 6, [1849-50] Cal. Stat. 254.

¹⁴²Act of April 10, 1850, ch. 72, section 2, [1849-50] Cal. Stat. 177. Under the Spanish/Mexican system, wives as well as husbands had testamentary control over their separate property. deFuniak at 544.

ignorance of the Californians and their customs, disregard for non-democratic institutions and a typically American arrogance all combined to produce an intensely antagonistic climate,"¹⁴³ and conditions permitted Americans to act on this hostility. Because Americans now so outnumbered native Californians, they could easily politically dominate this population. First, the election of the initial legislature in November, 1849, was far more affected by the gold rush migration than had been the election of convention delegates earlier that summer. As a result, nothing like the over-representation of Californios and old-line Anglos, which occurred in the convention's Select Committee, could happen in the first legislature. Second, there was no longer any need to appease the Californios now that statehood had been granted.¹⁴⁴ Third, given that Americans chafed at the large, fallow landholdings produced by the dynastic rancho system, this probably made them reluctant to retain laws which could be seen as having contributed to these circumstances.¹⁴⁵ Finally, a broadly and highly internalized conception of the common law, i.e., an Anglo-American legal culture, guided legislators in formulating California's code.¹⁴⁶

What is unclear is whether legislators envisioned Section 13 as requiring them to institute provisions of the civil law as a reform of the common law.

¹⁴³Prager at 29-30.

¹⁴⁴Id. at 16-17.

¹⁴⁵Id. at 30-31.

¹⁴⁶Id. at 31-32.

Certainly, lawmakers did not ignore the reference in Section 13 to common property, but they did not design the treatment of this property in a way which provided women with much in the way of rights, either of the empowerment or protective sort. It may have been too much to expect antebellum Anglo male lawmakers to accept the idea that someone, a woman and a wife at that, should be granted an ownership interest in the product of their labor.¹⁴⁷ In addition, nineteenth-century common law-trained Anglo lawyers and judges no doubt were unable to think of marital property, or separate property for that matter, except in a gendered way. Who you were in the marriage, husband or wife, was what mattered first and foremost. But these legislators did not even buy into the delegation's interest in protecting families through guaranteeing wives their rights in what was their separate property.¹⁴⁸ No satisfying explanation for this can be discerned from the face of the enactments; all that can be concluded is that common law attitudes, and attitudes more orthodox than reform-minded, won out.¹⁴⁹

¹⁴⁷See generally David R. Roediger, The Wages of Whiteness: Race and the Making of the American Working Class (1991). Prager explains it was not merely an inability of men as lawyers and judges to understand the concept of the marital community, and ownership rights therein, but it was also the inability of men as men to do so. Prager at 35-36. Actually, Prager was not quite as blunt, referring more vaguely to the "discomfort with the community property component of a community property system." Id. at 36.

¹⁴⁸As Prager noted, "[t]he legislature's transformation of the concept of separate property for the wife into a concept of ownership without control stands as evidence that the convention's bold stance with respect to the property rights of married women was not approximated by the first legislature." Id. at 32.

¹⁴⁹Id. at 31-32.

As a result, the first legislature demonstrated its uncomfortableness with both looking backward to indigenous law and looking forward to reform of the common law through the use of joint property ownership. Moreover, the legislature was uncomfortable even with reforming the common law through wives' separate property rights designed merely to protect the family. It appears that the commitment of the inaugural legislature ran only so far as to getting a marital property scheme on the books. This left, to say the least, many possible points of contention to be hashed out in the courts. The door was certainly open for the California Supreme Court to increase the commitment of the state to retaining indigenous law or to reforming the law through civil law provisions, by implying such provisions to fill in gaps in the California scheme. Moreover, it was within the purview of the Supreme Court to hold the legislature to the reformist mandate of Section 13, by striking down those laws in derogation of the wife's property rights. But if legislators could not escape common law acculturation, Supreme Court Justices might have an even more difficult time. This did not bode well for the formative years of California marital property law.

Development of a Warped System

The imposition of common law restrictions on the wife's handling of her separate property, along with the failure to enact the Spanish/Mexican, or any other, restrictions on the husband's management of the common property,

appeared to make California women worse off than their Eastern sisters.¹⁵⁰ But this was only the beginning. Over the next ten to fifteen years, judicial statutory interpretations combined with additional legislative enactments to cause the law to evolve to the point where the wife also lost any inter vivos ownership rights she had in the common property. Her interest clearly became limited to rights which would accrue only if she survived her husband.¹⁵¹

Section 11 of the Act defining the rights of husbands and wives, which treated husbands and wives equally with regard to the devolution of the common property, became a lightning rod for Anglo male dissatisfaction with California's marital property system.¹⁵² Some of the problems with this statute were caused by the legislature's incomplete adherence to Spanish/Mexican law, but more significantly Section 11 was quite at odds with common law principles and expectations. A full adoption of the Spanish/Mexican marital property provisions in 1850 probably would not have, in and of itself, prevented the move away from gender-neutrality, but the move would not have happened so easily and thus so quickly. Both sorts of problems served to open the door to further restrictions on the wife's property rights, restrictions which happened to accord with the common law.

¹⁵⁰Id. at 28.

¹⁵¹Id. at 35.

¹⁵²Id. at 36. As Prager put it, "disposition on death which lodged only one-half the common property in the survivor bred resistance to the community property concept and ultimately furthered the notion of the common property as fully and exclusively owned by the husband." Id. at 28.

By requiring that half the common property go to the descendants of the decedent, if any, Section 11 guaranteed that, most of the time, the community would be divided during the lifetime of the survivor. This could cause irrational economic disruption,¹⁵³ but in addition the common property succession statute caused psychological disruption, at least in men, because it did not comport with common law-based expectations. First, it afforded the possibility that stepchildren of the surviving spouse would take. If the wife died first, this meant that what the husband regarded as "his" hard-earned property would be "taken" from him and given to non-blood relations. Second, and more fundamentally, it meant that, regardless of who received it, what the husband regarded as "his" hard-earned property would be "taken" from him during his lifetime.¹⁵⁴ Third, the law gave the decedent no control over who took the property. In other words, on its face, Section 11 failed to provide the decedent with testamentary control over a share of the common property, which proved problematic when the decedent was the husband. From the Anglo-American point of view, then, the statute operated to remove rights that men had enjoyed back East.

The legislature could have resolved the very real problem of economic disruption caused by division of the common property during the lifetime of the survivor, without altering the gender neutrality of Section 11, by giving the

¹⁵³Id. at 37.

¹⁵⁴As Prager put it, "it resulted in property, which those reared in the common law thought of as the husband's property, being passed on the wife's death to people other than the husband." Id. at 36.

surviving spouse management rights (as was provided under Spanish/Mexican law) or even ownership rights in the whole of the common property. Moreover, the Supreme Court could have played a role as well, by deciding that the constitution called for the continuance of the Spanish/Mexican system.¹⁵⁵ Then, the fact that the legislature had failed to institute the Spanish/Mexican management provisions would have been of no import, as the Court could have simply carried over the provisions from pre-statehood law. In fact, as early as 1851, in Panaud v. Jones, the Court recognized that the legislature had deviated from Spanish/Mexican law with regard to management rights over the common property upon dissolution of

¹⁵⁵deFuniak contended that the debates of the constitutional convention "conclusively" demonstrated that the delegates intended to continue the system then in force and to place it in the constitution so as to put the law beyond the reach of the legislature, and he built a great deal of his criticism of the development of California's marital property law around this somewhat questionable position. deFuniak at 108-109. On a more logical and less empirical basis, he argued more convincingly that the constitutionalization of marital property law in California required the Supreme Court to reach decisions on the basis that the Spanish/Mexican system had been retained in all its particulars. According to this argument, although the constitution did not spell out all provisions of the Spanish/Mexican system, it would be impossible to do so in such a document. "It is obvious, however, that the constitutional provision providing for community of property must mean a community of property according to some system with established principles, and it is equally obvious that the system provided for was the continuation of the system already in force It is even more obvious . . . that the state legislature cannot constitutionally abrogate the community property system . . . or alter the principles of such system." On this basis, deFuniak concluded, "[i]t is probable, indeed, that many of the present legislative enactments in [California] are in fact unconstitutional and invalid." *Id.* at 72-73. Unfortunately, by this point, in 1943, deFuniak was largely tilting at windmills.

Alternatively, the Supreme Court might have read the constitutional call for the legislature to "define" married women's property rights as requiring the legislature to secure those constitutionally-protected rights, and thereby have invalidated portions of the 1850 marital property law. However, given the force of Anglo-American common law chauvinism at the time, this result was even less likely. See Dow v. Gould, 31 Cal. at 639 (1867) (discussing the constitutional provision and concluding that "[t]o define, as the word is used in the statutes and Constitution, signifies to prescribe, to fix the bounds, to establish and declare the limits of, any right, power, duty etc.").

the community by death.¹⁵⁶ However, according to the Court, this deviation merely indicated that the California marital property system, while drawing on the Spanish/Mexican system, was established independently of it.¹⁵⁷ Neither did the court, in any other early case involving California's marital property law, base its decision on the fact that California had merely continued the law in effect prior to statehood.¹⁵⁸ Instead, the Court moved away from any reliance on

¹⁵⁶1 Cal. 488 (1851). Prager was mistaken to describe this, and a case raising similar issues, Ord v. De La Guerra, 18 Cal. 67 (1861), as having been decided under California law. See Prager at 37 n.180. In both cases, the Supreme Court was clearly, and rightfully, applying pre-statehood law. See Panaud, 1 Cal. at 514 (noting that the 1850 statute did not control the case); Ord, 18 Cal. at 74-75 (applying "Mexican law"). Both cases involved issues arising due to the death of the wife prior to statehood.

¹⁵⁷Inasmuch as the case was brought under pre-statehood law, any commentary on post-statehood law constituted no more than *dicta*. Panaud referred to the California statute, "not because it controls this case, but for the reason that, with the exception of the above stated, it contains a clear and succinct statement of the Spanish law respecting the property of husband and wife." 1 Cal. at 514. The exception, referred to by the Court, was the failure to provide for survivor management of the common property. Id. at 513-514. Thus, there was room to read Panaud as having decided that the post-statehood law was not a mere continuation of the Spanish/Mexican law.

¹⁵⁸In two cases, Packard and Dow, the court did acknowledge a connection between the Spanish/Mexican civil law system and the laws enacted by the first legislature based on Section 13's mandate. However, in neither case did the Court go as far as to declare that the constitution required the continuation of the indigenous system, and in fact, in both cases, the Court nevertheless fell back on a reliance on the common law. Packard v. Arrellanes, 17 Cal. 525, 537 (1861). The Court stated that "[o]ur whole system by which the rights of property between husband and wife are regulated and determined, is borrowed from the civil and Spanish law, and we must look to these sources for the reasons which induced its adoption, and the rules and principles which govern its operation and effect," (emphasis added) but then ignored its own admonishment when reaching its decision on this case. It should have at least sought guidance in pre-statehood law, but instead the Court held that, inasmuch as the California statute was silent where the Spanish/Mexican system had made provision, no provision could be implied. Id. at 539.

But Packard's outcome was consistent with a case decided one year before by the same three justices, Van Maren v. Johnson, 15 Cal. 308 (1860). Having been urged by one of the parties to rely on common law to fill in the gaps where California's marital property law was silent, the author of the opinion, Field, seized the opportunity, on the basis that "common law constitutes the basis of our jurisprudence." Id. at 312. Nowhere in this decision did Field consider (nor was he urged by the other party to consider) that it was the Spanish/Mexican law which should have been used to fill in the gaps.

Spanish/Mexican legal authorities (such as treatises), and instead continually referred to Anglo-American sources grounded in the common law.

Neither was the legislature likely at this point to introduce the Spanish/Mexican management provisions into California's marital property scheme. Moreover, the legislature was unlikely to amend the law in yet another way which would have resolved the economic disruption problem: by giving the surviving spouse ownership in the whole of the common property. By remaining true to the gender neutrality of the common property succession statute, such possibilities not only would have failed to solve the problems already perceived by those with a common-law mindset, but also would have aggravated those problems, by giving women quite a bit more power over property than the common law system allowed. In this environment the only way to resolve the psychological disruption caused by Section 11 was to gender the statute by devising one set of rules for the husband and another set for the wife. In doing so, the legislature would make clear its priorities: that it was less concerned about the economic disruption caused by division of the common property during the lifetime of the survivor, which would occur whether the survivor was a widower or widow, than it was about the psychological disruption caused to Anglo-American men when the results of the statute did not comport with their common law expectations.

The "reform" occurred in 1861, when the legislature retained the 1850 descendant succession rules for the wife, if the husband died first, but required

that the whole of the common property go to the husband, if the wife predeceased him.¹⁵⁹ While this solved for the surviving husband the problem of economic disruption, more importantly, it solved the problem of psychological disruption from seeing "his" hard-earned property going to others (especially stepchildren) during his lifetime. But this reform opened the door to some serious questions about the wife's inter vivos ownership rights in the common property. Where the 1850 statute had implied such an interest, the 1861 Act was even more equivocal. Under the new statute, the husband could be viewed as a forced heir, which would not be inconsistent with the notion that the wife had a lifetime ownership interest in the property. But this would have been an interest now almost devoid of meaning, inasmuch as the husband's management powers, during the life of the community, were coterminous with ownership. Thus, it is not surprising that the 1861 statute came to be read as according the wife no interest in the common property during her lifetime, and an interest only if she survived her husband.

This interpretation was aided considerably by decisions of the California Supreme Court, beginning with Panaud. While Panaud could be seen as indicating that the Spanish/Mexican management provisions could not be read into the California law, it did not resolve the issue of just what was being passed to the wife's descendants under the 1850 version of Section 11. In other words, the extent of the wife's inter vivos interest in the common property was unsettled, given that the California statutory scheme contained no express language defining

¹⁵⁹Act of May 8, 1861, ch. 323, sec. 1, [1861] Cal. Stat. 310-11.

this interest. An opportunity to answer this question came in the form of a case which did not arise under Section 11, but had enormous effect on the development of community property law in California.

The case, Van Maren v. Johnson,¹⁶⁰ brought before the court in 1860, prior to the 1861 amendments, presented the precise issue of whether the common property could be tapped for the wife's debts contracted prior to marriage. If the wife was seen as having an inter vivos ownership interest in the common property, then it would follow that that property was liable for her separate debts. Citing to a Louisiana case, the husband argued that the wife had "no certain vested interest in the common property until after dissolution of the community," and that "[t]he common property belongs absolutely to the husband."¹⁶¹ Meanwhile, the creditor argued that the issue could not be resolved by reference to statutory law. While the statute made the separate property of the wife liable for her premarital debts, and specifically exempted the husband's separate property from such liability, it was silent regarding the exposure of the common property. Thus, according to the creditor, the court had to rely on common law to resolve the issue.¹⁶² Nowhere did the creditor argue that Spanish/Mexican law would control in the absence of a provision specifically

¹⁶⁰15 Cal. 308 (1861).

¹⁶¹Id. at 309-310. Rightfully so, the debtor also argued that the husband's separate property was not liable for his wife's premarital debts, while relying on Texas community property cases. Id. However, it seems the debtor could have just as easily cited California law.

¹⁶²Id. at 310. This argument would flow from the fact that California chose to become a common law jurisdiction.

stating that the common property was liable for the wife's separate debts, or that the wife held an ownership interest in the common property during the lifetime of the community.

Stephen Field delivered the opinion of the Court. He recognized the silence of California statutory law regarding the liability of the common property for this debt, noting as well that the law was silent regarding liability for the husband's premarital debts. But it was clear that the reason why the common property was reachable to satisfy the husband's debts was because "title to the property rests in the husband," according to Field.¹⁶³ Confusing title and ownership in this context, Field went on to reason that, if title rests with the husband, then the wife has nothing but a "mere expectancy" in the common property, "like the interest which an heir may possess in the property." Thus, under California's marital property regime, she could not subject the common property to liability for her pre-marital debts.¹⁶⁴ But this did not mean that the common property could not be reached for the wife's debts. Cleverly, Field agreed with the creditor that the common law would then control to determine whether there was any other avenue by which the debt could be satisfied. The rule under the common law was well-settled, that the husband was liable for the debts. Next, Field returned to the statute, finding that it acted to modify the common law, and in two respects: the separate property of the wife was also liable

¹⁶³*Id.* at 311.

¹⁶⁴*Id.* Field cited a Louisiana case for this conclusion.

and the separate property of the husband was not. The conclusion, then, was that the husband was liable "to the extent of the common property."¹⁶⁵ Cleverly and conveniently, Field was able to satisfy the demands of the creditor but still declare that the wife did not have an inter vivos ownership interest in the common property.

In the year following the Van Maren decision, the Supreme Court was faced with the question of the wife's inter vivos ownership interest in the context of a Section 11 case, again arising under 1850 law.¹⁶⁶ Following the death of the wife and then the husband, the children of the marriage sought an administration on their mother's estate, prior to administration on their father's. Relying on Van Maren, the Court ruled that the wife had nothing to pass upon her death, inasmuch as she has no cognizable interest during her life. The Court reasoned, "we do not see upon what principle the intangible interest of the wife can be regarded as part of her estate. It would be absurd to attribute to her death the effect of transforming this interest into a legal right."¹⁶⁷ As a result, "there is nothing sufficiently tangible in the interest of the wife to become the subject of

¹⁶⁵Id. at 311-312.

¹⁶⁶Packard v. Arellanes, 17 Cal. 525 (1861).

¹⁶⁷Id. at 539. According to the Court, if California had enacted a provision governing administration of the common property, which had existed in Spanish/Mexican law and had been enacted in Texas and Louisiana, the results would be different. Id. It would be on that basis, independent of whether the wife had a vested right in the common property, that administration of the common property (of the wife) could be sought. But, inasmuch as California had no provision calling for such administration, and had enacted a provision governing administration of only the estates of individuals, the right could exist only if the wife had an interest in the common property which could be regarded as part of her estate.

proceedings in probate."¹⁶⁸ The Court then went on to define the children's interest. It was not, according to the Court, that the children of the marriage had no right to succeed to the common property; that would contradict the express language of the 1850 statute. What they lacked, the court cleverly reasoned, was a common law right as a successor to their mother's estate. Rather, they succeeded to her portion of the common property by operation of the statute, presumably after the death of the husband.¹⁶⁹ Following this decision and in conformance

¹⁶⁸Id. at 541.

¹⁶⁹Id. at 539. This bit of cleverness permitted the Court to remain true to the Van Maren decision without contradicting Section 11 of the Act defining the rights of husbands and wives. Inasmuch as the Court held that, under the 1850 law, the children did succeed to a portion of the common property by virtue of their mother's death, the issue of the extent of the husband's management powers after her death remained a live one in cases where the wife died prior to the 1861 and 1864 reforms.

The issue of management powers, at least for the surviving husband, remained a difficult one for the Court, even under the Spanish/Mexican law, until the 1861 reforms. Panaud v. Johnson, 1 Cal. 488 (1851), and Ord v. de la Guerra, 18 Cal. 67 (1861), arising under Spanish/Mexican law, involved similar fact patterns, whereby the wife predeceased the husband and the husband continued in possession of the common property after her death. The suits were brought after the husband's death, by the children of the marriage, against the executor of his estate. The children argued that they were entitled to a share of the estate as heirs of the wife, not merely as heirs of the husband. In other words, the plaintiffs challenged any notion that the husband could take ownership of the whole of the common property, and moreover, in Panaud, the plaintiff challenged the extent of the husband's right to manage that property. Both decisions denied that the husband had an ownership interest in the whole of the common property, but they were quite clear about guarding his rights to manage that property.

Noting the husband's right to manage the whole of the common property during the life of the marriage, the Panaud court held that the children did not inherit an indefeasible right to the mother's half, but instead had an interest which could not be perfected until the father's death, "and then, only after the payment of his debts." 1 Cal. at 517. In other words, the husband was permitted to alienate any or all of the common property during his lifetime, including the half tied to his deceased wife, and could direct by his will the alienation of the property for payment of his debts. Id. at 515-516. While the Spanish/Mexican succession code was gender-neutral in its terms, both courts, after citing to that law, nevertheless switched into gendered language, upholding various rights of the "husband" (rather than the "surviving spouse"). The Panaud court stated, "It would be a startling doctrine to hold that, on the death of the wife, one half of the common property immediately vested in the children of the marriage, without reference to the payment of the debts contracted by the husband for the benefit of the joint community The common property should be and is, not one half but the whole, a security for the payment of debts contracted for the common benefit, and also by the husband after the death of the wife." Id. at

517. But, would the court have been so startled to hold otherwise, had the case involved the death of the husband first? In other words, would the court have been so quick to allow the wife the power to alienate the common property freely during her lifetime and by will, for the payment of debts contracted by her as a widow? With the use of language which implied a relevance to the genders of the decedent and the survivor, not called for by the law, it would be but a small step to conclude that a surviving husband had different, and more, rights in the common property than did a surviving wife.

Meanwhile, Ord, although using the terms "husband" and "wife" rather than "spouse," nevertheless displayed a far less gendered mindset. The defendant in Ord attempted to rely entirely on Anglo-American law, analogizing the surviving rights of the husband to a trust. Rejecting the trust analogy, the Court realized that the Mexican law of succession controlled, and instead analogized the husband's rights in the common property to that "of a surviving partner in a commercial partnership." 18 Cal. at 74-75. Not only was the "partner" gender-neutral, but this figure was also an equal.

The connection between Panaud and Ord is unclear. Panaud was not cited by either of the parties or the Court in Ord, and the results of the two cases actually appear to be at odds. While Panaud effectively held that the husband was not liable to account to the children for the wife's share of the common property, the Ord decision held the opposite. In Panaud, the children's rights were fully defeasible, 1 Cal. at 517, while in Ord, the children were tenants in common with the husband, and thus entitled to an accounting and discovery of assets upon the husband's death. 18 Cal. at 75-76. In other words, his management powers were far from unfettered. Both cases seemed to hold, under Spanish/Mexican law, that the surviving husband was permitted to manage the common property during his lifetime, however the Panaud case appeared to give the husband far greater management powers than did Ord.

Not until 1871 was the Court called upon to apply the 1850 statute to decide the extent of the husband's management powers over the common property after the death of the wife. The Court attacked the problem from the angle of the wife's ownership interest. Broad v. Broad, 40 Cal. 493 (1871). The children of the marriage argued that, upon their mother's death, title to her share of the common property, a piece of real estate, vested in them, as tenants in common with their father. Id. The children relied on Ord, but also cited Panaud in their favor. Unlike with the earlier cases, the father was still alive, and the children were suing him in an action for partition and for the profits on the real property. Id. The father argued that he was entitled to possess, manage and control the property during his lifetime, and in any event, upon the mother's death no title or interest had passed to the children. Id. at 495. Not surprising, the father cited Panaud, but ignored Ord. Nevertheless, inasmuch as both these cases had been brought under Mexican law (which, as Panaud had noted, differed from the California statute with respect to the survivor's management powers over the common property), they really were of no authority. The Court did not cite to either. Meanwhile, neither party advanced any argument that the Spanish/Mexican law should have been considered to be in force during the relevant period. The father, in arguing that no title or interest passed to the children on the mother's death, cited to Van Maren v. Johnson and Packard v. Arrellanes, to argue that the children could not maintain a partition action during his lifetime. Id. The father was represented by prestigious counsel, M.H. Myrick, who would later serve as judge of the Probate Court in San Francisco during the mid-1870s and then as a Justice on the California Supreme Court, beginning in 1879.

The Court disagreed with the father, holding that the term "shall go" in the 1850 succession statute clearly meant "shall vest," and that the statute implied that "the other half [shall go] to the descendants." Thus, the Court held that, upon the mother's death, the children "take title of the same nature, and to the same extent," as the father. Id. at 496. This was not inconsistent with Packard, inasmuch as the court was relying on the statute to pass interest, not on

with it, the legislature further modified the common property succession statute in 1864, to provide that the whole of the common property would go to the surviving husband without interference by the judicial system.¹⁷⁰

theories of succession. Nevertheless, the Court reached this result grudgingly, critical as it was of the 1850 statute. However, the Court approved of the reformed version, asserting that Section 11 of the statute had been amended "for the purpose of obviating, for the future, many of the inconveniences, and perhaps hardships, which are so forcibly presented by the defendant. It was deemed proper to change the statute, so that upon the death of the wife, the entire common property should go to the husband." *Id.* at 497.

Again, however, note that the gender of the survivor was a driving force behind this editorializing, although the Court was probably oblivious to this fact. In other words, the Court failed to realize that the amendments only addressed the inconveniences faced by the surviving husband when the common property was divided at the dissolution of the community by death. At the least, it could be predicted that if this case had involved a surviving wife, who had continued to manage this piece of real estate, the outcome under the 1850 statute would have been the same, but no doubt the Court would have been more comfortable about reaching that outcome, i.e., it would not have perceived the wife's situation as involving "inconveniences, and perhaps hardships."

Meanwhile, although resolving the issue of the extent of the children's interest, the Court in *Broad* avoided specifically addressing the management issue. (Nevertheless, by deciding that the children were tenants in common with their father, *Ord* certainly provided authority for the extent of the father's management powers.) In 1888 the Court was faced squarely with the issue of the extent of the father's management powers. *Johnson v. San Francisco Sav. Union*, 75 Cal. 134, 16 P. 753 (1888). Here, the common property involved an encumbered piece of real estate. After the wife's death, the husband secured new mortgages as previous ones came due, thereby further encumbering the property. Finally, the property went into foreclosure. The issue was, did these further encumbrances constitute community debts, for which the property was liable? Or, put another way, did the community continue after the death of the wife? *Id.* at 142-143; 16 P. at 755-756.

The Court began by noting, consistent with *Panaud*, that, under the Spanish law, the community did continue, but then noted that "this doctrine of Spanish law (if such it be) did not obtain a foothold in our law." *Id.* at 144, 16 P. at 756. Citing to *Ord*, *Packard*, and *Broad*, the Court held that the husband "took as a surviving partner, not as a continuing partner. The partnership was dissolved by the death, and his duty was to settle up its affairs, not to proceed to impose new burdens upon the property in the prosecution of new enterprises This is widely different from saying that the property is liable for debts which are not community debts; that is, for debts contracted after the dissolution of the community." *Id.* at 144, 16 P. at 756 (internal citations omitted). Thus, this decision made clear that, under the 1850 statute, the husband did not have the right to manage the common property as an ongoing enterprise during his lifetime. If the wife's descendants were children of the marriage, the husband, as guardian, would have the right to manage their share of the common property during their minority. However, this did not guarantee the husband management control over the whole of the common property for the duration of his life, as was the case under Spanish/Mexican law. Prager at 36 n.178.

¹⁷⁰Act of April 4, 1864, ch. 333, sec. 1, [1863-64] Cal. Stat. 363. The statute now read, in part, "Upon the dissolution of the community by the death of the wife, the entire common property shall, without administration, go to the surviving husband." See also, Prager at 38 n.186.

The 1861 statute also solved the problem of lack of testamentary control in the common property. The husband was now permitted such under limited circumstances - when he had no descendants.¹⁷¹ Three years later, the legislature expanded this to unlimited testamentary control.¹⁷² Interestingly, the Supreme Court had found a way to play a role in advancing the testamentary rights of husbands over the common property, around the time that the legislature was instituting its own reforms. Soon after the 1861 amendments were signed into law, the Court was presented with the question of whether, under the 1850 version, a spouse could exercise testamentary control over the common property.¹⁷³

The facts of the case were rather paradigmatic: the decedent-husband's will gave the entirety of his estate to his wife, specifically mentioning his minor children, apparently in order to prevent them from taking as pretermitted heirs. However, the will did not specifically indicate by its language whether the husband was purporting to devise his interest in the common property; in fact, there was

¹⁷¹Id. The sheer complexity of Spanish/Mexican law regarding disposition of the common property upon the death of a spouse no doubt had made it unattractive to Anglo lawmakers unschooled in the system, but the fact that it gave the wife testamentary control, and the same level of testamentary control as the husband had, over half of the common property must have made it untenable to those with a common law mindset. Moreover, the Spanish/Mexican law was quite unacceptable from a common law perspective, because it meant that a husband could lose "his" hard-earned property not by operation of law, as appeared to be the case with the 1850 statute, but by the autonomous action of his wife. deFuniak at 554-557.

¹⁷²Act of April 4, 1864, ch. 333, sec. 1, [1863-64] Cal. Stat. 363. The common law revolution was now complete. The common property succession statute provided, in remaining part, "Upon dissolution of the community by the death of the husband, one-half of the common property shall go to the surviving wife, and the other half shall be subject to the testamentary disposition of the husband, and in the absence of such disposition shall go to his descendants."

¹⁷³Payne v. Payne, 18 Cal. 291 (1861).

no use of the terms "separate" and "common" property in the will.¹⁷⁴ By the terms of the California statute, these children would have succeeded to his interest in the common property, in contravention of common law expectations. That this would not have been the decedent's intention is evidenced by the fact that he appears to have drawn up his will without knowledge of the California marital property and succession laws, and thus most likely with a common law mindset.

The suit which was brought was "amicable," and the children's representation by counsel appears nominal, as no briefs were filed in support of the proposition that the law required their father's share of the common property to descend to them, notwithstanding the will.¹⁷⁵ Nevertheless, the strongest argument in their favor was obvious: nowhere in the 1850 statute was there any language granting the spouses, let alone the husband, a testamentary right in the common property.¹⁷⁶

In the face of this, the surviving wife's counsel's argument made clever use of common law doctrine (from Shelley's case, specifically), to argue that the words in the statute, "the other half to the descendants of the deceased husband or wife,"

¹⁷⁴The will, drawn up in California in 1857, appears to have been holographic, and not the work of an attorney. 18 Cal. at 293. Meanwhile, a codicil to the will was drawn up in New York in 1861, and was properly witnessed. *Id.* at 294-295. Not surprising, the codicil also does not distinguish between "separate" and "common" property. This was not a case where the testator was residing temporarily in California. Rather, his family had lived there with him and the property of the marriage was situated there. *Id.* at 295. Moreover, this was probably the typical situation where the couple had married young, without bringing much property to the marriage. Thus, the bulk of the property at issue in this case was probably acquired during the marriage, i.e., was common property.

¹⁷⁵*Id.* at 295, 299.

¹⁷⁶deFuniak at 562 n.84.

were words of limitation only, and operated no differently than the words "to his heirs in fee," which, under common law, entitled the ancestor to (his half of) the entire estate. If the ancestor held the entire estate, the argument went, then he necessarily held testamentary power over that estate. Moreover, the attorneys contended that any other construction would nullify California's wills statute, which gave a man the right to dispose of "all of his estate." The attorneys asked, rhetorically but incredulously, "Will it be said that . . . 'all of his estate' means only 'all of his separate estate'?"¹⁷⁷ However, counsel's argument was undermined by the fact of the newly enacted amendment, even though its terms were not applicable to this case. The statute implied that, prior to its enactment, the law was understood to deny spouses testamentary control over any of the common property; else why would the legislature bother passing it? The attorneys were quite clever, arguing (rather implausibly, it seems) that the amendment operated to limit what was previously the law, i.e., full testamentary control.¹⁷⁸ Twisting and turning the new statute, the attorneys urged that it "is not to be interpreted as giving, for the first time, such testamentary disposition to the husband."¹⁷⁹

¹⁷⁷Payne, 18 Cal. at 296. Nowhere did counsel for the wife attempt to rely on Spanish/Mexican provisions which gave the spouses limited testamentary control over the common property, but this is not surprising, inasmuch as they were seeking a decision from the Court that the husband had full, and not merely partial, testamentary control over his half of the common property. Interestingly, the first half of the attorneys' argument was gender neutral, suggesting that wives as well as husbands had testamentary control over common property. The second half of the argument, relying on the wills statute, referenced only husbands.

¹⁷⁸Id. at 297.

¹⁷⁹Id. at 296.

Ignoring counsel's argument, Justice Stephen Field delivered the opinion of the Court, relying almost entirely on the 1855 case of Beard v. Knox.¹⁸⁰ The wife's attorneys had argued merely that Beard did not prevent a result in their favor, inasmuch as the case held only that the husband could not devise the wife's half of the common property. But nowhere did they argue that Beard compelled such a result. Nevertheless, the Court considered Beard as having decided that the husband could at least devise his own half.¹⁸¹ Yet, the language in Beard, stating that the husband might dispose of his half of the common property "to whomsoever he pleased," was dicta. Moreover, the husband's will had devised his half to his daughter, which provided the same outcome as ostensibly required under the 1850 statute. It should not have surprised Field, then, that "the decision has never been questioned," inasmuch as the result was correct.¹⁸² However, Field took the acquiescence in the Beard result to indicate acquiescence in this dicta. In this way Field transformed incorrect dicta, in a case otherwise correctly decided, into precedential authority, without any examination of the authority (or lack of it) upon which the dicta might have been based. Rather, Field justified his reasoning on the basis that the dicta in Beard had become, in practice, "a rule

¹⁸⁰5 Cal. 252 (1855).

¹⁸¹Payne, 18 Cal. at 295, 301.

¹⁸²Id. at 301.

under which property of vast amount and value has been distributed,"¹⁸³ although he provided no evidence to support this empirical belief.

While wrong,¹⁸⁴ the result in Payne served the purpose of minimizing or eliminating economic disruption, by sanctioning a spousal devise of half of the common property. But nothing required testators to do so. Moreover, with the Payne (and Beard) court faced with the need to discover testamentary rights in the 1850 state only for the husband, the door was open for a subsequent consideration of this case as authority for the proposition that the statute precluded finding testamentary rights for the wife. Conveniently, though, the Payne court itself could avoid acknowledging its gendered expectations in the face of a gender-neutral statute. Not surprising, this sort of reading of Payne, while certainly not compelled, accorded with the 1861 legislative reforms, which mooted any issue of the wife's testamentary control over the common property, inasmuch as the husband was made the owner of the whole of the common property upon the wife's death.¹⁸⁵

The 1861 legislative reforms of Section 11, which contributed to a hardening of the position that the wife's lifetime interest in the common property was not equal to that of her husband, were presaged in 1857 by an amendment to

¹⁸³Id.

¹⁸⁴According to deFuniak, the result in Payne was correct on the basis that it rightly applied the Spanish/Mexican law, continued in effect by virtue of the constitution. deFuniak at 562 n.84. However, Spanish/Mexican law gave spouses testamentary power over only a small portion of each one's half of the common property. deFuniak at 554.

¹⁸⁵Act of May 8, 1861, ch 323, sec. 1, [1861] Cal Stat. 310-311.

the statute regarding division of the common property upon divorce. Having had to design a provision which had no direct corollary in Spanish/Mexican law, the first legislature had been admirably consistent in choosing to treat divorce similarly to the death of a spouse (with both representing the "death" of the marital community), and to treat the spouses in a gender-neutral fashion. Moreover, inasmuch as the statute granted each of the divorced spouses one-half of the common property, this provision, even more than Section 11, implied that both spouses had inter vivos ownership interests in the property. However, the legislation diverged significantly from divorce law in Eastern common-law based states, where property awards were rendered uncertain due to judicial discretion, and was quite at odds with nineteenth-century American expectations regarding divorce, where all aspects of the outcome were affected by the determination of guilt and innocence.

It appeared, then, that the divorce statute was one place where California wives were better off than their Eastern sisters. In fact, with the Supreme Court and the legislature undermining at every turn the notion that the wife had an inter vivos ownership interest in the common property, as time went on an argument could almost be made that a woman was better off ending the marriage by divorce before she died. At the least, this statute could hardly be seen as deterring, for wives anyway, divorce-inducing behavior. In other words, this statute seemed to

prevent California judges from being able to impose community norms regarding marital breakdown, a power accorded to judges in most other states had.¹⁸⁶

Thus, there were a number of factors which could have contributed to the legislature, only seven years later, backing away from an automatic 50-50 division and granting judges discretion to divide the common property unequally, when the grounds for divorce involved particular culpability, i.e., adultery and mental cruelty.¹⁸⁷ While the statute remained facially gender-neutral, and enumerated grounds which probably did not in sum total favor men over women,¹⁸⁸ this amendment nevertheless ultimately hurt women far worse than men, inasmuch as

¹⁸⁶This speculation indicates a need for research into court records at the trial level to discern the manner in which judges handled division of common property. Neither Robert L. Griswold's nor Ford's study of divorce is helpful, as each fails to include property issues. Robert L. Griswold, Family and Divorce in California, 1850-1890: Victorian Illusions and Everyday Realities (1982) (examining San Mateo divorce records from 1850-1890) [hereinafter, Griswold, Family and Divorce]. Meanwhile, Miroslava Chavez has examined records from Los Angeles County, for the 1850s through 1880, and has found that, until the 1870s judges were rarely presented with the opportunity to make a property division, either because the parties did not request such, or the husband was able to convince the judge that there was no common property to divide. Author's conversation with Miroslava Chavez, April 1, 1999. This tends to indicate that the 1850 statute did not translate into real power for divorcing women.

¹⁸⁷Act of April 14, 1857, ch. 176, [1857] Cal. Stat. 199.

¹⁸⁸See Robert L. Griswold, "Divorce and the Legal Redefinition of Victorian Manhood," in Marc. C. Carnes and Clyde Griffen, eds., Meanings for Manhood: Constructions for Masculinity in Victorian America 98-99, 101, 105 (1990) (indicating that during this period, especially in California, adultery remained a male ground for divorce, while expanding definitions of mental cruelty rendered that a female ground). See also, Ford, chs. 6 and 7 (examining Sacramento divorce records from 1849 to 1872, where cases were brought on the grounds of adultery and mental cruelty); and Griswold, Family and Divorce (examining San Mateo divorce records from 1850-1890).

it helped to undermine the proposition that the wife held an inter vivos ownership interest in the common property.¹⁸⁹

Meanwhile, as confirmed by the experience of the Eastern common law states in enacting Married Women's Property Acts, legislators did not have as difficult a time conceiving of and thus according married women property rights in something considered to be their separate property. The 1850 law, speaking as it did of only a wife's separate property, was clearly a product of common law thinking. And because the first legislature had specifically defined inter vivos rights in the wife's separate property, lawmakers could focus easily on reconfiguring the boundaries of that category of property. Thus, it is not surprising that, during this period when wives' rights to the common property were being continually eroded, attention was turned to the separate property aspect of the system, as a way to adjust the relative power of the spouses more favorably towards wives. In other words, what the law makers had been taking away with one hand, with regard to the wife's interest in the common property, the legislature could see itself as giving back with the other, by according the wife increased control over her separate property. Yet, it was not a fair trade-off, inasmuch as the typical couple brought little separate property to its marriage, and most of the property accumulated over the life of the marriage was common property. Moreover, the motives of the legislature, in granting wives rights, may

¹⁸⁹Inasmuch as the husband's ownership interest could be implied from the strongly worded management statute, the 1850 divorce statute added little more authority. On the other hand, the wife's ownership interest could be implied only from Section 11 and the divorce statute.

have been just as much grounded in an interest in protecting a portion of property from the husband's creditors, than in any solicitude towards women's rights.¹⁹⁰ In addition, if the 1850 statute were not inconsistent enough, adjustment of these boundaries regarding the wife's separate property rights could serve to further erode community property principles.¹⁹¹

After having taken away (from the vantage point of the community property system) the wife's right to manage her separate property in 1850, the legislature began giving back management rights in limited circumstances. First, in 1852, the lawmakers enacted a "sole trader" statute, ostensibly permitting married women to establish businesses.¹⁹² This statute not only evinced a thoroughly common-law mindset, but also significantly warped the community property system. Such a statute was a non sequitur, inasmuch as a married woman, just as much as a married man, ought to have been able to run a business for the benefit of the marital community. Why, then, would California require a statute to state the obvious? Clearly, the legislature was operating from the assumption that, even in the absence of any enactment stating so, married woman lacked the legal capacity to own businesses. Second, the statute did not state the obvious, i.e., that

¹⁹⁰See Hoff at 128.

¹⁹¹Prager concluded that many of these statutory reforms "cast doubt on [California's] commitment to community property concepts." Prager at 40.

¹⁹²Act of April 12, 1852, ch. 42, [1852] Cal. Stat. 101-02, amended by Act of April 8, 1862, ch. 121, [1862] Cal. Stat. 108. Such a statute should have been, theoretically, wholly unnecessary under the community property system. Sole trader statutes did serve an important function under the law of coverture, given that women lost their legal identity upon marriage. However, this was not the case under the Spanish/Mexican civil law. deFuniak at 6.

under a community property system, wives could run businesses, because it indicated something very different than that these businesses were run for the benefit of the community. Instead, under this statute, the businesses were to be run solely for the benefit of the wife. Thus, the only way to rationalize this statute is that the legislature believed that principles of coverture trumped principles of community property, in the absence of a statutory provision addressing the issue at hand, notwithstanding Section 13 and notwithstanding California's legal heritage. In effect then, subsequent adoption of the common law by the 1850 legislature had more force than adoption of a constitutional provision in 1849.

On the surface, this statute appeared to empower women while at the same time it protected the family. However, it was limiting as well. In restricting the amount of property which could be liable for a married woman's debts, to her separate property and any assets accumulated as a result of the business, and thus exempting the common property, it effectively limited her ability to obtain credit. By again denying the wife an inter vivos interest in the common property, this statute gave with one hand while it took with another. Moreover, this statute further contravened the community property system by rendering certain property which was paradigmatically common property, the fruits of labor, separate.¹⁹³

¹⁹³Act of April 12, 1852, ch. 42, sec. 3, [1852] Cal. Stat. 101, amended by Act of April 8, 1862, [1862] Cal. Stat. 108.

Another reform permitted a married woman whose husband had been absent from the state for a year to convey separate real property.¹⁹⁴ Not only was this so niggardly, given the crisis situation it undoubtedly was meant to address, but also, in the little bit of assistance that it did provide, it served the interests of the state as much as it did those of married women. Considering California's lack of any sort of state-sponsored welfare system, in the face of significant male transience during this mining boom, this reform helped to keep women and children from pressing their needs upon a government ill-equipped to meet them. However, inasmuch as the law kept her powerless to dispose of the common property left behind by the husband, this reform provided one of the only ways that a woman could provide for herself and her family if abandoned.

Meanwhile, the Supreme Court appeared to give some teeth to Section 13's call for married women's property rights, although it did so in a way that thoroughly contravened the community property system and was ultimately of greater benefit to men. This ruling enhanced the husband's right in his separate property while at the same time protecting other property, which the husband had the right to manage, from the husband's creditors.¹⁹⁵ George v. Ransom arose as a result of the husband's creditors attempting to get their hands on dividends from stock admitted to be the separate property of the wife. According to Section 9 of

¹⁹⁴Act of February 16, 1855, ch. 17, sec. 1, [1855] Cal. Stat. 12.

¹⁹⁵The Court did not try to hide the fact that its decision was about protection, although it phrased it as protection of the wife. "One object of the provision was, to protect the wife against the improvidence of the husband." George v. Ransom, 15 Cal. 322, 323 (1860). In reality, this "protection" would benefit any and all members of the family.

the 1850 Act defining the rights of husbands and wives, and consistent with Spanish/Mexican law, the fruits of separate property were considered common property.¹⁹⁶ Accordingly, the dividends were common property subject to the debts of at least the husband. The wife's attorney contended to the Court that section 9 was unconstitutional.¹⁹⁷ Interestingly, the creditor did not argue for a straightforward application of this gender neutral statute, on the basis that it was thoroughly consistent with theories of community property law. Instead, operating from a common-law mindset, he assumed that the fruits of the property were "due mostly to the husband's labors," and thus should be seen as belonging to him (and his creditors). There was no sense, in this argument, of a shared community, only of separate labor and separate ownership of the fruits of that labor.

The Court responded with an equally common law-based mindset. It began by asserting that "[t]his term 'separate property' has a fixed meaning in the common law, and had in the minds of those who framed the Constitution, the large majority of whom were familiar with, and had lived under that system. By the common law, the idea attached to separate property in the wife."¹⁹⁸ Assumed here was the idea that California had adopted its separate property provisions

¹⁹⁶This statute was amended in 1853, to allow for a married woman to control her separate property based on the terms of the instrument transferring the property to her. Act of May 12, 1853, ch. 116, section 1, [1853-54] Cal. Stat. 165. Moreover, by antenuptial agreement, women could avoid the harshness of the separate property management statute. Act of April 17, 1850, ch. 103, secs. 19-23, [1849-50] Cal. Stat. 255.

¹⁹⁷George v. Ransom, 15 Cal. at 322.

¹⁹⁸Id. at 324 (emphasis added).

based on the common law, and not based on the civil law. Of course, then, this allowed the Court to ignore the fact that the term "separate property" had a fixed meaning in the Spanish/Mexican system, an ungendered meaning.¹⁹⁹ Moreover, in stating that the legislature "has not the constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband or his creditors," the Court additionally evidenced the view that the constitution did not call for the continuation of the Spanish/Mexican marital property system.²⁰⁰ Declaring section 9 unconstitutional, the Court explained that "[t]he common law recognized no such solecism as a right in the wife to the estate, and a right in some one else to use it as he pleased, and to enjoy all the advantages of its use."²⁰¹ It apparently mattered not to the Court what the civil law-based community property system recognized. Moreover, it apparently escaped the notice of the Court that, in permitting the husband initially full, and

¹⁹⁹Seven years later, the Court appeared to change its mind about the origins of California's separate property provisions, but it still managed to avoid declaring that the Constitution required the continuation of the Spanish/Mexican system. "By the use of the terms 'separate property' and 'common property' — terms of well-known signification both in the laws then in force and in the Constitution of Texas [i.e., the Spanish/Mexican law] — . . . it is true they swept out of existence many of the disabilities of the wife and some of the most important rights of the husband, growing out of the marriage relation at common law, yet in all other respects they looked to the common law as affording the measure of the rights, powers and disabilities incident to the relation of husband and wife." Dow v. Gould & Curry Silver Mining Co., 31 Cal. 629, 641 (1867).

The enactment of the Civil Code in 1872 included a definition of the wife's separate property, in Section 162. Annotations to the Code indicated that "the term 'separate property' in the fourteenth section of Article XI of the Constitution [proposed as Section 13] is used in its common law sense," citing to George v Ransom. This is a rather amazing statement, clearly reflecting the development of California's marital property law, and not its establishment.

²⁰⁰George v. Ransom, 15 Cal. at 323.

²⁰¹Id. at 324.

now near-full, management power over the wife's separate property, this right to use without owning was just what another section of California law did provide.²⁰²

Only one legislative reform during this period was clearly inspired by an interest in increasing the legal status of women. In 1866, Dr. William J. Knox, a State Senator from San Jose, drafted and introduced legislation to eliminate the requirement that wives seek their husbands' consent in order to make a will devising their separate property.²⁰³ The proposal sailed through both house and was signed into law by the governor.²⁰⁴ Knox was a "firm believer in woman's capacity to govern herself," before the time when California women had found

²⁰²Inasmuch as the Court did not question the validity of the provision which gave the husband management control of the wife's separate property, and presumably over this now-separate property as well, this lends further credence to the view that George v. Ransom was not really about increasing the rights of women, but rather was about family protection. For the Court to have additionally declared void husbands' management powers over wives' separate property would have meant an increase in women's legal status to the detriment of men.

Although the question of husbands' management powers under section 6 was not directly before the Court in this case, seven years later that section withstood constitutional attack, by virtue of reasoning which was inconsistent with George. While in George, the Court read section 13 as calling for the securing of separate property rights in the wife, the Court in Dow v. Gould & Curry Silver Mining Co., 31 Cal. 629 (1867), read it in a precisely opposite way. The transferee argued that the section was unconstitutional, and that the wife had the power to convey her separate property alone. Id. at 635. Moreover, the transferee reminded the Court that it had already declared section 9 unconstitutional. Id. at 636. Again, the transferee did not rely on any argument based in Spanish/Mexican law, which would have given the wife management over her separate property.

The Court declined to find the section void, reasoning that the constitution granted the legislature the right to pass laws "more clearly defining the right of the wife in relation . . . to her separate property." Id. at 638. As a result of this clause, the rights of the wife in her separate property were not fixed by the constitution, but instead any issue besides ownership was "committed to the control and discretion of the Legislature." Id. at 639. Moreover, the Court noted, "[t]o define, as the word is used in the statutes and Constitution, signifies to prescribe, to fix the bounds, to establish and declare the limits of, any right, power, duty etc." id. at 639.

²⁰³Senate Bill No. 252, introduced by Mr. Knox, Feb. 21, 1866; California Journal of the Senate 333 (1865-66).

²⁰⁴Id., Mar. 2, 1866, at 378; Mar. 7, 1866, at 408; Mar. 15, 1866 at 471; Mar. 21, 1866, at 522-523; Act of Mar. 20, 1866, ch. 285, sec. 2, [1865-66] Cal. Stat. 316-17.

their collective political voice.²⁰⁵ When the Senator died the following year, women lost an ally in the legislature, who undoubtedly could have done much good had he served in the period after 1869, when women had organized to assert their rights.²⁰⁶

By the close of the 1860s, the legislature and the Supreme Court had seen to it that California's community property system operated little differently from a reformed common law system.²⁰⁷ At the most, the legislature and Supreme Court were willing to begin to fulfill the constitutional convention delegation's interest in protecting families from the improvidence of the husband, as evidenced by the few statutory reforms and judicial decisions which had gone women's way. However, the chipping away at the husband's management control over the wife's separate property was not enough to bring California women up to par with their Eastern sisters, and, moreover, there was virtually no interest in amending or interpreting the law in such a way as to empower women. Tellingly, the only reform which unequivocally increased wives' power over their property (and decreased husbands' power), by permitting them to make a will without the consent of their husbands, was proposed by a legislator clearly in favor of women's

²⁰⁵"Faithful Friends in San Jose," Woman's Journal, August 13, 1879, at 260. Knox was married to Sarah Knox, who went on to become one of the preeminent women's rights activists in California during the nineteenth century. When he died, he left his separate property and his interest in the common property to his wife, income from which provided financial support for the movement.

²⁰⁶A woman activist later contended that, had Knox lived, he would have introduced a bill to give the wife control over her share of the common property during her lifetime. Id.

²⁰⁷Prager at 46.

rights. And this reform was the only one to bring the state's marital property scheme more in line with the antecedent Spanish/Mexican system. Yet, the realignment was probably no more than happenstance, given that this reform was also being instituted back East as a modification of the common law.

Rather, the legislature, and, especially, the Supreme Court, showed no interest in fulfilling the Select Committee's intention that the California marital property scheme be tied to the Spanish/Mexican civil law system. In fact, it would be more accurate to say that California's lawmaking institutions were downright hostile to the joint property ownership concept, upon which this system was based. But rather than boldly and directly scrapping the system in favor of a modified common law scheme, the legislature and the Supreme Court instead retained the civil law-based structure while, bit by bit, disabling the vehicle of common property. While may have served the immediate purposes of lawmakers, it left in place at least the promise of equal power for wives over marital property. When California women found their collective political voice in 1869, it wasn't long before they recognized and seized upon this unfulfilled promise, lobbying the legislature, not for special treatment as with the MWPAs, but for equal rights, especially with regard to the common property. Before this could occur, however, women would have to come together, recognize their shared legal disabilities and organize to fight against this injustice.

CHAPTER THREE

The Roots of the Formation and Organization of a Women's Rights Movement in California, 1850-1874

Introduction

For the first twenty years of the development of California's marital property laws, women participated in no direct way, except by their occasional appearance as litigants before the State Supreme Court. However, when it occurred, this participation was for the traditional purpose of resolving a discrete dispute. There is no indication that female litigants envisioned their role or goal more largely, e.g., to secure a decision which would render marital property law more fair for women generally. In other words, there was no sense of the political in these lawsuits. In addition, there is no evidence that women, either individually or in concert, exercised any influence over the legislatures which met up through the 1867-68 session. All this was to change dramatically in 1869, with the formation of California's first women's rights organization. From this starting point, Anglo women entered the political arena to attempt to reform marital property law, to see to it that the system would operate more favorably for women. This political activism was conducted within a framework of a broad

platform for equal rights, which viewed political, legal, civil and economic rights as inextricably intertwined.

However, before this level of activism could be reached, enough individual women had to come to see their fates as linked. First, they had to develop a gender consciousness whereby they could see themselves connected by their place in society, the economy and the political and legal systems. But second, California women had to develop a political sense which today we would label feminist. They had to recognize the ways in which they were being treated unequally and inequitably, and believe that, through collective action, they could remedy that treatment. This evolution occurred between 1850 and 1870, among certain Anglo-American women who arrived post-conquest, and usually, post-statehood.¹

Meanwhile, certain factors contributed to the development of California's women's rights movement, which influenced the form that subsequent activism was to take. When, in the summer of 1869, the first woman suffrage society was established in the Golden State, in some respects its members were following a trend occurring in the East and Midwest, as the women's movement there began establishing itself separate from the earlier abolitionist movement while at the

¹Non-Anglo women did not participate in this process, either as individuals joining with Anglo-American women, or as groups separate but parallel to Anglo-American women. As a result, in the nineteenth century, their voices were not heard in the political arena. For simplicity of reference, I will refer to the Anglo-American women who became politically involved as Californian women, with the caveat that this reference is overinclusive. Thus, such a reference should not be taken to mean that women generally in California participated in this political process, nor should it be taken to mean that I believe that under all circumstances the label of Californian women only properly includes Anglo-American women.

same time narrowing its focus to political rights.² Yet, in other respects, the organized California women's rights movement sprung from different sources, was based on different motivations, and developed along a different path. Even so, this organizational development in California was directly impacted by the Eastern-based movement, in ways which might not seem predictable for a location so separated and isolated.³

²Ellen Carol DuBois, Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869 54 (1978).

³The California suffrage movement of the late nineteenth and early twentieth centuries has been portrayed rather extensively. See Susan Scheiber Edelman, "'A Red Hot Suffrage Campaign': The Woman Suffrage Cause in California, 1896," 2 California Supreme Court Historical Society Yearbook 51 (1995); Gayle Ann Gullett, "Feminism, Politics, and Voluntary Groups: Organized Womanhood in California, 1886-1896" (Ph.D. diss. University of California, Riverside, 1983); Joan M. Jensen and Gloria Ricci Lothrop, California Women: A History 63-67 (1988). However, the movement prior to this has received no comprehensive treatment. As a result, this chapter will provide an accounting of the early movement's organizational controversies, even though, surprisingly, these disputes do not appear to have negatively impacted the content or frequency of law reform activism.

One work, centering on the suffrage movement in the West, makes little mention of the Golden State. See Beverly Beeton, Women Vote in the West: The Woman Suffrage Movement, 1869-1896 (1986). Neither has the movement been portrayed through the biography of a main figure, as has been the case with Abigail Scott Duniway in Oregon. See e.g., Ruth Barnes Moynihan, Rebel for Rights: Abigail Scott Duniway (1983). (This will be remedied to some degree by Barbara A. Babcock's forthcoming biography of Clara Shortridge Foltz.) In their survey, Jensen and Ricci Lothrop do not deal with the organizational development of the suffrage movement, and give only cursory treatment to women's political activities during the 1870s and 1880s. See Jensen and Lothrop at 61-63. Meanwhile, one work which did deal with the subject at some length is rarely referenced, most likely because only a few copies of the privately published volume are extant, and because the subject is unexpectedly included in this, a biography of a San Francisco reformer who exited the organized suffrage movement very early. Moreover, even when available to researchers, the work is rendered less useful due to its lack of footnotes. Reda Davis, Woman's Republic: The Life of Marietta Stow, Co-operator 201-232 (1969).

Recently, particular aspects of the early movement have begun to be explored by historians focusing on related topics. See Roger Levenson, Women in Printing: Northern California, 1857-1890 (1994), esp. ch.6; Ann Braude, Radical Spirits: Spiritualism and Women's Rights in Nineteenth-Century America 192-195 (1989); Robert J. Chandler, "In the Van: Spiritualists as Catalysts for the California Women's Suffrage Movement," 73 California History 189 (1994) [hereinafter, Chandler, "Spiritualists"]; Barbara A. Babcock, "Clara Shortridge Foltz: 'First Woman'," 30 Arizona Law Review 673 (1988); Barbara A. Babcock, "Clara Shortridge Foltz: Constitution-Maker," 66 Indiana Law Journal 849 (1991).

Preparing the Soil

The formation of an organized women's rights movement in California can be most immediately tied to the arrival in San Francisco of the famed lecturer, Anna Dickenson, in July of 1869. Dickenson's speeches garnered a substantial audience and were given much attention by the local press.⁴ By the time she departed in that September, the San Francisco Woman Suffrage Association (SFWSA) was up and running, conducting weekly meetings which were well-attended and duly reported in the mainstream newspapers.⁵ But Dickenson had stepped onto fertile soil, twenty years in the making. The unusual frontier conditions of California, and particularly Northern California, had led to the formation of a female gender consciousness among Anglo women which allowed them to recognize the disadvantageous position they held, especially economically.⁶ While more pre-feminist than feminist, this gender consciousness was a necessary condition for the development of female advocacy and leadership. Four factors in particular contributed significantly to the rise of California's

Finally, women's political activities in San Francisco during this period are touched on in Philip J. Ethington, The Public City 209-218, 326-336 (1995). However, the topic was not an integral part of the larger study, and a good deal of caution should be exercised when relying on this material, as it contains numerous inaccuracies.

⁴See e.g., Alta California, July 13, 15 and 17; Sept. 5 and 6, 1869, reporting on Dickenson's lectures upon her arrival in San Francisco and again when she returned to the city after touring the state.

⁵See id., September 6, 1869, at 1.

⁶Like the women's rights movement in the rest of the United States, the California movement was overwhelmingly white, middle-class and Protestant.

women's rights movement: demographics, the female press, conditions in the typesetting labor market and Spiritualism.

Demographics

Anglo arrivals to California during the territorial and gold rush periods (settling mostly in the northern half of the state) were not only overwhelming, but they were overwhelmingly male.⁷ This unique demographic situation provided both increased and decreased opportunities for Anglo women pioneers, but in any event meant that women would hold a different position in the social order in California than they had held back East.⁸ In fact, the arrival in Northern California of a noted women's prison reformer from New York, Eliza Farnham, was directly related to this dearth of women. And Farnham would prove to be the origination point for the development of California's women's rights movement.

In Spring 1849, in the midst of the gold rush, Farnham set out to organize a female expedition to the Pacific Coast. She had to travel to California in any event, as her husband had died there, leaving her with a considerable estate to

⁷In July, 1847 there were 138 women in San Francisco. JoAnn Levy, They Saw the Elephant: Women in the California Gold Rush xix (1992). By 1860, the ratio of the sexes in San Francisco in 1860 was 25:1. Twenty years after that, the numbers had equalized, but in the 22-65 age group, males continued to outnumber females. Levenson at 48-49.

⁸See, generally, Levy.

settle and manage.⁹ At the same time, she reasoned that California would benefit greatly from an influx of educated, upstanding and unmarried Anglo women, "one of the surest checks upon the many evils" attendant to the gold rush.¹⁰ Word of Farnham's plan reached the West Coast, where miners embraced it most enthusiastically. Meanwhile, however, East Coast society began to discount Farnham's intentions, hinting that her proposal was a cover for delivering prostitutes. Actually, the negative reaction probably "came because it was a woman, a headstrong advocate of women's rights, who intended to lead it."¹¹ Her more than two hundred applicants fell to two.¹²

Nevertheless, Farnham herself, who settled in Santa Cruz, brought a feminist consciousness which was rendered only stronger by the circumstances of her subsequent life in California. The outpost of Santa Cruz was not prepared to

⁹Carolyn Swift and Judith Steen, eds., Georgiana: Feminist Reformer of the West 18 (1987). Even prior to setting sail for California, Farnham did not lead the life of a typical Victorian wife. Her husband was a wanderer, and particularly fascinated with frontier California, leaving her in New York with two sons to support. That responsibility she fulfilled quite unconventionally, as the matron of the Female State Prison at Sing Sing. Id. at 11. While Farnham was otherwise broad-minded, it appears that she shared husband Thomas Jefferson Farnham's Anglo-centric attitudes, as expressed in his Travels in the Californias and Scenes in the Pacific Ocean (1844), published after one of his visits to California. In this travelogue, he displayed an inflammatory attitude towards California's indigenous population. See Leonard Pitt, Decline of the Californios: A Social History of the Spanish-Speaking Californios, 1846-1890 15-17, 20-21 (1966); Swift and Steen at 23-24. According to Swift and Steen, Eliza paid a significant price for expressing these attitudes upon her arrival in Santa Cruz, "exclusion and rejection. Her attitude was superior, morally righteous, and totally tiresome to the community around her." Id. at 24.

¹⁰"California Association of American Women," circular, 1849 (California State Library, Sacramento).

¹¹Swift and Steen at 19

¹²Id. at 18-19. There was a near riot when Farnham's ship anchored in San Francisco without its cargo of Anglo brides. Id. at 20.

accept a widow farmer, particularly one who openly embraced a radical platform of abolition, women's rights, phrenology, and especially Spiritualism.¹³ The effects of Farnham's exclusion from the community were mitigated by the arrival, in the summer of 1850, of Georgiana Bruce (later Kirby), an old friend from New York who shared her radical ideas.¹⁴

Although Farnham returned to New York in 1856, where she continued her activist agenda, Georgiana Bruce Kirby remained in Santa Cruz to found, in 1869, one of the first local suffrage societies in the state.¹⁵ Nearly twenty years after Farnham's untimely death in 1864, the History of Woman Suffrage acknowledged her path-breaking role in the formation of the California movement:

The advocacy of women's rights began in Santa Cruz County with the advent of that grand champion of her sex, the immortal Eliza Farnham, who braved public scorn because of her advanced views for so many years before the suffrage movement assumed an organized form. Mrs. Farnham's work rendered it possible for those advocating women suffrage years later to do so with comparative immunity from public ridicule.¹⁶

¹³Id. at 21-22. See discussion below for the effect of Spiritualism on the California women's rights movement.

¹⁴Id. at 25-26. Both women wed two years later, but Farnham's second marriage was no happier than her first. It ended in 1856, in one of the first divorces recorded in Santa Cruz County. Id. at 30-31.

¹⁵Id. at 31-32, 36-37. Farnham returned to California for a visit in 1859, and to work at the Insane Asylum in Stockton for a year in 1861. Id. at 32.

¹⁶Elizabeth Cady Stanton, Susan B. Anthony, and Matilda J. Gage, eds., 3 History of Woman Suffrage 765 (1881) [hereinafter, HWS]. Interestingly, Anthony had initially requested that Farnham's friend Kirby provide a sketch of Farnham's life for this chapter. However, Kirby told Laura deForce Gordon, "But Mrs. F. was opposed to woman's suffrage & I can't see how she can be included in any such category." Predictive of the form the chapter would eventually take, Kirby wrote, "[Farnham's] spiritualistic experiences & teachings which form so prominent a side of her would not be accepted in this material day." Letter from Georgiana Bruce Kirby to Laura deForce Gordon, Dec. 31, [no year], Laura DeForce Gordon Collection, Bancroft Library, Berkeley, California [hereinafter, LDG Collection].

The Press: Literature and Journalism

A gender consciousness was also fostered early on by the female journalists and literary elite of the San Francisco area. Sarah Moore Clarke became the first newspaperwoman in California or elsewhere in the west by editing a weekly out of California in 1854.¹⁷ According to a journalist and historian of the period, the paper "was intended to do service as a ladies' paper, as well as in the drudgery of a general news organ."¹⁸

About four years passed before another publication of any note would be put out by women. The Hesperian, an elegant literary magazine, debuted in May, 1858.¹⁹ The editors called on "the Women of California" to contribute to the magazine, using "the talent and genius, latent and active, which [they] possess."²⁰ The Hesperian could best be described as pre-feminist, as it did not challenge the appropriateness of woman's sphere. However, an adjustment in editorship early

¹⁷Sherilyn Cox Bennion, Equal to the Occasion: Women Editors of the Nineteenth-Century West 2 (1990).

¹⁸Edward C. Kemble, A History of California Newspapers 331 (1858). Unfortunately, not enough copies of the weekly have survived to allow for an assessment of Clarke's attempts to connect with and foster a gender consciousness among Bay Area women. As Bennion noted, "the modern reader must rely on the judgement of Edward C. Kemble . . . for the conclusion that Clarke actually intended The Contra Costa to be a woman's paper, for the contents of the only surviving number closely resembles that of many general weeklies of the time." Bennion at 14. According to Bennion's exhaustive research, California was the only area in the West where women edited newspapers or periodicals in the 1850s. Id. at 2.

¹⁹Id. at 17. The Hesperian was one of only three literary periodicals being published in San Francisco at the time, and historian Hubert Howe Bancroft attributed the demise of one of the three to the high quality of The Hesperian. In 1859 it won an award for book printing at the California State Fair. Id. at 17, 18.

²⁰"To the Women of California," The Hesperian, May 1, 1858, at 9, also quoted in Bennion at 18.

on at least brought with it a concern for those women whose circumstances forced them to work outside the home. Mrs. Hermione Day remarked, "the avenues where she may labor are few, and at best undesirable."²¹ For a brief period during 1862, Mrs. Elizabeth T. Schenck, who was to play a significant role in the woman suffrage movement, took over and breathed new life into the now-struggling magazine.²²

After one more change in editorship which included a name change to the Pacific Monthly (in an attempt to move the magazine out of the genre of women's literature), in late 1863 stability was promised with a takeover by Lisle Lester.²³ She immediately established her editorial position, writing, "Will it be a 'Woman's Rights magazine'? Emphatically, No! Yet it is an advocate for the proper rights of women."²⁴ By "proper rights" Lester included employment rights, and thus was willing to take on issues confronting those women who were forced to participate in the labor market. She observed,

²¹The Hesperian, Nov. 15, 1858, at 216, also quoted in Levenson at 47.

²²Levenson at 50. Oddly enough, Schenck later appeared somewhat dismissive of pre-feminist efforts such as The Hesperian, noting that the pioneer women of California "entertained broad views upon the intellectual capacity and political rights of women, but their efforts were confined to fields of literature." 3 HWS at 751.

²³Levenson at 50. Lisle Lester was a pen name; her given name was Sophia Emeline Walker. See also, Robert Chandler, "A Woman Printer Battles an All-Male Union," 4 The Californians 44 (1986) [hereinafter, Chandler, "Woman Printer"]. Mrs. Schenck, her predecessor, later referred to her as "Lyle" Lester. 3 HWS at 762. The college-educated Lester entered journalism early, married at the age of 21, but divorced three years later. She attended Lawrence University, which had been endowed partially by her uncle. Levenson at 51-52.

²⁴Pacific Monthly, Dec., 1863 at 332, also quoted in Levenson at 54.

In all cities female labor had been limited to a few channels, only such as society and custom, have imposed for years, until those very channels have become overburdened with applicants, and society drawing the lines of limitation so close, that it actually seems to be a matter of great astonishment if a woman dare earn her living at any other respectable business, other than that which has been laid down as her field and destiny.²⁵

At that point, Lester went on to inform her readers of an occupation, typesetting, "which ladies are engaged in to the utter astonishment of a part of society."²⁶

Lester may not have intended to stir up the trouble that she did, but this statement quickly embroiled her in quite a dispute with San Francisco's powerful, male-only Typographical Union.²⁷

While Lester was never quite able to achieve stability for the Pacific Monthly,²⁸ her efforts paved the way for other journalistic and literary women. Another attempt to put out a female-oriented publication came in February, 1869, when those interested in securing women's economic rights established El

²⁵Id., Feb., 1864, at 437, also quoted in Levenson at 55.

²⁶Id., Dec., 1863, at 332, also quoted in Levenson at 54.

²⁷See discussion of women's employment conditions, below.

²⁸Under Lester's watch issues were late or never published, typesetting and composition were sometimes sloppy, and the journal seemed to be constantly dogged by financial problems. The financial problems were due more to low circulation than lack of advertisers. Levenson at 66. Finally, not quite a year after Lester had arrived in San Francisco, she suffered a serious accident which prevented her from working further on the Pacific Monthly, and when she recovered months later, she was unable to revive the magazine. Id. at 68. Lester left California, remarried, and later returned to San Francisco as Mrs. Lyman P. Higbee. She became tangentially involved in the organized women's rights movement, and played a more visible role in the Laura Fair trial. But her second marriage failed as well, and she eventually resumed her journalism career in the East. Id. at 69-71.

Dorado.²⁹ Unlike the Pacific Monthly, this paper had the financial backing of the San Francisco business community, but this meant that El Dorado was not in a position to embrace a full agenda of women's rights, even if the female publisher had wished to do so.³⁰ In the inaugural issue the editor declared: "As for the ballot box, be that not our care," although El Dorado was to be a

'woman's paper' - i.e., a paper conducted by women, and devoted to the interests of the women of the Pacific Coast. It is not and will not be an advocate of 'Woman's Rights,' as enunciated by certain hot-headed dames, whose zeal runs away with their discretion; but, its mission will be simply to advance the social and business interests of the women of this coast, and also to afford them an organ through which their grievances may find . . . a public utterance.³¹

However, the publication could not ignore certain rumblings in the San Francisco community, both within and outside literary circles, as the topic of woman suffrage began to appear in even general-audience newspapers. Typically, the publication would print a letter to the editor espousing female enfranchisement, which would then spark a sustained dialogue.³² Moreover, with its reference to "hot-headed

²⁹The El Dorado was put out by the Women's Typographical Association. The role of female typesetters and their allies in the development of California's women's rights movement is discussed below.

³⁰Levenson at 83-84. Reports had the enterprise funded to the tune of \$20,000 by about 200 shareholders. Id. Conventional backing notwithstanding, El Dorado did not last even six months. The last extant issue is September, 1869, although nothing in that issue indicated that the paper would fold immediately thereafter.

³¹El Dorado, Feb. 19, 1869, at 4, also quoted in Levenson at 85. Remarking on this position, J.J. Owen, publisher of the San Jose Mercury and women's rights supporter, accurately predicted, "Half-way measures of reform, and half-in-earnest efforts to redress crying grievances, seldom amount to much." San Jose Weekly Mercury, Mar. 4, 1869, at 2.

³²"The Woman Question," San Jose Weekly Mercury, Feb. 15, 1866, at 2 (letter to editor commenting on debate which has been taking place in this paper, the Alta California and others).

dames," El Dorado may have had in mind the path-braking Mrs. Emily Pitts (later Stevens).

Thus, while El Dorado was continuing the pre-feminist trend of California women's publications, that trend began to be challenged with Emily Pitts' co-purchase of the Saturday Evening Mercury in January, 1869.³³ The Mercury had been a literary newspaper, to which Pitts added a healthy dollop of editorializing about women's rights, and a newsy column entitled, "Facts for Women." Unlike her predecessors, Pitts advocated women's political rights, declaring immediately: "We shall claim for [woman] the right of suffrage - believing by this she will gain the position for which God intended her - equality with man."³⁴ Soon the Saturday Evening Mercury adjusted its format to concentrate exclusively on women's rights issues, being the first newspaper in San Francisco to embrace the cause without ambiguity. On the heels of this, with Pitts gaining full ownership of

³³When Pitts and her partner purchased the newspaper, it was known as the Sunday Evening Mercury. The masthead was later changed to reflect a change in the day of publication. Levenson at 90, 92. Pitts had come to San Francisco from New York in 1865, in the company of another woman. At first she declared herself unmarried, but later used the appellation "Mrs." Nevertheless, she did not appear to be attached to any "Mr. Pitts." Id. at 90; "Our Cause and Ourselves," Pioneer, Oct. 15, 1870, at 1.

³⁴"Salutatory," Saturday Evening Mercury, Jan. 24, 1869, at 2. Elizabeth T. Schenck, often considered the mother of the organized women's rights movement in California and who provided the account of California's initial efforts at association for the History of Woman Suffrage, no doubt had in mind the difference Pitts' publication represented, when she asserted that for nearly twenty years after the gold rush "no word was uttered by tongue or pen demanding political equality for women - none at least which reached the public ear." 3 HWS at 750. As a result, Mrs. Schenck began her account at the point of Pitts' entrance into the newspaper business. Although Schenck did mention The Hesperian, with which she had been involved, she did so only in the context of a discussion of women's entrepreneurial achievements (here, journalism and publishing), declining to portray the substance of that (or any other pre-Pitts publication) as contributing to the eventual formation of California's women's rights movement. Id. at 761.

the paper in November, 1869, she altered its name to fit its new mission, calling it the Pioneer.³⁵

Typesetting

As the gold rush erupted, the northern mining and urban areas of California presented women with unusual labor market circumstances. On the one hand, the scarcity of women created unprecedented opportunities, and the type of woman attracted to frontier California was willing to take both more initiative and more risks economically. Moreover, the condition of the labor market was relevant to perhaps a larger proportion of women, particularly American-born, middle-class women, than was the case in more settled areas of the United States, as the hardships of frontier life, combined with a volatile economy, forced more women towards self- and family support. As one emigrant wife recalled, attesting to the subsistence environment she found: "'Yes, we worked; we did things that our high-toned servants would now look at aghast, and say it was impossible for a woman to do. But the one who did not work in '49 went to the wall. It was a hand-to-hand fight with starvation at the first!'"³⁶ And,

³⁵Levenson at 93. Soon after, The Pioneer masthead recorded a name change for the editor, to Emily Pitts Stevens, presumably indicating her marriage to accountant Augustus Stevens. Id. at 94-96. However, this may have been a common-law, rather than solemnized, marriage. Id. at 96.

³⁶Levy at 98-99, quoting Luzena S. Wilson, Luzena Stanley Wilson, '49er. Eliza Farnham had written to New England women contemplating coming West, warning, "I would advise no woman to come alone to the country who has not strength, willingness, and skill for [menial] occupations; who has not also, fortitude, indomitable resolution, dauntless courage, and a clear self-respect'," apparently to keep from prostituting herself. Swift and Steen at 25.

looking back from the mid-1880s, journalist and suffragist Elizabeth Schenck declared "legion" "[t]he number of women who have supported their families (often including the husband), and acquired a competency in boarding and lodging-house keeping, dressmaking, millinery, type-setting, painting, fancy work, stock-dealing, and even in manufacturing and mercantile pursuits."³⁷

In the early gold rush period, the type of labor open to women was mostly menial, but men were willing to pay, sometimes handsomely, for cooking, washing and boarding.³⁸ As JoAnn Levy explained, "California's gold seduced thousands of women. . . . With a little initiative and minimal equipment, women often were in business for themselves and earning as much, and often more, than the average miner."³⁹ Clothes laundering proved to be particularly lucrative, given that mining and frontier living were dirty undertakings, and men especially disliked performing this task for themselves. However, women's experiences here presaged later labor market difficulties once the chaos of the frontier died down. The very lucrateness of laundering attracted certain men who were "willing to endure ridicule [to] compete[] with the washerwomen."⁴⁰ In San Francisco, the onset of this competition was clearly visible to the women, as clothes washing was conducted at a central location, a pond which came to be known as

³⁷3 HWS at 763.

³⁸Levy at 92-103.

³⁹Id. at 92.

⁴⁰Id. at 103-104.

Washerwomen's Bay. Thus, in March 1850, laundresses met at the Bay to discuss how they could protect their market.⁴¹ According to the newspaper's account of the meeting, the leader garnered agreement that "'They had come to Californy to make money,'" and that money they'd made, more than ever before.⁴² She noted that the fine clothes worn by many of the assembled provided testament, and to drive out male competition, she proposed a 1/3 reduction in fees. While those less well-off expressed disagreement with the plan, remarkably a society was formed, resolutions were adopted and it was at least agreed that laundry prices would be reduced in accordance with price reductions in soap.⁴³ Yet, the competition which eventually defeated these women came not from fellow Anglo men, but instead came from a source which nineteenth-century San Francisco women would come up against time and again, Chinese men, whose communal style of living and lack of family responsibilities allowed them to survive on lower wages.⁴⁴

Yet, Victorian social conventions held sway in the Golden State, and thus the female labor market became even more circumscribed as the chaos of the frontier died down. With San Francisco developing a more urban, class-based character, the women's press came to provide an avenue for developing gender consciousness beyond simply the reading material available to women. The female

⁴¹Id.

⁴²Id. at 104, quoting a story published in a March, 1850 issue of the Alta California.

⁴³Id. at 104.

⁴⁴Id. at 105.

editors and publishers of these organs additionally practiced what they preached, by providing typesetting employment opportunities to other women, both in the direct production of the newspaper or magazine and through additional printing business which they solicited.⁴⁵ Typesetting provides an interesting case study of the circumstances of the female labor market in nineteenth century San Francisco, while also helping to explain the development of the organized women's rights movement in California.

Typesetting was one area of labor which did not depend so much on brute force as it did on manual dexterity. Thus, there was much room to view women as peculiarly suited for this kind of work, while male typesetters had trouble falling back on the argument that women lacked the physical strength to perform the job. Moreover, typesetting required a certain level of literacy, thus drawing middle-class women into the field. Finally, and possibly because they could not lay claim to these jobs on the basis of physical superiority, male typesetters in San Francisco had formed a powerful union which fought tenaciously to keep anyone but white males off the job. Predictably, then, expansion of opportunity for women in this field was not without controversy.

⁴⁵In fact, the place that San Francisco women were able to secure in the printing industry in the nineteenth century was significant enough to allow for specialized historical study. Levenson found women increasingly entering the typesetting business, so that by 1882, 11% of compositors in San Francisco were women, and by 1890, over one quarter of the City's printers were women. Levenson at 49. Meanwhile, DuBois also examined the role of female typesetters in the development of the post-bellum woman's rights movement. DuBois at 128-144.

Lisle Lester, whose involvement in this area of female employment proved to be more noteworthy than her literary accomplishments, had this to say of her use of woman typesetters:

It is astonishing what an undue amount of excitement and discussion is raised over this one fact: namely, a lady setting type. People consider her out of her place 'at the case,' but a man is not out of place in a fancy dry goods store! It is singular how people will rule out of place all vocations that [are] proper and well adapted to ladies, and condemn any attempt that one may make to build up the right, as well as the respectability of other channels, for woman's labor. The art of composition in a printing-office is perfectly adapted to female help - and experience tells us that female compositors, who make their living at the case as a general thing, excel, both in rapidity and correctness.⁴⁶

But the real problem, Lester maintained, stemmed from the policies and practices of the all-male San Francisco Typographical Union, rather than from general public opinion.⁴⁷ Typographical unions of the time typically were open only to white men. In California, with few black printers (and the more numerous Chinese precluded due to the language barrier), Anglo women bore the brunt of this discrimination. By the 1860s the local union held considerable power over the "press" of the city, and members had apparently been instructed to walk off the job if and when a woman was hired. Justifying its position, the union asserted that women's typesetting was inferior to men's, and noted women were willing to work

⁴⁶Pacific Monthly, Feb., 1864, at 437-38, also quoted in Levenson at 55.

⁴⁷The Union, formally known as the Eureka Typographical Union, had experienced two failed starts before becoming a local of the National Typographical Union. At this point it was finally able to exercise real control over the San Francisco printing industry. Levenson at 57.

for lower wages. In addition, the union pointed out that women were unable to perform that heavy physical labor which was associated with printing.⁴⁸

Confronting these charges, Lester exploded with some of her best rhetoric:

Any man who will attempt to prejudice the public against female help in printing offices by bringing forward such a false assertion [that women work for lower wages], and such a weak, brainless, puny argument as that, must either be a fool, or the double-refined quintessence of mortal meanness. In such a small, caviling, detestable excuse, is a clear evidence of a painful want of brains '[T]hat ladies cannot do the work as well' is still more ridiculous, and another witness to the blockhead intellect, that patched it up The whole argument is puerile, low and disgusting, far beneath the dignity of a true gentleman.⁴⁹

According to Lester, these positions proved the union to be "a usurping power, a ruling monopoly, a selfish organization."⁵⁰

Lester herself was immune to any criticism on this account as she paid her typesetters union scale, employing both women and a male foreman.⁵¹ Several editors supported Lester's position against the union, the staunchest being J.J. Owen, of the San Jose Mercury, a noted Spiritualist who was later a leader in

⁴⁸Chandler, "Woman Printer," at 44-45.

⁴⁹Pacific Monthly, July, 1864, at 673, also quoted in Levenson at 63.

⁵⁰Id., July, 1864, at 673, also quoted in Levenson at 63.

⁵¹Levenson at 56-57. Lester asserted that she would never hire a man who was unwilling to work with women, and threatened that, "if we cannot find a printer man enough to have a little independence about him, and is so afraid of the 'Union' that he dare not work in the office with a lady, we will send East for a Printer." Pacific Monthly, Feb., 1864, at 437-38, also quoted in Levenson at 56. Yet, when Lester did have to replace her male foreman, who left for the mining country on short notice, she found it impossible to do so, as, predictably, Union men would not take the work. Lester then did the work herself, and proudly announced, "We . . . feel perfectly competent now to transact our little business without calling upon the kindness of 'Union' men who are afraid to be found in an office that employs women." Id., July, 1864, at 746, also quoted in Levenson at 63.

woman suffrage organizations. He sounded a note familiar to reformers by arguing, "We have shut the door against female labor . . . too long, driving hundreds of our dependent sisters into the broad road of shame."⁵²

To combat the sex-based discrimination, Lester made a bold suggestion that the women of the state organize to form their own union, a strategy which had yet to be employed anywhere else in the nation.⁵³ Following through on this idea, she formed the Female Typographical Union in April, 1864, with both female and male leadership, "for the protection of female compositors and gentlemen desiring to attain employment in an honorable manner."⁵⁴ However Lester's "union" proved to be little more than an interest group, as many of the members were not actively involved or even trained in typesetting or printing.⁵⁵

A few years later female printers gained a better foothold with the formation of the Woman's Cooperative Printing Union (WCPU) in August, 1868. Even still, the founder, Agnes Peterson, considered the issue of women's economic status as separate and separable from women's political status, declaring in a description of her enterprise, "we do not know anything about or wish to take any

⁵²Chandler, "Woman Printer," at 45-46.

⁵³Levenson at 60.

⁵⁴Id. at 61.

⁵⁵Lester was joined on the Executive Committee by Elizabeth Schenck, former owner of the Pacific Monthly and future suffrage leader. Fanny Green McDougal, who would soon begin editing a Spiritualist publication, Golden Gate, served along with two men on the Committee on Rule and Finances. Id. 61.

stand in politics, or want to vote."⁵⁶ Peterson's personal experiences shaped her belief that the WCPU could assist women economically yet ignore the political discrimination they faced: "We all strongly sympathize with women who are unjustly oppressed and shut out from an opportunity of earning their living and will be willing to aid any way we can any who have been thrown in the same position as ourselves."⁵⁷ Almost a year later, Emily Pitts took over management of the WCPU, and incorporated it with the stated purpose "[t]o give employment to women and typesetters, and thereby enable them to earn an independent and honest living, and to conduct and carry on a general Printing [sic] business."⁵⁸

Pitts competently oversaw the WCPU, thereby paving the way for subsequent growth under Lizzie G. Richmond, whose "astute management made the WCPU a thriving business like many another stock company in growing San Francisco."⁵⁹ Richmond's success was all the more notable given the economic climate of the time. The newly completed transcontinental railroad had caused prices and hence wages to fall, leaving even male printers without work by late 1869.⁶⁰ Nevertheless, in August of 1870, the hegemony of the all-male union

⁵⁶The Revolution, Sept. 10, 1868, at 149, quoted in Levenson at 79.

⁵⁷Id. Yet Peterson realized that her position was not universally shared, especially by the editors of The Revolution, as she admitted, "you may have a contempt for our lack of strongmindedness." Id.

⁵⁸Levenson at 87, quoting Incorporation Papers, California State Archives. The letters of incorporation were signed by both men and women.

⁵⁹Id. at 87. Between 1869 and early 1870, Richmond, the mother of two, arrived in the Bay Area, was divorced, and took over management of the WCPU. Id.

⁶⁰Chandler, "Woman Printer," at 47.

began to be undermined, through a self-destructive strike to restore wages which finally resulted in opening up the most lucrative newspaper typesetting business to women.⁶¹ During the strike, some of these positions were filled by women, who were paid the union rate and proved their worth enough to be kept on afterwards. Meanwhile, the men failed to secure higher wages.⁶² The success of these female strikebreakers and the failure of the Union allowed San Francisco's daily newspapers to acknowledge what California papers elsewhere, not under union control, had argued: that women were peculiarly suited to setting type and for other jobs in the printing industry.⁶³ Writing in her new publication, Emily Pitts lauded the dailies, and placed the success in context:

[The publishers] are entitled to woman's warmest consideration and gratitude. It is a victory for women in California . . . of no light consideration. It has opened up to her enterprise and ambition one of the most intellectual and lucrative departments of industry that exists.⁶⁴

Spiritualism

A female gender consciousness would not have been enough to spark an organized women's rights movement; the availability of leadership, as well as a

⁶¹Id.; Levenson at 199-120.

⁶²Levenson at 121.

⁶³Id. at 121-124. Ironically, however, the strike divided the WCPU. It agreed to set type for one of the San Francisco dailies but had to withdraw when its male foreman refused to act as a strike breaker. Thus, while the WCPU flourished after the strike, it played no direct role during the dispute. Chandler, "Woman Printer," at 47.

⁶⁴"The Printers' Strike," Pioneer, Aug. 27, 1870, at 1.

platform from which to lead, was crucial as well. In the East the abolitionist movement provided both the training ground for women's rights activism and a forum in which the cause could be advocated, albeit secondarily to the call for the end of slavery.⁶⁵ However, this opportunity did not present itself in California in the years leading up to the Civil War, as no sort of anti-slavery organization ever materialized during that time.⁶⁶ Instead, it was the newly-founded religious movement, Spiritualism, which provided both leadership opportunities and the platform from which women's rights could be advocated.⁶⁷

Spiritualism was based on the belief in the immortality of the soul, acquired through witnessing communication with the spirits conducted by mediums, either male or female. Mediumship notwithstanding, there was no official organization, hierarchy or doctrine to support the religion. Instead, divine truth was directly accessible to individuals. The individualism and empiricism embraced by Spiritualism in turn combined both to propel the movement towards a radical social program based on these same individualist principles, and to lead it to participate "in the optimistic equation of science and progress that bolstered the

⁶⁵DuBois at ch. 1, passim.

⁶⁶Chandler, "Spiritualists," at 190.

⁶⁷Unitarianism, Universalism and Quakerism, all with ties to Spiritualism, played a role as well. Braude at 43-49. Interestingly, Elizabeth Schenck attributed the absence of abolitionism with retarding the development of the women's rights movement in California, as compared with the East, referring euphemistically to the lack of "preceding causes, as in the older States, to stimulate the discussion of the question." 3 HWS at 750. However, she avoided crediting Spiritualism with playing any role in organizing California women.

conviction of so many nineteenth-century reform groups."⁶⁸ Not surprisingly, a strong component of the Spiritualism program involved a dedication to female equality and autonomy, as a recognition of woman's individualism. Historian Ann Braude, in her excellent study, Radical Spirits: Spiritualism and Woman's Rights in Nineteenth-Century America, explained that, while "[n]ot all feminists were Spiritualists, . . . all Spiritualists advocated woman's rights."⁶⁹

Spiritualism grew up with the women's rights movement, having been founded around the time and the place of the Seneca Falls Convention in 1848. It was an outgrowth of a crisis of faith occurring among Americans in the mid-nineteenth century, and while it thus appealed to iconoclasts and nonconformists, many, especially women, were drawn to it initially simply from an interest to communicate with a deceased spouse or child. The carnage of the Civil War provided additional interested takers, and for these widows, often left with families to support and no gainful employment to be had, Spiritualism's interest in elevating the status of women had real-life appeal.⁷⁰

During the antebellum period, Spiritualism and the women's rights movement were closely intertwined with radical abolitionism. According to Braude, "The early women's rights movement, like Spiritualism, drew both inspiration and leadership from the left wing of the movement for the abolition of

⁶⁸Braude at 2-8.

⁶⁹Id. at 3.

⁷⁰Id. at 4-5; Davis at 207.

slavery. Radical abolitionists, in turn, found in Spiritualism a religion in harmony with their individualist principles."⁷¹ Yet while Spiritualism drew on the individualist rhetoric developed by the left wing of the anti-slavery movement, Spiritualists saw abolition as just one part of a reform platform based on the doctrine of self-ownership.⁷² Thus, according to Braude, "during the 1860s, the course of woman's rights within Spiritualism and within abolitionism began to diverge."⁷³

Braude trenchantly observed that, "because the woman's rights movement was essentially ancillary to the abolitionist movement, internal and external developments affecting anti-slavery determined its course. Abolitionists set the agenda, and women's rights activists either followed their lead or reacted against it."⁷⁴ While the post-war fight over the Fifteenth Amendment led the abolition-based women's rights movement to narrow into the woman suffrage movement, the Spiritualist-based women's rights movement was not reactionary, and even believed women's rights to be the preeminent reform. Unlike abolitionists, Spiritualists had continued during the Civil War to agitate for women's rights, and afterwards to pursue the broad woman's rights agenda developed during the

⁷¹Braude at 60.

⁷²Id. at 73-77.

⁷³Id. at 77.

⁷⁴Id.

antebellum period, "combating every disability imposed by church, state or social convention."⁷⁵

Included in this was a politicized critique of the marriage relationship, a critique which "formed the central plank of Spiritualism's woman's rights platform."⁷⁶ In fact, this critique flowed from the personal experiences of Spiritualists whereby Victorian marriage proved to be "the most serious barrier to the individual sovereignty of women."⁷⁷ Thus, Spiritualist women were more inclined to escape authoritarian marriages, while women who had experienced unhappy marriages ending in divorce or desertion may have been more attracted to Spiritualism.⁷⁸ However, enemies of Spiritualism linked this critique of marriage with "free love," and as a result this problem came to dog the women's rights movement, especially where Spiritualist influence was strong.⁷⁹

While Spiritualism provided a platform for advocating women's rights, which permitted the movement to develop differently than it did on the platform provided by abolitionism, the religious movement also allowed for the

⁷⁵Id. at 78, 81.

⁷⁶Id. at 119.

⁷⁷Id. at 117.

⁷⁸Id.

⁷⁹Id. at 127. Braude succinctly explained the problematic nature of the term free love, "Proponents used it to refer to their opposition to marriage laws that discriminated against women, while detractors used it as a synonym for promiscuity or infidelity." Id. Before too long, the negative connotation won out, which did not help proponents who had earlier embraced the label. More generally, historian Robert Chandler observed that as women became the primary speakers for the movement in California, "foes shifted their charges to sexuality." Chandler, "Spiritualists," at 192.

development of female leadership, although in a manner unlike the abolitionist movement. At a time when there was a hostility towards women speaking in public, so much so that the issue divided the abolitionist movement, and "[a]t a time when no churches ordained woman and many forbade them to speak aloud in church," Braude observed that "Spiritualist women had equal authority, equal opportunities, and equal numbers in religious leadership."⁸⁰

The structural barriers to women's leadership, so prominent in organized religions, were absent in Spiritualism.⁸¹ While leadership was provided by mediums, becoming a medium was not a matter of individual choice. Rather, the spirits called one to mediumship, women at least as often as men.⁸² Thus, Braude noted, "mediums bypassed the need for education, ordination, or organizational recognition, which [otherwise] secured the monopoly of male religious leaders."⁸³

Brilliantly, the passivity of mediumship "gave women a public leadership role [while at the same time allowing] them to remain compliant with the complex of values of the period that have come to be known as the cult of true

⁸⁰Braude at 3, 90-91.

⁸¹Id. at 7-8. "Spiritualism never gave rise to permanent institutions of any consequence The movement had no orthodoxy because it had no governing body or power that could label a subgroup heterodox. . . . [I]t had no membership because it had nothing for adherents to belong to. It had no official leadership because it had no offices for leaders to hold." Id.

⁸²Id. at 83.

⁸³Id. at 84.

womanhood."⁸⁴ In addition, the spirits could convince a woman that she could accomplish things she herself didn't believe she could, that she could assume a leadership role in the face of public criticism.

These women were, for the most part trance speakers; that is, they did not have a particular spirit emanating from them but rather were seen as having "access to the wisdom of departed spirits" generally.⁸⁵ According to Braude, "Because the trance was viewed as enabling women to speak who were otherwise unqualified to do so, the claim of entrancement became a convention used to support women's right and ability to ascend the public platform."⁸⁶ Conveniently, there was no consistent mode of trance behavior.⁸⁷ Female trance speakers did not simply preach to the faithful, but rather, "reached a broad audience, composed of the curious and the skeptical as well," and received considerable press coverage.⁸⁸ The trance lecture often provided listeners with their first introduction to a woman speaking in public, and the enthusiastic reception given these women helped pave the way for women to speak in other roles.⁸⁹ After the Civil War, trance mediums "transferred their talents to the suffrage cause. Most

⁸⁴Id. at 82.

⁸⁵Id. at 83-84, 89.

⁸⁶Id. at 89.

⁸⁷Id. at 88.

⁸⁸Id. at 92-94.

⁸⁹Id. at 93-98. She argued that "[t]rance speaking was a transitional phase that enabled both individual women and women as a group to break through the limitations of their role." Id. at 98.

continued to speak in trance but spoke for suffrage in a conscious state as well. The ranks of the trance lecturers provided a corps of experienced female speakers on the suffrage campaign."⁹⁰

Meanwhile, Braude found that Spiritualists "responded disproportionately to the call of the West . . . where society enjoyed relative freedom from traditional values and institutions."⁹¹ This was particularly true for the urban center of the West, San Francisco and the surrounding area. Eliza Farnham wrote East for information regarding Spiritualism less than three years after the religious movement began,⁹² and about two years after that, in 1852, a letter to the Alta California detailed Spiritualist experiences.⁹³ By 1854, when Dr. Sarah Pellett came to San Francisco to give the earliest women's rights lecture, a local newspaper was found complaining of "strong-minded females" who had arrived "from the great hotbeds of transcendentalism at the east."⁹⁴ Yet it was not until 1859 that the first lectures specifically dealing with Spiritualism were given in San Francisco by Eliza Farnham herself.⁹⁵

⁹⁰Id. at 193.

⁹¹Id. at 195.

⁹²Swift and Steen at 27-28.

⁹³Levenson at 42.

⁹⁴San Francisco Golden Era, Oct. 1, 1854, at 2, quoted in Levenson at 45.

⁹⁵Levenson at 42.

Spiritualism, then, along with the unique social and economic conditions of the frontier, may provide the key to understanding how the women's rights movement began and developed in California. Yet, given the place of Spiritualism in the broader American society by that time, and in California later in the century, it is not surprising that this element would drop out of any account fairly early in the recording of the history of the movement. By the mid-1880s, Elizabeth Schenck's rendition in the History of Woman Suffrage avoided any obvious reference to the influence of Spiritualism on the development of California's women's rights movement, making her account not only incomplete but skewed.⁹⁶ Because Spiritualism was hardly an organized religion in the traditional sense, it is difficult to peg its effect.⁹⁷ However, Spiritualists were a highly literate group, in terms of both writing and speaking, and the lack of dogma and institutional structure permitted rather unfettered, wide-ranging publishing and lecturing in the name of Spiritualism. Thus, the print media provide some of the best places to look for the influence of Spiritualism on the development of the women's rights movement in California.

⁹⁶It was not that Schenck was unaware of the Spiritualists in her midst. In fact, in describing women's early involvement in journalism and publishing, Schenck included newspapers and magazines known to be Spiritualist, but omitted this affiliation, only referring to one as "liberal." 3 HWS at 761.

⁹⁷By the mid-1860s, by one Spiritualist leader's account, there were 5,000 "recognized" Spiritualists in San Francisco (out of a population of 130,000), and many others who were not public about their affiliation. San Jose provided another stronghold for the movement, and in 1865, California Spiritualists met in convention there. Both men and women led the San Jose gathering, which culminated in the passage of resolutions consistent with the broad Spiritualist platform. Included was a call for women's rights, not just in the political realm, but in the areas of education, employment, and property as well. Chandler, "Spiritualists," at 193.

California's first dedicated Spiritualist publication, The Family Circle, was begun in 1859.⁹⁸ It was followed by the Banner of Progress in 1867, a weekly which consistently included discussions of women's rights issues.⁹⁹ Women soon joined in, either publishing their own periodicals and tracts, or in performing the printing tasks necessary to the publication process. In fact, Roger Levenson's detailed study of women in printing in Northern California from 1857-1890 led him to conclude that "[a]ll of the principal figures in this study, and in the suffrage movement [in Northern California], had some connection with Spiritualism, ranging from actual practice to the printing of books or appearing on a public platform with Spiritualists."¹⁰⁰ Moreover, as early as 1852, Spiritualists could be found expressing their beliefs through letters to the editor of general circulation publications, which, by the 1860s, included calling for female enfranchisement.¹⁰¹

However, trance speaking garnered even more public attention. As it was practiced on the platform rather than from a pulpit, anyone who could attract an audience could engage in this activity; no official imprimatur was necessary. These

⁹⁸Levenson at 42.

⁹⁹Id. at 83.

¹⁰⁰Id. at 42.

¹⁰¹Typical of this was an exchange which occurred in the mid-1860s. Spiritualist editor and former Assemblyman J.J. Owen of the San Jose Mercury issued the first call in California for the enfranchisement of former slaves, which motivated fellow Spiritualist, Mrs. C.M. Stowe, to respond by calling for female suffrage as well. San Jose Mercury, Jan. 9, 12, 1865, quoted in Chandler, "Spiritualists," at 191. Consistent with the Spiritualist view, which placed these two reforms on equal planes, Stowe wrote, "Let justice be done to all - to the colored race, and to woman also." Mercury, Jan. 12, 1865. Mrs. Stowe was a spiritual healer and speaker, while her husband presided over a San Jose Spiritualist organization. Chandler, "Spiritualists," at 191.

speakers would simply advertise ahead in the local newspapers, and they gained a reputation by force of audience reception. In early 1866, two mediums, Mrs. Ada Hoyt Foye and Mrs. Laura Cuppy (later Smith) brought Spiritualism into public view in San Francisco, drawing large crowds to their lectures.¹⁰²

One of America's foremost Spiritualist trance speakers, Laura deForce Gordon, arrived in California in late 1867, having lectured her way across the country on the topics of Spiritualism and woman suffrage, in order to support herself and her husband. She found a captive, appreciative audience in mining camps of the mother lode.¹⁰³ Gordon holds the distinction of giving the first public lecture on woman suffrage in California, speaking in San Francisco in February, 1868.¹⁰⁴ She did not attract a huge crowd, but the lecture was attended by some of the women who were to become bulwarks in California's women's rights movement: Sarah Wallis, Elizabeth T. Schenck, L. M. Clarke and Emily Pitts, and was reported on by the Alta California, San Francisco's chief

¹⁰²Braude at 192. Clearly, mediumship provided a direct avenue to self-support, which would serve as an example to women who were questioning the Victorian assumption of female dependency. Id. at 118. Laura Cuppy regularly earned \$65 to \$80 per lecture. Chandler, "Spiritualists," at 193.

¹⁰³Id. at 194; Braude at 194. Gordon began as a travelling trance speaker in her teen years in the Northeast. Id. Around this time she met Susan B. Anthony for the first time, sharing the platform with her and Parker Pillsbury in Rochester, New York. Of Anthony, who was later to become a close ally, Gordon wrote in her diary, "[I] did not like her influence. My first impressions are decidedly unfavorable to her. Perhaps I am wrong, hope I am, but she does appear so cold and unfeeling or rather, intolerant, to all who does [sic] not believe as she does." Laura deForce Gordon Diary, entry for Dec. 4, 1859, typescript in possession of Mrs. Hieb, great-grand-niece of Laura deForce Gordon, Lodi, California.

¹⁰⁴3 HWS at 751.

commercial newspaper.¹⁰⁵ Gordon then travelled to Sacramento, securing the State Senate chamber after hours to speak on women's political rights, impressing the many members of the legislature who were in attendance.¹⁰⁶ Yet, with Gordon and her husband leaving California soon after to settle in Nevada, interest in the cause died down before any organization could be achieved in the Golden State.¹⁰⁷

Path of Early Development

Although the women of California had yet to effect any association to seek political rights, they were not unmindful of organizational efforts occurring back East in the name of the women of the nation. In 1868, Sarah Wallis, who was to become a stronghold in California's organized movement, began soliciting subscriptions for The Revolution, a periodical founded that year in New York by Susan B. Anthony and Elizabeth Cady Stanton, and issues "were eagerly read and passed from hand to hand."¹⁰⁸ Then, when Anthony and Stanton formed the

¹⁰⁵Id.; Chandler, "Spiritualists," at 194. Schenck described the Alta's reportage of women's rights and the organized movement as being in "its usual negative style." 3 HWS at 755.

¹⁰⁶3 HWS at 751.

¹⁰⁷Id. at 752.

¹⁰⁸Id. at 752, 765. In addition, in early 1869, a Congressional suffrage petition was circulated in Mayfield, Wallis' hometown, which "created quite a sensation among the friends and foes of woman's equality." "Woman's Rights," San Jose Weekly Mercury, Feb. 11, 1869, at 2.

In November of that year, Susan B. Anthony wrote to Laura deForce Gordon, now living in California, asking her to solicit subscriptions to the newspaper. Letter from Susan B. Anthony to Laura deForce Gordon, Nov. 8, 1869, in Laura deForce Gordon Collection, Bancroft Library, Berkeley, California [hereinafter, LDG Collection]. Gordon was successful enough to earn Anthony's congratulations, as she wrote, "You have done mostly better than I have in getting

National Woman Suffrage Association (NWSA) the following year, San Franciscan Elizabeth Schenck was appointed a vice-president, to represent California.¹⁰⁹

Thus, the timing of Anna Dickenson's visit was propitious. Meanwhile, with Emily Pitts having by then positioned the Pioneer clearly within the genre of feminist publications, dedicated to the cause of equality between men and women, would-be organizers had a way to publicize their cause as well.

In July, 1869, five women met, without ceremony, in a private home in San Francisco, to discuss the issue of woman suffrage. Four of the five were Spiritualists, all were or had been married, and at least two had experience in the workplace.¹¹⁰ Later that month, as the size of the group began to grow, its organization was formalized. It took on the name of the San Francisco Woman Suffrage Association (SFWSA) and installed officers.¹¹¹ Meanwhile, its weekly meetings began garnering attention from the local general-circulation daily newspapers.¹¹² Mindful that the opening of the next biennial legislative session

subscribers for the Revolution." Id., Feb. 9, 1871. Apparently, the relationship between the two women had warmed some time prior to this.

¹⁰⁹3 HWS at 752.

¹¹⁰Davis at 206; 3 HWS at 752.

¹¹¹Serving as President was Elizabeth Schenck, Vice-President Emily Pitts Stevens, Recording Secretary Nellie Hutchinson, Corresponding Secretary Celia Curtis, and Treasurer S.J. Corbett. 3 HWS at 752. By October, the size of the group had grown from the original five to eighty members. "Women in Council," San Jose Weekly Mercury, Oct. 21, 1869, at 2.

¹¹²"A Women's Suffrage Convention," Alta California, September 6, 1869, at 1. According to Reda Davis, although the newspapers mocked suffragists, "[a]t first, the movement attracted widespread interest; the newspapers gave it a great deal of space and left-handed support. Had they ignored it, it would have been worse." Davis at 207. This is in significant contrast to the suffrage movement in Oregon, which was ignored by the mainstream press. See Lauren Kessler,

was just a few months away in December, 1869, the SFWSA began to circulate a suffrage petition and lay the groundwork for the formation of a statewide organization which could press the cause at the capital in Sacramento.¹¹³ To that end, Laura deForce Gordon, who had recently returned to California after an unsuccessful attempt to settle in Nevada, travelled Northern California under the aegis of the San Francisco society, lecturing extensively and organizing local associations which could then send delegates to a statewide convention.¹¹⁴

However, dissent surfaced in the ranks of the SFWSA around this time, and from this point until Spring 1873, there was hardly a period in which relations among activists, either locally or at the state level, were entirely harmonious.¹¹⁵

"The Ideas of Woman Suffragists and the Portland Oregonian," 57 Journalism Quarterly 597 (1980).

¹¹³Emily Pitts set forth the thinking behind this plan: "The legislature of California will be in session on Monday next, and will properly continue till about the first or the fifteenth of March. There will not be another session for two years. It is of the highest importance that the question of women's [sic] suffrage should be brought squarely before that body for examination and discussion." "Womans' [sic] Suffrage Convention," Pioneer, Dec. 4, 1869, at 1.

¹¹⁴"They Mean Business," Pioneer, Dec. 25, 1869, at 1. Laura deForce Gordon was lecturing four times a week. "Suffrage Meeting," id. Jan. 1, 1869, at 1. Almost as if to predict a certain friction which would arise after that convention, Pitts Stevens hastened to explain, "The San Francisco association does not assume any airs or prerogatives in this matter; it only responds to the felt necessity that somebody should do something to awaken and extend the public interest during the few weeks yet to elapse before the State Convention, so that said convention may bring together a large and earnest body of men and women. When the State Association shall have been created, it will naturally assume the direction of this sort of work." Id., Dec. 25, 1869, at 1.

¹¹⁵Even the decision by the SFWSA to effect statewide organization was not without controversy. In the first dispute to surface in the suffrage ranks, a prominent member withdrew in November, 1869, ostensibly due to a disagreement over plans for the timing and location of the statewide convention. Donna C. Schuele, "In Her Own Way: Marietta Stow's Crusade for Probate Law Reform Within the Nineteenth-Century Women's Rights Movement," 7 Yale Journal of Law and Feminism 279, 281 (1995). While this clash of egos presaged further difficulties, it had no appreciable effect on the planning for the statewide meeting.

Given the distance of California from the East Coast, and the state's relative isolation, it may seem surprising that most of this dissention was connected to the split in the suffrage movement which occurred back East and manifested itself, first, in the formation of the National Woman Suffrage Association (NWSA), and soon after, in the creation of a rival organization, the American Woman Suffrage Association (AWSA). Eastern activists seemed almost eager to parade their dissensions before the Californians, and at the same time they found an audience receptive to the scheming and backbiting which accompanied this discord. Meanwhile, given the close association between Spiritualism and suffrage activism in California, the Golden State was particularly susceptible to another aspect of Eastern-based controversy – the issue of free love. As a result, Spiritualist suffragists in California were both vulnerable and sensitive to being discredited through sexual innuendo.

The statewide meeting was held in late January, 1870, partway through the legislative session.¹¹⁶ A number of formally organized local associations sent delegates to a meeting in Sacramento, while others showed up to represent their locality informally. Participants affiliated with the SFWSA outnumbered the rest of the delegates combined, and, given their influence, many wanted a statewide organization to be something more than a reconstituted SFWSA. With the establishment of the California Woman Suffrage Association (CWSA), the convention did achieve its goal, although the issue of whether this new

¹¹⁶ HWS at 753.

organization would affiliate with either of the nationally-based groups, and if so, which one, threatened the success of the gathering.

The timing of the convention could not have been worse for keeping Eastern-originating organizational disagreements at bay. There, women's rights activists had split partly over the issue of the proper scope of the movement. Post-Civil War, abolitionists divided over the issue of whether the Northern victory should lead them to secure equal rights for all, men and women, or whether this was "the Negro's hour," whereby women should continue to table their demands (as they had during the Civil War) for equal political rights in favor of first securing rights for newly-freed male slaves. Elizabeth Cady Stanton and Susan B. Anthony, who had resumed the charge for women in the aftermath of the Civil War, believed that woman's cause should be pressed no less than that of the freedman, while Henry Beecher, Lucy Stone and others were willing to acquiesce. This fundamental disagreement caused Stanton and Anthony to spearhead the formation of the NWSA, separate from those dedicated to securing freedmen's rights prior to women's rights. They sought the immediate enfranchisement of women through an amendment to the federal constitution, but additionally advocated a broad critique of woman's place in American society. In turn, Beecher, Stone and others organized the AWSA, which came to be considered more conservative, more open to male participation, more interested in lobbying

for suffrage on a gradual, state-by-state basis, and uninterested in advocating any other reform but female enfranchisement.¹¹⁷

Given California's lack of an abolitionist organizational base, and the fact that Spiritualists were heavily if not exclusively behind pre-organizational advocacy of women's rights in the state, it is not surprising that those supporting woman suffrage early on gravitated towards the newly-formed NWSA, especially in the absence of any other national organization dedicated to the cause of female equality. These women were already familiar with the NWSA through Stanton and Anthony's publication, The Revolution, and Stanton and Anthony had flattered the Golden State by naming Elizabeth Schenck a vice president, even in advance of formal organization there. Apparently, the SFWSA returned the favor by officially affiliating with the NWSA, hardly a controversial move at the time.¹¹⁸ However, in the few months between the initial organization of the San Francisco group and the inaugural meeting of the statewide organization, the rival AWSA had been formed.

A few of the California suffragists participated in that association's inaugural convention in Cleveland, in December, 1869, notably Fanny Ames and her husband Charles, who picked up the designation of the AWSA's California

¹¹⁷See Anne Firor Scott and Andrew MacKay Scott, One Half the People: The Fight for Woman Suffrage, 15-19 (1982).

¹¹⁸"Woman's State Suffrage Association," Saturday Evening Mercury, Aug. 14, 1869, at 1. At first the SFWSA was sometimes referred to as a statewide organization, being the only suffrage society in California at the time. However, when plans were laid for a state level association, there was more care taken to designate the SFWSA as a local group.

vice-president.¹¹⁹ While the SFWSA had been initially dominated by Spiritualists, especially at the point when it chose to become an NWSA auxiliary, the growing membership had diluted that force. The Ameses, for example, were Unitarians.¹²⁰ It seems that the couple was enthusiastic enough about the AWSA that, prior to the Cleveland convention, certain SFWSA members suspected that the couple might attempt to misrepresent the sentiments of the local society. Writing from the convention, Fanny attempted to persuade Emily Pitts of the good intentions of the AWSA.¹²¹ Thus, it was by no means clear, by January, 1870, with which national association delegates to the statewide convention would choose to affiliate.¹²²

Apparently, the issue caused quite a bit of tension, even in advance of the opening of the California convention. In hindsight, Schenck explained, "[u]nder these circumstances it was not strange that a spirit of rivalry should manifest itself," although she regretted the extent of its effect on this fledgling

¹¹⁹"National Woman Suffrage Convention," Pioneer, Dec. 11, 1869, at 1; "Call for State Convention," id., Dec. 25, 1869, at 1 (reprinting call for convention and listing Charles Ames as "Vice-President, American Association"). The History of Woman Suffrage appears to be in error in recounting that Fanny was named a vice president. 3 HWS at 754.

¹²⁰Davis at 210.

¹²¹"Letter from Mrs. Ames," Pioneer, Dec. 11, 1869, at 1 (Fanny Ames assuring Emily Pitts that she is not there as a representative of the San Francisco society).

¹²²That both associations had made inroads into California was clear in the call for the statewide convention, as Elizabeth Schenck and Charles Ames were listed as vice presidents for the NWSA and AWSA, respectively. "Call for State Convention," Pioneer, Dec. 25, 1869, at 1; "'Nationals' and 'Americans'," id.

organization.¹²³ However, the SFWSA did what it could to attempt to defuse the issue prior to the opening of the state convention, by disaffiliating with the NWSA, once the AWSA was formed.¹²⁴ In public, those whose sympathies may have rested with one or the other of the national associations put on something of a show of studied indifference, professing the benefits of neutrality for a state-level organization, although they could not altogether give up the idea that the group might affiliate with their preferred association. Charles Ames wrote,

we owe it to the cause and to ourselves, that principles, and not persons, shall be chiefly considered. Better that we ignore both the larger Associations, or that we co-operate with both, than that we split up, and spend half our force in a senseless quarrel with each other. If when the State Convention meets and a California Association is organized, there is a general desire to make it an auxiliary to a national body, and there is a decided difference of opinion or taste as between the two, there will be no help for it; we must canvass the question in a frank, and open discussion, in which a calm, judicial temper ought to prevail.¹²⁵

Meanwhile, Anthony had been tipped off to the Ameses' interest in AWSA affiliation, and sent the following plea to the convention:

as to the alliance which your new Pacific Woman Suffrage Association shall make - of course I shall be a thousand times glad if it be with THE NATIONAL; but if you find your kindred spirits in THE AMERICAN, why, there is your place. I know of no difference in the OBJECT of the Associations. All I know is, that the LEADING spirits (THE PEOPLE) of the American declared the National not "formally" not "legally" not

¹²³ HWS at 754.

¹²⁴ "A Blow in the Dark," Pioneer, June 4, 1870, at 1. According to Pitts Stevens, the county society took this move "because it deemed it unwise to nourish the spirit which gave birth to the division." Id.

¹²⁵ "'Nationals' and 'Americans'," Pioneer, Dec. 25, 1869, at 1.

"Nationally" organized; and ignoring the National as such, entirely - went up to Cleveland and formed the American.¹²⁶

According to Schenck, the interest in NWSA affiliation stemmed from pure motives, primarily "loyalty, devotion and gratitude" to Anthony and Stanton, based on an understanding that they had provided the catalyst for California's formal organization by appointing Schenck a vice-president. It was out of this feeling, Schenck maintained, that some suffragists believed that the statewide society should affiliate with the NWSA.¹²⁷ However, regardless of this benign explanation, those who supported NSWA affiliation appear to have been just as, if not more, motivated by the philosophies, aims and methods of that organization. Meanwhile, the Ames faction was equally partisan, as Charles Ames registered dissatisfaction with Stanton and Anthony's opposition to the ratification of the Fifteenth Amendment, and bought into the AWSA's complaint that the NWSA had been organized in an exclusive manner, and thus was founded upon a narrow base.¹²⁸

Notwithstanding Charles Ames' professed desire to keep divisiveness out of the convention, on the third day the question of making the CWSA an auxiliary of the AWSA was put before the delegation. The Chronicle, which ordinarily

¹²⁶"Letters to the Convention," Pioneer, Feb. 5, 1870, at 2.

¹²⁷Id. Schenck certainly had an interest in presenting this somewhat self-congratulatory explanation for a position which was actually no more defensible than the Ames position. However, her implication that the AWSA was antagonistic towards Stanton and Anthony apparently did hold sway among NWSA supporters. "Letter from Mrs. Ames," id., Dec. 11, 1869, at 1.

¹²⁸"'Nationals' and 'Americans'," Pioneer, Dec. 25, 1869, at 1.

delighted in reporting on dissension among the suffragists, made little of the move, stating only that "Mrs. DeForce Gordon, Mrs. [Georgiana Bruce] Kirby and others had a pleasant little verbal controversy."¹²⁹ However, Emily Pitts Stevens later portrayed the Ames faction as mounting a "strong effort" to secure AWSA affiliation, which was beat back by a "very determined and very persistent opposition."¹³⁰ Acquiescing in her friend Anthony's wishes, Laura deForce Gordon, whose sympathies were clearly with the NWSA, brokered an agreement that the newly-formed CWSA would remain independent of any national organization for at least a year.¹³¹ Nevertheless, Charles Ames couldn't let the issue go without seeing to it that the following resolution was accepted: "our hesitations to connect the California Woman Suffrage Association with any national body does not imply on our part any want of confidence or sympathy or fellowship towards our coadjudicators in the East, whose work and success is part of our common joy."¹³² The AWSA supporters also gained management of the aptly named Board of Control, to which the CWSA constitution assigned all

¹²⁹"Woman Suffrage. Third Day of the State Convention," San Francisco Chronicle, Jan. 29, 1870, at 3.

¹³⁰"A Blow in the Dark," Pioneer, June 4, 1870, at 1.

¹³¹3 HWS at 754. Gordon offered the following resolution, which was adopted: "That the California Woman Suffrage Association remain independent of all National Associations for the term of one year, or until the next annual meeting of this Association, to be held in January, 1871." "Woman Suffrage Convention," San Jose Weekly Mercury, Feb. 3, 1870, at 2. Later, Elizabeth Schenck described Gordon's efforts: "she saved us from being forced into the Amer[ican] Ass[ociatio]n - by the Ames faction." Letter from Elizabeth Schenck to unknown [probably Charles Gordon, husband of Laura deForce], July 20, 1871, LDG Collection.

¹³²"The Convention," Pioneer, Feb. 5, 1870, at 2.

business of the organization. According to Pitts Stevens, they did this in order to "be able to manipulate [the CWSA's] affairs, so that by indirect action they might accomplish what by an open, fair, honorable movement they could not."¹³³

Thus, it is not surprising that, although the convention adjourned with the affiliation controversy having been mostly avoided, Gordon's compromise plan did not quell the dissensions, even for a few months. With the Ames faction having gained positions of leadership in the CWSA, where these individuals had been less influential in the SFWSA, disputes soon arose between the two organizations which, on the surface, had nothing to do with the national split, but probably were grounded in that division.¹³⁴ First, the CWSA took over the petition drive which had been started by the SFWSA a few months before. According to the indignant county society, the Board of Control had engaged in "unwarranted acts" with regard to the SFWSA's petitions, and "deranged its whole plan of operations in regard to their collection and presentation!"¹³⁵ Second, a financial dispute arose

¹³³"A Blow in the Dark," Pioneer, June 4, 1870, at 1.

¹³⁴The Chronicle reported that "there is a war between the State and city society." Prentice Mulford, "Pathetic Details of the Sorrows of a Man," San Francisco Chronicle, Mar. 13, 1870, at 5.

¹³⁵Pioneer, Feb. 12, 1869, at 2. Pitts Stevens reported that the SFWSA was successful in at least maintaining control of the petitions which had already been gathered. "A Blow in the Dark," id., June 4, 1870, at 1.

Immediately following adjournment of the statewide convention, speakers fanned out through the state to arouse interest in the suffrage issue and gain signatures for the petition. Most had gained experience through Spiritualist lecturing. Chandler, "Spiritualists," at 197-198; Braude at 193. It appears that Fanny Ames and the CWSA Committee on Lecturers and Agents were quite concerned to exercise control over these women, who may have been NWSA sympathizers. Meanwhile, Spiritualism-turned-suffrage lecturer Laura deForce Gordon continued to seek to remain above the fray. Back on the lecture/organizing circuit herself, she wrote to Fanny Ames, "inasmuch as there has been considerable dissatisfaction expressed by different parties, several of whom are members of the 'Board of Control' [sic] of the State [Association], in

by which the CWSA contended that it was owed money from the SFWSA. It seems that admission had been charged to the state convention, which had resulted in a profit. The SFWSA laid claim to the surplus, on the basis that it had assumed the financial risk of the convention, while Ames, in his position as member of the State Board of Control, claimed that the money belonged to his organization.¹³⁶

The reigning president of the SFWSA was deposed over favoring Ames' position, and, according to Emily Pitts Stevens, "a number of dissentient [sic] members withdrew, but not in numbers sufficient to impair the force and influence of the County Association."¹³⁷ The San Francisco Chronicle had a different assessment of the defections, arguing that "[t]he best and strongest men and women who identified themselves with the movement at its inception seem to have become alienated and estranged," and as a result, the suffrage movement in that city had "'petered out."¹³⁸ The defectors went on to form a separate local organization, which they denominated a "Woman Suffrage Club," with membership

regard to my work for [the SFWSA], prior to [the founding of the state society], I deem it best for all concerned, to decline acting under the auspices of any & all organized Societies for the present." Letter from Laura deForce Gordon to Mrs. Ames, Feb. [?], 1870, LDG Collection. This letter was apparently in response to Fanny Ames having sent Gordon a letter setting out the terms on which canvassers for suffrage would be sent out across the state by the CWSA's Committee on Lecturers and Agents. Letter from Fanny Baker Ames to Laura deForce Gordon, Feb. 2, 1870, LDG Collection. No doubt, Gordon, as experienced a lecturer as California had seen, was perturbed at being told how to conduct herself on the lecture circuit.

¹³⁶"What the Press Say of Us," Pioneer, Feb. 12, 1870, at 4.

¹³⁷Id. at 4. According to a later account, thirteen of one hundred members withdrew from the county association. "Woman Suffrage," Pioneer, Jan. 23, 1873, at 8.

¹³⁸"Petering Out - The Women's Cause," San Francisco Chronicle, Apr. 9, 1870, at 2.

open only to women, "for the purpose of mutual improvement and education."¹³⁹ The Chronicle lauded the "study and sensible effort" of these women, while deriding the original group as "impracticable enthusiasts."¹⁴⁰ Apparently, the dissention began to spread beyond San Francisco, with local organizations being solicited to disaffiliate from the statewide association.¹⁴¹ There is some indication that Spiritualism had become a point of contention, with the "renegades" viewing the SFWSA as overly dominated by that group, and particularly by Spiritualist

¹³⁹"Opposition Woman Suffrage," San Francisco Chronicle, May 14, 1870, at 3; "Woman Suffrage," Pioneer, Jan. 23, 1873, at 8. This group apparently did not get involved with law reform efforts, yet did not hesitate to criticize the CWSA in this regard. According to a member of the CWSA, "Professing to avoid all publicity, they yet occasionally appear, invidiously contrasting their own quiet method with our more public career, and, . . . seek to justify their own inaction by censoriously criticising the Association." Id.

¹⁴⁰"Opposition Woman Suffrage," San Francisco Chronicle, May 14, 1870, at 3; "Woman Suffrage," Pioneer, Jan. 23, 1873, at 8. The Chronicle identified a few of the members of this new organization, including the deposed president of the SFWSA, and another woman who had withdrawn from the SFWSA prior to the statewide convention. According to Pitts Stevens, the separation occurred as a result of a dispute over methods for securing suffrage. Inasmuch as the NWSA and the AWSA differed on this account, this indicates that the local division was tied to the national discord. More particularly, based on the limited mission of the organization and the Chronicle's comments, the defectors were probably uncomfortable with the high level of law reform activism being urged and engaged in by the SFWSA. "There is No Opposition," Pioneer, May 21, 1870, at 1. Quite some time later, claiming to have "no prejudices in the matter," Pitts Stevens attempted to reconcile the two groups, on the basis that "a war in our own camp would give our enemies opportunities for attacks and ridicule." "Heal the Dissensions," Pioneer, Jan. 23, 1873.

¹⁴¹The Ames faction called for the disaffiliation, apparently having been unable to exercise enough influence over the NWSA sympathizers, notwithstanding its majority on the Board of Control. At a certain point, that majority resigned. The disaffiliation was meant to express dissatisfaction with John A. Collins, a Spiritualist who was now in control of the SFWSA. "A Blow in the Dark," Pioneer, June 4, 1870, at 1. Meanwhile, Collins' position within the SFWSA was not even entirely acceptable to NWSA supporters, and eventually, as discussed below, led to another rift in San Francisco's suffrage movement.

lecturer John A. Collins.¹⁴² Apparently, the Ames faction sought to form a new organization, rather than attempt to work alongside what they considered the opposition in the CWSA.

¹⁴²Collins was a "conservative" Spiritualist, who led the resistance to the Ames faction, and thus Davis portrayed the split as having a religious basis. Davis at 210. Pitts Stevens believed that the Ames faction wanted to eliminate the influence of Spiritualism, which it saw as unrespectable, from the California suffrage movement. She responded that, inasmuch as the movement was a political one, organizations had no "right to pry into moral, religious or social character or standing of members." "Suffrage Grumbles," Pioneer, Aug. 27, 1870, at 1. J.J. Owens, Spiritualist editor of the San Jose Mercury, had also come to believe that the wish to disassociate from Spiritualism was what caused four of the largest county societies to secede from the CWSA just three months after its formation, and why the Ames faction withdrew from the Board of Control. "'Fastidious Reformers'," San Jose Weekly Mercury, Oct. 20, 1870, at 2. He had been told that an attendee at the San Jose society's meeting "gave vehement expression to the idea that the Society must drive from its ranks, and sunder all connection with, spiritualists, infidels and improper persons generally," before success could be reached. Owens remarked that this expression "received no rebuke from the Chair, or disclaimer of any kind from the Society." Id.

However, this explanation was challenged by a leading Spiritualist in Santa Cruz, who was in the forefront of the "disaffiliators," Georgiana Bruce Kirby. She wrote to Owens, reminding him of her Spiritualist ties but noting that she was an officer of one of the societies which withdrew, and claimed that some of the former members of the Board of Control were Spiritualists as well. Kirby argued, "it never occurred to any of us [Spiritualists] . . . that we were treated with any less 'distinguished consideration' because of our peculiar theological views. Neither at the convention or since did any one intimate that we were 'disgusting.' So it is plain that spiritualism or anti-spiritualism had . . . little to do with the present aspect of affairs." According to Kirby, the split resulted from members of the Ames faction being "treated with every discourtesy when [their] opinions differed with those of the minority; [their] motives were called into question." Id.

There is also an indication that some female suffragists viewed this as a territorial battle between two strong male egos, Ames and Collins. This was reflected in an on-going interest in eliminating male membership from the suffrage organizations, and may explain, to some degree, the female-only membership of the Woman's Suffrage Club. As Elizabeth Schenck wrote to an ally, probably Laura deForce Gordon's husband, in the context of expressing her displeasure with both Ames and Collins, "Men are forever quarreling - changing parties, forming factions, working together for a time, then breaking up." Letter from Elizabeth Schenck to unknown, July 20, 1871, LDG Collection.

In the final analysis, the split probably did involve a distaste for Spiritualism, but not in total. Rather, the displeasure appears to have reflected an interest in disassociating from anything smacking of free love advocacy, which had become connected with Spiritualism by the 1870s. It is difficult to substantiate this, as references to free love in the media were usually oblique, but this issue did come to the fore two years later, among those suffragists who sympathized with both Spiritualism and the NWSA. The result, as discussed below, was a split between conservative and liberal Spiritualists.

Thus, circumstances could not have been better for the arrival in October, 1870, to Northern California of Mrs. Hannah Maria Tracy Cutler (who went by the appellation, "Mrs. H.M. Tracy Cutler"), a leading figure in the AWSA and, by some accounts, a consummate troublemaker. At first, there was no reason to suspect her motives in coming to Northern California to lecture, and in fact, the Pioneer spoke favorably of her.¹⁴³ However, Pitts Stevens had reason to distrust this woman, having heard from contacts in the East that "money had been contributed to send Mrs. Cutler to California in the interest of the [AWSA], to build up here a State auxiliary society," but she ignored the rumor.¹⁴⁴ Tracy Cutler herself hid her true intentions at a meeting of the Santa Clara County

¹⁴³"Mrs. Tracy-Cutler," Pioneer, Oct. 8, 1870, at 1; "Mrs. Tracy Cutler's Lecture," id. Oct. 15, 1870, at 1. Before too long, Pitts' attitude would change completely. After experiencing Tracy Cutler's partisanship for nearly a year, she wrote to Laura deForce Gordon, commenting on Tracy Cutler's harsh words for NWSA supporters, including Gordon: "I will give her worse than she sends, the only way is to fight the enemies without gloves, the idea of Mrs. T. Cutler setting herself up as a critic of the best women we have, I am disgusted with her and all sick." Letter from Emily Pitts Stevens to Laura deForce Gordon, Sept. 3, 1871, LDG Collection. While Pitts Stevens' sentiments were no doubt genuine, this letter was probably meant to curry favor with Gordon, who found Stevens' style of advocacy unsophisticated.

¹⁴⁴"Mrs. Tracy Cutler and Ourselves," Pioneer, Dec. 22, 1870, at 1. Later, Pitts Stevens felt particularly betrayed, believing that Tracy Cutler had procured her assistance in getting herself established under false pretenses, "with her crafty and spy-like manner of her introduction to us." Id., Feb. 9, 1871, at 1. "We welcomed her among us as a laborer in the common field. We secured her a hall; we advertised her lecture, we gave her friendly notices in the Pioneer. When she was assailed by the opposition press, we rushed to her assistance and defended her." Id., Dec. 22, 1870, at 1. But, Pitts Stevens explained, under the circumstances, there was little else she could have done. "We knew that her sympathies were with the Boston party [AWSA], but could not believe it possible that she would condescend to secure our aid to bring her before the public to enable her to overthrow what we were trying to build up. With our ideas of honorable action, we could not insult her by interrogating her as to the policy she designed to pursue in regard to scattering the seeds of division among us in this state." Id. Not to be outdone in the battle of rhetoric, Tracy Cutler gratuitously responded, "I felt that only a person overwrought, and consequently unduly sensitive, could have said such things, and the long sickness of the editress [Pitts Stevens], from which she has but just recovered, shows that I was correct." "Letter from California," Woman's Journal, January 28, 1871, at 32.

Woman Suffrage Association, in San Jose in late October, where a resolution was offered to call a convention to form a statewide organization affiliated with the AWSA, apparently in derogation of the neutrality agreement. While Tracy Cutler did not miss an opportunity to promote the AWSA, including at the expense of the NWSA, she purported to support neutrality in order to avoid two state groups working against each other, and the resolution was defeated.¹⁴⁵

By December, however, Tracy Cutler, newly elected president of the AWSA, had discarded the pretenses and was openly organizing on behalf of the AWSA, reporting her activities to the allied Woman's Journal in Boston.¹⁴⁶ In January a call went out to meet in convention the following month to form a statewide auxiliary. The offshoot Woman Suffrage Club of San Francisco participated in the call, as did Charles Ames.¹⁴⁷ According to the call, those in favor of forming the auxiliary believed that the CWSA had strayed from the single purpose of advocating for suffrage, and Henry Blackwell, writing from Boston, explained that California AWSA supporters "have declined to quarrel, compromise, or combine with those who choose a different course of action."¹⁴⁸ Pitts Stevens did not disagree that the CWSA advocated a variety of causes, but

¹⁴⁵"Correspondence of the Pioneer," Pioneer, Nov. 5, 1870, at 1. Pitts Stevens later characterized Tracy Cutler's speech as actually "giving to the project artful words of encouragement." "Mrs. Tracy Cutler and Ourselves," id., Dec. 22, 1870, at 1.

¹⁴⁶Id.; "Woman Suffrage in California," Woman's Journal, Jan. 28, 1871, at 32.

¹⁴⁷Id.; "The Ames' Disorganizers at Work," Pioneer, Jan. 5, 1871, at 1. Pitts Stevens referred to the Ames faction as "that ambitious, envious and reckless clique." Id.

¹⁴⁸"Woman Suffrage in California," Woman's Journal, Jan. 28, 1871, at 32.

she did disagree that the group was thereby "advocating something wrong."¹⁴⁹ By her estimation, the breadth of the CWSA's platform was its strength: "The platform of the CWSA . . . is so broad and Catholic in its scope and spirit, that any individual . . . may, if interested in woman's elevation and enfranchisement, be welcome as a co-worker in the society."¹⁵⁰

But perhaps the most cogent response came from an individual who, upon hearing of the call, put some "pointed questions" to those making it:

1. What should we on this coast care for the American Association, or any association when it is at the expense of harmony . . . here?
2. Why do the Pacific States want to embroil themselves with eastern discord?
3. What is the object sought - individual ends or woman suffrage; if the latter, would not unity accomplish more?
4. Would not a united Pacific division stand stronger with both parties East by being independent of all?
5. Are we possessed of so little calibre and executive ability, that we want eastern tutors, whose skirts we must hang to?

Finally, why should Mrs. Stanton and Miss Anthony be set aside for newer lights who now step forward to pick up the golden laurels they have won for the cause at the expense of so much time and self-sacrifice . . . when the newer gods failed to lend even a whisper of comfort and encouragement.¹⁵¹

¹⁴⁹"The Ames' Disorganizers at Work," Pioneer, Jan. 5, 1871, at 1.

¹⁵⁰Id.

¹⁵¹"A Few Words from an 'Outsider'," San Jose Weekly Mercury, Jan. 19, 1871, at 2.

The writer went on to assure that, "lest some may think this emanates from a member of some counter society, . . . I speak for the cause and for no association, but as one ready to work as an OUTSIDER."¹⁵²

Mrs. Tracy Cutler was elected president of the convention, and the meeting produced the AWSA-affiliated Pacific Coast Woman Suffrage Association. Although it attracted members from north of San Francisco to south, the group was centered in the San Jose area, and elected, as some of the leaders, individuals who had separated from the SFWSA earlier.¹⁵³ According to the Woman's Journal, "[t]hose who participated in the meeting, hold the highest social position."¹⁵⁴ Meanwhile, J.J. Owen of the San Jose Mercury reported that "[t]here was no disposition to disparage the works of the California Woman Suffrage Society; in fact that society was scarcely alluded to; but all seemed to feel that there was room enough and work enough for all."¹⁵⁵

Meanwhile, although the affiliation battle appeared to be settled with the establishment of separate suffrage organizations, a related Eastern-based concern, which had been dogging the NWSA, surfaced on the West Coast as well - the

¹⁵²Id.

¹⁵³"California Correspondence," Woman's Journal, Feb. 11, 1871, at 48.

¹⁵⁴"Notes and News," Woman's Journal, Feb. 18, 1871, at 53.

¹⁵⁵"Women in Convention," San Jose Mercury, Jan. 26, 1871, at 3. However, Charles Ames felt he "had been so roundly abused by certain parties, and so entirely misrepresented, that he had counselled the ladies against" asking him to speak. "California Correspondence," Woman's Journal, Feb. 11, 1871, at 48. Regardless, Ames delivered a speech at the convention. "Woman's Rights," San Francisco Chronicle, Jan. 19, 1871, at 2.

issue of free love. The SFWSA and the CWSA were hit from within as well as (as expected) from without, resulting in yet another fissure, this time among NWSA supporters. At this time, the CWSA was being led by Spiritualist John A. Collins, who, it seems, had a penchant for rambling speeches laden with free love and other sexual references and accusations.¹⁵⁶ Although Collins professed to be opposed to any importation of free love doctrine into the suffrage cause, it seems he could not leave the topic alone. Apparently, he had gotten to a position of leadership in the suffrage movement early on, by virtue of promotion by Emily Pitts Stevens and as a way to counteract the influence of Ames. As Elizabeth Schenck confided later, her plan was to dispose of Collins once Ames had been neutralized, but she failed in this second step.¹⁵⁷ Meanwhile, Collins was busy

¹⁵⁶"The Strong-Minded," San Francisco Chronicle, Jan. 28, 1871, at 3. Apparently, Collins was such a buffoon that it caused the Chronicle, in comparison, to praise Emily Pitts Stevens as having "some realization of the aims and objects of the Association," who "speaks to the point, earnestly and seriously." Id. It is not easy to tease the free love subject out of media reports, as the participants spoke almost in code, employing highly veiled references. Thus, the Chronicle reported on this exchange at the convention: "Mrs. Wiggins said something about 'side issues' - a delicate way of referring to Brother Collins' favorite subject of discussion. Mrs. Pitts Stevens, in reply, said she was not afraid of side issues. (What is Mrs. Stevens afraid of?) But she urged upon her auditors the necessity of keeping before their eyes the real goal of all their efforts - the ballot." Id.

¹⁵⁷Letter from Elizabeth Schenck to unknown [most likely Charles Gordon, husband of Laura deForce], July 20, 1871, LDG Collection. Schenck wrote, "The plan I formed in respect to Ames and Collins - (although I have never divulged it to anyone) - was this. After Ames was admitted by a majority vote, into the Soc[iety], I saw that I must have Collins, to assist in fighting off Ames - intending that after this was accomplished, to fight Collins off. But I failed in the latter, just as you 'men politicians' fail in your projects, when the majority are against you. . . . I have seen long ago - just what you say in reference to the plans and plots of Pitts and JAC [Collins]. . . . I have laid the whole matter before Stanton & Anthony they know it all - knew Collins years ago in the East, and were mightily disturbed when they found who their Agent was for . . . California. This is a secret - which you must keep. . . . So you see, I have done all in my power to circumvent their plots (JAC & Pitts)." She further noted, "the only reason he is not foiled, is because the women in town do not care to fight him." Finally, she remarked, "I see he has made some sad mistakes in his management lately." Id.

attempting to get himself appointed as California's delegate to the upcoming NWSA convention, a move strongly opposed by Stanton and Anthony.¹⁵⁸

Two events came together in the spring and summer of 1871, which helped lead to the 1873 split: the much-publicized visit to California of Stanton and Anthony, and the controversial trial of Laura D. Fair, a married woman who stood accused of murdering her also-married lover, Alexander Crittenden, a prominent San Francisco attorney and politician.¹⁵⁹ Talk of "free love" linked the two events.¹⁶⁰ Drawing on the promiscuous connotation of free love, the mainstream media held Fair up as the prime example of the degenerate ramifications of free love relationships. At the same time, drawing on the positive connotation of free love, Stanton was engaging in a trenchant critique of Victorian attitudes about marriage, divorce and the double standard with her famous lecture entitled "Free Love." To Stanton, Fair must have appeared to be the personification of the hypocrisy and inequality embedded in Victorian society. Alone each occurrence was enough of a lightning rod for conservative criticism. Meanwhile, Stanton and

¹⁵⁸Id.

¹⁵⁹Chandler, "Spiritualists," at 200. A biographical sketch of Crittenden is contained in Oscar T. Schuck, ed., History of the Bench and Bar of California 402-404 (1901). Interestingly, although Crittenden's death was recorded, there was absolutely no mention of the circumstances by which it occurred.

¹⁶⁰For more on free love, see John C. Spurlock, Free Love: Marriage and Middle-Class Radicalism in America, 1825-1860 (1988), esp. ch. 7.

Anthony did not help matters by linking themselves to Fair through visiting her in jail and lending comfort and assistance to her cause.¹⁶¹

Stanton and Anthony arrived in San Francisco in mid-July, after Laura Fair had been convicted, by an all-male jury of course, of first degree murder in the killing of Crittenden.¹⁶² As a result, she had been the first woman sentenced to death in California.¹⁶³ A number of women had rallied around her during the trial, and now, from her jail cell, Fair was attempting to win a new trial.¹⁶⁴ After giving a few lectures which were well-received, Stanton and Anthony visited her. In a subsequent interview, Stanton did not mince words with a Chronicle reporter: "Mrs. Fair may not have been a saint, but she cannot have been a demon. I think that the treatment of this woman is an outrage and a disgrace to the City of San Francisco."¹⁶⁵ She continued, "There never was a man on trial whose whole life

¹⁶¹Chandler, "Spiritualists," at 200.

¹⁶²"The Fair Verdict," San Jose Weekly Mercury, May 4, 1871, at 2.

¹⁶³"Sentenced," San Jose Weekly Mercury, June 8, 1871, at 2.

¹⁶⁴"The Rights of Women," San Jose Weekly Mercury, April 27, 1871, at 2; "Sentenced," id., June 8, 1871, at 2. The Mercury called this "the most damnably unjust sentence that ever disgraced the criminal records of this State," and predicted, on the heels of news of juror misconduct, that the California Supreme Court would order a new trial. Owens also correctly predicted Fair's acquittal. Id.; "Mrs. Fair to Have a New Trial," id., Feb. 8, 1872, at 2.

Meanwhile, some dispute had arisen as to just who the women were who had established a presence in the courtroom during the trial and otherwise supported Fair. Not surprisingly, the San Francisco newspapers had tried to link Fair to the suffrage movement, thereby discrediting women's rights advocates. However, one woman wrote to set the record straight, "The papers have, as you know, continually berated and insulted the ladies who have had humanity enough in their natures to defend Mrs. Fair from the beastly aspersions of public talk The truth is that the majority of the ladies who have called on Mrs. Fair are entirely unknown to those who belong to the Suffrage Association." "Laura D. Fair," id., June 22, 1871, at 2.

¹⁶⁵"Laura D. Fair. She is Visited by Mrs. Stanton and Miss Anthony," San Francisco Chronicle, July 14, 1871, at 3.

was raked up as this woman's was."¹⁶⁶ The following day, Stanton gave her famous lecture on free love, to her largest audience yet in San Francisco. While the title might have meant to titillate, the speech was filled with clever sarcasm, recognizing the double entendre that the term had become:

Free love is the greatest of all bugbears to Woman's Rights. So far as I am concerned I have always been too busy to think about such a thing, and have never found time to love more than one man. Our sires and our sons are, strange to say, the most disturbed on this question of free love; and yet man, since the commencement of time, has tried for himself every phase and form of relation to woman. . . . Do you think that women are going to be pushed down lower than they ever were before? Every man who pens one single line about free love is guilty of the vilest hypocrisy. . . . The principle I claim is to break asunder all unclean and unholy ties, and that is the free love I preach. . . . Therefore, when we stand up and demand our rights and our laws, do not gag our mouths with this infamous cry of free love.¹⁶⁷

She also alluded to Laura Fair's circumstances, stating, "Fears are expressed that the ideas of Woman's Rights will disturb the whole family arrangements [sic]. I am proud to say that this will be the case. Only read of the numerous cases of divorces, infanticides and the shootings of paramours. Stanton then made "a plea for mercy for the women now in confinement, tried and condemned by laws not of their own making, justice not being either possible or expected until the thorough revolution has taken place."¹⁶⁸

According to one historian, neither the lectures nor the aid and comfort offered to Fair was well-received by the public at large, and Stanton and Anthony

¹⁶⁶Id.

¹⁶⁷"'Free Love', " San Francisco Chronicle, July 15, 1871, at 3.

¹⁶⁸Id.

were effectively driven out of town.¹⁶⁹ Then, in 1872, with Victoria Woodhull exerting control both over Spiritualism and within the NWSA, women's rights activists in California who were tied to Spiritualism became even more vulnerable to the "free love" charge.¹⁷⁰ This same year, the NWSA supporters met in convention to organize an association of the Pacific Coast states and territories, and Pitts Stevens could be found warning that "[t]hey were not here to talk free-love, or anything of the kind; but to talk of the ballot, and the best way to get it. She did not want to go into the social question at all, and would not."¹⁷¹ Nonetheless, the next day John Collins' wife, Mary, apparently felt the need to force the attendees to go on record, as she introduced the following resolution: "That the enfranchisement of women should be the first if not the exclusive aim of the friends of equal rights and good order, and that all social and religious questions should be ignored, as having no necessary connection with the movement for equality of political privileges."¹⁷² Whether this resolution was even voted upon is unclear, but the issue remained alive, as later that day, a delegate rose to complain that the Chronicle had identified her as a part of the

¹⁶⁹Chandler, "Spiritualists," at 200-201.

¹⁷⁰Davis at 221; Braude at 170-73. Chandler demonstrates the degree to which Spiritualism and the "free love charge" were connected in the minds of San Franciscans. Chandler, "Spiritualists," at 201.

¹⁷¹"Cluck, Cluck, Cluck," San Francisco Chronicle, June 19, 1872, at 3. Notice the use of the euphemism for free love, "the social question." This gathering, spearheaded by Pitts Stevens, was for the purpose of forming a political party to advocate woman suffrage. "The Suffrage Revolt," id., Apr. 27, 1873, at 5.

¹⁷²"The Suffragers," San Francisco Chronicle, June 20, 1872, at 3.

"Woodhull-Claffin branch of the Suffragists," and she went on to remark that "I believe all who make Woman Suffrage a stepping stone to advance the pernicious doctrines of Free-love are the moral lepers of society [W]hile I am willing to work for suffrage, I am not willing to wade through the cesspool of Woodhull and Claffinism to obtain it."¹⁷³

While it is difficult to determine just what was behind all these protestations, it appears that Collins believed Pitts Stevens too liberal on the free love question, while Pitts Stevens merely protested the relevance of the issue within the context of the suffrage movement without taking a substantive stand. Collins, then, was attempting to force Pitts Stevens and her supporters to go on record as to their true views on the subject. Consequently, a "war" had developed between the two, and the final falling out occurred in 1873, when Collins attempted to exclude Pitts Stevens from the CWSA annual convention. But Collins overplayed his hand, and the result was yet another split in the suffrage movement, which left Collins without a forum.

The Chronicle clearly delighted in reporting the convention battle, which broadened to pit Collins supporters against those of Pitts Stevens:

The Convention during the morning session had been run completely under the baton of Field Marshal Collins. In the afternoon a terrible mutiny broke out. . . . The way it came about was this: Chief-Engineer Collins, as President of the Board of Control, had so manipulated the wires that when the San Francisco delegation was made up the name of Mrs. Emily Pitts-Stevens [sic] was left off. Between Commodore Collins and Mrs. Stevens there exists a state of war, and the former resolved that the latter should be

¹⁷³Id.

humiliated. . . . But Pitts was not to be put down. She had lots of friends who determined she should have a show.¹⁷⁴

First, in a crafty move, Pitts Stevens' supporters gained the unopposed admission, as delegates at large, of several attendees.¹⁷⁵ Then they attempted to do the same for Pitts Stevens. According to the Chronicle, "Field-Marshal-General Collins shot a quick glance at Mrs. Pitts and turned a little pale. He saw that a spirit of insubordination was smouldering among his force, and he resolved to crush it out."¹⁷⁶ To do so, Collins was forced to explain publicly why Pitts Stevens had been excluded, but this too backfired:

Being a member of the Board of Control which named the San Francisco delegation, I happen to know why Mrs. Stevens' name was omitted. It was done purposely, and not by any strange oversight. Mrs. Stevens has been prominent in the Suffrage movement, but she has not been discreet, [sic] and as the good of the cause was the first thing to be considered, it was deemed advisable to omit her name from the list of delegates.¹⁷⁷

¹⁷⁴"Woman Suffrage," San Francisco Chronicle, Apr. 9, 1873, at 3.

¹⁷⁵Id. Later, Collins and his supporters maintained that, while they chose not to oppose the admission of these delegates, they were not in favor of their admission either, being, as they were, "[p]arties belonging to no suffrage organization, and others openly opposed to them for their restraining influence." "The Suffrage Revolt," San Francisco Chronicle, Apr. 27, at 5.

¹⁷⁶"Woman Suffrage," San Francisco Chronicle, Apr. 9, 1873, at 3.

¹⁷⁷Id. Later, Collins supporters were more revealing about what Pitts Stevens had done which was so unforgivable: "The members recalled with shame and sorrow her unfortunate, threatening and revolutionary harangue - the inspiration of her Woodhull 'Free Love' associates - in March, 1872, before the Joint Committee of both branches of the California Legislature on Woman Suffrage, in the Assembly chamber, to a large audience." "The Suffrage Revolt," San Francisco Chronicle, Apr. 27, 1873, at 5. Interestingly, at the time, one newspaper had praised Pitts Stevens' performance as appropriately hard-hitting, and it did not appear to have any negative effect on the lobbying efforts of law reform activists. See Chapter 4. Clearly, however, certain CWSA members had been highly embarrassed, and they weren't about forget about the incident. Moreover, these members strongly opposed Pitts Stevens' attempt to form a political party to agitate for suffrage. Id.

Who deemed this advisable Collins did not reveal. Nor did he identify the "outside influences" which he claimed had forced "unworthy personalities" such as Pitts Stevens upon the California movement.¹⁷⁸ In the end, Collins could muster the support of only his wife and two others, and Pitts Stevens was admitted as a delegate.¹⁷⁹ The Chronicle concluded that "the Convention was hopelessly divided into a Collins clique and an anti-Collins clique."¹⁸⁰

The next day, it became clearer that free love was the real issue, when a leader emerged for the "anti-Collins clique": a recently-arrived New Yorker by the name of Anna Kimball, who, according to the Chronicle, "graduated with distinguished honor from Madame Woodhull's finishing school for ladies. . . . Mrs. Kimball was a firm believer in Mrs. Woodhull's theories of reform."¹⁸¹ She was accompanied by a number of women, including Pitts Stevens. Between those who knew and supported Kimball, and those who simply opposed Collins, the anti-Collins faction proved the more powerful. Kimball was able (without much effort) to bring the floor debate around to Victoria Woodhull and free love, and the next

¹⁷⁸Id. "Woman Suffrage," San Francisco Chronicle, Apr. 9, 1873, at 3.

¹⁷⁹Id. She promptly rose to read a letter from Susan B. Anthony, to which Collins objected. The delegation voted for the letter to be read, "and Field-Marshal Collins saw that he had been beaten again." Id.

¹⁸⁰"A Wolf in the Fold," San Francisco Chronicle, Apr. 10, 1873, at 3.

¹⁸¹Id. The Chronicle also described her as "rich, brilliant, witty, dressed with superb taste, [with] brains enough to run a dozen Conventions while Field Marshal Collins was getting ready to run one." Id.

day the group engineered a walkout as Collins lamely attempted a "fast gavel" adjournment of the convention.

The Chronicle reported that "now it is said the Kimball party are going to organize a Convention of their own, to advocate Woodhullism. This is probably the end of the suffrage movement in this State for the present,"¹⁸² but it had reached this conclusion too quickly. The anti-Collins clique indeed set about reorganizing the suffrage society, with the Chronicle characterizing the Collins supporters as having been "virtually expelled."¹⁸³ Inasmuch as the Chronicle listed a number of prominent Spiritualists besides Collins among those "kicked out," this fissure was not over Spiritualism, but rather was among Spiritualists. However, certain members of the anti-Collins faction, made up as it was of Collins detractors who were not necessarily Kimball supporters, would have none of the Chronicle's portrayal of the break as occurring over the question of free love.¹⁸⁴ Yet, while speaker after speaker "disclaimed any sympathy with the more ultra reform measures advocated by some, . . . none of them could get over the fact that the Convention had been captured . . . by a distinguished and avowed

¹⁸²Id. The Chronicle editorialized: "Respectable women will not lend their countenance and aid to any reform whose expounders are social outcasts, flaunting their velvet and vice in their very faces. Respectable women will not come to any meeting to listen to a discussion on the propriety of claiming the right of suffrage when they know that their ears are likely to be assailed by the insane ravings of free-lovers Such influences as these have well-nigh ruined the suffrage cause in the East, and the same influences are now being brought to bear upon it in California." Id.

¹⁸³"The Overskirt War," San Francisco Chronicle, Apr. 11, 1873, at 3.

¹⁸⁴Id. According to the Chronicle, "with tears in her eyes [Emily Pitts Stevens] disclaimed any belief in free-love heresies and bitterly denounced the Chronicle reporter for classifying her with people who are open in their advocacy of those doctrines."

advocate of every ism under the sun."¹⁸⁵ Thus, it was not surprising when a member of this new organization turned in the same direction as the old group had, to convince the convention to enact a resolution denouncing free love.

As before, members of the convention attempted to keep the question from being voted on. There were good reasons, which had little to do with one's views on the free love issue, for opposing such a resolution within a suffrage organization, however, there was no doubt a fear that defeat of the resolution would be seen as an endorsement of free love. This time, "there was no dogging the issue," by parliamentary or other maneuvers.¹⁸⁶ The resolution was voted down, and, sure enough, the Chronicle reported the vote as amounting to "a virtual indorsement of the doctrine of free love."¹⁸⁷

The Collins clique attempted to fight back in the newspapers, bringing its version of the controversial events before the public in the Chronicle two weeks later. It lamely attempted to argue that the actions of the offshoot were illegitimate, on the basis that Collins' adjournment of the convention without the election of officers for the following year, merely meant that the previous officers would continue to serve. Collins then accused Pitts Stevens of being "an instrument . . . under the guidance of artful conspirators, to capture this State

¹⁸⁵Id. The Chronicle then reported, of Kimball, that "when called on for a speech, [she] frankly declared that she could not speak well on any other subject than social reform - meaning thereby free-love - and that she took but little interest in the question of woman suffrage." Id.

¹⁸⁶"The Petticoat Rumpus," San Francisco Chronicle, Apr. 13, 1873, at 3.

¹⁸⁷Id.

Suffrage Organization, in order to subject it to the Woodhull phase of woman suffrage" and to infect the cause "with the virus of that modern social pest denominated 'Free Love.'"¹⁸⁸ But this attempt by the Collins faction to recapture the suffrage movement came to nothing, as the newly constituted CWSA continued conducting business as usual and Collins supporters never formally organized in opposition.¹⁸⁹

After this split in 1873, suffrage organizing seemed to settle down in California. Charles Ames had already abruptly left the state, and John Collins withdrew from the movement at this time (although his wife remained active).¹⁹⁰ Another lightning rod for controversy, Emily Pitts Stevens, also left the movement, by around 1874, switching her advocacy efforts to the temperance cause. She was forced to sell the Pioneer for financial reasons, and the new editors adopted a less confrontational style, although the paper did not last too long after that.¹⁹¹

The schisms and charges and countercharges may have hurt the women's cause in the eyes of the general public, as the media delighted in reporting and editorializing about the discord. Yet, oddly enough, the organizational problems

¹⁸⁸"The Suffrage Revolt," San Francisco Chronicle, Apr. 27, 1873, at 5.

¹⁸⁹"The Suffragists," San Francisco Chronicle, Jan. 10, 1874, at 1. At this time, according to the Chronicle, Collins was "about to perfect plans for the recapture of the old [organization], or rather the reinstatement of the old officers and Board of Control," but nothing ever came of these plans. "Look Out, Mrs. Hill," id., Jan. 7, 1874, at 3

¹⁹⁰Davis at 210.

¹⁹¹Levenson at 112.

did not seem to impact negatively on legislative lobbying. There appeared to be agreement among activists as to what issues needed to be pressed, and a unified front was presented to state lawmakers. Moreover, and probably not surprisingly, the individuals who were the source of much of the organizational intrigue were not the ones laboring in the trenches of law reform. And those whose activism took them to Sacramento were thoroughly committed to the causes they espoused, in their quest for equal treatment for women under the law.

Conclusion

California's experience with organizing for woman suffrage is better characterized as organizing for women's rights. The Golden State's women's rights movement sprung not from abolitionism, which had always treated the cause as secondary, but rather from Spiritualism, which equally denounced the subjugation of women and slaves. As a result, the movement was able to retain its broad-based platform, which espoused not only women's political equality, but their legal, economic and social equality as well, at a time when the movement nationally was severely narrowing its focus to female enfranchisement.

While this link to Spiritualism quickly dropped out of accounts of the development of California's suffrage movement, it is one of the keys to understanding this evolution, and especially to understanding its breadth.¹⁹²

¹⁹²Braude's research has led her to conclude that California was probably unique in the role that Spiritualism played in the development of the women's rights movement there. Braude at 195.

Meanwhile, male resistance to female participation in the labor market, in the face of women's need to work to support themselves and their families, contributed to the early formation of gender consciousness. While this gender consciousness did not include advocacy of equal political rights, and thus might best be characterized as pre-feminist, nevertheless it did include a critique of the social and economic status accorded to California women. As a result, when California women did embrace the suffrage cause, they were in a position to recognize that political rights were only part of the equation. Even as AWSA supporters appeared to echo their Eastern leaders' concern about the scope of the suffrage movement, in reality these Californians favored an expansive agenda of legislative reform. Out of this belief system came an unparalleled twenty years of sustained legislative pressure on a wide variety of fronts, made all the more remarkable for surviving on frustratingly few victories in between the far more numerous setbacks and defeats.

CHAPTER FOUR

The Initial Fight for Equal Political and Legal Rights in the Legislature, 1869-1878

Introduction

Comparing the legislative activity of the 1867-68 (Seventeenth) session with that of the 1869-70 (Eighteenth) session reveals startling differences regarding lawmaking affecting women. Clearly, the women's rights organizing which got underway in northern California just months before the opening of the Eighteenth Session had a tremendous impact. Of course, women themselves played no direct role in the internal business of the legislature, but their demands were put in front of the Assembly and Senate by a range of elected representatives. At one end were those men who were themselves involved in the organizing campaigns, and at the other end were those who were neutral or even somewhat hostile towards the cause, but who nevertheless felt an official duty to bring these demands to the floor. Regardless, in 1869 a new constituency's voice emerged in the legislative branch, never to be silenced after that.

Like their contemporaries in other states, California women's rights activists focused a great deal of effort on gaining suffrage. However, in the legislative arena, this attention appears to have been moderated, and often even

overshadowed, by the quest for civil, legal and economic rights as well. Throughout, furthermore, the focus was on achieving equal rights with men, not special treatment for women. Not surprisingly, it was in these other areas, rather than with the suffrage fight, that California women attained their few successes. This pattern of success and failure was due no doubt in part to the generally accepted belief that the demand for the right to vote was more radical than the demand for legal or economic rights, or even for other civil rights.¹ However, beyond this global explanation, institutional arrangements specific to California were just as relevant. For example, the fact that marital property rights in California were and always had been statutorily defined meant that this area of law was unquestionably a subject properly for the legislature and its majoritarian process.

This did not mean that statutory law reform would be easy to achieve. A variety of institutional barriers, such as the legislature's biennial calendar and its bicameral division, stood in the way. Not only did a bill have to pass two houses in order to be enacted, it had to do so within the brief three to four month period of the legislative session. Moreover, because California convened its legislature only every other year, the political climate could change considerably before an issue could be brought before lawmakers again. Finally, with an entirely new legislature elected prior to the start of each session, lawmakers effectively retired

¹Ellen Carol DuBois, Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848-1869 16-19 (1978).

at the end of a session. This lack of incumbency meant that there was no representative to lobby during the "off season," and that the turnover among representatives was high. Each session, then, required starting from scratch, for those lobbying law reform.

Nonetheless, women's rights advocates repeatedly focused their attention on changing what they perceived as the most glaring inequalities in California's marital property law. One was the wife's inability to control and manage her separate property while her husband had full control of his. More intractable were the various ramifications flowing from the state's refusal to treat the wife as having a vested ownership or management interest in the common property during the lifetime of the marriage, i.e. the "mere expectancy" problem.² These inequities included the following: the requirement that the widow's share of the common property be subjected to the probate process in order for her to gain ownership (while the law gave a widower title automatically); an intestacy provision which allowed a widow only one-half of the common property, with the other half descending to the husband's heirs (while the husband acquired ownership of the whole of the common property upon his wife's death); a provision which gave the husband full testamentary control over half the common property while the wife had no interest in the community if she pre-deceased her husband; and a provision which lodged control of the wife's earnings not in her

²See Chapter Two for a description of the development of legal doctrine which created this problem.

but in her husband (while a husband could exercise full control over his earnings). It was especially in these areas that treatment under California's version of community property law left wives worse off than their Eastern sisters, whose common law marital property system was, even before this period, beginning to be liberalized through judicial and statutory reform.

Political rights, on the other hand, would probably be relatively more difficult to achieve, as it was widely believed that the right to vote was organic, which meant that it could not be conferred by statute, but would require the arduous process of constitutional amendment. The California constitution specifically accorded the right of suffrage to men, thus most enfranchisement strategies called for a constitutional amendment to excise the word "male," making the provision gender-neutral and thereby granting women the right to vote. While, as we shall see, California suffragists never fully conceded the issue of whether the legislature had the power itself to enfranchise women, and in fact increasingly sought a statutory resolution, the questionability of this position meant that the legislature could easily duck this issue as it chose. Nevertheless, California women were provided with a golden opportunity to achieve political rights with the calling of a constitutional convention in 1878.

This chapter will examine the multitude of law reform efforts made to alter California women's legal, social, economic and political status, during the period beginning with the organization of the women's rights movement in 1869, when women's voices began to be heard in the lawmaking process, through the

legislative session leading up to the Constitutional Convention of 1878-79.

Chapter Five will examine the same efforts made during that convention and in subsequent legislative sessions, through 1889.

Eighteenth Session, 1869-70

No doubt taking its lead from Eastern associational efforts, the organized women's rights movement of California identified itself clearly from the start as a movement to gain the vote, with all groups thereafter denoting themselves "suffrage" organizations. Not surprisingly, then, pressing that claim dominated initial legislative efforts. A narrow window of opportunity was fast approaching, with the legislature in session from December, 1869, through March, 1870, but not again until December of 1871. Feeling the pressure, Emily Pitts Stevens, editor of the recently renamed Pioneer, urged immediate action: "It is of the highest importance that the question of women's suffrage should be brought squarely before that body for examination and discussion. The existing sentiment in favor of women's enfranchisement, whatever it may be, should be concentrated by petition and placed before that body."³ As a result, the newly-formed San Francisco Woman Suffrage Association quickly began work towards the goal of impacting that session (although as noted earlier some controversy surrounded the choice of strategy). First, a larger and thus more credible voice was sought, by organizing local suffrage societies which would then band into a statewide

³"Womans' Suffrage Convention," Pioneer, Dec. 4, 1869, at 1.

organization. At the same time, signatures were being gathered on petitions to be presented to the legislature.⁴

The first woman suffrage petition was presented to the Senate on March 2, 1870, with many women in attendance to witness the historic event. Characteristic of the significant male involvement in the movement during its early years, more than half of the three thousand plus signatures came from men. The petition called for securing women's right to vote through amendment of the California Constitution.⁵ It was put forth by Senator Charles A. Tweed of Placer County, who early in the term had distinguished himself as a strong advocate of women's rights.⁶ Upon presenting the petition, Tweed made "an elaborate speech in favor

⁴In early October, Pitts Stevens' Saturday Evening Mercury (soon to be renamed the Pioneer) noted that a petition addressed to the California legislature, seeking a woman suffrage amendment to the constitution, was available for signing. Oct. 9, 1869, at 1. But the collection effort hit an organizational snag, when, after its formation in January, the statewide suffrage association tried to take over the petition drive from the original San Francisco group. Emily Pitts Stevens wrote, "What a pity - That the San Francisco Woman-Suffrage Society should not be allowed by the State Board of Control to complete the movements in regard to the petitions to be sent to the Legislature, long since inaugurated, and thereby to have deranged its whole plan of operations in regard to their collection and presentation." Pioneer, Feb. 12, 1870, at 2.

This was the first of many turf wars which were to develop between various California woman suffrage organizations. Interestingly enough, however, these disputes rarely if ever appeared to impact the effectiveness of the lobbying efforts of women's rights advocates. Thus, such organizational disputes are at most tangential to the scope of this chapter.

⁵Journal of the California Senate, Mar. 2, 1870, at 425 [hereinafter Senate Journal]; "An Imposing Spectacle," Pioneer, Mar. 5, 1870, at 1; Petition for Woman's Suffrage, in Senate, Mar. 2, 1870, 2 Appendix to the Journals of the California Senate and the Assembly, Eighteenth Session, 13th entry (1869-70). The printed version of the petition ran to 34 pages, and indicates that the signatures were widely gathered, from Nevada County south to San Diego.

⁶Senate Journal, Mar. 2, 1870, at 425. Senator Tweed, also known as Judge Tweed, was very active in the organized suffrage movement, especially in educating women as to the inequality of California's laws. See, e.g., "San Francisco County Woman-Suffrage Association," Pioneer, May 21, 1870, at 1. Upon presentation of the petition, the San Francisco Chronicle remarked, "who more fitted for the task . . . than the venerable, antiquated, but progressive Senator from Placer, Mr. Tweed." Mar. 3, 1870, at 1.

of woman suffrage, . . . as eloquent in his remarks as he always is on questions affecting human rights."⁷

Not content to leave the petition in the hands of a standing committee, Tweed successfully battled for its referral to a "friendly" select committee, which came to be known as the Special Committee on Woman Suffrage.⁸ This was precisely what was favored by the suffragists, as they believed that the ensuing favorable report to the legislature would engender "lively debate," which would gain media attention.⁹ This committee was so favorable, that it even tried to hire

Earlier in this session, a fellow senator had accused Tweed of advocating for suffrage ever since joining the legislature. Sacramento Union, Jan. 11, 1870, at 1. In fact, Tweed served in the Senate during the previous session without pressing this or any other women's rights issue, at least on record. This additionally indicates the significance of the effect of female-led activism on the legislature, which activism did not arise until the 1869 session. Nevertheless, California women lost this staunch ally when Tweed was appointed Chief Justice of the Supreme Court of Arizona following this term. "Judge Tweed," Pioneer, Jul. 9, 1870, at 1. The San Francisco Chronicle colorfully described the appointment as to "the wilds of Arizona [to do] penance," apparently for his work on behalf of the women's rights cause. "Sacramento," Chronicle, Jan. 14, 1872, at 1. Tweed eventually returned to San Francisco, where he died in 1887.

⁷"Sacramento. The Woman's Suffrage Petition in the Senate - Senator Tweed the Ladies' Champion - The Sergeant-at-Arms Quiets the Ladies," San Francisco Chronicle, Mar. 3, 1870, at 1.

⁸Senate Journal, Mar. 2, 1870, at 425, 427-28; id., Mar. 7, 1870, at 472. Five Senators were appointed to the committee: Tweed and Charles Maclay, of Santa Clara, who were clearly in favor of women's rights, and Lawrence, Bavard and Fowler. Pioneer, Feb. 26, 1870, at 1.

⁹A few months earlier, Emily Pitts Stevens had set forth a strategy which depended upon this: "[The petitions] will be referred to a Special Committee, a majority of which according to legislative usage, will undoubtedly be favorable to the movement. Before that committee the best available talent should urge the claims of the petitioners. That committee, we have a right to presume, would make a full and able report, embodying compactly and forcibly the most important reasons why the ballot should be extended to woman. . . . The report of the committee would bring the question fairly before the Legislature. The subject would naturally elicit a lively debate. . . . These debates would go to almost every family in the state, by means of the press, that publish more or less of the proceedings." After that, the committee's report "would be a valuable document for the 'Suffrage Society' to scatter broadcast over the state, . . . preparatory to the general election of 1872, when the claims of women's enfranchisement will, we presume, enter largely in the canvas of that year." "Womans' Suffrage Convention," Pioneer, Dec. 4, 1869, at 1.

a female clerk at prevailing wages, although the Senate would not approve the plan.¹⁰

Tweed's Special Committee held hearings on the suffrage petition just a few days later. Three women addressed the committee, a first in the State of California's short history. Mrs. Caroline H. Spear, Mrs. Laura deForce Gordon, and Mrs. Laura Cuppy Smith were all experienced public speakers, having gained notoriety as Spiritualist lecturers. Mrs. Spear spoke first, representing the California Woman Suffrage Association (CWSA), and went right to the issue of unequal laws, although, she noted, "I very much dislike to place this right to the ballot on any ground of expediency - I have such a strong faith in the might of justice and truth."¹¹ Claiming that such statutes would never be on the books if women had the ballot, she criticized laws which gave "profligate and idle" husbands the ability to spend wives' property, gave guardianship to husbands whose "odiousness" had forced wives from the home, and gave the husband sole control over "property jointly accumulated by the labor of himself and his wife," leaving the wife no interest at her death. She emphasized, "Your petitioners ask for no privileged or exceptional legislation for women, no protection for life or

¹⁰Senate Journal, Mar. 4, 1870, at 456. Interestingly, this motion unwittingly handed opponents the opportunity to inject racism into the suffrage issue, when, in good faith, a Senator offered an amendment to open the clerk's position to a woman of any race. Not surprisingly, this amendment was treated with laughter and derision before being voted down. (Tweed voted against the amendment.) The resolution itself was then tabled with the claim, "I think we have legislation of more importance here." Sacramento Union, Mar. 5, 1870, at 1.

¹¹Regarding the use of rights-based and expediency-based arguments for woman suffrage, see Aileen S. Kraditor, The Ideals of the Woman Suffrage Movement (1981), esp. ch. 3.

property save that which is extended to men. . . . Bearing the same relation to the State as men with similar needs, they ask for similar rights."¹²

According to the Capital Reporter, however, it was Gordon's speech which was

the feature of the evening. . . . [N]one could deny the eloquence of this lady The Senate Chamber has heard nothing superior. There was a hush universal in this place during the hour she consumed speaking. . . . discussing questions of constitutional and parliamentary law with an ease and familiarity which many of the most potent, grave and reverend Senators could themselves have envied.¹³

Assessing all three speakers, the newspaper concluded that the women's debut had been an auspicious one: "as to mere ability and eloquence, to the women belonged the triumph of the hour."¹⁴

Just over a week later, Assemblyman Seldon J. Finney presented several woman suffrage petitions to the House, also asking for amendment of the state

¹²"Woman-Suffrage at the Capital," Pioneer, Mar. 12, 1870, at 1.

¹³"Woman-Suffrage. The Meeting in the Senate Chamber," Pioneer, Mar. 19, 1870, at 1 (reprint from the Capital Reporter).

¹⁴Id. Unfortunately, the text of Gordon's speech was not recorded. Further praising this performance, as compared with those female speakers appearing later before the Assembly, the San Francisco Chronicle complained: "none [of the latter] were born orators; none of them — in fact, all combined - couldn't [sic] hold a candle to Laura deForce Gordon and her curls. They . . . succeeded in wiping out all the good impression made by the oratresses in the Senate." "Sacramento. Female Suffragists Before a Committee," San Francisco Chronicle, Mar. 20, 1870, at 1. However, the same newspaper had criticized Gordon and her compatriots just the week before, stating, "Everyone of those speakers was more or less tinctured with ghostology." Prentice Mulford, "Pathetic Details of the Sorrows of a Man," id., Mar. 13, 1870, at 5. Mulford professed to support woman suffrage, but rued the influence that Spiritualists were exerting on the organized movement in California. Clearly, he failed to recognize that the oratorical prowess of Gordon and the others was a direct result of their involvement in Spiritualism, and, conversely, he failed to recognize that those women who had not been involved in Spiritualism had lacked the opportunity to become practiced public speakers.

constitution. A special committee to consider these petitions was formed there as well, and the Assembly agreed that its chamber could be used for a special evening meeting of the committee, where the women would be given the opportunity to state their case.¹⁵

Finney presided, joined by Senator Tweed. The chamber was filled "to its utmost capacity," with many women forced to stand. Mrs. A.A. Haskell, president of the CWSA, spoke first, followed by Laura Cuppy Smith, who delivered a speech similar to her Senate performance. Remarking first that just three months earlier she would not have dreamed that women would be permitted to address the legislature, this time she based her argument for the ballot on women's need for employment, and their inability to procure it, at least in the public sector, while disenfranchised. Cuppy Smith argued that women were effectively foreclosed from appointive office, inasmuch as "it is not for the interest of any man to give employment to her if his salary depends on the ballot."¹⁶

Mrs. S.B. Lewis of Sacramento also focused on the need for the ballot in order to effect law reform, listing a variety of laws unfair to women, including

¹⁵Journal of the California Assembly, Mar. 10, 1870, at 586 [hereinafter Assembly Journal]; id. at 590. The five members appointed to this committee, including Finney, were all Republicans. Sacramento Union, Mar. 11, 1870, at 3.

Similar to the ugly show in the Senate, racism reared its head here as well, when a resolution was introduced to require the Special Committee to provide an opinion as to whether female suffrage should be granted without discrimination as to race. The resolution was immediately ruled out of order, but not before the accompanying laughter displayed a clear disingenuousness. Id., Mar. 14, 1870, at 3.

¹⁶"Plea for Woman-Suffrage Delivered Before the Legislature, by Mrs. Smith, of Santa Clara," Pioneer, Apr. 9, 1870, at 1. Cuppy Smith also argued, probably wrongly, that lack of the franchise precluded women from seeking elective office and the financial remunerations that went with it.

denial of control over her wages. To those lawmakers who might wish simply to correct these wrongs, she responded, "I answer, give us the ballot, the key to all civil rights, and it will redress them; for the root of them all is the fact that man claims the right to be our representative."¹⁷ Another speaker based her claim for suffrage on the loyalty that women had shown during wartime, the taxes they paid, and their subjection to the criminal law.¹⁸

The next day, Finney's Special Committee issued its report "recommend[ing] that the prayer of said petition be granted." The Committee then set forth a proposed constitutional amendment which, while retaining racial restrictions, removed the word "male" and granted suffrage instead simply to "citizens."¹⁹ This proposal was placed before the Assembly as a concurrent resolution, and was hotly debated a few days later, but not without some members grouching that more important business awaited on file.²⁰

¹⁷"Plea on Behalf of Woman-Suffrage, Before the Assembly Committee, Sacramento, California. March 18, 1870," Pioneer, Apr. 2, 1870, at 2.

¹⁸Id. In addition, Rev. Brown and Rev. Charles Ames, two men active in the movement, spoke. The other female speakers were Mrs. Minnie McKee of San Jose, Mrs. H. Bowman of Sacramento, and Mrs. Carrie Young of Idaho. "Women Before the Legislature," Sacramento Union, Mar. 19, 1870, at 5; "Woman-Suffrage at the Capital," Pioneer, Mar. 26, 1870, at 1.

¹⁹Assembly Journal, Mar. 19, 1870, at 698; "Report of the Committee on Petition for Woman's[sic] Suffrage, Recommending an Amendment to the State Constitution," Appendix to Journals of the California Senate and Assembly, 18th Session (1869-70), report no. 57. Note that this issue was being debated prior to the ratification of the Fourteenth and Fifteenth Amendments to the federal Constitution.

²⁰Assembly Journal, Mar. 19, 1870, at 703; Sacramento Union, Mar. 23, 1870, at 3. The Assembly Judiciary Committee, to whom the resolution was referred, reported it back without recommendation. Assembly Journal, Mar. 19, 1870, at 703.

Finney opened debate on the resolution, passionately arguing both the importance of the issue and his belief in the equality of women, asserting suffrage as a natural right. Echoing Mrs. Lewis, he decried the notion of virtual representation, and (maybe unwisely) asserted that women's self-representation would rein in the liquor interests and clean up politics. Assemblyman George R.B. Hayes, leading the anti-suffrage charge, made the usual claim that women would be degraded by entering the political realm, and argued that those who sought the vote were extremists in this as well as other issues and would never be chosen as wives.²¹ Following this debate, by a two to one margin the Assembly refused to engross the proposed amendment, and action on this issue ground to a halt.²² Just over a week later the session drew to a close, and California women would have to wait almost two years to bring the suffrage issue before the legislature again.

The fledgling state and local associations had tightly focused their legislative efforts for the Eighteenth Session on the right to vote, albeit claiming that this was the necessary step towards eradicating other inequalities faced by women. In fact, however, the suffrage proposal was the culmination of a variety of legislative efforts which had been undertaken by Senator Tweed, in order to improve

²¹Sacramento Union, Mar. 23, 1870, at 3.

²²Assembly Journal, Mar. 22, 1870, at 728-29. Notice was given of a motion to reconsider this vote the following day, but the motion was never made. Id.

Meanwhile, the San Jose Weekly Mercury praised those Assemblymen willing to vote in favor of the resolution, and especially noted that "the Democratic party is well represented among the names of the twenty-three who thus honored themselves." "Friends of Woman Suffrage," San Jose Weekly Mercury, Mar. 31, 1870, at 1.

women's condition. Tweed's commitment to women did not escape the notice of a fellow senator, who discerned a pattern early in the session, and complained presciently, "He first advocated a bill to allow women to give testimony in certain cases, then to allow them to marry persons of a different color, and now he makes this proposition [to encourage government employment for women]. After awhile he will propose to let them vote."²³

Tweed began by tackling gaps in the law governing spousal separation, either as a prelude or alternative to divorce. He introduced and shepherded to passage bills that gave separated wives rights to their earnings and separate property as well as equal custody rights.²⁴ In addition, Tweed was responsible for amending the divorce statute in ways favorable to women, by allowing wives to testify in such actions, and providing additional grounds which permitted wives to seek divorce based on the husband's willful desertion or willful neglect to provide necessities when able to do so.²⁵

Even more noteworthy, perhaps, a series of bills meant to alter the current treatment of the wife within the community property regime was introduced.

²³Sacramento Union, Jan. 11, 1870, at 1. Most of the bills favorable to women, introduced during this and subsequent sessions, were referred to the Judiciary Committee. During this session, Senator Tweed's membership on that influential committee no doubt contributed to the success of his agenda, making the Eighteenth Session a relatively good one for women, with three pieces of legislation enacted, all introduced by Tweed.

²⁴Tweed sold this legislation as essentially conservative, meant to assist Catholic women who would not seek divorce for religious reasons and others with "conscientious scruples." Id., Jan. 20, 1870, at 1.

²⁵Senate Journal, Dec. 13, 1869, at 88; id., Dec. 20, 1869, at 122; Act of Mar. 12, 1870, ch. 188, [1869-70] Cal. Stat. 291. Women were alerted to this change by the Pioneer. "New Divorce Law," Pioneer, Mar. 26, 1870, at 4.

First, as a part of the separation/divorce legislative package, Tweed secured a right for all wives, releasing their earnings from liability for the debts of the husband.²⁶ While this law provided the family with a layer of protection against a husband's improvident spending, it was nevertheless contrary to California's marital property scheme, where earnings represented paradigmatic common property, and thus would have contributed significantly to the further hybridization of the law. Neither did this law give wives any positive power to control their earnings, as a partner in the marital community or as the holder of separate property.

Possibly as a result, Senator Charles Maclay proposed legislation that would give women actual management control over both their separate property and their earnings, but this bill raised some of the same issues as Tweed's.²⁷ If the proposal was meant to provide management power without sole ownership, it was consistent with a community property regime. However, an interpretation of the bill as placing wives' earnings in the category of separate property was again inconsistent with the framework of California marital property law. The proposal was recommended for passage by the Judiciary Committee, but it was not debated

²⁶Senate Bill No. 204, Senate Journal, Jan. 19, 1870, at 205; Act of Mar. 9, 1870, ch. 161, [1869-70] Cal. Stat. 226-227; Senate Bill No. 542; Senate Journal, Mar. 7, 1870, at 472; Act of Mar. 18, 1870, ch. 227, [1869-70] Cal. Stat. 328-329.

²⁷Senate Bill No. 315, introduced Feb. 4, 1870, Senate Journal at 283.

any further in the waning days of the session.²⁸ Meanwhile, in the Assembly, Daniel Inman had introduced legislation to give wives at least some of the property rights that theoretically should have been theirs under a common property regime. His bill would have allowed a married woman to sell separate real property without her husband's permission, an activity consistent with both ownership and management rights in that separate property. However, this bill, too, failed to survive its committee referral.²⁹

Finally, in the face of the dictates of common wisdom in the era of laissez-faire economics, Tweed tried to marshal the force of the legislature to improve women's employment opportunities, by proposing a joint resolution encouraging government offices to hire women, at pay equal to that received by men.³⁰ Beyond its immediate benefits, Tweed believed that through this resolution the State could set an example for the private sector. But opponents resisted this attempt to "regulate" matters between private employers and employees. Further

²⁸Senate Journal, Mar. 3, 1870, at 440. The day before his favorable report from the Judiciary Committee, Tweed previewed his support for the measure in the course of the suffrage debate, urging the Senate to enact "other measures to secure additional rights for women - the right, for instance, to manage her own property independent of her husband." Sacramento Union, Mar. 3, 1870, at 1. Nevertheless, while Tweed and Maclay may have believed they were advancing married women's property rights, they appeared oblivious to any need to harmonize their agenda with California's existing marital property regime.

²⁹Assembly Journal, Jan. 7, 1870, at 186.

³⁰Senate Journal, Jan. 10, 1870, at 165-66. Before getting down to serious discussion of the issue, Tweed had to endure fellow lawmakers' laughter and joking attempts to refer the resolution to a (nonexistent) "Domestic Relations Committee" or a "Committee on Swamp and Overflowed Lands." Sacramento Union, Jan. 11, 1870, at 1. Critical of such behavior, the San Francisco Chronicle called Tweed's plan a "plain, unvarnished request" and a "very laudable resolution." "Sacramento. Shall Women be Granted Employment?" Chronicle, Jan. 12, 1870, at 3.

they argued that such a resolution was unnecessary, both because there was currently no law prohibiting female employment in government and also because those women working in federal government positions proved that no roadblocks existed to female employment.³¹

Tweed countered that he had discovered many jobs in government which could be filled by female labor but were not, which demonstrated, he believed, the need to encourage these offices to hire women. In a debate which bore a striking resemblance to the modern disagreements over affirmative action, Tweed had to defend his notion of encouragement both against charges that he was advocating a quota-type requirement to hire women, and against speculation that women might not be qualified for government employment.³² But Tweed could not keep this resolution dealing with equal economic rights from becoming a referendum on the issue of political rights for women, as a number of opponents rather illogically linked the issues and shifted the focus of the debate. In the end, the resolution was rejected.³³

³¹Sacramento Union, Jan. 11, 1870, at 1.

³²Id. Tweed properly denied that there was any language in the resolution which required the hiring of women. And he met the charge of a lack of qualification by noting, "The best benevolent institutions of this State are managed by women. Our best public charities are under their control." Id.

³³Senate Journal, Jan. 11, 1870, at 170. Tweed himself aided in this transformation by bringing up the fact that women were permitted to hold office in certain states, as a way of asserting women's fitness for government employment. Sacramento Union, Jan. 11, 1870, at 1. The San Francisco Chronicle called attention to the partisanship surrounding the resolution's defeat, noting that the resolution "ruffled the dignity of several Democratic Senators, who brought into play what little stock of parliamentary law they had acquired to defeat the resolution, not by a square fight on the merits, but by dilatory motions." Chronicle, Jan. 12, 1870, at 3.

While the Senate may have been unwilling to bring the law to bear on the labor market, even in the legitimate realm of government employment, the Assembly was willing to act in a related way. Legislation was introduced there ordering the San Francisco Board of Education to equalize the salaries of male and female teachers. Although it was fairly late in the session, referral of the bill to the Assembly's San Francisco delegation allowed for quicker consideration and passage. The Senate also timely considered the bill and passed it, and the Governor affixed his signature.³⁴ While this bill affected women in a now-feminized job market, its passage demonstrated a more positive interest in law reform for women's economic benefit than Tweed's resolution had. But even this small victory would not go unchallenged both by the San Francisco Board of Education or the next Legislature.

Nineteenth Session, 1871-72

The CSWA's narrow focus on woman suffrage in the Eighteenth Session certainly departed from the Spiritualist women's rights paradigm, but is probably attributable to two factors: first, a realistic assessment that, given the newness of the organization and the briefness of California's legislative session, the CWSA needed to "start small," and second, the accessibility of suffrage as an issue, as

³⁴Assembly Bill No. 656 introduced by Mr. McMillan; Assembly Journal, Mar. 18, 1870, at 621. In 1870, 64% of San Francisco teachers were female, making it the best profession open to white women in the city. Even still, in other cities like New York and Chicago, the teaching force had become more highly feminized by this time. See Nancy Ann Yamane, "Women, Power and the Press: The Case of San Francisco, 1868-1896," 39-40 (Ph.D. diss., UCLA, 1995).

compared with issues of marital property law. Over the next two years, as the CSWA became more established, it was in a position to broaden its platform. In addition, as the members became more informed of women's status under the laws of California, i.e., as they developed a "legal consciousness," they became equipped to challenge the inequalities embedded in the state's marital property scheme.³⁵

Emily Pitts Stevens had attempted, even prior to formal suffrage organizing, to educate women as to their property rights by devoting a detailed column in her newspaper to her understanding of marital property law in California.³⁶ However, inasmuch as California's marital property law was fairly complex, the women were even better served by the educational efforts of sympathetic male attorneys and judges, who had become active in the cause. Two of the earliest supporters were Judge Tweed and Judge Addison M. Crane of Alameda (who in addition had ties to Spiritualism). Crane not only assisted the

³⁵Donna C. Schuele, "Community Property Law and the Politics of Married Women's Rights in Nineteenth-Century California," 7 Western Legal History 245, 265-269 (1994).

³⁶"Property Rights of Married Women," Saturday Evening Mercury, Sept. 4, 1869, at 1. Pitts Stevens' exposition is interesting not just for the fact that she saw the need to educate women as to the community property system, but also for the way that it reveals an inexperienced layperson's understanding of this relatively complex system. Pitts Stevens interpreted the definition of common property to mean that "the husband and wife have an equal interest in it." But she went on to explain that, in reality, the husband was not bound to respect the wife's interest. Of wages, paradigmatically common property, she noted, the wife "is not entitled to a cent of [the husband's] earnings; he is entitled to all of hers." Meanwhile, Pitts Stevens recognized that the sole trader law was an attempt to ameliorate this inequality. However, she failed to recognize that it did so in contradiction to the community property system, by imposing a common-law system fix. Thus, she trenchantly noted its limitations - "no married woman could get authority to be a sole-trader at housekeeping" - but failed to recognize the larger problems this caused within the community property regime, when women's rights were carved out in a gender-specific way rather than being equalized in a gender-neutral way.

SFWSA, but he also addressed the inaugural CWSA convention, again providing an exposition of the California laws affecting married women.³⁷ Yet another effort to educate women as to their unequal treatment under California law occurred in the summer of 1871, when a San Jose attorney, C.C. Stephens, spoke at the Fourth of July picnic meeting of the Pacific Coast Woman Suffrage Association.³⁸ In turn, the speeches of both Crane and Stephens were immediately disseminated by local newspapers, Crane's in the Pioneer and Stephens' in the San Jose Mercury.³⁹

This legal consciousness-raising prepared women to lobby the next legislature, meeting in December, 1871, for changes in the community property and probate laws, as well as for suffrage. In addition, women's rights activists had more time to mobilize for this session. The result was the presentation of a petition in the Assembly early on, asking not only for suffrage, but also "that the laws may be so changed that women shall after marriage have the same rights and power to contract, and have the same absolute ownership and dominion over their

³⁷Pioneer, Feb. 5, 1870, at 2. Crane has been described by one historian as "never too busy to explain California law to women, including property law, which he considered most unjust." Davis at 228. Nevertheless, five years later Crane apparently felt that enough relative progress had been made in reforming this law, as he told a gathering of Spiritualists that California's laws affecting women "are much more liberal than in other States in the Union." "A Word About Women," Common Sense, April 17, 1875, at 573.

³⁸"Letter from California," Woman's Journal, July 22, 1871, at 232.

³⁹C.C. Stephens, "Legal Disabilities of Women in California," San Jose Mercury, July 31, 1871, at 1; Pioneer, February 5, 1870, at 2. Stephens' speech was published as a tract by the PCWSA, and reprinted in 1873. C.C. Stephens, "Legal Disabilities of Women in California," pamphlet (2d ed. 1873), in UCLA Special Collections, Los Angeles, California.

own property as before marriage, so that she shall be, in respect to her natural and property rights, the equal of her husband."⁴⁰

As with the previous session, the presenter, here Assemblyman F.S. Freeman, resolved to have the petition referred to a special committee, rather than a standing committee. This time a revealing debate ensued, which proved the suffrage advocates to have been astute in their choice of strategy.⁴¹ With Freeman protesting that he himself "was not a particular advocate of women's suffrage," he claimed he was simply acting on the wish of the petition's originators to have it referred to a special committee, and barring that, the Judiciary Committee. Meanwhile, a member of the overburdened Judiciary Committee freely acknowledged that reference there would be tantamount to burying the petition, and, he noted, "would be so understood if carried." A compromise was suggested whereby this special committee could deal with the substantive issues and then pass along to the Judiciary Committee any constitutional questions the

⁴⁰Sacramento Weekly Union, Suppl., Jan. 20, 1872, at 2. Note that, while the petition spoke forcefully of "rights," "power," "dominion" and "equality," in the Assembly Journal the petition was described as calling for the "protection of women," i.e., treatment different from that accorded men. Assembly Journal, Jan. 12, 1872, at 248.

⁴¹One member tried to use Freeman's resolution to bury the matter altogether, moving that it be postponed until April first, the end of the session. Another, also apparently not in favor of women's rights, suggested referral to the Committee on Public Morals. And at first, referral to a Special Committee was voted down, apparently due to hostility to the substance of the petition, although the vote was immediately reconsidered. Sacramento Weekly Union, Suppl., Jan. 20, 1872, at 2.

Special Committee might find.⁴² In the end, Freeman's lukewarm position notwithstanding, he was appointed chair of a select committee of five.⁴³

At the end of January, a woman suffrage petition was presented in the Senate, by now-Senator Finney, from citizens of San Francisco, including Leland Stanford. This petition contained precisely the same wording as Freeman's petition from Yolo County residents, asking for equal political and separate property rights. It was referred, apparently without incident, to a Special Committee which included Finney and Maclay.⁴⁴ Throughout the session, numerous other woman suffrage petitions were presented in the Assembly from citizens around the state, thereby yielding a total of over five thousand signatures.⁴⁵

⁴²Id.

⁴³Id. The committee appears to have consisted of Freeman, J. Burkhalter, David Meeker, John M. Days and J.N. Turner. At first, the President of the Senate appointed Senator C.G.W. French to the committee, mistakenly believing him to be the presenter of the petition. After some discussion, Freeman was appointed in his place. However, French's signature appears on the committee's report, indicating his involvement at some point. Assembly Journal, Jan. 12, 1872, at 248; Sacramento Weekly Union, Suppl., Jan. 20, 1872, at 2; "Report of the Special Committee in Relation to Granting Women Political Equality," 3 Appendix to the Journals of the California Senate and Assembly, Nineteenth Session [1871-72], Report No. 7, at 11 [hereinafter "Political Equality Report"].

⁴⁴Senate Journal, Jan. 31, 1872, at 272; Sacramento Union, Feb. 1, 1872, at 3.

⁴⁵Assembly Journal, Feb. 12, 1872, at 417, 421; id., Feb. 26, 1872, at 499; id., Mar. 7, 1872, at 606; id., Mar. 14, 1872, at 687. (This petition, presented by Assemblyman Meeker, the oldest member of the House and a member of the Special Committee, was described as containing over 1,800 signatures of San Francisco citizens. It may have been the same petition as was presented in the Senate by Finney. Sacramento Weekly Union, Mar. 22, 1872, at 1; Assembly Journal, Mar. 21, 1872, at 741 describing petition as coming from the "American Women's [sic] Suffrage Association," which was probably the splinter group, calling itself the Pacific Coast Woman Suffrage Association, an AWSA affiliate formed in Santa Clara County by Hannah M. Tracy-Cutler); "Political Equality Report" at 1. Meanwhile, the CWSA reported sending a petition to the legislature calling for woman suffrage by constitutional amendment, containing 5,127

On an evening in mid-March, woman suffragists were once again given the opportunity to speak in the Assembly Chamber, before the woman suffrage committees of both houses, as well as "[q]uite a large audience, containing a generous admixture of ladies."⁴⁶ In accordance with the petitions presented this session, the focus now was on more than just political disfranchisement. Mrs. O. Hanks spoke first, discoursing on women's constitutional rights. Apparently in response to the argument that the right to vote flowed to men as a result of military duties, Mrs. Hanks neatly responded that "it was rather too much to ask women to bear soldiers and arms also."⁴⁷

Mrs. Nettie C. Tator, a widow and activist from Santa Cruz, then stepped up to deliver what one Sacramento newspaper characterized as "the bread and butter side of the argument."⁴⁸ Tator had recently made a name for herself by attempting to become the first woman admitted to practice law in California. Although her performance in a bar examination demonstrated her fitness, the

signatures. "Annual Meeting of the California Woman Suffrage Association", Woman's Journal, May 31, 1873, at 171.

⁴⁶Assembly Journal, Mar. 6, 1872, at 603 (adoption of Freeman's resolution that the "Woman Suffrage Association" be permitted to use the Assembly Chamber on the evening of March thirteenth); "Woman Suffrage Meeting", Sacramento Weekly Union, Mar. 16, 1872, at 8. Assemblyman A.D. Splivalo's resolution that an anti-suffragist Mrs. J.B. Frost, be permitted to use the Assembly Chamber the following evening was adopted. Assembly Journal, Mar. 8, 1872, at 635.

⁴⁷"Woman Suffrage Meeting," Sacramento Weekly Union, Mar. 16, 1872, at 8.

⁴⁸Id. The newspaper was referring to Tator's argument that many of the women seeking the ballot were self-supporting, and thus had practical reasons for doing so. "Address of Mrs. Nettie C. Tator before the Joint Committees of the Senate and Assembly of the State of California on the subject of Extending the Right of Suffrage to Women, Sacramento, March 13, 1872," at 6, Women's Rights Pamphlets, Bancroft Library, Berkeley, California [hereinafter "Address of Mrs. Tator"].

judge to whom she had applied had second thoughts about the legality of her admission, and he was at this point reserving judgment.⁴⁹

Given Tator's lack of a male provider, it is not surprising that her speech focused on economic barriers faced by women. And, given Tator's legal training, it is not surprising that she advocated law reform as a way to remove those barriers.⁵⁰ In doing so, Tator first echoed a flattering tone that the California suffrage movement had adopted early on, which tapped into the feelings of both destiny and uniqueness characteristic of California. She reminded legislators: "It is said that the light of civilization grows brighter in its advance Westward; and with the growth of civilization, comes greater liberties and privileges for women. If so, it is most fitting that it should crop out in this Golden State, in giving women all the rights political that man [sic] have."⁵¹ Additionally, however, Tator argued

⁴⁹Elizabeth Cady Stanton, Susan B. Anthony, and Matilda J. Gage, eds., 3 History of Woman Suffrage 757 (1881); Barbara Babcock, "Clara Shortridge Foltz: 'First Woman'" 30 Arizona Law Review 673, 686 n. 65 [hereinafter "First Woman"]; Carolyn Swift and Judith Steen, eds., Georgiana: Feminist Reformer of the West 45-46 (1987); "Obstacles to Woman's Advancement," Pioneer, May 30, 1872, at 4.

As for Tator's fate, during the session a new law was passed ending the process by which aspiring attorneys could seek admission to the bar from their local District Courts. Instead, now application could only be made to the California Supreme Court. This law went into effect on April 1, 1872, thereby causing the local judge who had been considering Tator's application to find that he now lacked jurisdiction over the matter. However, at least two of the local judges before whom Tator had sought admission believed that California's law restricting admission to white males was unconstitutional under the newly ratified Fourteenth Amendment's privileges and immunities clause. It is not known whether Tator ever pursued an application to the California Supreme Court, but we do know that she did not gain the distinction of becoming California's first woman lawyer. "Shall a Woman Practice Law?" San Jose Weekly Mercury, Aug. 8, 1872, at 2; Babcock, "First Woman," at 686. Soon after, Tator disappeared from accounts of California suffrage activism, possibly having left the state to return to her native Wisconsin.

⁵⁰Although the newspaper account of her speech indicated that she did not stick closely to the prepared text, that text was printed in pamphlet form. "Address of Mrs. Tator" at 6.

⁵¹Id. at 10.

that women needed political rights "more in this state . . . than in the older states. There is more individuality of character here for both sexes, and few social restraints[,] therefore a greater tendency towards license, which makes it all the more necessary for her to have it in her power to protect herself through making the laws of the land" ⁵² Men could not adequately protect women, according to Tator, because "[i]t is impossible for them to understand our needs well enough to represent us. We are too unlike in our natures." But, she continued, even if men could ably represent women, "still it is better that we should do it for ourselves, for the exercise of so doing would give us greater intellectual power and development, and make us more fit companions for you." ⁵³

Tator viewed political power as a necessary tool for gaining economic power, as she focused on the inequalities embedded in marital property and other laws. First she asserted a wife's claim on the common property and set forth the basis for that claim: "When a man and his wife commence life poor, and struggle along together in the acquirement of property, by good right half of that property and whatever income accrues from it, is hers. But," Tator complained, "does she get it? No! And if she dies he continues on just the same with all his business relations . . . ; while on the other hand, if he dies, she cannot do anything until the property has been administered upon by law," with resultant waste. Tator then noted the common justification for this inequality - that it was necessary to protect

⁵²Id. at 10.

⁵³Id. at 6.

the interests of the children. Yet, Tator asked, "Who . . . looks after the interest of children more closely than mothers do?"⁵⁴

Further, Tator drew attention to the vagaries of life which forced some women to work outside the home, yet noted the difficulties which they faced. "[I]f every woman in this world had a home, and some kind provider and protector, those who are now clamoring for the ballot, would be much fewer in numbers than they now are; for with many, this is a question of bread and butter, instead of (as with others) a question of right, or as a means of opening up higher and broader spheres of action, or greater opportunities for culture and intellectual development."⁵⁵

Almost as if anticipating the rise of the gendered welfare state nearly fifty years later,⁵⁶ Tator reasoned that when a woman was without male support, especially where children were involved, "the collective man, the State," should do the providing. However, she acknowledged that the only realistic remedy was "to open the doors to every honorable employment to woman; giving her equal chances with man, and equal pay for the same labor." But, Tator claimed, "this will not be done, until the ballot is put into her hand to compel it."⁵⁷ Her unstated premise here was that it was not simply market forces subordinating

⁵⁴Id. at 8.

⁵⁵Id. at 11.

⁵⁶See e.g., Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992), esp. chs. 6-9.

⁵⁷Address of Mrs. Tator at 12.

laboring women, but additionally operating were unjust legal and political forces, legitimately addressable through the lawmaking process.

But the most lively, radical speaker of the group was yet to come.

According to the Sacramento Union, Emily Pitts Stevens "took the stand to make the closing argument, to much applause. Her speech was Pitts-Stevenism [sic] in the best style of the art. She railed against class legislation, walked the stand, and in an off-hand, defiant way told the audience a good many wholesome truths." With bravado, Pitts Stevens threatened that "[i]f the Legislature did not strike out the word male from the Constitution, the women would come here two years hence more than two thousand strong and change it themselves."⁵⁸

Two weeks after the women appeared at the Capitol, the Assembly Special Committee issued its report, dealing with both woman suffrage and the widow's rights in the common property.⁵⁹ Amazingly, it was exceedingly favorable. The committee came out in support of granting women both this marital property

⁵⁸"Woman Suffrage Meeting," Sacramento Weekly Union, Mar. 16, 1872, at 8. Interestingly, certain other leaders of the CWSA had a very different impression of Pitts Stevens' speech, finding it to be an "unfortunate, threatening and revolutionary harangue," inspired by her association with "Woodhull 'Free Love'" supporters. This speech contributed to the 1873 rift in the CSWA. "The Suffrage Revolt," San Francisco Chronicle, Apr. 27, 1873, at 5. See Chapter Three.

⁵⁹The petitions which had been presented to the legislature had focused, with regards to marital property rights, on the wife's inability to manage her separate property. However, the Assembly Special Committee did not respond to that issue, nor had the speakers addressing the committee. Instead, the committee advocated a different right, perhaps in response to Tator's speech.

right, through a modification of statutory law, and suffrage rights, through amendment of the state constitution.⁶⁰

Clearly, the committee believed that suffrage was the more radical of the two proposals, and it adopted three rhetorical tactics to make its report more palatable to fellow Assembly members. The first was to pick up on Tator's theme, portraying the granting of suffrage as yet another demonstration of California's superior brand of progressiveness. The second was to play down the radical nature of the call for woman suffrage, by simply stating, "there is nothing in the proposed amendment which is either of a revolutionary character or in opposition to the spirit and genius of the Government."⁶¹ But the committee also traded on the more radical nature of the suffrage call, using it to make the granting of property rights seem like a matter-of-fact realignment of law "which has survived its usefulness." To this end the committee noted that the equalization of marital

⁶⁰The committee was referred to by a variety of names during this session. An Assembly Journal entry called it the "Special Committee on the Enfranchisement and Protection of Women," while the committee issued its report under the title "Special Committee in Relation to Granting Women Political Equality." *Assembly Journal*, Mar. 27, 1872, at 833. The different references are revealing, as the second appears to address the issue as one of empowerment, while the first is anchored in the more conservative mindset of protection. The report was signed by three committee members, J.M. Days, J.H. Turner, and C.G.W. French, "For the Committee." Later evidence indicates that Days probably authored the report. In 1885, when Days was elected to the State Senate, he reembarked on efforts to amend the marital property law. A report he submitted at that time contained, in parts, nearly identical wording to this report. See discussion in Chapter Five. Meanwhile, evidence taken from the voting record on two pieces of proposed legislation emanating from the committee's report, Assembly Bill No. 758 (equalizing control over the community by the surviving spouse), and Assembly Bill No. 760 (proposing a constitutional amendment to permit woman suffrage), indicates that the remaining committee members, Freeman, Burkhalter, and Meeker, did not truly support the committee report. In both cases, these three Assemblymen were the only committee members voting against the legislation. *Id.*, Mar. 29, 1872, at 880-81.

⁶¹"Political Equality Report" at 5.

property rights, "being within the province of ordinary legislation [could] be granted without delay."⁶²

Addressing the substance of the marital property issue, the committee recognized a wife's valuable contribution to the marriage. While the committee argued from the traditional "separate spheres" analysis of the time, nonetheless it asserted that the wife's contribution within the home was no less important than the husband's, made outside the home. However, unlike Tator, the committee did not characterize the wife's activities as adding to the family's financial wealth.⁶³ Rather, the committee waxed romantically, the wife "gratif[ies] the family pride by embellishment of the home," and through "the cultivation of her mind, the refinement of her taste, and the protection of her health," places herself in a position to "bear . . . well formed and beautiful and healthy children, and to intelligently surround them with improving and refining conditions that will give them a noble direction in life, and thus honoring [her husband's] name, transmit it to the future untarnished." Thus, the committee concluded, "[u]nless money is more valuable than the mind of man, and coin than character, the business

⁶²Id. at 3, 10.

⁶³The committee believed that the argument, that the widow should not be permitted to succeed to the "husband's" estate because "he earned it by virtue of his own persona, foresight, enterprise, perseverance and business energy, and that therefore it belongs to him," to be "one of the most plausible and forcible objections that has been and probably that can be urged against the proposed change." "Political Equality Report" at 10. Thus, the committee was forced to come up with something of value that the wife contributed to the marriage in order to support its position.

qualifications of the husband may be fairly and equitably offset by the home duties of the wife," with the contributions admitting of equal value.⁶⁴

According to the Special Committee, the way to value equally the wife's contribution was to treat her survivorship interest in the common property no differently than that of her husband.⁶⁵ Nevertheless, the committee recognized that this was on the one hand a rough calculation and, on the other hand, an unenforceable bargain, as marital property rights did not simply flow from a contractual agreement. The committee asserted, "If either partner of the matrimonial firm fails to perform a full share of the labor assumed or assigned that is a misfortune, but it should not be allowed to vitiate the personal or property right of either partner."⁶⁶ Thus, the committee deftly deflected a typical point of opposition against married women's property rights – that not all wives added to the financial (or other) well-being of their families – even though it acknowledged the force of such an argument.

Having earlier discounted the possibility that the wife's contribution to the marriage might enhance family wealth, the special committee nevertheless moved on to examine the economic challenges faced and overcome by wives and widows, notwithstanding this unequal treatment. According to the committee, "Facts are numerous showing that wives during years of wedded life experience great

⁶⁴Id. at 10.

⁶⁵Id. at 11.

⁶⁶Id. at 10.

hardships, arising from the inability of their husbands to provide for their wants, but who, on becoming widows, supported themselves, educated their orphan children, and accumulated property. Instances are numerous where wives . . . have rescued and brought out incumbered estates, involved by the unfortunate speculations or business incapacities of their husbands."⁶⁷ The committee attributed the achievements of these women to a transference of skills learned in running a household, asserting, "it is notorious that woman has a natural tact for business. They [sic] are great contrivers and economists. Their watchful care and industrious habits are proverbial."⁶⁸ Thus, women had already, under the most adverse circumstances, shown themselves ready and able to exercise the power equal property rights would give them.

Finally, the special committee believed that an equalization of marital property laws would positively influence the interactions between husbands and wives, to the ultimate benefit of the state, by helping to resolve the age-old problem of dependency of widows and their children. The committee explained, "If . . . husbands knew that their widows would succeed to their business, this would necessarily operate as a powerful stimulus to induce them to instruct their wives not only in business matters generally, but also to enlighten them as to their own pecuniary condition and manner of conducting their affairs. It would stimulate wives to fit themselves for the proper discharge of the new

⁶⁷Id. at 11.

⁶⁸Id.

responsibilities and duties which the changed order of things would impose upon them."⁶⁹

Based on this report, committee member John M. Days immediately introduced Assembly Bill No. 758, designed to give a widow ownership and management of the entire common property upon the death of her husband, and Assembly Bill No. 760, proposing an amendment which would remove the word "male" from the constitutional provision dealing with suffrage.⁷⁰ As predicted, the Assembly was willing to act on the proposed equalization of common property rights without the delay of referring the bill itself to committee, and just two days after its introduction, the bill passed, thirty six to twenty seven.⁷¹ However, all this occurred so late in the legislative session that there was not enough time to launch the necessary battle for the bill in the Senate, especially given an

⁶⁹Id.

⁷⁰Assembly Journal, Mar. 27, 1872, at 833; Sacramento Weekly Union, Mar. 30, 1872, at 4. The proposed amendment would have changed Section 1 of Article II to read: "Every citizen of the United States of twenty-one years of age and over, who shall have been a resident of the State six months next preceding the election, and of the county or district where such vote is taken thirty days, shall be entitled to vote at all elections which are now or may hereafter be authorized by law." By removing the word "male" from this section, voting rights would have been made gender-neutral.

⁷¹Assembly Journal, Mar. 29, 1872, at 880. Undoubtedly in an attempt to derail the bill in the closing days of the session, a move was made in the Assembly to refer the bill to the Judiciary Committee, on the basis that the bill was "filled with imperfections." While sometimes using the appropriate term "common property," the bill alternatively used the phrase "family estate," which, one member pointed out, had no meaning in the law. While Days denied actually authoring the bill, he blustered that "if the term was not known in law he would make it known in law." Regardless, the phrase was stricken and the bill passed. Sacramento Weekly Union, Suppl., Apr. 6, 1872, at 2. Yet controversy lingered, as a motion to reconsider the vote was threatened, but the motion was never made. Assembly Journal, Mar. 29, 1870, at 880.

unfavorable Judiciary Committee report there a few days before the close of the session.⁷²

Meanwhile, the woman suffrage bill, calling as it did for a constitutional amendment, raised, if nothing else, more complicated procedural issues. Days urged a favorable vote on the measure by downplaying the relative significance of the Assembly's consideration. He reminded his fellow lawmakers that their vote would not be final on the matter, as a constitutional amendment would have to be submitted to the electorate, which would take another two years. He even went so far as to claim that he was not necessarily prepared to support such an amendment, however, under these circumstances, "he would cheerfully vote for the bill, and he hoped every member would be gallant enough to do the same."⁷³ Interestingly, there does not appear to have been any real debate on the issue, and the bill went down to quick defeat, ten to fifty two. Moreover, even with the Special Committee's favorable report, three members of that committee were found voting against the suffrage amendment.⁷⁴

⁷²Senate Journal, Mar. 30, 1872, at 729. See also, id., Jan. 26, 1885, at 143, recounting the history of this bill. While acknowledging the timing problems, suffragist Mary J. Collins later opined that it was unlikely the Senate would have passed the bill, even if it had "ample time to pass upon [its] merits." Mary J. Collins, "Woman Suffrage in California", Woman's Journal, Jan. 4, 1874, at 32.

⁷³Sacramento Weekly Union, Suppl., Apr. 6, 1872, at 2.

⁷⁴Burkhalter, Freeman and Meeker voted against the proposal. Days and Turner were the only committee members voting in favor, and French appears to have abstained from voting. Assembly Journal, Mar. 29, 1872, at 881.

In reviewing the Assembly's actions on those bills which resulted from the Special Committee's recommendations, suffragist Mary J. Collins astutely observed, "the readiness of the Assembly to concede to woman certain political, personal and property rights, . . . compared with its meager vote, conferring the ballot, shows how grudgingly the stronger sex clings to its

Subsequent to this vote in the Assembly, the Senate Special Committee issued its own report. As this was done on the last day of the session, it effectively precluded any substantive action in that house. Fairly early in this session, the Special Committee chair, Senator Finney, had reintroduced fellow committee member Maclay's bill from the previous session, now Senate Bill No. 167, giving the wife management and control over her separate property and her earnings.⁷⁵ Although Maclay's bill had been fully recommended by Tweed's Judiciary Committee two years prior, during this session the Judiciary Committee balked at giving the wife full control of her earnings, and thus refused to recommend this portion of the bill. While the Senate voted against eliminating the offending section by one mere vote, it effectively killed the entire proposal by voting to strike the enacting clause.⁷⁶

Meanwhile, another bill regarding married women's property rights was making its way through the Assembly. This proposal may have been meant to

monopoly of political power, and demonstrates the reformatory character of the enfranchising principle of our movement." "Woman Suffrage in California," Woman's Journal, Jan. 4, 1874, at 32.

⁷⁵Senate Journal, Jan. 26, 1872, at 258. The wording of this bill, Senate Bill No. 167, is identical to Senate Bill No. 315, introduced February 4, 1870. Giving the wife control, but not sole ownership, of her earnings would certainly be consistent with a community property scheme, although it would be an enlightened application, providing as it would increased power to the wife. However, a newspaper's editorializing about the bill reveals a protective impulse as the more likely motivation behind it: "now and then [the husband's] duty [to support] devolves upon the wife because of the worthlessness of the husband. When such is the case every consideration of justice demands that the wife should have absolute control of her earnings, and it is a disgrace to the State that such is not already the law." "Earnings of the Wife," San Jose Weekly Mercury, Feb. 29, 1872, at 2 (reprint from the Argus).

⁷⁶Senate Journal, Feb. 5, 1872, at 294; id., Feb. 6, 1872, at 300.

accomplish about the same objectives as Senate Bill No. 167, formerly Maclay's bill, yet its wording was not so clear. For example, Senate Bill No. 167's provision giving married women the exclusive right to control and dispose of their earnings used language consistent with an understanding of the bifurcation of ownership and control in the community property regime. Meanwhile, Assembly Bill No. 344 gave rights to the wife to control some types of property as if she were unmarried, which included property "acquired in any other way than by gift or conveyance from her husband," which probably, but not certainly, included earnings.⁷⁷ But Assembly Bill No. 344, with its use of the common law term femme sole, which had no meaning in a community property regime, was poorly drafted, and thus it is difficult to discern exactly how it was intended to fit into the state's actual community property regime.⁷⁸ Nevertheless Assembly Bill No. 344 passed both

⁷⁷Assembly Bill No. 344, introduced by Mr. Splivalo; Assembly Journal, Feb. 10, 1872, at 415. The San Francisco Chronicle viewed the bills as quite similar, noting, "should this bill pass the Assembly we prophesy that the Senate will knock it sky high. In fact the Senate has already passed adversely upon the same question, embraced in Finney's bill." "Sacramento," Chronicle, Feb. 13, 1872, at 1. In fact, the Chronicle guessed wrong about the Senate's vote.

The voting record of the author, Splivalo, sheds little light on the intended scope of the legislation, as he more often than not came out against granting rights to women. Not only did he vote against Assembly Bill No. 758 and 760, but he also introduced a resolution giving an anti-suffragist use of the Assembly Chamber the evening after the suffragists were to speak there. Assembly Journal, Mar. 29, 1872, at 880, 881; id., Mar. 8, 1872, at 635. The Chronicle looked to Splivalo's marital status to discern his motivations: "Mr. Splivalo is a chivalrous young bachelor, with no present alliance matrimonial in his mind's eye, so he can afford to be liberal." "Sacramento," Chronicle, Feb. 12, 1872, at 1. Meanwhile, Senator Finney, who introduced Senate Bill No. 167, was clearly in favor of granting rights to women. (The Chronicle earlier described Finney as an "ardent Republican and Woman's Rights man." "Sacramento," id., Jan. 19, 1872.

⁷⁸Interestingly, the San Francisco Chronicle also failed to recognize the disharmony, as it said approvingly of the bill, "This knocks the old common law into a cocked hat." Chronicle, Feb. 13, 1872, at 1.

the Assembly and the Senate, but in the end, any concerns raised by the wording of Splivalo's bill were mooted by the Governor's failure to sign it into law.

Nevertheless, the Nineteenth Session brought about changes in certain areas of married women's property rights without any obvious or direct political efforts having been made by women. Formulation of a Civil Code and a Code of Civil Procedure provided drafters with an opportunity to engage in law reform under the guise of codification. The efforts to memorialize California law in code had begun over ten years before, and with the enactment of a statute in the Eighteenth Session, authorizing the formation of a law revision commission, development of the codes started in earnest in 1870.⁷⁹ California's actions were part of a nationwide movement begun by David Dudley Field, brother of former California, and now U.S., Supreme Court Justice Stephen Field. Codification was based on a view of the law as a scientific and logically coherent system, and the enactments in the Golden State became the most significant and comprehensive to date.⁸⁰ The other codes were drawn up by a leading attorney and his associates, and served to gather and restate statutory and judge-made law.⁸¹ However, the revision commission made some substantive changes as well, particularly in the area of marital property law.

⁷⁹Oscar T. Shuck, ed., History of the Bench and Bar of California 191 (1901).

⁸⁰Lawrence M. Friedman, History of American Law 405 (2d ed., 1995). Friedman attributed the relatively greater success of the codification movement in the western U.S. to the region's civil law tradition. Id. at 394-95, 406-407.

⁸¹Shuck at 191.

The Civil Code, dealing with the rights of persons and things, contained over three thousand sections, including those governing marital property. In drafting it, the commission relied on a proposed civil code which had been designed by David Dudley Field for the State of New York in 1865.⁸² New York, with its marital property system having originated in judge-made common law, had been one of the first states to grapple with the issue of statutorily reforming this law, beginning in 1846.⁸³ While certain Married Women's Property Acts had gained passage in New York in the meantime, Field saw the need for more extensive modification of the common law and he used the exercise of codification to attain that end as well.⁸⁴

Thus, it may have been this Eastern influence which led to California's proposed Civil Code, which would give a wife the ability to enter into transactions

⁸²A. Bradford and David Dudley Field, The Civil Code of the State of New York (1865), cited in Friedman at 403. New York never adopted Field's Civil Code. *Id.* Meanwhile, although the California Code Commission adapted the New York version to the State's previous legal developments, still there were tell-tale signs of Eastern influence, particularly for those sections dealing with wives' separate property rights. Annotations published by two of the three Commission members made reference to the common law in expanding on these code sections, whereby they are explained as a modification of the common law. However, inasmuch as separate property is a meaningful category under the community property system, such an explanation based on common law notions was theoretically nonsensical. See, e.g., Civil Code Sections 167, 170 and 171 in 1 Civil Code of the State of California (annotated by Creed Haymond and John C. Burch, of the California Code Commission) (1872) [hereinafter, Annotated Code].

⁸³See, Peggy Rabkin, "The Origins of Law Reform: The Social Significance of the Nineteenth-Century Codification Movement and its Contribution to the Passage of the Early Married Women's Property Acts," 24 Buffalo Law Review 683 (1974); Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982).

⁸⁴Thus, Field believed that his proposed modifications of the common law of marital property completed "so far as [seemed] just and desirable, the removal of the disabilities of married women." Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975," 24 UCLA Law Review 1, 41 n. 202 (1975), quoting Bradford and Field at 28.

regarding her property, the right to make a declaration of homestead upon the common property, and the ability to sue in her separate name when the action concerned her separate property. However, the most significant change in married women's property rights could be found in proposed Section 162, and the more vaguely worded Section 158. As the law stood, a wife's separate property, if not under the complete control of the husband, at least could not be conveyed without the husband's consent. The new code proposed to permit wives to dispose of their property without this consent, and further to "enter into any engagement or transaction . . . with any other person, respecting property which [she] might if unmarried."⁸⁵

The other sections of the Civil Code merely reiterated the law currently in force. For example, it maintained the husband's right solely and fully to control the community property during the marriage, while only upon his death would the

⁸⁵Civil Code Sections 158, 162; "Married Women Under the New Code," Pioneer, Jan. 30, 1873, at 6 (reprint from the Santa Cruz Sentinel). The annotations provided for Section 158 reveal only that this section looked to law developed in common law jurisdictions. Annotated Code, Section 158. However, during the previous session, similar legislation had been introduced, although it died in committee. Assembly Journal, Feb. 7, 1870, at 186.

The Santa Cruz Sentinel editor was quick to recognize the improvement that these code sections brought to married women, but was also quick to point out the anomalies that remained. Reviewing various sections of the Civil Code dealing with marital property, the newspaper acknowledged that the code granted wives the right to enter into "transactions" regarding their property, but also noted that another section prohibited them from transacting for the payment of money. The newspaper sarcastically commented, "This is liberal; first tell a married woman she may contract, and then forbid her by rendering her contracts void, if she is obligated to pay money." Pioneer, Jan. 30, 1873, at 6 (reprint from the Sentinel).

Another law reform contained in the code gave the wife the right to declare a homestead out of the common property. Yet, this statute appeared inconsistent with the direction California law was taking, treating wives as if they had no ownership interest in the common property during marriage. Meanwhile, upon further analysis, this statute simply provided for family protection when the husband failed to do so. Not only was this clearly in the interest of the state, but it did not empower the wife in any real way.

widow become entitled to a one-half share in that property. Reporting on the provision, the Santa Cruz Sentinel commented, "The wife has the satisfaction . . . of knowing that if she survives her husband she immediately becomes somebody, and is possessed of what of right should always have been hers." And the newspaper sarcastically pointed out a missed opportunity to take this law to its logical conclusion: "Why the law has not given the husband the right to will away . . . the whole of the community property is not clear; for an obdurate husband could very easily do away with the community property before his death if it was his desire to leave his wife penniless [sic]." ⁸⁶

With the proposed Civil Code giving with one hand some separate property benefits for married women which they had been unable to achieve through direct lobbying of the legislature, the proposed Code of Civil Procedure took with the other hand by instituting new restrictions on sole traders. Some of the tightening of the statute seemed to be in response to lingering concerns by the husband's creditors,⁸⁷ but other amendments appeared to have little more purpose than to exact a price from the wife in the form of humiliation, dependency, and marital destabilization.

⁸⁶"Married Women Under the New Code," Pioneer, Jan. 30, 1873, at 6 (reprinted from the Santa Cruz Sentinel).

⁸⁷Code of Civil Procedure Sections 1813(4), 1815 (1872). In addition, the drafters cleared up an issue regarding the source of financing for the wife's enterprise, by specifying that she could not receive more than five hundred dollars from the husband's separate property or the community property. Code of Civil Procedure Section 1814 (1872) (emphasis added).

Under the proposed Code of Civil Procedure section, it was not simply enough that a woman declare to the court that she was seeking sole trader status for the purpose of supporting herself and her children. Rather a wife would have to provide the names and relation of those dependent upon her, and, more degradingly, have to declare "the fact of insufficient support from her husband, and the causes thereof, if known."⁸⁸ She would also have to reveal "[a]ny other grounds of application which are good causes for a divorce, with the reason why a divorce is not sought."⁸⁹ Clearly a wife would think twice about making such declarations for the public record unless indeed her marriage was already truly broken down. Interestingly, while the media did alert women to their newfound gains under the Civil Code, the record is curiously silent regarding the new restrictions imposed at the same time by the proposed Code of Civil Procedure.

Upon drafting by the commission, the proposed codes were submitted to a joint legislative committee. Members of that committee included Senator William W. Pendegast and Assemblyman French, whose voting records included support for women's rights, and Senator James T. Farley, who was vehemently opposed. The committee seemed more focused on the history-making opportunity that the adoption of the codes presented to the legislature, rather than on examining the substance of the codes' sections. As a result, there was no tinkering or

⁸⁸Code of Civil Procedure Section 1813(1) (1872).

⁸⁹Code of Civil Procedure Section 1813(3) (1872).

modification; instead the Civil Code appears to have been reviewed as a whole, and approved.⁹⁰ In doing its part, the joint committee declared that

it would be well for the honor of California if by the action of the present legislature it should adopt this great work, thus setting an example which will be speedily followed by all her sister States, adding new laurels to the fame she has already justly acquired, and at once becoming . . . a lawmaker . . . to the millions of citizens of other states who will soon follow in her footsteps.⁹¹

Thus, the committee saw California's adoption of the codes as the beginning step towards achieving the codification movement's goal of nationwide harmonization of state-level law, a step which would eventually entitle California to "the first post of honor and gratitude of the whole country."⁹² It was not surprising that, on the heels of this rhetoric, both houses quickly approved the Code without debate.⁹³ While there were a few legislators who voted against the bill, they did so to

⁹⁰These codes were developed and adopted in just the manner envisioned by David Field, inasmuch as they were initially the work of experts (the commissioners appointed by the Governor), and were given the "stamp of validity" by the legislature. According to Field's vision, the codes were not meant to be a product of and/or reflect the political give and take of the legislative process, and in California they most certainly were not. Friedman at 405.

⁹¹Shuck at 192; Assembly Journal, Mar. 16, 1872, at 714; Sacramento Union, Mar. 18, 1872, at 4.

⁹²Id. Splivalo stated that "[i]t seemed strange to him that while little bills received full consideration from the House, [here] immense volumes were rushed through, the contents of which he felt safe in saying were known to hardly anyone on the floor." Id.

⁹³Senate Bill No. 430, introduced by Mr. Pendegast, Senate Journal, Mar. 15, 1872, at 562; Assembly Journal, March 16, 1872, at 713.

register discomfort with the abruptness of the process, which took a mere two days, rather than with the substance of any code sections.⁹⁴

Thus, one of the most significant advances in equalizing California's marital property law was achieved more obliquely than any other reform during this period. Although the organized women's rights movement had called for this reform, activists appeared to play no direct role in actually gaining it.⁹⁵ And ironically, it was the importation of a common law property reform which brought the State of California's marital property system more in line with a true community property system. On the other hand, the codification exercise allowed the drafters to extend the trend towards tightening the sole trader statute, by making it more difficult for married women to support themselves and their families, and making sure that wives' dependency would be unmistakably impressed upon them in the process of gaining sole trader status.

⁹⁴One senator, who had been opposed to the codification project when it was inaugurated in the previous session, went so far as to retract his position, praising the work of the commission and declaring that the proposed codes represented "the greatest and best step forward that the State of California has taken toward a perfect system of laws." Sacramento Union, March 16, 1872, at 1.

⁹⁵There is some evidence, however, that the Pacific Coast Woman Suffrage Association did lobby the drafting commission in the summer of 1871, after attorney C.C. Stephen's speech to the group regarding the inequalities women faced under California law. The organization passed a resolution "to the effect that there be a form of amendments prepared, by which these laws should be made equal, and that such should be referred to the commissioners now engaged in revising the laws of the State." Hannah M. Tracy-Cutler, "Letter from California," Woman's Journal, Jul. 22, 1871, at 232.

Twentieth Session, 1873-74

The burst of attention and activity devoted to law reforms in favor of women during the Eighteenth and Nineteenth Sessions was not fully maintained over the Twentieth. Nevertheless, significant and lasting gains were made during this period, even with proportionately fewer bills introduced. Experience may have begun to pay off, as two pieces of legislation coming out of this term had their antecedent in the previous session. In addition, although California women's rights activists seemed to have played no direct role in the gains made through the 1872 enactment of the Civil Code, they did take part in this session's inevitable and inevitably extensive amending of that code.

The comparatively quiet presence of the organized women's rights movement in 1873-74 seems to have been due to a change in tactics.⁹⁶ Rather than, as before, circulating a petition and seeking a legislative hearing, the California Woman Suffrage Association insinuated itself into the process earlier, less overtly and less formally. First, the organization prepared a circular which it sent to the nominating committees of the various political parties, to urge them to put forth only candidates favorable to women's rights.⁹⁷ After the election, the CWSA appointed a select committee of women to lobby newly elected lawmakers prior to their convening in Sacramento, and to continue correspondence with them

⁹⁶It may, as well, be explained by the Collins—Pitts Stevens rift, which threw the organized movement into some disarray. See Chapter Three.

⁹⁷Mary F. Snow, "Letter from San Francisco," New Northwest, Sept. 12, 1873, at 2.

during the session.⁹⁸ Then, early in the session, the organization's Board of Control submitted an extremely comprehensive petition to both houses.⁹⁹ The petition set forth a list of grievances, and asked for not only a suffrage amendment and eligibility to school offices, but also legislation granting women an equal share of governmental clerical positions at all levels, equal property rights within marriage, and generally a removal of disabilities currently imposed by law.¹⁰⁰

In a relatively rare contemporary assessment of the effect of partisan politics on women's chances in the upcoming session, suffragist Mary J. Collins noted the existence of three factions, which she believed held equal sway: the Democrats, the Republicans, and the Independents, composed of disgruntled Republicans. "What this body will do for the cause of Woman is impossible to predict: the Republicans are inclined to be friendly; the Independents are loud in their professions for reform; and a few scattering suffragists are among the Democracy [sic]. . . . [W]hether there is a majority in favor of a Constitutional Amendment, conferring upon woman the ballot, is doubted by some and affirmed by others. That there will be legislation for the removal of some of the political disabilities of women I have no doubt." Also giving Collins optimism was the

⁹⁸Mary F. Snow, "Annual Meeting of California Woman Suffrage Association," Woman's Journal, June 6, 1874, at 179.

⁹⁹Assembly Journal, Jan. 12, 1874, at 399; Senate Journal, Jan. 12, 1874, at 300. See also, Snow, Woman's Journal, Jun. 6, 1874, at 179. While Snow touted the group's petitioning efforts, after the session, an anonymous suffragist, probably from San Jose, complained that Snow did no more than "sen[d] up the petition, which was laid on the table without reading." "Protection of American Women — The Alameda Outrage," Woman's Journal, Sept. 5, 1874, at 286.

¹⁰⁰"Woman Suffrage," San Francisco Chronicle, Jan. 14, 1874, at 1.

current Governor, Newton Booth, whom she described as "a statesman of the progressive order" who favored woman suffrage.¹⁰¹

Collins' predictions proved prescient, as the first battle fought to successful completion in 1874 involved the eligibility of women to educational offices. The issue of such eligibility had initially arisen in a practical way in February, 1870, when Mrs. Minnie McKee, a suffrage activist, was nominated for the elected position of Superintendent of Schools in San Jose. Emily Pitts Stevens cheered her on, commenting in the Pioneer, "We hope that the public will have the good sense to elect her to that position, and should there be a dispute as to her eligibility, we trust that the courts will also have the good sense to back up by their decisions, the action of the people." And she encouraged other women "to press themselves into these positions whenever possible or practicable."¹⁰²

¹⁰¹Mary J. Collins, "Woman Suffrage in California," Woman's Journal, Jan. 24, 1874, at 32. Further into the session, as Collins' predictions were being borne out, suffragist Mary Snow concurred that, while some women's rights bills would pass, the issue of woman suffrage would not. "Still," Snow optimistically believed, "the discussion elicited will help to arouse from their apathy . . . thoughtless women . . . , and add to the constantly increasing number of men who are inclined to do us justice by granting the franchise." Mary Snow, "Progress in California," id., Mar. 14, 1874, at 84.

¹⁰²"A Woman for Office," Pioneer, Feb. 19, 1870, at 1. Not long after, John A. Collins, a leading figure in the San Francisco Woman Suffrage Association, suggested at the group's weekly meeting that a woman be nominated for San Francisco Superintendent of Public Schools. "Woman-Suffrage Association," Pioneer, Apr. 2, 1870, at 1.

About a year and a half later, Laura deForce Gordon was nominated for State Senate by the Independent (or Woman Suffrage) party of San Joaquin County (which was probably the same as the county's woman suffrage society). She accepted the nomination and campaigned heavily for office, gaining a great deal of attention. According to Elizabeth Schenck later, "accounts of her vote tally range from 101 to 200," with many votes rejected due to "technical irregularities". 3 History of Woman Suffrage at 756. See also, "Mrs. Laura DeForce Gordon," and "Mrs. Gordon's Letter of Acceptation," New Northwest, Aug. 11, 1871, at 2; "Suffrage Lecturer," id., Aug. 25, 1871, at 2. One commentator claimed that the vote total would have been higher, but for the fear that if elected Gordon would be barred from serving. "Mrs. Gordon's Campaign in California," id., Sept. 22, 1871, at 1. Ironically, Emily Pitts Stevens denounced Gordon's run for office, calling it

After McKee failed in her election bid, Pitts Stevens tackled the subject of female officeholding in general way a few months later, noting the existence of an "erroneous impression . . . that women are not eligible to public office in California. The idea has arisen from the fact that they are not voters." However, she contended that "there is nothing, even by implication, in the constitution or laws of this State requiring that an office holder should be a voter," except (she erroneously believed) for legislators. Reasoning further from the fact that California widows were permitted to administer the estates of their deceased husbands, Pitts Stevens argued that the holding of this "office" indicated, in logic as well as experience, that there was no question but that women were eligible to "civil office."¹⁰³ And while Pitts Stevens recognized that the lack of the franchise, translating as it did into a lack of political influence, would make it difficult for a woman to attain office, she speculated that an elective or appointive school or administrative office might nonetheless be within reach.¹⁰⁴

"spurious" and "premature." Id.

¹⁰³"The Right of Women to Hold Office," Pioneer, Aug. 3, 1870, at 1. Pitts Stevens thought that maybe the erroneous beliefs stemmed from the fact that under California law married women could not enter into contracts, and thus might be barred from holding offices which required the posting of a bond. Pitts Steven argued that the solution to this would be to repeal the "absurd law." Nevertheless, she noted that single women could still fill these positions. Id. Her understanding of woman's ineligibility for legislative office (while not necessarily correct) no doubt contributing to her denouncing Laura de Force Gordon's run for State Senate about a year later.

¹⁰⁴"The Right of Women to Hold Office," Pioneer, Aug. 3, 1870, at 1. As Pitts Stevens had argued, when McKee was nominated, "Why shouldn't women superintend as well as instruct schools? Why should not women be upon Boards of Education as well as men? Who have greater interest in the proper education of children than wives and sisters and mothers? Who better than they understand the wants, capacities and peculiar nature of children?" Id., Feb. 19, 1870, at 1.

Pitts Stevens' lobbying paid off, when, in the fall of 1870, the CWSA Board of Control included as part of its agenda urging representatives to "define what offices women may fill under the present Constitution."¹⁰⁵ Soon San Francisco's female teachers joined the call for women to serve as school officers, by demanding the creation of the office of Assistant Superintendent of Public Schools, to be filled by a woman. The position was indeed created, but the school board appointed John Swett, at a salary almost four times that of a female teacher. This enraged Pitts Stevens, who claimed that female suffrage was the only way to stop an all-male Board of Education from handing out perks exclusively to men.¹⁰⁶

Following up on its agenda item, the CWSA drafted a proposed bill to make women eligible for elected and appointed school offices, at pay equal to that of male officeholders, which was introduced late in the Nineteenth (1871-72) Session by John Days on behalf of the Assembly's woman suffrage committee.¹⁰⁷ Assembly Bill No. 759 permitted "election or appointment" of women to "any office in the Public School Department of city, county or State."¹⁰⁸ The bill was

¹⁰⁵"Circular from the Board of Control," *id.*, Sept. 10, 1870, at 1.

¹⁰⁶"Further Concessions Demanded," *id.*, Oct. 1, 1870, at 1; "Deputy School Superintendent," *id.*, Jan. 5, 1871, at 1.

¹⁰⁷"California State W.S. Association. Minutes of the Fifth Anniversary Meeting," New Northwest, May 22, 1874, at 1.

¹⁰⁸Assembly Bill No. 759, introduced by Mr. Days, Assembly Journal, Mar. 27, 1872, at 833. This bill also provided for female officeholders to be compensated at the same rate as men. Interestingly, this reform was only briefly mentioned in the Special Committee's otherwise lengthy report, through cursory reference to the three states in which women could hold one or another educational office. This reference was embedded in a general discussion of female officeholding

brought up for debate immediately and modifications were offered from the floor. Both an amendment excepting women from certain offices and an amendment to specifically open educational offices to all women regardless of "race, color or previous condition" were rejected. While the bill was then ordered engrossed by an overwhelmingly favorable margin (49 ayes, against 11 noes), no other action was taken before the end of the session a few days later.¹⁰⁹

As a result, in the ensuing Twentieth Session, the CWSA made the demand for eligibility to educational office a specific part of its petition to the legislature, and a bill similar to Assembly Bill No. 759 was introduced in the Senate fairly early in the session.¹¹⁰ The proposal appears to have benefitted from additional crafting during the legislative hiatus, as it now specified age and citizenship requirements, and stated clearly that it did not encompass educational offices from which women were excluded by constitutional fiat.¹¹¹ The bill was referred to the

characterized as "political concessions," and did not even allude to women's special talents or roles in directing children's education. "Political Equality Report" at 7.

¹⁰⁹Assembly Journal, Mar. 29, 1872, at 881; Sacramento Weekly Union, Apr. 6, 1872, at 2. The CWSA was erroneous in its claim that the bill actually passed the Assembly. See, "California State W.S. Association," New Northwest, May 22, 1874, at 1; Mary J. Collins, "Woman Suffrage in California," Woman's Journal, Jan. 24, 1874, at 32.

¹¹⁰Senate Bill No. 230, introduced by Mr. Pendegast; Senate Journal, Feb. 6, 1874, at 407.

¹¹¹Id. Senator Pendegast, responsible for introducing the bill, indicated during debate that he was not its framer. However, he related that when he was presented with the proposal, he had suggested adding the clause regarding constitutionality (although this would have simply stated a well-settled tenet of statutory interpretation) "so as to prevent the possibility of a doubt," and the author agreed. Sacramento Weekly Union Suppl., Feb. 21, 1874, at 2. Meanwhile, after the bill's passage, the Woman's Journal credited members of the Santa Clara Woman Suffrage Society ("a body independent of the State Society") with drafting the bill. "The California Law," Woman's Journal, Apr. 18, 1874, at 128.

Education Committee, always considerably less bogged down than the Judiciary Committee, and received a favorable report only three days afterwards.¹¹² In the meantime, signatures were gathered for a petition favoring Senate Bill No. 230 by name, which was presented by Senator Finney ten days after its introduction,¹¹³ while Sallie Hart, Sarah Knox, and Laura Watkins led the charge in Sacramento lobbying for the bill's passage.¹¹⁴

¹¹²Senate Journal, Feb. 6, 1874, at 407; id., Feb. 9, 1874, at 416.

¹¹³Id., Feb. 16, 1874, at 449. Petitions were also submitted to the Assembly, supporting Senate Bill No. 230 by name, as it deliberated over the bill. Assembly Journal, Feb. 27, 1874, at 718; id., Feb. 28, 1874, at 737. Women's rights activists suffered a real loss with Finney's death in the summer of 1875.

¹¹⁴San Francisco Chronicle, Feb. 13, 1874, at 3; "Educational Offices," San Jose Weekly Mercury, Feb. 12, 1874, at 2; C.C. Stephens, "An Open Letter to the Hon. Thomas H. Laine," San Jose Weekly Mercury, Feb. 26, 1874, at 2; "The California Law," Woman's Journal, Apr. 18, 1874, at 128; "Faithful Friends in San Jose," Woman's Journal, Aug. 13, 1879, at 260.

By way of arguing against the bill, an Assemblyman claimed, "It is well known . . . that this has been boldly and resolutely electioneered and lobbied, both by the male and female portion of the [women's rights] lobby." Sacramento Union, Mar. 14, 1874, at 3. Senator Thomas Laine, a vocal opponent of women's rights, described Hart's lobbying, which she conducted at one point while he was speaking against the bill, thusly: "going . . . from seat to seat, like some blazing comet, shaking a kind of fascination from her twirled hair." "Sacramento," San Francisco Chronicle, Feb. 18, 1874, at 3.

The Mercury, meanwhile, provided a more positive assessment of Hart's efforts: "She is reported to have made considerable headway with some of our law givers who have been supposed to be incorrigible opponents of women's rights." "Suffrage," San Jose Weekly Mercury, Feb. 12, 1874, at 2. And that newspaper credited the "indefatigable efforts" of all three women in causing Senate Bill No. 230's passage in the Senate. "The Education Bill," San Jose Weekly Mercury, Feb. 26, 1874, at 2.

Apparently a dispute arose later over credit-taking for passage of the bill. Noting that Hart, Knox and Watkins spent six weeks in the legislature lobbying the bill, and the San Jose delegation spent four hundred dollars on the cause, an unnamed activist contrasted these efforts with those of CWSA's Board of Control, which "sent up a petition, which was laid on the table without reading." "Protection of American Women - The Alameda Outrage", Woman's Journal, Sept. 5, 1874, at 286; "The California Law," id., Apr. 18, 1874, at 128; "Faithful Friends in San Jose," id., Aug. 13, 1879, at 260. According to one writer, it was the local San Jose suffrage organization, which "[did] not affiliate with either of the state societies," which have been given credit for securing passage of the bill. "Protection of American Women - The Alameda Outrage", id., Sept. 5, 1874, at 286 (Meanwhile, in her annual report of the CWSA, Snow did no more than acknowledge help from "an independent delegation of ladies" from Santa Clara, while touting the CWSA's petition efforts. Mary F. Snow, "Annual Meeting of the California Women Suffrage

The proposal was vigorously debated in the Senate. Notwithstanding the clause regarding constitutional prohibitions, initial concerns centered on its constitutionality, and specifically whether nonelectors could hold office.¹¹⁵ Pendegast answered the charge with authority, considered as he was a "constitutional lawyer." While he conceded that the Constitution would preclude women from holding the top office of State Superintendent of Public Instruction, he could find no authority at the state level which would prohibit them from holding lower positions. Moreover, Pendegast asserted his belief that this bill was

Association," *id.*, Jun. 6, 1874, at 179.)

Sarah L. Knox, a founding member of the San Jose group, who was probably the source of the \$400, occupied a unique position on the organized movement due to her wealth and social standing. She became involved in supporting women's rights even before a formal movement had formed in California, while married to successful businessman William J. Knox. The couple moved to California in 1850, and Knox was elected to the Assembly in 1855. Ten years later, he was elected to the State Senate. There he introduced and shepherded to passage a bill giving married women full testamentary power over their separate estate, thus correcting an inconsistency in California's community property law. See Chapter Two. When Knox died soon after this in 1867, he left his widow significant assets, including valuable commercial real property in San Jose, having also named her executor of his estate. From this base, Mrs. Knox was in a unique position to provide financial support for the fledgling women's rights movement, both locally and nationally. For example, in July 1878, she was listed as having given \$104 to the NWSA, one of the largest donations to that organization that year. In addition Knox's real estate holdings allowed her to take an annual stand (for which she became famous) against taxation without representation. Part of her protest, as a property taxpayer, involved her repeated attempts to vote, beginning in 1873. Over the years, she was joined in her protests by other local women, including Clara Shortridge Foltz. In 1879, she remarried a well-known and progressive architect, and honored both husbands by becoming known as Sarah Knox-Goodrich. 3 History of Woman Suffrage at 765-66; Sarah L. Knox, "Annual Protest," San Jose Weekly Mercury, Apr. 11, 1878, at 3; "Treasurer's Report to July, 1878," Ballot Box, Aug., 1878, at 5; "Faithful Friends in San Jose," Woman's Journal, Aug. 13, 1879, at 260; Babcock, "First Woman," at 682. Laura Watkins, also from San Jose, was described as someone who was not as wealthy as Knox, but who worked just as hard to advance the cause of equal rights. "Faithful Friends in San Jose," Woman's Journal, Aug. 13, 1879, at 260. See also Carolyn C. Jones, "Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s," 1994 Univ. Illinois Law Review 265, 266 n.2, 268 (describing tax protests of California women).

¹¹⁵This occurred even though, in contrast to its antecedent, this version of the bill appeared to avoid begging the issue, by simply making women "eligible to" office, rather than describing how they might get there (i.e., by election or appointment).

merely "declaratory" of the constitutional right already held by women.¹¹⁶

Reassuring his fellow Senators, Pendegast reminded them that this bill would not "confer upon women the right to vote," gratuitously adding that women "probably never would be voters."¹¹⁷

Pendegast must have viewed women's eligibility for school offices as less extreme than suffrage, but he was not pressing this bill in order to empower women. Instead, his interest was quite pragmatic, as he and others had observed the difficulty in getting adequately educated men to hold these offices, which he himself had earlier characterized as "minor."¹¹⁸ This difficulty arose because "such persons generally had some other business, of more importance to them,

¹¹⁶Sacramento Weekly Union, Suppl., Feb. 21, 1874, at 2. Pendegast did concede that the charters of certain municipalities required school trustees or directors to be qualified voters, and when these charters used the term "he" when speaking of the officeholding, Pendegast believed that this implied a gendered intent. Id.

¹¹⁷Id.

¹¹⁸Sacramento Union, Feb. 7, 1874, at 1. Pendegast was not imagining men's disinterest in these positions. Even years after women won the right to run for these offices, men's lack of interest continued to present problems. Around 1879, two leading suffragists ran for school trusteeships in San Jose. Sarah Knox-Goodrich reported that, although the candidates nominated in opposition, who were men, publicly stated that they did not want the job, the women were not elected. Knox-Goodrich further complained that male electors had publicly indicated their support for the women but must have actually cast ballots against them. "California Women at the Polls," Woman's Journal, Jun. 19, 1880, at 196.

However, the San Jose Mercury provided some interesting insight into why the women actually were not elected. Educational office-seeking was not a non-partisan activity, and thus women needed to gain nomination under the banner of a political party, or else run as independents. Yet, inasmuch as women were not electors, this put them in a peculiar position vis-a-vis party membership. As a result, apparently the San Jose women ran on the tickets of fringe third-parties, which cost them the endorsement of the otherwise supportive Mercury. In explaining its position, the Mercury opined that women "must adhere to party regulations" the same as men. "Failing to obtain a nomination at the hands of one party they must not ask it at the hands of another; and especially should they not accept a nomination from a party with which they have not the least political sympathy. Far better that they come before the people as independent candidates and run solely upon their individual merits." "Women in Politics," San Jose Weekly Mercury, May 6, 1880, at 2.

which occupied all their time."¹¹⁹ However, Pendegast went further to argue that women's presence in these offices would provide a positive public benefit, allowing for "a more efficient administration of school affairs," because "[w]omen would of course take a deep and vital interest in looking after their own children and those of her neighbor's [sic]."¹²⁰

But Senator Farley attacked this bill as neither benign nor of limited effect. He recoiled at the specter of women entering the very public political arena to campaign for office, including "go[ing] to the polls," "mount[ing] the rostrum and proclaim[ing] to people their qualifications," and "seeking the popular vote of the people."¹²¹ Rebutting Farley's positions was Senator Phillip A. Roach, who claimed that it was not in woman's nature to go around seeking votes, and anyways, if women did so, "public opinion would be so strong against them that they could not be elected." Additionally, Roach was able to neutralize Farley's

¹¹⁹Sacramento Weekly Union, Suppl., Feb. 21, 1874, at 2.

¹²⁰Id. Later, an Assemblyman in favor of the bill noted, "Men on these Boards too often neglected their duties and made them stepping-stones to political power while capable women were idle." Sacramento Union, Mar. 14, 1874, at 3. And another cited the feminization of the teaching profession as reason enough to support this bill, asking rhetorically, "If it was right that [woman] should teach was it not right that she should employ teachers?" Id. Meanwhile, the San Francisco Chronicle noted, "Such action as is provided in this bill has been taken in a number of the States, and the result seems to be satisfactory. Women take a deep interest in school matters, and ought to have a voice therein. The presence of a couple of intelligent women in the Board of School Directors of San Francisco would have an improving effect. The people of the city should try the experiment." Chronicle, Feb. 13, 1874, at 3.

¹²¹Sacramento Weekly Union, Suppl., Feb. 21, 1874, at 2. According to Farley, this would be particularly true if a woman chose to run for County Superintendent of Schools. Thus, during later consideration, Farley sought to have the bill amended such that women would not be eligible for that office. His motion failed by about the same margin as votes in support of the bill. Senate Journal, Feb. 17, 1874, at 460; Sacramento Union, Feb. 18, 1874, at 1; "The Education Bill," San Jose Weekly Mercury, Mar. 5, 1874, at 1.

concerns by analogizing the women's office-seeking to that of a man running for District Court Judge: "It is very seldom that a Judge of a District Court will ever go and solicit votes."

Potentially more damaging was Farley's ominous prediction that "as a general rule ladies who have children were not the ones who would be candidates for office," rather it would be the "strong-minded," who would use their office as a "stepping-stone" to greater political participation by women. According to Farley, in the eyes of the suffragists, "the object of this bill was to gain one point towards securing woman's [sic] suffrage."¹²² Actually, Farley's assessment was probably not too far off the mark. However, the combined support of women's rights ideologists and governmental pragmatists allowed the bill to pass the Senate handily, twenty four to thirteen, and later withstand a motion to reconsider this vote.¹²³

Moving over to the Assembly, the bill stirred up similar controversy.¹²⁴ Assemblyman W.J. Tinnen provided the most emphatic denunciation yet, wildly declaring that the proposal was supported only by "men of erratic ideas, by soured old maids, disaffected wives, divorced women, grass widowers, and . . . by women who are sorry that they were born women." And he saw this legislation not only

¹²²Sacramento Union, Suppl., Feb. 21, 1874, at 2.

¹²³Senate Journal, Feb. 17, 1874, at 460; id., Feb. 18, 1874, at 471.

¹²⁴The bill was referred to the Assembly's Education Committee as well, which recommended its passage. Assembly Journal, Feb. 26, 1874, at 701. The Chair of that committee was Mr. A. Higbie, who also served that year on the special women's rights committee. Assembly Journal, Jan. 24, 1874, at 467.

as an entering wedge for women's rights, but also for "its twin sister, free love, medium seances, spiritualism, communism, and all other isms with which the human race is now being persecuted."¹²⁵ However, another Assemblyman deftly moved to quiet the hysteria over women's rights by casting this instead as an issue of men's rights:

This bill only provides that when the qualified male voters of any school district shall in their judgment consider some women in that district better qualified for the position of School Trustee, and there upon . . . elect them to the position, why we say that they may accept the position. That is the whole of the bill What woman's rights [sic] is there about it? . . . The only question now is whether a majority of qualified electors shall have the right to have the person serve whom they elect?¹²⁶

Tinnen failed in his efforts to put off the Assembly's consideration of the bill, but after it passed he was successful in moving to have that vote reconsidered. The bill passed again, although only by one vote.¹²⁷ This set the stage for an unusual maneuver just one day after it was signed into law, when Assemblyman John C. Gray attempted to introduce a bill to repeal Senate Bill No. 230 by name. Apparently, however, not all of those originally opposed were such sore losers as Gray, and the vote to reject this proposal was much wider than the one-vote margin in favor of Senate Bill No. 230's passage.¹²⁸

¹²⁵Sacramento Union, Mar. 14, 1874, at 3.

¹²⁶Id.

¹²⁷Assembly Journal, Mar. 7, 1874, at 824-25; id., Mar. 9, 1874, at 831-32.

¹²⁸Assembly Journal, Mar. 13, 1874, at 916-17. Upon passage of the bill, the San Jose Mercury reported on local women's interest in taking advantage of the opportunities it offered. The editor, J.J. Owens, noted that women would be running for at least two of the seats on the San Jose Board of Education. "More than this," he argued, "we have our eye on two or three

On the heels of Senate Bill No. 230 becoming law, another bill was introduced which was also rooted in the actions of previous sessions, the battle over teachers' salaries. Notwithstanding the legislation enacted in 1870 to equalize teachers salaries, the San Francisco School Board had tried to reduce female teachers' salaries just a few months later. The women successfully launched an organized resistance, which had included their demand regarding the position of Assistant Superintendent of Schools.¹²⁹

Meanwhile, in the Nineteenth Session an Assembly bill was introduced by San Francisco Representative William R. Wheaton, in part to undo the 1870 legislation equalizing teachers' salaries. This new bill purported to restore the Board's discretion to lower the salaries of female teachers in San Francisco's primary schools (of course, the level at which the vast majority taught).¹³⁰ With the blessing of her sister teachers, Sallie Hart rushed to Sacramento to fight against this provision. Fortunately she found the legislators not only overwhelmingly opposed to reducing these salaries, but also sympathetic to raising

women, [who] would make an excellent County School Superintendent." "The Women Victorious," Weekly Mercury, Mar. 12, 1874, at 2. The following year, seven counties saw women nominated for the top superintendent post. "Woman's Rights in California," Woman's Journal, Aug. 14, 1875, at 260. About ten years after the passage of Senate Bill No. 230, the History of Woman Suffrage reported that every area in California by then had seen women elected to school offices. 3 HWS at 751.

¹²⁹"SFCW-SA," Pioneer, Aug. 13, 1870, at 1; "Further Concessions Demanded," id., Oct. 1, 1870, at 1; "Deputy School Superintendent," id., Jan. 5, 1871, at 1. Even after all this, San Francisco's women teachers made only 48 cents on the dollar of male teachers. Id., Jan. 5, 1871, at 1.

¹³⁰Assembly Bill No. 333, introduced by Mr. Wheaton, Feb. 8, 1872; Assembly Journal, Feb. 8, 1872, at 406.

them. Even Wheaton distanced himself from the salary provision, as he revealed that the bill had been drawn up by none other than John Swett, the San Francisco superintendent who had benefitted from the 1870 legislation.¹³¹ The pernicious provision was struck although the remainder of the bill was enacted.¹³²

Not long after Wheaton's bill was amended in favor of the women, Assembly Bill 506 was introduced to equalize the pay of all male and female teachers in the state's public schools. However, the Education Committee reported the bill back without recommendation, and it failed to progress further through the enactment process.¹³³ Yet the groundwork had been laid, and during the Twentieth Session, a similar bill was introduced with much greater success. Although Assembly Bill No. 633 was proposed little more than two weeks before the end of the session, and then spent ten of those days tied up in committee, within five days of coming out of committee the bill was passed by both houses and signed into law, apparently without significant debate or opposition.¹³⁴

¹³¹"The Schoolmarms," San Francisco Chronicle, Mar. 5, 1872, at 3. Nevertheless, San Francisco teachers resolved to oppose the remainder of Wheaton's bill as well. Such impertinence did not sit well with some Assembly members. One thought that the women were simply refusing "to get over a prejudice when they have it," and another sarcastically commented, "[A]ll you [Assembly] members from San Francisco go against it. That is [sic] your orders now. . . . Go forward and obey your orders," and he sneered, "We must take our lessons, rules and orders from these young ladies who have been teaching perhaps six months, perhaps nine months; and as soon as they can get a husband quit." "Sacramento," San Francisco Chronicle, Mar. 14, 1872, at 1.

¹³²Assembly Journal, March 2, 1872, at 564; id., March 7, 1872, at 617.

¹³³Assembly Journal, Mar. 1, 1872, at 551; id., Mar. 8, 1872, at 624; id., Mar. 9, 1872, at 645.

¹³⁴Assembly Journal, Mar. 14, 1874, at 917; Sacramento Union, Mar. 16, 1874, at 1; Assembly Journal, Mar. 24, 1874, at 1049; id., Mar. 26, 1874, at 1119; Senate Journal, Mar. 27, 1874, at 822, 823; Assembly Journal, Mar. 27, 1874, at 1131; id., Mar. 30, 1874, at 896; id., Mar. 30, 1874, at 1229. There is some evidence, however, that the female teachers' lobby was involved in

Finally, a battle loomed over marital property law as now contained in the Civil Code, especially with regards to the wife's rights to her separate property. An omnibus bill was introduced to tweak the code, including an amendment to Section 167, which, Sections 158 and 162's breakthrough provisions notwithstanding, prohibited wives from making contracts for the payment of money. The amendment would have eliminated that retrograde provision, and replaced it with language to restrict the property liable for any contract a wife might make. However, the amendment was broadly drafted, so that the effect, intended or not, was to release all property of the couple from liability for the wife's debts. Under such circumstances, credit would never be extended to a married woman, thus eviscerating the rights granted in 1872.

passage of this bill as well. Nancy Yamane credits Kate Kennedy, a leading San Francisco educator and then principal of an elementary school, with being the "critical organizer of [this] movement." At the time, Kennedy was being paid less than men who held the same position. Yamane at 42.

While opposition to the bill was insignificant, it did not escape the attention of the San Jose Mercury. When one of the two Senatorial opponents, William Irwin, ran for reelection the following session, that paper appealed to women to help defeat him, noting that, although "[t]he women of California cannot vote, . . . they are not prohibited from working or speaking." "Woman's Rights in California," Woman's Journal, Aug. 14, 1875, at 260 (report from San Jose Weekly Mercury).

Meanwhile, Sallie Hart apparently left San Francisco's teaching profession at this point, as she was reported to be following in her father's footsteps, by studying law at Michigan State University in the fall of 1874. But this was not before her life was threatened as she engaged in temperance reform, promoting local option. "Protection of American Women - The Alameda Outrage," Woman's Journal, Sept. 5, 1874, at 286.

In mid-January, the Board of Control of the CWSA¹³⁵ learned that the omnibus bill was about to be passed by the Assembly, so it quickly dispatched a committee consisting of Laura deForce Gordon, Sarah Wallis, and M. Louise Willson to Sacramento to secure a change in the Section 167 amendment.¹³⁶

¹³⁵It appears at this point that the California Woman Suffrage Association was also known as the "California State Woman Suffrage Association," the "State Incorporated Woman's Suffrage Society," and the "Incorporated State Woman's Suffrage Society." See, e.g., "State Woman Suffrage Society: Reports Showing the Origin of the Amendments to the Code Concerning Woman's Property Rights," Common Sense, Jul. 11, 1874, at 108; "Property Rights of Married Women," San Jose Weekly Mercury, Apr. 9, 1874, at 2.

¹³⁶There is some confusion as to just who was responsible for safeguarding these property rights under the Civil Code. Complicating the matter is the fact that participants and media alike used a variety of names to refer any one suffrage organization. However, a series of letters to the editor of Common Sense after the legislative session indicate that some sort of intra-organizational rivalry occurred with regards to these efforts. The first letter, written by Mary F. Snow, as the Recording Secretary of the Board of Control of the "California State" organization, characterized the Board's involvement during that legislative session as being mostly behind the scenes, and described these efforts as being "aided" by "an independent delegation of ladies from Santa Clara county" going to Sacramento to lobby for a bill "in relation to our property rights." "Woman Suffrage: Annual Report of the Recording Secretary of the California State Board of Control," Common Sense, Jun. 13, 1874 at 61 (emphasis added). See also, Snow, Woman's Journal, Jun. 6, 1874, at 179, where she refers to the Santa Clara women as "an independent delegation of ladies."

A month later, M. Louise Willson, denoted as the Secretary of the State Incorporated Woman's Suffrage Association (which may have been the same organization to which Snow belonged), wrote "on account of the extraordinary misunderstanding that has arisen in regard to the agencies concerned in the passage of the very important amendment to the Code concerning the property rights of married women." According to Willson, the Board of Control met in January and authorized Wallis, Gordon and herself to lobby for an appropriate amendment to Section 167. In what seems to have been meant as a backhand compliment to Snow, Willson noted, "we are quite willing to admit that all persons working for the cause have doubtless contributed indirectly to the forming of a public opinion which made it possible for our delegates to accomplish this work," but she wanted it to be known that the lobbyists acted on "the delegated authority of the Society." "State Woman Suffrage Society: Reports Showing the Origin of the Amendments to the Code Concerning Woman's Property Rights," Common Sense, Jul. 11, 1874, at 108). Willson's account is supported by a more contemporaneous account in the San Jose Mercury (also reprinted by Laura deForce Gordon's Stockton Weekly Leader), which indicated that Wallis, Gordon and Willson were appointed by the Board of Control to lobby for the appropriate code amendment. "Property Rights of Married Women," San Jose Weekly Mercury, Apr. 9, 1874, at 2, reprinted in Stockton Weekly Leader, Apr. 11, 1874, at 2.

Clearly it was important to Wallis, Gordon and Willson to be seen as having acted under the aegis of the statewide organization. On the other hand, Snow (who, it would seem, took part in the Board's delegation of authority) may have felt the need to justify the Board's earlier decision to press its cause behind the scenes and through the lobbying of select legislators.

After "two weeks [of] persevering work," they procured harmonization of the various code sections, such that a married woman now had "the absolute power to control, manage and dispose of her separate property without the intervention or consent of the husband."¹³⁷ Meanwhile, a day before the omnibus bill finally emerged from the Assembly Judiciary Committee after two and a half months, a proposal was introduced in the Senate dealing exclusively with Civil Code section 167. This bill would have amended the section much more directly, by specifying, "A wife may make a contract for the payment of money or other purpose, to be satisfied out of or enforced against her separate property."¹³⁸ It passed the Senate just after Assembly Bill No. 126 emerged from the Judiciary Committee there, but with the Senate subsequently passing the omnibus bill, Senate Bill No. 481 died in the Assembly with the ending of the session.¹³⁹

Nevertheless, it seems that there came a point when this strategy proved too weak, necessitating full-out lobbying for the civil code amendments.

¹³⁷Senate Journal, Mar. 19, 1874, at 700; Senate Bill No. 481; "Property Rights of Married Women," San Jose Weekly Mercury, Apr. 9, 1874, at 2; M. Louise Willson, "State Woman Suffrage Society; Reports Showing the Origin of the Amendments to the Code Concerning Woman's Property Rights," Common Sense, Jul. 11, 1874 at 108. Instead, Section 167 was amended to provide that the community property would not be liable for the debts of the wife.

Reprinting the San Jose Mercury's account in her newspaper two days later, Laura deForce Gordon graciously added, "the credit for all the good accomplished . . . belongs by right to Mrs. Sarah Wallis, who during the last two weeks of the session was unceasing in her efforts to convert some of the 'old-fogy' members who at first opposed the bill, and we rejoice that the noble efforts of this brave champion of Woman's equality before the law, have been so fully crowned with success." "Property Rights of Married Women," Stockton Weekly Leader, Apr. 11, 1874, at 2.

¹³⁸Senate Bill No. 481, introduced by Mr. James A. Duffy; Senate Journal, Mar. 19, 1874, at 700. It appears that, convoluted as the omnibus bill's amendment of Section 167 was, it effected the same change as this straightforward rendering would have.

¹³⁹Senate Journal, Mar. 27, 1874, at 815. In the meantime, in early March, Senator Laine, a staunch foe of women's rights, hatched a plan to introduce a bill to "re-establish" the common law in California, "or to repeal all ordinances and statutes pertaining to women that are modifications

Despite these defensive victories, the Twentieth Session offered little for women in their battle to gain the vote. In immediate response to the CWSA's suffrage petition, a resolution was adopted by both houses to form a joint committee to consider the matters raised therein. Finney and David Goodale were appointed from the Senate, and W.A. Aldrich, Paschal Coggins and Higbie from the Assembly.¹⁴⁰ Nevertheless, the committee appears to have adopted a "wait and see" posture, while the various proposals wended their way through the legislature, and it did not submit a report until the last day of the session.¹⁴¹

The report stood in marked contrast to that submitted by the Assembly Special Committee the session before. While noting that the joint committee had met several times, the group announced that it had "deemed it inexpedient to

thereof." Not only was Senator Laine sorely misinformed as to the jurisprudential history of the State, but he wrongly viewed statutes dealing with married women's property rights as being modifications of the common law. Nevertheless, his motivations were revealing, inasmuch as they indicate the degree to which legislators may have been confused about the marital property framework in place in California. "Common Law," Stockton Weekly Leader, Mar. 7, 1874, at 2.

¹⁴⁰Senate Journal, Jan. 23, 1874, at 344; Assembly Journal, Jan. 24, 1874, at 467. This quick action, coupled with the favorable response the women activists were getting to the educational office bill, caused Mrs. Knox to hold out "some hope of a Bill to amend the Constitution." "Educational Offices for Women," San Jose Weekly Mercury, Feb. 12, 1874, at 2. Nevertheless, Mary Snow, member of the Board of Control of the CWSA, later admitted that, unlike during the previous two sessions, this organization made no efforts to speak before this committee or in any other way lobby it. Snow, Woman's Journal, June 6, 1874, at 179.

¹⁴¹Assembly Journal, Mar. 30, 1874, at 1220; Senate Journal, Mar. 30, 1874, at 886. Interestingly, the Recording Secretary of the CWSA Board of Control later blamed the "protracted" discussion surrounding passage of both the educational office bill and the separate property rights code amendments for eating into time which the legislature might otherwise have spent considering the suffrage issue. Mary F. Snow, "Woman Suffrage: Annual Report of the Recording Secretary of the California State Board of Control," Common Sense, June 13, 1874, at 61. Yet these were the areas in which particular women engaged in a great deal of direct lobbying, after the CWSA had adopted a far less activist strategy for this session. Thus, for Snow, this may have been a case of sour grapes.

recommend any specific action, for the reason that a number of bills touching the legal rights and disabilities of women have been from time to time submitted to the consideration of the Legislature, and the members of the committee have given to such bills such personal support as in their estimation their merits demanded."¹⁴² Apparently the women were now victims of their limited success. As for the suffrage issue, the committee declared it unnecessary to propose a specific amendment, inasmuch as the legislature had recommended calling a constitutional convention, where the issue could be handled in the course of revision.¹⁴³ Thus, the women gained a paradoxical victory in Twentieth Session, being now eligible to run for office, but not able to vote for themselves.

Twenty-first Session, 1875-1876

The Twenty-first Session could at best be described for women as meager and frustrating. It seemed as if the easier battles had now been won, making it all the more difficult to ascertain the proper strategies for taking on the intractable issues. As with the previous session, no grand petition drives were launched, but instead the CSWA Board of Control presented a lengthy prayer on behalf of its members.¹⁴⁴ The "memorial" set forth six grievances addressing the "unequal oppressive and unjust bearing of the laws upon California women . . . which often

¹⁴²Assembly Journal, Mar. 30, 1874, at 1220.

¹⁴³Id.

¹⁴⁴Id., Jan. 10, 1876, at 124.

result in great hardships upon children." Most concerned the law's operation on wives' economic status, especially regarding the common property. The first noted the consequences of giving the husband sole management of the common property: "afford[ing] him ample opportunity, if he be so inclined, to defraud his widow of her equitable share of the family estate." The second dealt with the consequences of failing to treat the widow the same as the widower regarding the common property: "the estate expires and its body is turned over to the Probate Court for inquisition, and much of its substance is needlessly wasted . . . , and often hopeful estates are entirely consumed by dishonest or ignorant administration." Another grievance noted that, while maintaining control over the common property, the husband is permitted "to denounce his wife through the press as a deserter, and forbid her credit on his account." Finally, the consequences of "protecting" the common property from the wife's contracts were spelled out: "mak[ing] it practically impossible for the wife to obtain credit, no matter how valuable the family estate."¹⁴⁵

To remedy these injustices, as expected, the petition asked for an amendment to the California constitution to give women the ballot on an equal basis with men, but this time there was a twist. An additional request was made, for "[s]uch enactments on the part of the Legislature" which would permit women to vote in the upcoming election, both for Presidential electors and other public

¹⁴⁵"Woman Suffrage in California," Woman's Journal, Feb. 12, 1876, at 56.

officials, thereby circumventing the arduous amendment process.¹⁴⁶ The women based this request on a one-time circumstance, the nation's centennial, thus giving the legislature the opportunity to make history in a gallant, but limited, way.

In presenting the petition to the Assembly, George A. Young informed the body of the petitioners' belief that "this, our Centennial year, should also be the millennium of equal rights." Nevertheless, Young attempted to distance himself from the petition, noting that "I present it, not as its author, or as fully indorsing the sentiments which it contains, but as performing a duty which I owe to a citizen . . . , having a grievance and petitioning for its redress. I being but the servant of the people, it is for them to command and me to obey."¹⁴⁷ He then narrowly succeeded in having the petition referred to a Special Committee, and he was appointed to serve along with two other members.¹⁴⁸

Meanwhile, women's rights advocates were being taught a lesson in the tenuousness of statutory reform. The narrowly-won victory of the previous session, making women eligible to school offices, was now under siege. Apparently on the basis that the law had done more than declare a right already in existence, a bill was introduced into the Assembly to repeal the educational

¹⁴⁶"Report of the Assembly Committee, to which was referred the Memorial of the California Woman Suffrage Committee," 5 Appendix to Journals of the Senate and Assembly, Twenty-first Session, [1875-76], Report No. 21, at 3 [hereinafter "Suffrage Report"]. Prior to this instance, petitioners appeared to operate under the assumption that women could be granted the vote only through the amendment process.

¹⁴⁷Sacramento Union, Jan. 11, 1876, at 1.

¹⁴⁸Sacramento Union, Jan. 11, 1876, at 1. The motion to refer the petition instead to the Committee on Elections was defeated by one vote. Id.

office statute, and it passed handily.¹⁴⁹ This turn of events led one "Citizen" to write to the San Jose Mercury,

Again, one Legislature passes a law, duly approved by the Judiciary Committee, duly discussed and put into successful operation, a law not involving any transient or non-political issues, and the next Legislature repeals that law. Is that not boy's play or partisan legislation? Is that a legislature of which California may be proud? What sort of politics is that when the profound interests of society are trifled with in that way?"¹⁵⁰

The women won a reprieve, however, when the Senate failed to go along with the repeal. Clarina I.H. Nichols, a midwestern suffragist of national prominence, now residing in California, attributed the halting of this repeal "mainly . . . to the judicious efforts of lady friends in the lobby."¹⁵¹

Regardless, legislation was never introduced to permit women to vote in the pending general election. And the release of the Special Committee's report, coming as it did once again on one of the last days of the session, guaranteed that

¹⁴⁹"Considered in the Assembly," San Jose Weekly Mercury, Mar. 9, 1876, at 2. The vote in the Assembly was surprisingly strong, nearly two to one in favor of repeal. However, the Mercury did note that all the Republicans present voted against the bill. "Not Gallantry, But Justice," San Jose Weekly Mercury, Mar. 9, 1876, at 2. Meanwhile, John A. Collins, in assessing the near-repeal, implied that partisanship was to blame, noting in this session the legislature was controlled by the Democrats, whereas last session it had had a Republican majority. "A Reverse in California," Woman's Journal, May 13, 1876, at 154.

Soon after the Assembly's action, the City Council of San Jose, led by Mayor Barney Murphy, voted to permit women to run for educational office in that locality. J.J. Owen wrote in approval, "Mayor Murphy . . . deserves, under the circumstances, generous commendation. His action may have seemed inspired by gallantry, but it was answer, simply, to the demands of Justice." *Id.* Murphy, who had served in the Assembly during the 1869-70 session, was elected State Senator for the 1877-78 session, where he distinguished himself as a woman's rights supporter.

¹⁵⁰"A Step Backward," San Jose Weekly Mercury, March 16, 1876, at 1.

¹⁵¹"California Law Not Repealed," Woman's Journal, July 28, 1877, at 240.

no additional action would be taken.¹⁵² At first the committee sounded respectful of the call for equal suffrage, noting that of late "a large and influential portion of American citizens claim that great injustice is done to the intelligent wives, mothers, and daughters of the nation, by denying them the privileges of the ballot-box."¹⁵³ Further, the committee admitted that the issue of political rights was now "no longer confined to abstract theories, but has been reduced to actual practice."¹⁵⁴ And the Special Committee cited with approval the various advances such as increased property rights that women had recently made, which stemmed, the committee believed, from agitation of the suffrage issue.¹⁵⁵

But the women's alleged success pressing the suffrage cause appears to have been their undoing. While previous committees had not favored female enfranchisement, the tone of this report was of a decidedly harder line than that of earlier ones. For starters, the committee could cite to public opinion which had coalesced by this point, which was "decidedly adverse to such a movement." Moreover, the committee concluded that support for woman suffrage would mean subjecting "the best interests of our political government . . . to a questionable stability by the introduction of so radical a change in our suffrage element."¹⁵⁶

¹⁵²Assembly Journal, Mar. 31, 1876, at 655-56.

¹⁵³"Suffrage Report" at 3.

¹⁵⁴Id. at 4.

¹⁵⁵Id. at 3-4.

¹⁵⁶Id. at 5.

Yet the committee did suggest an entering wedge for future activism. First, as had the Special Committee in the previous session, it noted that California would probably soon be calling a constitutional convention, where the merits of the woman suffrage issue could be "thoroughly consider[ed] and pass[ed] upon." Second, the committee agreed that the legislature indeed had the power, under the U.S. Constitution, to enact a statute granting women the vote in presidential elections. However, the committee used the limited scope of this power not to justify a favorable recommendation, but rather to dismiss the idea, on the basis that such a grant of suffrage would be worth little, given that any subsequent legislature could repeal the grant.¹⁵⁷

Nevertheless, like earlier Special Committees, this one too seemed as supportive of equalizing property rights as it was unsupportive of granting suffrage. It reconciled this dichotomy in an interesting way, by claiming to be opposed to those laws which "discriminate against woman as an individual."¹⁵⁸ But the committee did not even tackle the range of this sort of law, concentrating its displeasure instead simply on those which treated widows differently than widowers. Yet even here, the committee felt it necessary to condone laws which treated wives differently than husbands during the life of the marriage, on the

¹⁵⁷Id. at 5.

¹⁵⁸Id.

basis that it was "[i]n the interests of both, [that] the law allows the husband absolute control of the common property."¹⁵⁹

Meanwhile, the committee did acknowledge the value of the wife's contribution to the community, and unlike the 1872 consideration of this issue, acknowledged the actual economic value of that contribution: "[T]he joint earnings of husband and wife [are] community property, in which each [has] an equal interest, [which reflects] that the wife is an equal co-worker with the husband in building up the family interest."¹⁶⁰ This logic led the Special Committee to condemn the current law, which "virtually breaks up the home on the death of the husband, and throws the common property of husband and wife into probate, for settlement and distribution, work[ing] great hardship on widows and orphan children," and "where the sorrowing and bereaved widow is often treated more like a stranger than a proprietor," to the point where "large estates have been by incompetent or dishonest executors entirely consumed in their administration."¹⁶¹

The Special Committee could find no rationale for this unequal treatment, understanding as it did the wisdom of the widower automatically succeeding to all of the common property, without administration, thereby facilitating both continuation of any family business and the ability of the father to care for his children. According to the committee, a widow would be no less able to

¹⁵⁹Id.

¹⁶⁰Id. at 6.

¹⁶¹Id. at 5, 6.

accomplish the same if accorded the same treatment under the law: "That woman is, as a general thing, great economists [sic] and good managers [sic], making the most possible out of her slender resources, has good judgment, temperate and industrious habits, the facts of history roughly establish, and it is an equally well-established fact that mothers are as devoted to their children, and will make as great sacrifices to advance their interest as fathers."¹⁶² Further, echoing the 1872 Assembly Special Committee's report, this report argued that broader social benefits would flow from a change in the law, such as encouraging husbands to keep wives informed of the family's financial status and wives taking an interest in such information in order to minimize disruption upon the death of the husband.¹⁶³

However, the committee's expression of interest in "recommend[ing] any legislation which tends to better the condition of women in a legal aspect . . . or will invest the wife with as many of the rights and privileges of the husband as is consistent with public policy," rang hollow, coming as it did at the end of the session, too late for any meaningful action. In fact, although two bills to reform this area of the law were introduced, curiously neither proposal went as far as the committee's recommendation. Why this was so is somewhat unclear, considering

¹⁶²Id. at 6.

¹⁶³Id. at 7.

that the issue was being lobbied on two different fronts.¹⁶⁴ One effort emanated from a source outside of the organized women's movement, a widow named Marietta Stow.¹⁶⁵

While, as has been noted, a number of the women active in the movement had gained first-hand experience with the inequalities embedded in California's marital property law, their motivations for involvement in the movement for equal rights seemed not to hinge so clearly or exclusively upon their personal grievances. Such was not the case with Stow, who came to Sacramento seeking law reform in January, 1876, bitter as could be about her experiences at the hands of California's probate system. Marietta had been married to Joseph W. Stow, a San Francisco businessman of comparatively more prominence than wealth, and she had the misfortune to be overseas when he passed away. Many months later, after finally returning to the city, Stow found the estate being administered by

¹⁶⁴In the course of the first woman suffrage lecture ever given in California, in February, 1868, Laura deForce Gordon "particularly condemned the probate court system, which ostensibly for the protection the protection of women and children, is really a means of robbery." "Woman Suffrage: Annual Meeting of the Incorporated Society," Common Sense, Aug. 1, 1874, at 145; Davis at 203. However, it apparently took some years for Gordon's early concern to translate into an agenda item for California's organized women's rights movement.

¹⁶⁵Actually Stow was one of the founders of the San Francisco Woman Suffrage Society in 1869. However, she split from that group soon after, ostensibly over a disagreement about strategy, never rejoining the movement. See, Donna C. Schuele, "In Her Own Way, Marietta Stow's Crusade for Probate Law Reform Within the Nineteenth-Century Women's Rights Movement," 7 Yale Journal of Law and Feminism 279, 281 (1995) [hereinafter, Schuele, "Marietta Stow." While historian Philip Ethington considered Stow to be an integral part of the suffrage movement, my extensive research of Stow's life has turned up no evidence of this, and in fact has led me to conclude quite the opposite, that Stow operated, at best, on the fringes, never willing to be merely a follower but apparently not able to secure a leadership position outside of groups she herself founded. Id. at 292-293.

executors named in a deathbed will, who were self-interested business associates of her husband.¹⁶⁶

Not only had the law granted these executors had the discretion to make decisions affecting Stow's welfare, but the San Francisco Probate Court had exercised much sway over her life as well. In contradiction to the law, the judge¹⁶⁷ permitted the creditors of the estate to contest and thereby delay his order of a meager interim living allowance. After a year of such mistreatment, and attempts to resolve issues herself through studying the law, Stow hired an attorney to file suit against the executors, ostensibly for mishandling shares of stock in a closely held corporation in which they and her husband had been involved. She lost the case.¹⁶⁸ While evidence indicates that Stow's claim that the executors, lawyers and creditors wasted an estate worth \$200,000 was exaggerated,¹⁶⁹ nevertheless, she felt "hurt, wronged, outraged, insulted," by both the process and outcome of the estate settlement. She railed, "Call ye this justice? Accursed be such justice, and the framers of such diabolical justice! Bury it and them out of sight, in the lowest Gehenna and the deepest sea of Sodom!"¹⁷⁰

¹⁶⁶Id. at 281-283.

¹⁶⁷The judge overseeing Stow's probate was M. H. Myrick, who was appointed to the California Supreme Court a few years later in 1880.

¹⁶⁸Estate of J.W. Stow, 1 Myrick's Reports of Cases in the Probate Court of the City and County of San Francisco 97 (1875).

¹⁶⁹Schuele, Marietta Stow," at 280-85.

¹⁷⁰Id. at 284-285; Marietta L. Stow, Probate Confiscation and the Unjust Laws Which Govern Women 5, 6 (3d ed. 1878).

Unable to gain redress in the legal system, Stow sought a broader, more popular forum. Using her legal knowledge, in 1876 she penned the first edition of a book about her experiences to educate other women, colorfully entitled Probate Confiscation and the Unjust Laws Which Govern Women. Further, she drafted a proposal entitled "A Bill for the Protection of Widows and Orphans," to remedy the injustice which she had experienced.¹⁷¹ Stow's bill treated the married partners equally, such that upon death of either spouse, one half of the common property would go immediately, without administration, to the survivor. While the other half would descend to the children, the survivor (and not an executor or administrator) would have full management control over this half of the property as well, until the youngest child reached majority, when it would then be distributed equally.¹⁷² Interestingly, Stow's bill was very close to the provisions of the Spanish/Mexican system.

In early 1876, Stow began a speaking tour to promote her book, traveling to Sacramento to lobby her bill as well. In promoting the need for reform, Stow focused first on the requirement that the widow's, but not the widower's, share of the common property be probated:

¹⁷¹Stow realized that she herself was beyond the help of this bill, but in response to those who questioned why she would seek reforms which would not benefit her, she replied, "Yet, there is a principle which underlies all earnest work, and there has to be a certain amount of agitation before the people are aroused." Stow, "Probate Confiscation," New Northwest, May 12, 1876, at 2.

¹⁷²Stow at 13-14, 19. Stow had conducted much legal research for her probate case, and may have come across a description of the Spanish/Mexican system in the course of that research. None of the proposals drafted by the organized women's rights movement, regarding treatment of the common property upon the death of one spouse, mimicked the Spanish/Mexican system so closely.

The existing Probate Court . . . has more of the character of a prize tribunal than a court of justice. . . . The Probate Court takes from its victim the hard-earned fruits of her toil. . . . The law, under probate administration, fixes the stigma of dishonesty upon the brow of every widow. It assumes that she will only pay the debts of the marriage-firm by compulsion; and in the enforcement of this monstrous supposition she loses a large portion of her property through the manipulations of the Probate Court . . . The wresting from the widow of any portion of the entire management and control of her half of the community property . . . sets at nought the true relation of husband and wife as business partners.¹⁷³

Stow blamed this unequal state of the law on the fact that it was made by men but only affected women. She asked male legislators to put themselves in the shoes of widows: "What member of this House would like to be deprived, at the death of his wife, of the management of his property for months and years? How could he sit silent while witnessing daily the depletion of his accumulated wealth, that which had been gathered through years of toil and privation?" Concluding that "concentrat[ing] in the body of half the people, the power to make and administer the laws without the consent of the other half, is utterly irreconcilable with every principle of free government," like the organized suffragists, she urged that treating women alike would provide "an auspicious moment, during this centennial year."¹⁷⁴

Prior to her marriage to Joseph, Marietta had supported herself through public speaking in the East, and had been involved in women's issues, primarily in the economic realm. She had joined San Francisco's suffrage society very early

¹⁷³Id. at 14-16.

¹⁷⁴Id. at 17-19.

on, but dropped out almost as quickly.¹⁷⁵ However, inasmuch as Stow was not a participant in California's organized women's rights movement, she came to Sacramento as an outsider, rather than as part of the familiar force in the halls of the Capitol. Probably as a result, Stow was not able to get her proposal introduced as a bill in its own right.¹⁷⁶ Instead, she had to be content with having a portion of it incorporated into a bill sponsored by the organized movement, which had been drafted and was being lobbied by Mrs. Sarah Wallis, one of the "founding mothers" of the California suffrage movement.¹⁷⁷

¹⁷⁵Schuele at 280-81.

¹⁷⁶Nevertheless, media attention given the bill was generally positive. Obviously not realizing the roots of Stow's proposal, the San Francisco Chronicle thought it "radical." However, the Los Angeles Evening Express, the San Francisco Evening Post and the Sacramento Daily Bee expressed approval. "The Intestate Laws: Text of a New Bill to be Presented to the Legislature," clipping from the Chronicle, Jan. 8, 1876; clipping from the Evening Express, June 8, 1876; clipping from the Evening Post, Dec. 30, 1876; clipping from the Daily Bee, Mar. 31, 1877. Marietta L. Stow Scrapbook, (Special Collections, University of San Francisco).

¹⁷⁷Mrs. J.W. Stow, "Probate Confiscation," New Northwest, May 12, 1876, at 2. Stow referred to this as "the Woman Suffrage bill," but she was undoubtedly referring to the bill sponsored by the organized suffrage movement, which dealt with marital property rights. Wallis presented her bill to the Senate as a representative of the newly-named California State Woman Suffrage Association. Prompted by these efforts, Laura deForce Gordon wrote, "Mrs. Wallis has long been identified with all movements [calling for] consideration of the inequality of the law as applied to [women] in contradistinction to its operation where men are concerned." "The Women at Work," Stockton Weekly Leader, Jan. 22, 1876, at 2. Two years earlier, upon Wallis' election as president of the statewide woman suffrage organization for the year, Gordon had noted that Wallis was the only woman on the platform with her when she delivered the first woman suffrage speech in California, back in 1868. "Woman Suffrage: Annual Meeting of the Incorporated Society," Common Sense, Aug. 1, 1874, at 145.

In June, 1877, Wallis took advantage of the ability of women to run for educational office, by becoming a candidate for School Trustee in Mayfield (now part of Palo Alto). It is unclear whether she was nominated by the Republican party or by independents, but "[s]he was earnestly supported by a large majority of the Republicans, and a few liberal-minded men who honestly espouse the Democratic faith, and whose reason and judgment are not warped and made subservient to the conditions of sex, who believe that whatever a woman has the capacity to do, she has a right to do." The campaign was "spirited," and drew much attention. Wallis lost by only 12 votes out of 144 cast, her supporters viewing this as a great victory for women. "School Election in Mayfield," San Jose Weekly Mercury, Jul. 12, 1877, at 1.

Thrice-married, Sarah was at this time wed to Judge Joseph S. Wallis, also an ardent women's rights supporter, who had served as a state senator in 1863. Her first marriage ended in presumptive widowhood, her second through annulment. Thus, like Stow, Wallis was no doubt intimately familiar with the inequalities and difficulties women faced regarding the common property. During one period of marriage, Wallis had taken title to a farm in her name alone (an unusual move for a wife); and after that marriage ended, she ran a boarding house.¹⁷⁸ Wallis had drafted a bill similar to that part of Stow's, which altered the right of the widower to automatically succeed to all of the community property through reform of Civil Code Section 1401.

Interestingly, Wallis actually seems to have floated two different proposals this session. The first, introduced in the Assembly, provided that, upon the wife's death, half of the community property would descend to her children (or other descendants) if there were such. If not, then the husband took the whole of the martial property.¹⁷⁹ This did not give the wife any testamentary powers over the common property, however the law as it already stood did provide this if she had been abandoned by her husband.¹⁸⁰ A more liberal version was introduced in the Senate five days later. It gave the wife testamentary powers over half of the common property, thereby treating the widow and widower more equally.

¹⁷⁸Dorothy Regnery, "Pioneering Women: Portraits of Sarah," 8 The Californian 6-08 (1986).

¹⁷⁹Assembly Bill No. 198, introduced by Mr. Maguire, Jan. 12, 1876.

¹⁸⁰California Civil Code Section 1401. Stockton Weekly Leader, Jan. 22, 1876, at 2.

Further, if the wife died intestate her descendants would take her interest, but the bill specifically precluded the widower from succeeding to this half.¹⁸¹ Thus both bills purported to break the husband's absolute ownership of the common property upon the death of the wife, however the Assembly version read more like an exception to the current law, while the Senate version purported to treat the spouses almost equally.¹⁸²

The sponsor of the more conservative Assembly version, James G. Maguire, tried to no avail to characterize this bill as one of family protection, arguing that it "simply provides for the security of the children, or descendants of the wife." But another Assemblyman, John R. McConnell, noting that the Judiciary Committee was strongly opposed to the bill, asserted that the law already protected the wife's descendants. Instead, McConnell viewed Assembly Bill No. 198 as an illegitimate attempt by the wife to gain control over property that was not "hers," to the detriment of those with legitimate claims. He explained hyperbolically, "That property is, in ninety-nine cases out of a hundred, and I may say nine hundred and ninety-nine cases out of every thousand, the result of the industry and enterprise of the husband The law . . . above all provides for those who ought first to be provided for, the creditors who have trusted the

¹⁸¹Senate Bill No. 227, introduced by Mr. Edgerton ("by request"), Senate Journal, Jan. 19, 1876, at 151.

¹⁸²With the Senate version of the reform of Section 1401, the husband and wife would now be treated the same, except that, first, the entire community would be liable for the husband's debts upon his death, while only the wife's half would be liable for her debts on her death; and second, the law would continue to operate to allow the wife to succeed to the husband's half when he died intestate without descendants. California Civil Code Section 1402.

husband in his business relations upon the faith of this community property."¹⁸³

This debate revealed not only the incredible embeddedness of common law notions regarding the driving importance of title (rather than time of acquisition) in the face of California's use of community property law, but also disagreement regarding an issue continually faced by the State, that is, the how to short-circuit dependency on a government ill-equipped to provide for the welfare of its inhabitants, without impacting the economy.

Maguire tried to erase the impression that this proposed statute would allow for the defrauding of creditors. Further, he attacked the assumption that, because the husband supposedly accumulated the property, the wife should have no rights in it. "If we are to regard the husband and wife as one, we must consider that their efforts in the world have been united, and whatever they may have accumulated should be equally the property of the wife and the . . . husband."¹⁸⁴ Maguire also went so far as to take on McConnell's empirical assertion that the efforts of wives so rarely led to the accumulation of family capital. But most of all, Maguire attempted to advance the point that this bill was

¹⁸³Sacramento Weekly Union January 25, 1876, at 1. Another Assemblyman expressed similar views, asserting that, under this bill, "one half of your [the husband's] property descends to the children," and "upon the death of his wife, [the husband] ought to be allowed to control his property." Further, in the following comment, "I am perfectly willing, upon my own death, . . . that one-half of the community property should go to the wife," the Assemblyman certainly acted as if this were a type of inheritance or distribution coming from the husband's estate, rather than a vested right. Id. (emphasis added).

¹⁸⁴Sacramento Union, Jan. 25, 1876, at 1. If Maguire's reference to the unity of the husband and wife was meant to be synonymous with the existence of the marital community, it makes logical sense, but more likely it displays, like the words of his opponent, embedded notions of common law that were out of place in this jurisdiction.

meant to cover only those situations where the husband/father had acted wrongly in disposing of the common property upon the wife's death, thereby cutting off the children from any chance of inheritance now or later.¹⁸⁵ Most damaging, however, was the prediction of the difficulties a widower would face under this law. Presumably the children's share would be subject to management constrictions (whereas during the marriage the law gave him complete control of the community), such that the father, even if given guardianship control over that share, might have trouble continuing a business. Not surprisingly neither the Assembly nor the Senate version could advance past a negative recommendation by their respective judiciary committees.¹⁸⁶

Meanwhile, a bill was introduced by Senator William M. Pierson to narrow the allowable grounds for divorce to adultery only. Not only would this have negated one of Senator Tweed's 1870 reforms, which provided economically neglected wives grounds for divorce, but also it would have eliminated still other grounds that often addressed conduct more often attributed to men than women such as extreme cruelty, willful desertion, habitual intemperance and conviction of

¹⁸⁵Id. Along those same lines, Stow had argued, "If it is right to divide the property for the benefit of the children at the father's death, then it is equally important to make a division after the death of the mother. Half-orphans are more likely to suffer wrong at the hands of stepmothers than stepfathers. They are oftener [sic] turned out of doors penniless by fathers than by mothers." Stow at 19. Meanwhile, Maguire's plea to assist wronged wives and children was answered by another Assemblyman: "I don't believe that this House can legislate in extreme cases." Sacramento Union, Jan. 25, 1876, at 1.

¹⁸⁶Assembly Journal, Jan. 19, 1876, at 167; id. Jan. 24, 1876, at 195; Senate Journal, Jan. 24, 1876, at 166. Edgerton attempted to have the bill recommitted to the Senate Judiciary Committee for further consideration, but his motion failed by four votes, and instead the Senate voted to indefinitely postpone the bill. Id., Jan. 25, 1876, at 174.

felony.¹⁸⁷ The Senate Judiciary Committee actually recommended passage of this bill, albeit with amendment to retain the ground of extreme cruelty, yet the committee defined this ground very narrowly to include only endangerment of life or limb.¹⁸⁸

When the bill came up for debate, Pierson launched into a tirade against the moral decay supposedly caused by divorce, ending with the overblown claim that the existing California legal system sanctioned consensual and collusive divorce. Another supporter, Thomas H. Laine (a perennial foe of women's rights), tried to argue that tightening the divorce law in this way would actually benefit women, asserting that "feminine purity was endangered by laxity and guarded by stringency in the matter of divorce."¹⁸⁹ In an attempt to bring some sanity to the discussion, Robert McGarvey challenged the wisdom of defining

¹⁸⁷Civil Code Section 92. Civil Code Section 105 defined willful neglect as "the neglect of the husband to provide for his wife the common necessities of life, he having the ability to do so; or it is the failure to do so by reason of idleness, profligacy, or dissipation." On the other hand, given the statutory definition of desertion, the offense of willful desertion could be a significant trap for women. Civil Code Section 103 ("The husband may choose any reasonable place or mode of living, and if the wife does not conform thereto, it is desertion."); but see, Civil Code Section 104 ("If the place or mode of living selected by the husband is unreasonable and grossly unfit, and the wife does not conform thereto, it is desertion on the part of the husband from the time her reasonable objections are made known to him.").

¹⁸⁸Senate Journal, Feb. 7, 1876, at 221-2; Sacramento Union, Mar. 15, 1876, at 1. As the law stood, California defined extreme cruelty to include "grievous mental suffering." Civil Code Section 94. See also Robert L. Griswold, "Divorce and the Legal Redefinition of Victorian Manhood," in Mark C. Carnes and Clyde Griffen, eds., Meanings for Manhood: Constructions of Masculinity in Victorian Manhood 96 (1990).

¹⁸⁹Sacramento Union March 15, 1876, at 1. In the previous session, Laine could be found arguing wildly that "the law now in force allowing wives separate property was one great cause of the numerous cases of divorce and infanticide." Id., February 17, 1874, at 1. It is more than a little interesting that the same district, Santa Clara, could elect both Laine and Murphy. No doubt, the women activists had been involved in trying to influence these elections.

extreme cruelty so narrowly, and, in calling for the retention of a definition that included mental cruelty, in turn he pointed out that the grounds proposed to be stricken, such as habitual intemperance and desertion, could constitute such cruelty upon a wife.¹⁹⁰

After agreeing to maintain the more expansive definition of cruelty, the Senate enacted the bill, only nine Senators daring to vote in opposition.¹⁹¹ However, the proposal came over to the Assembly late in the session, and this timing, combined with an unfavorable Judiciary Committee report, doomed it there.¹⁹²

For once, California's institutional roadblocks to legislative change benefitted women. Their newly won political right to hold educational office, as well as their recently won recourse for economic mistreatment in marriage both survived dangerous counter-attacks in the Twenty-first Session.

Twenty-second Session, 1877-78

Plans for a convention to rewrite California's constitution had circulated through the legislature for a number of sessions throughout this decade,

¹⁹⁰Id., Mar. 15, 1876, at 1.

¹⁹¹Id.; Senate Journal, Mar. 27, 1876, at 524. During the final debate on the bill, McGarvey made a clever motion to recommit the bill to committee with instructions to amend the bill to add in habitual intemperance and conviction of a felony. Although the motion lost, the vote was closer than the subsequent vote on the bill itself (fourteen for, nineteen against vs. twenty-four for, nine against). Sacramento Union, Mar. 28, 1876, at 1; Senate Journal, Mar. 27, 1876, at 524. But, it should be noted, there was no move to restore the ground of willful neglect of the wife.

¹⁹²Assembly Journal, Mar. 30, 1876, at 638.

sometimes providing the basis for turning aside a consideration of amending the organic law to permit women to vote. In this session, however, the call for a constitutional convention was to become a reality.¹⁹³ As a result, women's rights supporters expended minimal efforts lobbying for a suffrage amendment, but advocates did press related claims.¹⁹⁴ A petition was presented which called for legislation permitting women to vote in presidential elections.¹⁹⁵ Another, signed by Laura deForce Gordon and others, representing the "California State Woman Suffrage Society," asked for removal of "political disabilities." However, displaying a new twist, this petition added, "especially in the matter of permitting women to practice law in the several Courts of the State."¹⁹⁶

¹⁹³In September, 1877, there was a popular vote to call a convention, and the legislature followed up with enabling legislation. The Governor, wary of the volatile political climate which had developed of late, considered not signing this bill, but capitulated in the closing days of the session. Barbara A. Babcock, "Clara Shortridge Foltz: Constitution-Maker," 66 Indiana Law Journal 849, 851, 864 (1991) [hereinafter Babcock, "Constitution-Maker"]; Babcock, "First Woman," at 695.

¹⁹⁴The woman suffragists planned their legislative strategy early, in a meeting held in April, 1877. "Woman Suffragists," San Jose Weekly Mercury, Apr. 19, 1877, at 2. Nevertheless, based on campaign promises to expend efforts on behalf of the suffrage cause, Sarah L. Knox later expressed significant disappointment that the issue had not been taken up, after some newly elected legislators had promised to do so (referring to Murphy, perhaps?). Sarah L. Knox, "Annual Protest," San Jose Weekly Mercury, Apr. 11, 1878, at 3. Meanwhile, by the measure of the volume of bills introduced, this session was the busiest yet. Babcock, "Constitution-Maker," at 865.

Knox had herself attempted a run for an Assembly seat for this session, as an independent candidate. She was endorsed by the San Jose Pioneer. In addition her candidacy was supported by the Ballot Box, a monthly national women's rights publication, at that time headquartered in Toledo, Ohio, with sympathies towards the NWSA. The Ballot Box commented, "It might be urged that being a woman she is not entitled to hold office," although it dismissed this concern as a "minor question." Ballot Box, May, 1877, at 2. Inasmuch as the publication's hot button appeared to be the nexus between taxation and representation, it is not surprising that it would report on the activities of Knox.

¹⁹⁵Senate Journal, Jan. 21, 1878, at 140; Sacramento Union, Jan. 23, 1878, at 4.

¹⁹⁶Assembly Journal, Feb. 4, 1878, at 304; Sacramento Union, Feb. 5, 1878, at 1.

This was not the first time that legislators were being asked to consider the notion of female attorneys, in the face of a statute that restricted bar membership to white males. The issue appears to have first arisen in the Senate during the Nineteenth (1871-72) Session, when a rather perfunctory bill was introduced by Senator A. Comte, Jr., which would have permitted attorneys from other states and territories to be admitted to practice in California, while maintaining the restriction as to white males.¹⁹⁷ Comte's bill quickly passed the Senate, but upon consideration by the Assembly, two controversial amendments were proposed. The first was to strike the word "white," such that if another state had admitted a nonwhite to practice, he would be permitted to practice in California. This amendment passed 39-22, which opened the door to the next amendment, to strike the word "male." Not only did this amendment pass, but it did so by a wider margin than the first, 47-14. The Assembly then voted in favor of the bill as amended.¹⁹⁸ Back in the Senate, Comte was so distressed by these changes that

¹⁹⁷Senate Bill No. 60, introduced by Mr. Comte, Senate Journal, January 4, 1872, at 158. Nettie Tator herself may have attempted to get legislation enacted to permit women to practice law. According to Barbara Babcock, Tator drafted a bill to that effect "but did not appear in Sacramento herself to push the legislation." Babcock, "First Woman," at 686 n. 65. However, there is no evidence that a bill with the purpose of allowing women to practice was introduced during the 1871-72 session. Nevertheless, as discussed above, Tator did appear in Sacramento that session, and spoke, albeit in a general way, of the need for law reform in order to open up greater avenues of employment for women.

¹⁹⁸Senate Journal, Jan. 17, 1872, at 273-274; Assembly Journal, Jan. 17, 1872, at 273-274. The San Francisco Chronicle expressed surprise that the opportunity to present this amendment had not been earlier seized by, say, Finney in the Senate. Nonetheless, of these developments, the Chronicle commented wryly, "Mr. Comte evidently didn't anticipate the skunk smell that would be raised over his innocent bill. The lawyers are always creating trouble anyhow." "Sacramento," Chronicle, Jan. 19, 1872, at 1.

Meanwhile, these developments did not escape the attention of women's rights advocates, as the New Northwest commented on the differing margin of victory for the two amendments: "It

he withdrew the bill, leaving the issue which had initially motivated its introduction unresolved.¹⁹⁹ As a result, late in the next session, a similar proposal tackling the problem of previously-admitted attorneys was again introduced in the Senate, and was passed immediately.²⁰⁰ Assembly members stirred up trouble again by offering the race and sex amendments. This time, however, the sex amendment was offered within the race amendment, and while the subamendment passed, the consideration of both issues ended in defeat. Not surprisingly, the original version was then enacted.²⁰¹

Now, six years later, women were no longer willing simply to wait to see if the issue could gain back-door consideration, especially when two of the state's leading suffragists were preparing themselves to be admitted to the bar. Clara Shortridge Foltz and Laura deForce Gordon had decided some time earlier that the practice of law would provide them with both an honorable and a more

used to be that men always showed more preference to the negro in legislation than they did to woman. It rejoices us much to note a 'change in the tide.'" "Progressing," New Northwest, Feb. 9, 1872, at 2.

¹⁹⁹Senate Journal, January 18, 1872, at 216. The San Francisco Chronicle had predicted the Senate's difficulty with accepting the Assembly's amended version: "It remains to be seen what the progressive but Democratic Senate will do about the matter. . . . [S]uch high-toned lawyers as Farley, Pendegast, Comte, and others, will hardly want to stand up and exchange compliments with a colored citizen." Chronicle, Jan. 19, 1872, at 1. Interestingly, yet not inconsistent with the vote in the Assembly, the Chronicle had no comment on whether the lawyer-senators would have a problem practicing against a female attorney.

²⁰⁰Senate Bill No. 506, introduced by Mr. T.J. Keys; Senate Journal, March 23, 1874, at 743.

²⁰¹Assembly Journal, Mar. 26, 1874, at 1110-1111.

lucrative way to support their families.²⁰² Each began reading the law under the tutelage of sympathetic male attorneys, Foltz with C.C. Stephens, whose activism in the women's rights movement had extended to educating women about the law. In fact, one of the inequalities which Stephens had pointed out, in his 1871 tract, was women's "exclusions from the pathways of the law."²⁰³

In other parts of the country litigation had become the first line of strategy for women attempting to gain admission to the bar, yet Foltz did not attempt to go this route. She was probably aware of the high-profile, but losing, cases of women such as Myra Bradwell and Belva Lockwood.²⁰⁴ In addition, given the previous legislative considerations of this issue, it seemed fairly clear that California law, as it stood, did not permit women to practice law. Thus, when Foltz drafted what became known as the "Woman Lawyer's Bill," it was "one of the earliest of its kind, and probably the first to emerge entirely from the

²⁰²At the time, Foltz's marriage was crumbling and soon to end in divorce, as her husband had taken up with another woman. Meanwhile, Foltz had always had to contribute significantly to supporting her family, now grown to five children, which she found difficult to do on what she could make sewing and lecturing. By 1878, Foltz believed that the only way she could keep her children together with her was to become an attorney. Babcock, "First Woman," at 679, 683, 688; Babcock, "Constitution Maker," at 865.

Gordon's marriage had also recently ended in divorce, due to bigamy, and her elderly parents were dependent upon her. Furthermore, like Foltz, during her marriage Gordon had had to work to support her husband, an untrained physician. After gaining a national reputation as a Spiritualist and women's rights lecturer, as well as a political stump speaker, Gordon spent the mid-1870s publishing newspapers in Stockton and Oakland, before selling her paper in May, 1877. She saw the practice of law as providing, besides a greater income, a more flexible schedule, a more impressive position from which to advocate women's rights, and perhaps a springboard to elective office. Babcock, "First Woman," at 687, 687 n. 72, 688; Babcock, "Constitution Maker," 866.

²⁰³Babcock, "First Woman," at 685.

²⁰⁴Id. at 701.

legislative process (rather than being a response to a court refusal of bar admission.)"²⁰⁵

Foltz sought out her local Senator, Barney Murphy, to introduce her proposal very early in the session.²⁰⁶ As had been the case with previous legislative sessions, Laura deForce Gordon was attending as a press representative, and was thus able to assist Foltz from her desk in the Assembly Chamber.²⁰⁷ Lending further aid were Sarah Knox, Sarah Wallis and others representing the state suffrage association.²⁰⁸ In keeping with traditional strategies, the women decided to gather petition signatures in support of this bill, but they astutely targeted members of the bar. In the face of such male support, refusal by the legislature would appear baseless. The women were successful, as petitions were presented from the hometowns of Foltz and Gordon, San Jose and

²⁰⁵Babcock, "Constitution Maker," at 869.

²⁰⁶Babcock provides a comprehensive, dramatic treatment of the passage of this bill, with a focus on Clara Shortridge Foltz. Babcock, "First Woman," at 685; Senate Journal, Dec. 17, 1877, at 44. The bill removed not only the gender proscription, but the racial proscription as well. Interestingly, this aspect of the bill got very little attention, even though, as the earlier amendment votes demonstrated, white women might have already gained the right to practice law if the issue had not been racialized at the same time. Babcock, "Constitution Maker," at 868 n. 66 (citing an article in the Sacramento Record-Union on Jan. 11, 1878, as the only source to mention the application to people of color). In fact, Assembly debate on the bill was opened by a supporter who claimed that "the object of the bill was to allow women to practice law when they were capable." Sacramento Union, Feb. 26, 1878, at 1.

Speculating on why Foltz drafted the bill in this way, Babcock thought that "perhaps she wanted to preserve the argument that former slaves and women should be treated alike." However, a less cosmic explanation might be found in the earlier attempts to open up the membership of the bar, with which Foltz's efforts were consistent but more politically astute (in making the removal of the racial proscription less obvious). Babcock, "First Woman," at 686 n. 66.

²⁰⁷ HWS at 757; Babcock, "Constitution Maker," at 865.

²⁰⁸ HWS at 757.

Stockton, respectively, as well as from Sacramento, containing the signatures of many prominent lawyers.²⁰⁹

The bill itself got off to a rather unpromising start, as the Senate Judiciary Committee recommended against enactment.²¹⁰ Nevertheless, it passed "decidedly" and with no debate, twenty-two senators being in favor, and only nine opposed.²¹¹ Most all of the attorney-senators favored the proposal, causing the Sacramento Bee to remark that they voted "'with a degree of liberality which does credit alike to head and heart'."²¹² Yet the bill would not have as easy a time in the Assembly, mostly due to attorney-lawmakers there.

With the Assembly Judiciary Committee having reported the bill out without recommendation, debate had hardly opened before a motion was made to bury it through indefinite postponement.²¹³ The proposal escaped this fate by a

²⁰⁹Assembly Journal, Mar. 26, 1878, at 715; id., Mar. 27, 1878, at 735; Sacramento Union, March 30, 1872, at 8. Sarah Knox commented later, "we made an effort to help [the bill] pass by getting up a petition, signed by all the prominent lawyers in San Jose. I understand that a similar petition was to be circulated in other portions of the State." "Women's Rights in California," Woman's Journal, Apr. 13, 1878, at 116.

²¹⁰Senate Journal, Jan. 5, 1878, at 79. However, the committee's recommendation was not unanimous.

²¹¹Id., Jan. 17, 1878, at 123-4; Sacramento Union, Jan. 18, 1878, at 1; Babcock, "First Woman," at 689.

²¹²Babcock, "First Woman," at 689 and n. 83 (quoting Sacramento Daily Bee, Jan. 17, 1878, at 3.

²¹³Assembly Journal, Feb. 8, 1878, at 321; id., Feb. 25, 1878, at 430; Sacramento Union, Feb. 26, 1878, at 1. Debate up to this point did focus on the merits of the bill, which indicates that a vote to postpone was effectively a vote in opposition.

five-vote margin and discussion continued on the merits.²¹⁴ Those in opposition were forced to distinguish female entrance into the legal profession from female entrance into medicine, the other paradigmatic profession and one which had always had a female presence. In addition, members of the Assembly who were also members of the bar had to fend off any accusation of self-interest.²¹⁵ Thus, an Assemblyman-lawyer was recorded as arguing that "[h]e did not oppose the bill because he feared the women coming into competition with him in the profession. . . . It was well enough for women to practice medicine, but it was no place for them in the law. He cited the embarrassing positions that women would be placed in when called upon to attend to certain classes of cases, and the character of testimony they would sometimes have to listen to and elicit."²¹⁶

Meanwhile, those in support struck a pose of gallantry and detached interest. Perhaps disingenuously given the involvement of Foltz and Gordon, one Assemblyman supported the bill but claimed not to know of "any woman in the State who now wanted to practice law." Perhaps in an astute tactical move, an

²¹⁴Assembly Journal, Feb. 25, 1878, at 430. All Assembly members who voted in favor of the bill on this day also voted against indefinite postponement. Meanwhile, there were three members who voted against postponement but then voted against the bill, and one who voted against postponement but did not take part in the vote on the merits. Thus, evidence tends to support the conclusion that members had either already made up their minds on the bill, or were not swayed by the favorable arguments presented on this day.

²¹⁵After the bill had initially gone down to defeat in the Assembly, the Watsonville Pajaronian commented on just this possibility: "We cannot help the thought, when the advancement of women is refused by legislative bodies, that prejudice is not the basis of such an action. . . . The only danger to be apprehended by women practicing law will be to the male lawyers, who would be obliged to constantly guard their legal laurels." "Women as Lawyers," San Jose Weekly Mercury, Mar. 14, 1878, at 3 (reprint from the Pajaronian).

²¹⁶Sacramento Union, Feb. 26, 1878, at 1.

ardent supporter of both the bill and Clara Foltz, Grove L. Johnson, appeared to play along with this misperception. Johnson, whose son Hiram was to be elected governor in the Progressive Era and usher in woman suffrage in 1911, reminded lawmakers that "the bill did not compel any woman to practice law. It only removed a barrier and allowed women to study and practice law if they desired to." But, as recorded by the Sacramento Union, Johnson answered his opponents passionately,

"he would like to know what law of God or man had given them the right to fix the sphere of women. The sphere of woman had been fixed by God, and man had no right to circumscribe it. He asked where was the instance of a woman attempting any position in life where she did not acquit herself well. He had not yet heard any reasons why women should not be allowed to practice if they desired to."²¹⁷

All the same, the bill went down to narrow defeat, thirty to thirty-three, as it turned out that a crucial number of those who had favored continuing debate later voted to oppose the measure.²¹⁸ Nevertheless, a motion made the next day to reconsider the bill²¹⁹ survived a gauntlet of parliamentary maneuvers, which

²¹⁷Id.

²¹⁸Assembly Journal, Feb. 25, 1878, at 430; Sacramento Union, Feb. 26, 1878, at 1.

²¹⁹Assembly Journal, Feb. 26, 1878; Sacramento Union, Feb. 27, 1878, at 1. There is some confusion in the records regarding the source of this motion. Rules of the Assembly permitted a member voting in the majority to call for a reconsideration of the vote the following day. If necessary, a member was permitted to switch his vote to the majority in order to do so. The member seeking reconsideration was required, on the day of the vote, to give notice of his impending motion to reconsider the following day. Here, the official records of the Assembly for February 25th do not show any member giving notice of such a motion. Assembly Journal, Feb. 25, 1878, at 431. Meanwhile, the Sacramento Union's detailed account of the proceedings indicated that James Murphy of Del Norte did so at the start of the evening session, although it notes cryptically that he did so "by request." Sacramento Union, Feb. 26, 1878, at 1. Babcock notes that this Murphy was opposed to permitting women to practice law, i.e., that his "nay" vote reflected his actual sympathies, rather than a parliamentary maneuver (which is confirmed by

allowed the proposal to be taken up again, albeit over a month later in the closing days of the session.²²⁰ In the interim, Foltz and Gordon swung into high gear, attempting to defuse the opposition led by assemblymen who were attorneys.²²¹ They did so rather astutely, presenting petitions which had been received from various and prominent members of the bar.²²² And in a tense showdown, the bill squeaked by on reconsideration with a margin of two votes.²²³ A recording of the

Murphy's continuing "nay" vote upon reconsideration). Babcock, "First Woman," at 692 n. 103; Assembly Journal, Mar. 29, 1878, at 774. However, it was Grove L. Johnson, a staunch supporter of Clara Foltz, who is recorded as having actually made the motion to reconsider the next day. Id., Feb. 26, 1878, at 448; Sacramento Union, Feb. 27, 1878, at 1. (Johnson was also the first to speak in support of the motion, when it was finally taken up, additionally indicating that it was he who made the motion. Sacramento Union, Mar. 30, 1879, at 8.)

According to Foltz's account many years later, Johnson switched his vote to "nay" in order to move for reconsideration, although this is not reflected in the official records. Clara Shortridge Foltz, "The Struggles and Triumphs of a Woman Lawyer," The New American Woman, Aug., 1916. Based on Murphy's notice of motion, Babcock considered Foltz's recollection of Johnson as the moving party to be faulty or at least unreliable due to passage of time, and leaves the issue open to speculation, positing that Murphy indeed made the motion, perhaps out of some political debt owed to Johnson. Babcock, "First Woman," at 692 n. 103.

²²⁰Assembly Journal, Mar. 29, 1878, at 772-4. Relying on newspaper accounts, Babcock describes the bill as having come up in the matter of course whereby each Assembly member was given the opportunity to present and dispose of one bill apiece in the waning days of the session. Babcock, "First Woman," at 693-94. However, the official records of the Assembly indicate that the motion to reconsider the bill was immediately followed by a motion to postpone that motion indefinitely, with the entire matter then being made the special order for the afternoon of March 5th. Its consideration was then serially rescheduled for the next few weeks. This was appropriate procedure for bills made special order, but not for bills coming up through the general file.

²²¹Babcock found that party affiliation did not explain support for and opposition to this bill. Babcock, "First Woman," at 689.

²²²Sacramento Union, Mar. 30, 1878, at 8. See also, Sarah L. Knox, "Women's Rights in California," Women's Journal, Apr. 13, 1878, at 116, discussing efforts of San Jose area activists in getting up one such petition for Foltz to present.

²²³Assembly Journal, Mar. 29, 1878, at 774. Altogether, there were seven votes taken in the Assembly relating to this bill. A close analysis of voting patterns reveals that the vast majority of those in favor voted extremely consistently in that manner. Meanwhile, the votes of those opposed reveal no consistent strategy to defeat the bill.

On March 29th, 72 Assembly members cast their vote on the merits of the bill, while only 63 had done so initially. The final margin of victory can be explained more by serendipity than by

Assembly's business noted that "some women and men in one part of the hall raised applause, and the Speaker rapped the House to order."²²⁴

A legislator breathlessly described the experience:

The fight came on this afternoon, and a real lively time it was, so far as parliamentary tactics were concerned. I never knew before how much pluck and energy there was in a woman - how they could urge their claims, plead for the privilege of making the battle of life - for such our friend Mrs. Foltz did, gently and eloquently. . . . But it was a close shave; only two majority in a full House.²²⁵

The drama was not over, however, as the bill awaited the governor's signature.²²⁶ Being the editor of a Democratic newspaper, Gordon successfully appealed to that party for assistance in urging the Democratic Governor William Irwin to sign the bill.²²⁷ Meanwhile, Foltz joined the competition with other legislators and lobbyists for the governor's attention. She managed to gain an

the power of persuasion. Just one member switched his vote positively, yet it yielded no net effect, as another member switched his vote to the negative. Rather, what made the difference were the comings and goings of legislators. The "aye" vote picked up seven new voters while losing only one, while the "nay" vote picked up five new voters while losing four. In addition, two of these four voters participated in the first three votes on this issue on March 29th, but inexplicably failed to vote finally on the merits of the bill. Consequently, it was really these two members who allowed for the victory to occur. (Of course, lobbying efforts may have motivated previously-absent Assembly members to be in attendance for this vote, which came up by scheduled special order.) Thus, it is not entirely accurate to attribute this victory to the swaying of "a crucial five votes." Babcock, "First Woman," at 694.

²²⁴Sacramento Union, Mar. 30, 1878, at 8.

²²⁵"A Victory in California," Woman's Journal, Apr. 20, 1878, at 124. The legislator went on to add, "But the tug of war is yet to come. Will the Governor sign the bill? . . . I have found Mrs. Foltz to be a well informed lady . . . and for her sake I hope the Governor will discard the usual prejudice and sign the bill." Id.

²²⁶According to a recounting in the History of Woman Suffrage, opposition remained so fierce in the legislature, that attempts were made to prevent the bill's enrollment in time for its presentation to the governor. 3 HWS at 758.

²²⁷3 HWS at 758.

audience with him, and in the waning minutes of the session the bill was signed.²²⁸

Besides the Woman Lawyer's Bill, two others were introduced during this session to protect women's economic position, both by Assemblyman Johnson. The first would have required the signatures of both husband and wife in order to convey real property which belonged to the community.²²⁹ The Judiciary Committee recommended against passage. The bill was debated on the floor and amended, but then the Assembly voted to indefinitely postpone further consideration.²³⁰ The second proposal called for amending Civil Code Section 137, to require the husband to support his wife and children during divorce proceedings or "unlawful" separation.²³¹ As it was, such an order of support was up to the discretion of the court.²³² This bill passed both houses, with apparently little debate, and was signed into law by the Governor.²³³

²²⁸"Letter from Mrs. Foltz," New Northwest, Apr. 9, 1878, at 2; Babcock, "First Woman," at 692.

²²⁹Assembly Journal, Dec. 11, 1877, at 102. While this bill was primarily protective in nature, it could be reasonably interpreted as recognizing an ownership interest on the part of the wife. In any event, its passage would have given California women a similar level of protection offered by the dower right in the East. A similar bill was introduced in 1889, and then finally enacted in 1891. See Chapter Five.

²³⁰Assembly Journal, Jan. 12, 1878, at 201; id., Feb. 1, 1878, at 289. In addition, a motion to reconsider the indefinite postponement lost on one of the last days of the session. Id., Mar. 29, 1878, at 775.

²³¹Assembly Bill No. 386, introduced by Mr. Johnson; Assembly Journal, Feb. 5, 1878, at 314.

²³²California Civil Code Section 137.

²³³Assembly Journal, Feb. 26, 1878, at 448; Senate Journal, Mar. 4, 1878, at 320; Assembly Journal, Mar. 22, 1878, at 679.

As women activists looked toward the next era of law reform, which would begin with a constitutional convention, they could be proud of their accomplishments over the first nine years and six legislative sessions. However, the optimistic belief of the early years, that suffrage was right around the corner, now appeared unwarranted. For all of their efforts, advocates had made little headway in this regard. More ominous, though, was the fact that the unceasing work towards the cause of equal legal, political and economic rights had exacted an unsurprising toll on the organized movement. As a result, while the upcoming constitutional convention promised a unique opportunity to achieve suffrage and other rights, it was unclear whether enough of an organizational infrastructure remained in place to take advantage of the offering.

CHAPTER FIVE

Constitutional Politics and the Fight for Equal Rights, 1878-1889

Introduction

If nothing else, in the 1870s, women's rights advocates could count on gaining attention owing to the very novelty of their cause. While newspapers might have lampooned their efforts, a savvy activist knew that being ignored was a far worse fate.¹ The novelty paid off with the legislature, where special committees to handle matters affecting women, especially suffrage, were the norm during that decade. At the very least this arrangement kept the issues from initially being buried or placed before hostile lawmakers. More often than not the members of these special committees took their task seriously, bringing a progressive mindset to bear on what they recognized as real and complex issues. Yet there simply weren't enough of these legislators serving during the 1870s, as time and again a failure of will permitted victory for those whose rhetorical stock in trade included the disingenuous exaltation of "woman's sphere."

¹Lauren Kessler, "A Siege of the Citadels: Search for a Public Forum for the Ideas of Oregon Woman Suffrage," 84 Oregon Historical Quarterly 117, 118 (1983) ("the suffragists badly needed access to the state's newspapers. Without coverage, without press discussion of the suffrage issue, without public dissemination of suffrage ideas, the movement could not hope for success at the polls"). Kessler found, in her study of Oregon's mainstream press, that it ignored the woman suffrage movement in that state, which not only served to deny the movement public existence but in turn provided a significant barrier to women's quest for political power. Kessler, "The Ideas of Woman Suffragists and the Portland Oregonian," 57 Journalism Quarterly 597 (1980).

Nevertheless, a few advances had crept in: divorce laws which attempted to accommodate a portion of wives' economic vulnerability (1870); amendments to marital property laws giving wives some control over their earnings and separate property (1870, 1872); the end of blatantly unequal pay for equal work in public school teaching (1870, 1874); removal of state-sponsored barriers to the legal profession (1878); and an opening for women's civic participation as educational officers (1874).

Yet much remained to be accomplished. Advocates' initial hopes that the age of woman suffrage was just around the corner appeared less and less realistic by 1878. And common-sense efforts to bring equal justice to the community property scheme, particularly as concerned widows, had yet to yield results. Countless hours had already been devoted to these causes, and movement leaders must have been wondering how much more anyone could be expected to give. But an upcoming constitutional convention provided an unprecedented opportunity, especially to grab the brass ring of suffrage, if only the necessary forces could be marshalled, it seemed. California's otherwise biennial legislature convened both in 1880 and 1881, after which it began a pattern of meeting in odd- rather than even-numbered years, commencing in January. As a result, between 1878 and 1881, the constitutional convention, as well as an extra legislative session, increased the opportunities for California women to press their law reform agenda.

Constitutional Convention, 1878-79

Anti-Chinese sentiment, along with an unsettled understanding of the scope of the Fifteenth Amendment, combined to heighten attention to suffrage rights in California at this time.² As a result, California women could be fairly well-assured that the issue of female suffrage would come before the convention, especially with the appointment in the opening days of a Committee on the Right of Suffrage.³ Moreover, the anti-Chinese climate held the promise of unprecedented alliances which might benefit women.⁴ The political atmosphere was unique: not only was anti-Chinese sentiment at a fever pitch, but also a strong third party, the Workingmen's Party, had developed, aiming to do battle against the Chinese, as

²On issues of race in the convention, see Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," 17 Hastings Constitutional Law Quarterly 35 (1989).

³Babcock, "Clara Shortridge Foltz: Constitution-Maker," 66 Indiana Law Journal 849, 864 (1991) (hereinafter Babcock, "Constitution-Maker"). As Babcock described it, "In California, the force of women's just claims as citizens was joined to the fear that the amendment's wording might also someday enfranchise races other than African-American as it already had a few Chinese born in America. White women's votes could be needed as an offset." This article provides an excellent study of the efforts made on behalf of women in the convention, and the historical context in which those efforts arose, although its focus on one individual, Foltz, tends to slight the efforts of others and to slight attempts made to organize women around the cause.

⁴The Ballot Box, published by the National Woman Suffrage Association, maintained that the Workingmen "are looking towards affiliation with women as a political measure necessary to them." Ballot Box, June, 1878, at 2. However any alliances which did develop appear to have been of a more informal nature. Meanwhile, long-time suffrage activist Sarah Knox's "Annual Protest" letter to the editor of the San Jose Mercury recognized the connection between women and the Chinese early on. She complained that the constitution might as well read "all men are created equal, women and Chinamen excepted," and taunted prospective delegates, "You should certainly change such sentences as ['all men are created equal'] in the Constitution or give to women the ballot." Knox's viewpoint, in implying that the state's treatment of the Chinese was also in derogation of constitutional principles, is notably less racist than that of many of her fellow suffragists, particularly Laura deForce Gordon, who had proven herself to be rabidly anti-Chinese. Knox, "Annual Protest," San Jose Weekly Mercury, Apr. 11, 1878, at 3.

well as California's corporatist interests. Whether other issues of importance to women, particularly in the area of marital property, would be given much attention, was harder to gauge.

Just after the close of the 1878 legislative session, noted activists seized the opportunity to lobby for the election of delegates who would support woman suffrage. Sarah Knox called for male voters, "in sending your representatives to the Constitutional Convention," to send those who would give real meaning to the phrase, "all men are created equal."⁵ Laura deForce Gordon volunteered to lecture "if the women of the State will aid me in getting up meetings."⁶ And Elizabeth Cady Stanton was invited to stump the state in aid of the cause.⁷

What was really needed was statewide mobilization. Unfortunately, the organizational network formed earlier in the decade had lapsed - years of defeat had understandably worn away the enthusiasm necessary to maintain such an infrastructure. But some Sacramento women were willing to start from scratch. Interestingly, those involved in this call to action do not appear to have been the "strong-minded" who had formed the earlier network. Rather, these women seemed to be primarily interested in women's economic rights, as they praised both the Grangers for being "the first society to accord woman equality of

⁵Knox, "Address to the People of San Jose," San Jose Weekly Mercury, Apr. 18, 1878, at 1 (emphasis added). Knox chose her words carefully - she denied that women, absent the ballot, were truly being represented.

⁶San Jose Weekly Mercury, May 23, 1878, at 2. Yet J.J. Owen, editor of the sympathetic San Jose Mercury, doubted that she would be able to raise enough money to rent halls.

⁷Ballot Box, June, 1878, at 2.

position" and the Workingmen's party for being "the first party to recognize woman as an equal in the great field of labor," and urged the election of delegates committed to instituting woman suffrage.⁸ While this apparently utilitarian approach to political rights might have garnered this group broader support than the "strong-minded" could muster, there is no evidence that this call resulted in the statewide, much less local, mobilization.⁹

Delegates to the convention were chosen at a special election in June, 1878. It appeared that no candidate was interested in making support for women's rights part of his platform.¹⁰ That is, not until Laura deForce Gordon jumped into the race herself, after apparently being unable to raise the necessary money to promote the cause more generally.¹¹ Gordon threw her hat into the ring a mere ten days before the election, emboldened by the fact that the convention's enabling legislation was silent regarding any gender restrictions on

⁸"Woman's Constitutional Convention," Sacramento Record-Union, Apr. 13, 1878, at 1.

⁹The Ballot Box reported, in June, that a statewide mobilization was occurring, however this report appears premature and optimistic. Ballot Box, June, 1878, at 2. Meanwhile, as noted below, the women of Sacramento again called for mobilization towards the end of the convention. This indicates further that this pre-convention call had not produced lasting results.

¹⁰See Debates and Proceedings of the California Constitutional Convention (1879) [hereinafter Debates], Jan. 14, 1879, at 1014 (remarks of Mr. McCallum). One delegate did maintain later that his constituents elected him at least knowing that he would advocate for woman suffrage, even if they themselves were opposed. Id., Jan. 13, 1879, at 1005 (remarks of Mr. Blackmer).

¹¹Babcock, "Constitution-Maker," at 876 ("[w]oman suffrage had been a serious issue only in Gordon's canvass"). Nevertheless, a few candidates were elected who were known friends of the women's cause. Id.

delegates.¹² Running as an independent and campaigning in her home county, San Joaquin, Gordon attracted a sizeable, curious audience to her stump speeches.¹³ While Gordon, of course, lost the election, she believed that her campaign had served to awaken an interest in woman suffrage.¹⁴ Clara Shortridge Foltz, who aided her in campaigning, indicated that Gordon "told the people that she undertook the experiment simply to scare the politicians and to have a little fun, both of which we have succeeded admirably in doing. . . . [G]reat good and no harm has been done in the agitation of woman's inherent right to assist in framing the organic law of the State."¹⁵

The period between the election and the opening of the convention presented yet another opportunity for mobilization, but once again the lack of an existing network hampered the ability of women to press their agenda. Clara Foltz had hoped to mount a statewide petition drive and call a mass suffrage meeting in the opening days of the convention, to counter the inevitable argument that most women were uninterested in gaining the vote. Personal circumstances,

¹²Id. at 870.

¹³Id. at 871. Her campaign was described as "brief though brilliant," and she attracted "larger and more enthusiastic audiences than any other speaker." As a result, she received "several hundred votes." Elizabeth Cady Stanton, Susan B. Anthony, and Matilda J. Gage, eds., 3 History of Woman Suffrage 759 (1881) [hereinafter HWS].

¹⁴3 HWS at 759.

¹⁵Foltz, "Woman Suffrage in California," New Northwest, July 5, 1878, at 2.

however, kept her from realizing these plans,¹⁶ but a few weeks after the opening of the convention the Santa Clara stalwarts, Foltz and Knox among them, were able to meet in San Jose to map out a strategy to secure a constitutional right to suffrage.

Exemplifying the failure to mobilize, the California Woman Suffrage Association (still operational, although its active membership was drawn almost solely from in and around San Francisco) did not hold its annual meeting, in San Francisco, until a few weeks after the convention had gotten underway. Nevertheless, the group resolved to send a committee of members to attend the convention "to urge . . . the importance of grafting into the new Constitution a clause removing the political disabilities of women."¹⁷ Five women were appointed, including Sarah Knox and Sarah Wallis.¹⁸

Meanwhile, a variety of amendments to Article II, Section 1 of the Constitution, which would confer on women the right to vote, had already been sent up in the opening days of the convention. Some, with their gender-neutral language, called for granting impartial suffrage, whereby men and women would

¹⁶Babcock, "Constitution-Maker," at 876-877. Babcock attributes Foltz's inability to mount such a campaign to the earlier passage of the Woman Lawyer's Bill (Foltz was busy studying for admission to the bar) as well as a quarrel with Gordon. Id.

¹⁷"State Woman Suffrage Meeting," San Jose Weekly Mercury, Oct. 10, 1878, at 2.

¹⁸Id.

be subject to the same qualifications.¹⁹ Others purported to give women the vote, but would have imposed qualifications beyond those imposed on men. To this end an amendment was introduced by Thomas B. McFarland, calling for enfranchising unmarried women, who held at least one thousand dollars in property, and married women, who held at least two thousand dollars in separate property.²⁰ Another proposal simply called for no taxation without representation; presumably this would similarly permit women holding real property to vote.²¹

Along with these amendments came a number of petitions addressing the subject. Although many followed a near-identical form, simply calling for no disfranchisement on account of sex, it is unclear whether they resulted from a concerted statewide drive.²² These petitions, often containing several hundred to

¹⁹Debates, Oct. 10, 1878 at 97 (amendment introduced by Mr. Grace, to make entire constitution gender neutral); id. at 104 (amendment introduced by Mr. Van Voorhis, to make Article II, section 1 gender neutral); id., Oct. 15, 1878, at 151 (amendment introduced by Mr. Sweasey, same).

²⁰Id., Oct. 9, 1878, at 81. Interestingly, the following day the New Northwest reported that an organization calling itself the Tax-payers' Union, comprised of men and women, met in San Jose to discuss the suffrage provision of the constitution. Veteran tax protester Sarah Knox, as well as suffrage activists Foltz and Laura Watkins, were involved on the women's side. While Knox pushed for the organization to support impartial suffrage, in the end it voted in favor of "granting all women who pay taxes on \$250 all the rights of citizenship." However, the Union also voted to support a mild impartial suffrage provision "authorizing the legislature at any time to remove all the disabilities of women." New Northwest, Oct. 10, 1878, at 2.

²¹Debates, Oct. 9, 1878, at 84 (amendment introduced by Mr. Tuttle).

²²Having examined the original petitions at the California State Archives, Babcock observed that they were "sometimes standard in locution, [but still] bore traces of individuality." Babcock, "Constitution-Maker," at 879. Babcock did not attribute the petitions to an organized drive (however, she may have slighted the work of the organized movement as it was, inasmuch as her article focuses almost exclusively on the efforts of Foltz and Gordon).

over a thousand signatures, came from counties in both the northern and southern parts of the state.²³ Only two petitions were submitted under the aegis of women's rights organizations, and these were signed by only leading members. One came from the Santa Barbara League, and another came from the CSWA (also known, at this point, as the California State Woman Suffrage Educational Association).²⁴ While these petitions in sum total indicated a healthy level of support for female suffrage, what was missing was an indication that they were the result of a well-organized movement.

Yet individual women rose to the occasion when it came to lobbying convention delegates. Sarah Knox appeared as a representative of the CWSA, along with fellow San Jose resident, Laura Watkins. Of Knox's efforts, one delegate reported, "The lady advocates her cause with energy and skill, though I apprehend she has undertaken a herculean task to induce this Convention to open

²³Debates, Oct. 10, 1878, at 89 (petitions presented by Mr. Hagar, Mr. Laine and Mr. Rolph); id., Oct. 11, 1878, at 110 (petition from San Francisco presented by Mr. Blackmer); id., Oct. 15, 1878, at 148 (petition from Santa Barbara, Ventura and Los Angeles counties presented by Mr. Blackmer); id., Nov. 7, 1878, at 319 (petition presented by Mr. Stuart); id., Nov. 12, 1878, at 376 (petition presented by Mr. Shafter); id., Nov. 18, 1878, at 450 (petition presented by Mr. Blackmer). Over three thousand signatures were obtained calling for a gender-neutral constitution. Id. at 832.

²⁴Id. Oct. 22, 1878, at 171 (petition presented by Mr. Hoge); id., Nov. 6, 1878, at 306 (petition presented by Mr. Sweasey). The CWSA petition was signed by only seven individuals, who were officers of the organization, including Knox, Foltz and J.J. Owen. This further indicates that the CWSA was not behind any statewide petition drive. Meanwhile, the Santa Barbara organization did not have a long history, having been formed only a few months before the opening of the convention. Ballot Box, July, 1878, at 3.

the door for Woman Suffrage."²⁵ But possibly the most influential appearance was by a delegation of women, led by Gordon, who spoke to the Committee on the Right of Suffrage one October evening, packing the gallery of the convention chamber with men and women alike. Their goal was to convince committee members that women indeed wanted the vote. As a result, according to Babcock, "the Committee, which had expected to focus on proposals for retreating from universal male suffrage [in order to exclude Chinese], found itself occupied instead with the question of extending the vote to women: 'impartial suffrage.'"²⁶ Gordon had been present at the convention from the start as a newspaper correspondent as well as a lobbyist.²⁷

With the Suffrage Committee now focused on the possibility of woman suffrage, a number of different approaches were considered. Only one member was in favor of inserting impartial suffrage into the constitution.²⁸ For a while, others considered submitting the issue to voters separate from but along with the

²⁵"Mrs. Knox at Sacramento," San Jose Weekly Mercury, Nov. 7, 1878, at 2, reprinted from the Truckee Republican. Babcock reports that Knox and Foltz steadily lobbied three of the delegates from the San Jose area, Non-Partisan Democrat E.O. Smith, Non-Partisan Rush McComas and Workingman D.W. Harrington, who consistently voted in favor of women's rights. Babcock, "Constitution-Maker," at 880.

²⁶Id. at 881.

²⁷3 HWS at 759. Babcock portrays Gordon as "alone in her [lobbying] efforts," "except for occasional help." "Constitution-Maker," at 883. Contemporary newspaper reports indicate that this probably slights the efforts of the San Jose-based CWSA delegation, particularly Sarah Knox.

²⁸Debates, Dec. 24, 1878, at 833 (remarks of Mr. Eagon).

proposed constitution.²⁹ The motivation for this tack was the committee's belief that none of the delegates had been elected on a platform of woman suffrage and its opinion that unconditional insertion of woman suffrage into the proposed constitution could sink the entire enterprise.³⁰ In the end, a majority of the committee opted for a compromise, recommending that a provision be tacked onto Article II, Section 1, which would allow the legislature to grant women the vote when it sought fit.³¹ Coming as it did on the heels of the legislature having granted women the right to practice law, this could be taken as more than an empty promise. Thus, the Committee on the Right of Suffrage appeared to hand women a considerable victory.³² What was missing from the report, however, was any justification or explanation for this somewhat irregular provision. Nor did those on the outside realize that quite a bit of ambivalence remained among committee members.³³

²⁹Id. (remarks of Mr. McCallum). John McCallum, a member of the Committee, revealed that this notion was considered "for some time" by the Committee, but the propriety of such was questioned. Id.

³⁰Id., Jan. 14, 1879, at 1014 (remarks of Mr. McCallum).

³¹"Majority Report of the Committee on the Right of Suffrage," id., Nov. 13, 1878, at 394 (submitted by John A. Eagon). The proposed section retained the usual restrictions on male suffrage, and then stated "that the Legislature may by law remove in whole, or in part, the disabilities to exercise the elective franchise on account of sex." See also, id., Dec. 24, 1878, at 833 (remarks of Mr. Eagon), indicating that this represented a compromise. See also Babcock, "Constitution-Maker," at 893 ([l]egislative empowerment looked like a moderate compromise that would attract suffrage sympathizers' support, while not greatly antagonizing opponents").

³²Id. at 881. According to Babcock, this provision "was a tribute in itself to the women's lobby." Id.

³³Debates, Dec. 24, 1878, at 833 (remarks of Mr. Eagon), indicating that "each member of the committee reserv[ed] a right to act upon [the provision] in the Convention as he saw fit."

Not only did this leave the report open to attack by the those committee members who disagreed, but also it was unclear who would rise to defend the unusual proposal. Indeed, a minority report was issued by James Caples, as it turned out, the delegation's most steadfast opponent of female enfranchisement.³⁴ In this report, Caples explained his opposition to the proviso on a number of grounds, both fundamental and particular. Believing that woman suffrage was supported by "a few professional agitators and schismatic propagandists," rather than "the sober, conservative people," Caples concluded that this provision would both repeatedly "surround the Legislature by a lobby influence detrimental and injurious to all just and wise legislation," and provide the opportunity for the agitators to "indefinitely replenish" their "stock in trade."³⁵ This would occur, according to Caples, because the legislature would not choose to adopt woman suffrage anytime soon. More generally, he viewed female suffrage as the entering wedge to female officeholding (with a woman "finally go[ing] to the Legislature to warm a contested seat"), which would "drag woman down from the lofty sphere

³⁴Id., Nov. 14, 1878, at 408. The majority report was signed by eight of the twelve committee members. The minority report was signed by Caples alone. It is difficult to discern whether the other three members abstained, or whether they simply let Caples speak for them.

³⁵"Minority Report of the Committee on the Right of Suffrage", id. at 408 [hereinafter "Minority Report"]. Moreover, according to Caples, the women's lobbying would hardly be conducted in a fair manner, as it would include "attacks of crinoline and sophistry, and blandishments, smiles and tears." Caples followed this prediction with a few lines of misogynistic poetry: "Graceful styles, and winning wiles, Charms replete, your hero greet; In dulcet strains, the siren reigns." Id. However, Alphonse P. Vacquerel later responded that "when I have seen the lobbying that has been done in this Convention, I do not know if lobbying done by women could be more obnoxious." Id., Feb. 14, 1879, at 1366.

which is her birthright."³⁶ Thus was an effective dodge of the issue cleverly recast as a perpetual menace that even those who supported woman suffrage would want to avoid.³⁷

Caples' report, with its overblown, illogical rhetoric, made him an easy target for the likes of Laura deForce Gordon, whose oratorical style was characterized as "Websterian."³⁸ Caples trotted out the usual essentialist arguments against female enfranchisement with a flourish, contending that voting and "the co-relative obligations of citizenship" were "utterly incompatible with the moral, social, and physical conditions of women in civilized society," and that suffrage would drag woman down from her "lofty sphere" which was "her realm by the patent eternal of Nature and Nature's God." He then concluded with a call against "desecrat[ing] the temple wherein man's noblest, highest, holiest aspirations are crystallized in that sweetest word of human tongue - home."³⁹

³⁶"Minority Report" at 408. Caples remained steadfast throughout the convention in his opposition to women's rights, causing the Sacramento Record-Union, to remark later, "we are sorry that a Sacramento member, Dr. Caples, should have earned the sad distinction of opposing the proposition for the emancipation of women, and still more sorry that he should have put forward so lame and impotent an argument. . . . It is time Dr. Caples recognized the fact that every argument of this kind against female suffrage is equally an argument against male suffrage, and that all such arguments must land those who employ them in a defense of autocratic government and the extinction of the liberties of the masses. . . . The men who refuse women the suffrage while pretending special reverence for their sex, are the worst of impostors. . . . [W]e did not expect that a Convention such as this would deal liberally with such a question." "Woman Suffrage," Sacramento Record-Union, Jan. 15, 1879, at 2.

³⁷The San Francisco Chronicle echoed Caples' dire prediction, opining that the provision would cause the issue of woman suffrage to "become a standing vexation" in the legislature. Babcock, "Constitution-Maker," at 881 n.116, quoting San Francisco Chronicle, Nov. 10, 1878, at 4.

³⁸Id. at 867.

³⁹Debates, Nov. 14, 1878, at 408.

About a week after the issuance of the minority report, the notorious delegate David S. Terry, former Chief Justice of the California Supreme Court and a good friend of Gordon, wrote to her that he had approached John Eagon, chair of the Suffrage Committee and signatory to the majority report, about the possibility of a debate between her and Caples. Eagon was not averse to the idea, believing that Caples would accept the challenge only to be ultimately bested by Gordon.⁴⁰ Following Terry's suggestion, Gordon apparently did issue a public challenge to Caples, and San Francisco Workingman delegate Charles C. O'Donnell attempted to facilitate the meeting. However, O'Donnell was ruled out of order when he moved, on the convention floor, to proffer use of the hall to the two, and the debate never did occur.⁴¹

⁴⁰Babcock, "Constitution-Maker," at 882. Eagon had served two terms on the Assembly, and two in the Senate, prior to the constitutional convention, while Caples never held elective office before or after the convention.

⁴¹Id. at 883 and n.124; Debates, Dec. 4, 1878, at 561. It is unclear whether O'Donnell was sincere in this attempt, and regardless, Caples was not amused. He complained later, "My facetious friend from San Francisco, Dr. O'Donnell, appears disposed to have a little fun at my expense. . . . I will state that I know nothing at all of his resolution." Id. Consistent with Eagon's assessment, the San Francisco Post believed that "Caples [would] stand a poor chance" against Gordon. Babcock, "Constitution-Maker," at 883 n.124.

Caples' more general derogation of O'Donnell's character, "it seems to be his peculiar department to make fun in this Convention," may not have been simply sour grapes. Later in the month, O'Donnell was criminally charged with medical quackery and having performed abortions. (Oddly enough, the charges occurred as a result of O'Donnell's unsuccessful libel suit against the San Francisco Chronicle, wherein the newspaper defended itself by proving the truth of its attack on O'Donnell.) Debates, Jan. 9, 1879, at 965. With even his own party seeking to disassociate itself from him, a committee was appointed to investigate the charges and recommend whether O'Donnell should be expelled. Id., Dec. 27, 1878, at 835. Having been unconvinced of the falsity of the charges, the committee recommended expulsion. However, rather than take a stand, the delegation as a whole chose to indefinitely postpone the matter. Id., Jan. 9, 1879, at 965-966. No doubt O'Donnell's absence from the convention for the next few weeks served to diffuse the issue. Meanwhile, it was to the women's benefit that O'Donnell was not expelled, as he voted in favor of their political rights in February.

By mid-December, the women's lobby had retreated home from Sacramento, on the basis that discussion of the Suffrage Committee's recommendation was not scheduled to come up in the normal course of business until January.⁴² However, on Christmas Eve, the women, as well as a large number of the delegates who also were not in attendance, were caught off guard when Henry Edgerton moved to discuss the report.⁴³ Although his motion passed, with barely a quorum present, various pro-suffrage delegates complained that the discussion was untimely and that the quality of the debate would suffer from unfair surprise.⁴⁴ As a result, a motion to end the debate was made twice, and it carried on the second try.⁴⁵

Debate on female enfranchisement was extensive, occurring not only on December 24th, but also on January 13th and 14th, and on February 13th and

⁴²Babcock, "Constitution-Maker," at 884. Delegate Thomas McFarland complained, "[w]hat right, what justice is there in passing over some four or five less important matters and taking up this?", noting that reports of the committees on Education, Revenue and Taxation and others, should have been considered first. Debates, Dec. 24, 1878, at 833.

⁴³It is unclear why Edgerton so moved. Babcock attributes his motion to "an attempted anti-woman suffrage coup," however Edgerton favored women's rights at the convention, and as a legislator had been responsible for introducing bills advantageous to women. Babcock, "Constitution-Maker," at 884. However, one delegate, William P. Grace, implied that the timing of the discussion was part of an anti-suffrage strategy, when he complained that "the manner on which this subject has been treated by this Convention, and by some people who are inclined to sneer at the right of woman to suffrage, is not creditable. I consider it taking mean advantage." Debates, Dec. 24, 1878, at 833.

⁴⁴Babcock, "Constitution-Maker," at 884; Debates, Dec. 24, 1878, at 832-833 (remarks of Mr. Blackmer, Mr. Eagon, Mr. McFarland and Mr. Grace). At the opening of the session that day, 101 of the 162 delegates were in attendance. After awhile, twenty-one more members disappeared, although a quorum remained. Id., at 831. No doubt even more members drifted away before the Suffrage Committee report was taken up, causing some to question whether a quorum was present at that point.

⁴⁵Id., at 833 (motion by Blackmer, lost; motion by Eagon, carried).

14th.⁴⁶ The discussion was punctuated by a number of amendments to the Suffrage Committee's proposal which ran the gamut, from granting impartial voting rights by virtue of this constitution,⁴⁷ to retaining the status quo of male-only suffrage.⁴⁸ In the middle, a variety of compromises were suggested, in addition to the committee's recommendation.⁴⁹ Some called for granting partial suffrage, to only certain women, and/or for only certain elections, e.g., to allow women, or maybe only mothers, to vote in school elections, or to impose property qualifications.⁵⁰ Finally, an interesting proposal to permit women to vote on whether they wanted the suffrage was put forth.⁵¹

Many if not most of the participants in the debate had never been elected to office before, not surprising inasmuch as they were members of the recently-formed Workingman Party. As a result, they had not been in on the woman

⁴⁶The San Francisco Chronicle claimed, in the wake of the January debates, that the woman suffrage question overshadowed all others at the convention. "Woman Suffrage Along the Line," Ballot Box, Feb., 1879, at 4.

⁴⁷Debates, Dec. 24, 1878, at 832 (by Mr. Blackmer).

⁴⁸Id., Jan. 13, 1879, at 1003 (by Mr. Tinnen).

⁴⁹J.J. Ayers moved to revive the committee's recommendation of legislative empowerment, after it had been defeated. Debates, Feb. 13, 1879, at 1363-64. In addition, George Steele proposed requiring a 2/3 vote of the legislature in order to grant suffrage. Id., Jan. 14, 1879, at 1015.

⁵⁰Id., Jan. 14, 1879, at 1013 (by Walker); id., Feb. 14, 1879, at 1369 (by Steele). Id., Jan. 14, 1879, at 1013 (by McFarland, identical to his amendment offered on Oct. 9, 1878); id. at 1016 (by Stuart).

⁵¹Id. at 1016 (by Mr. Howard).

suffrage discussions which had occurred in previous legislative sessions.⁵² This may have made them more eager to express their views, which were mostly favorable towards female enfranchisement. Meanwhile, one delegate who was also new to office-holding, Dr. Caples, spoke most at length and stood nearly alone in opposition. However, this should not be taken to indicate that support was wide-spread; rather it appears that those opposed to woman suffrage were content to let Caples carry on, secure in the knowledge that they were in the majority, and not feeling the need to sway others to their position. Most likely, they were glad to have attention focused on the unsophisticated Caples, so that they could avoid going on record. Meanwhile, Caples may have acted unwittingly, but in addition he had less to lose than those delegates with continuing political ambitions, inasmuch as his political career began and ended with this convention.

Those Workingmen who spoke in favor of female enfranchisement did so in terms of simple justice.⁵³ But this sense of justice, if not imbued with racism, at least was based on a belief that some groups were more "fit" for enfranchisement than others. As Eli T. Blackmer explained, "I am not pleading

⁵²The following participants had never held office prior to being elected to the convention delegation, and most never held elective office again: Beerstecher, Blackmer, Grace, O'Sullivan, Vacquerel, Ringgold, and Lindow, all of San Francisco; J.J. Ayers, of Los Angeles; Caples, of Sacramento; Steele, of San Louis Obispo; and Wickes, of Nevada City.

⁵³Babcock, "Constitution-Maker," at 884, 887. Babcock noted that "[n]ot one of the conservative lawyers spoke against impartial suffrage, either in December (when many were missing from the floor) or later when they voted overwhelmingly to defeat it." *Id.* at 884. The deceptiveness of the debate was not lost on one pro-suffrage delegate, who proclaimed, "I know how settled and pronounced is the opposition here to woman suffrage - that it cares not for discussion, and shuts its ear to argument." *Debates*, Feb. 14, 1879, 1366 (remarks of Mr. McFarland).

for a universal suffrage, but for an impartial suffrage, that whatever restrictions are [or are not] placed upon any class, shall [or shall not] be placed on all alike,"⁵⁴ arguing that women "are put upon a level in this country with no class of people but the despised Chinaman."⁵⁵ Thus, delegates saw injustice in prohibiting female suffrage, if Chinese, or other "unfit," men were allowed to vote. William Grace implored, "If we give negroes, and Chinamen, and everything else, a right to vote, and proclaim the universal brotherhood of man and fatherhood of God, why in the name of God don't you give [women] equal rights?"⁵⁶ And Thomas McFarland made the same point: "Most [women] are native born citizens of good character and repute, and of the Caucasian race. How, then, does it come, sir, that they have no more political rights on this free American soil, on which they and their ancestors were born, than Chinamen or State prison convicts?"⁵⁷ Beliefs such as these spurred Alphonse Vacquerel to offer an amendment late in

⁵⁴Id., Jan. 13, 1879, at 1005.

⁵⁵Id.

⁵⁶Id., Dec. 24, 1878, at 833.

⁵⁷Id., Jan. 13, 1879, at 1004. See also id., Feb. 14, 1879, at 1366 (remarks of Mr. O'Sullivan). This is not to say, McFarland hastened to add, that he was in not in favor of restrictions on Chinese immigration; he was only citing the Chinese as an example. Id., Jan. 13, 1879, at 1004. McFarland appeared to have in mind, in considering the fragility of women's civil rights, those few battles which they had won in the legislature, such as the Woman Lawyer's Bill. As McFarland noted, these "civil privileges" were temporary only; "as she has had no hand in creating them, so would she be helpless to prevent their destruction." Id.

the debate, requiring the legislature to enfranchise women if and when the courts granted "Mongolians the right of citizenship."⁵⁸

While the comparative concern over women's lack of enfranchisement did not necessarily imply racism, the belief that women's votes could counteract Chinese votes certainly did. Vacquerel spun out a scenario wherein the Fifteenth Amendment was interpreted to provide for Chinese naturalization. Accordingly, about 25,000 Chinese would be eligible to vote in San Francisco alone. Meanwhile, Vacquerel noted, white male voters, numbering around 30,000, were divided into three parties. As a result, "those twenty-five thousand Chinese would always be masters at the polls, and us, where will our strength be? But if you allow ten or fifteen thousand women to vote, will they not overbalance the Chinese power and give us a majority? . . . I offer you, gentlemen, a legal and constitutional way to prevent the Chinese power in this state." And to make sure that his point was understood, he challenged his fellow delegates: "the records of this vote will prove if really those who pretend they are opposed to Chinese are in earnest."⁵⁹

⁵⁸Id., Jan. 14, 1879, at 1018. The motion was ruled out of order on the basis that "[t]hat matter has already been acted upon." Id.

⁵⁹Id. at 1010. By the time the issue of woman suffrage surfaced again in the convention, one month later, Congress had enacted federal restrictions on Chinese immigration, and Vacquerel backed away from supporting female suffrage as an antidote to Chinese suffrage. Instead, he now supported suffrage on social justice grounds. Id., Feb. 14, 1879, at 1365-66. Meanwhile, Babcock attributes Volney Howard's proposal (discussed below) to his interest in "women's votes someday offsetting those of the Chinese." Babcock, "Constitution-Maker," at 889.

Unlike the situation where an individual amendment proposal is placed before the voters, this was a setting in which a huge number of provisions could be voted up or down only in total. As a result, delegates could retreat to the procedural position that inclusion of woman suffrage would impede ratification. For some, this provided a reason to oppose Blackmer's proposal granting suffrage outright, but maybe not a compromise position.⁶⁰ For others, any mention of woman suffrage, including the committee's proposal, could sink the enterprise, "given the large element of the people of this State who are opposed to woman suffrage." One delegate direly concluded, "At this moment I do not think we can afford to give the women a chance at the expense of this new Constitution."⁶¹

These delegates' positions were strengthened by a belief that they had not been elected in order to propose the enfranchisement of women. According to Morris Estee, "the people who elected us here had no idea that it would be one of

⁶⁰Debates, Jan. 14, 1879, at 1015 (remarks of Mr. Grace); id. at 1014 (remarks of Mr. McCallum)

⁶¹Id. at 1011 (remarks of Mr. Freud). While Jacob R. Freud was reluctant to reveal his views on the subject of female enfranchisement, another delegate, Morris M. Estee, who also believed that inclusion of any mention of the issue would imperil ratification, was himself opposed. Id. at 1014-1015.

In response, Steele questioned the strength of the anti-suffrage sentiment among the people, and wondered how these delegates could be sure that the addition of woman suffrage "would load down the Constitution. Besides, is it not fair to suppose that the thousand and more active and determined men and women throughout the State, who favor woman suffrage, would overcome the apathy and indifference of the many who think they are opposed to it without any, or a good or sufficient reason therefore. In which event it would become an element of strength instead of weakness." Id. at 1010.

the questions that we would pass upon."⁶² As a result, "the people of the state have not discussed the subject, nor are they prepared at this time to instruct their delegates in this Convention upon these questions."⁶³ While such a situation caused little difficulty for those, like Estee, opposed to woman suffrage, it presented a dilemma for the likes of John G. McCallum, who was personally in favor of immediate enfranchisement. Thus, he concluded, "I recognize the duty of acting in a representative capacity upon questions of such magnitude. Therefore, I could not vote for [Blackmer's amendment], because in doing so I would not reflect the sentiments of my constituents."⁶⁴

But this was just the reason to support the Committee's compromise, according to its chairman. Eagon contended that the legislature was the proper place to decide the issue because it was "somewhat a new proposition to the people."⁶⁵ George V. Smith and William Grace agreed that the proviso would allow for female suffrage to come to pass only when the public wanted it, and they

⁶²Id. at 1014 (remarks of Mr. Estee). Yet, when women had pressed suffrage claims in the previous few legislative sessions, and especially the issue of a constitutional amendment, one of the reasons given for putting off consideration of the matter was the strong possibility that a constitutional convention would soon be called, where the claim could more appropriately be made.

⁶³Id. However, Blackmer contended that his constituents elected him knowing that he would advocate for woman suffrage, even if they themselves were opposed. Id., Jan. 13, 1879, at 1005. And further, he argued that, as for the belief that there was no "great pressing demand made upon this Convention for this change; . . . I beg to call attention to the fact that we have had petition after petition sent up here upon this very question from many portions of the State." Id.

⁶⁴Id., Jan. 14, 1879, at 1014.

⁶⁵Id., Jan. 13, 1879, at 1004.

saw additional merit in the fact that the onerousness of the amendment process could be avoided.⁶⁶

All this naturally led to the time-worn contention that women did not actually want the vote, notwithstanding the "nearly three thousand" people who had petitioned the convention for female enfranchisement.⁶⁷ In turn this led delegate Volney Howard, of Los Angeles, to propose a test for that empirical assumption: that the constitution require a special election to be held, where only women would vote, on whether they wanted to vote. According to Howard's plan, if a majority of white adult women in the state voted in favor of suffrage, they would be enfranchised, however any woman not partaking in the election would be counted as a "nay" vote.⁶⁸ Howard was opposed to woman suffrage, but claimed that he would not stand in the way if women really wanted to vote. Yet, believing that few women would actually go to the polls, he undoubtedly thought that this proposal risked little to make a big point.⁶⁹ Meanwhile, those in favor of

⁶⁶Id., Jan. 14, 1879, at 1013 (remarks of Mr. Smith), and 1015 (remarks of Mr. Grace). However, Grace took issue with Eagon's characterization of this as a new issue. Id. at 1015 ("I say that it is not a new question. It has been discussed for the last twenty-five years, all over the country.").

⁶⁷Id., Dec. 24, 1878, at 832 (remarks of Mr. Blackmer). To this argument Grace deftly responded, "You say women do not want to vote. Then why are you so crazed about it?" Id., Jan. 14, 1879, at 1015.

⁶⁸As Babcock put it, Howard's solution to treat a nonvoting women as "nay" votes was meant to get around a dilemma created by "the terms of a debate which treated voting as a loss of virginity; a woman could not try it only once." Babcock, "Constitution-Maker," at 888.

⁶⁹Debates, Jan. 14, 1879, at 1012. Mr. Estee was another who was opposed to woman suffrage but willing to support Howard's proposal. Id. at 1014. Meanwhile, the petitions submitted to the convention were again pointed to as counter-evidence of Howard's belief. Id. at 1013 (remarks of Mr. McFarland). Further, James O'Sullivan argued that "[w]omen who are

suffrage were split over this unusual proposition. Some saw it as an acceptable compromise,⁷⁰ while others believed any results of such a poll were irrelevant to the issue of the right to vote.⁷¹ And others contended that the proposal was unfairly rigged in any event, inasmuch as women would be intimidated from voting (and thus voting in favor) in such an election.⁷² Thus, despite the fact that

taxpayers will certainly avail themselves of an opportunity to help in choosing their Assessors and Tax Collectors." Id., Feb. 14, 1879, at 1366.

⁷⁰Id., Jan. 14, 1879, at 1013-1014 (remarks of Mr. McCallum); id. at 1014 (remarks of Mr. Shafter). But James Shafter, in supporting Howard's proposal, called Howard's bluff: "[Howard] concedes a fact and then denies its application. He says distinctly that the women of this State are the most competent to judge whether they ought to have the right. Well, sir, that is conceding the whole question. What greater statesmanship is required than to solve that question directly?"

⁷¹Id. at 1013 (remarks of Mr. McFarland) ("If it were true that [women] did not want to vote, it would be no position to take, logically. The principle of law is to compel people to do duties that they desire to shun."); id., Dec. 24, 1878, at 832 (remarks of Mr. Blackmer) ("if there is only one woman who feels herself aggrieved by the political position in which she finds herself, it is but right and just that she have the privilege that she asks"); id., Jan. 14, 1879, at 1011 (remarks of Mr. Ringgold) ("I consider the proposition here a fraud.").

The debate in the convention was foreshadowed in the press in November, as the Stockton Independent proposed the idea of leaving the issue to be decided by the women themselves. Thinking itself quite progressive, that paper asked, "What has the [San Jose] Mercury and other advocates of female suffrage to say in reference to the practicability and fairness of our proposition." The Mercury did not mince words as it shot back, "There is no fairness whatever about it. . . . It is not a question of majorities but of inherent right - the right to representation or no taxation." San Jose Weekly Mercury, Nov. 14, 1878, at 2, with reprint from the Stockton Independent.

⁷²Debates, Jan. 14, 1879, at 1013 (remarks of Mr. McFarland); id. at 1015 (remarks of Mr. Grace); id. at 1011 (remarks of Mr. Steele). McFarland remarked, "if the amendment was adopted it would not be a fair test, and for this reason: These gentlemen who oppose woman suffrage would tell their wives and daughters: 'You ought not to want to vote. You are going out of your sphere. It is not ladylike, and if you want to vote you will lose my respect.'" Grace put it similarly: "[Women] would have to vote under restraint. It takes courage for a woman to come out for woman suffrage. Her friends and relatives have an undue power over her, and try to make her believe that it is humiliating, and that she ought to be ashamed to vote." And Steele, remarking more generally, cut to the heart of the matter: "it is ridiculous to assume that because all are not joining in the cry for it that they therefore oppose it, for it requires unusual courage for a woman to proclaim herself as favorable to woman's enfranchisement, until at least there is some prospect of obtaining it. The comfort of her individual life, and her social consideration, depends on those who hold the undue power. Her position is like the tenant who votes against his own political interests to please his landlord."

Howard's idea appealed in a perverse way to some anti-suffragists, it went down to defeat.⁷³

If the debate could not be won on the prediction that in reality women did not want the vote, those opposed could turn to the dire consequences, to the polity, to society, to the family and to women themselves, of female enfranchisement. At this point, the Wyoming experiment became pertinent. Blackmer read from the 1873 annual message of the territory's governor, who, while noting that at that point women had been voting in Wyoming for four years, resoundingly proclaimed that "'our system of impartial suffrage is an unequalled success.'" He then read from a speech delivered by a representative to the annual AWSA meeting. Noting the "wild west" reputation of Cheyenne, she found that "'the orderly voting, and the almost entire freedom from corruption, are due almost entirely to the woman suffrage. Formerly, irresponsible persons were in a majority Now, the wives, mothers, and sisters of property owners counteract the influence of the floating population.'"⁷⁴ But Blackmer's data was countered by suffrage opponent J.A. Filcher, who read from an interview of the former Receiver of the Public Land Office in Cheyenne. This man had found Wyoming's experience to be "'an utter failure,'" claiming that the initial high turnout of female voters dwindled over time, when "'the better class became disgusted with the

⁷³Id. at 1016. But this was not before an amendment to the amendment was attempted, to restrict further the eligible pool of female electors, to those who paid taxes within the past year. This was rejected. Id. (amendment by Mr. Stuart).

⁷⁴Id., Jan. 13, 1879, at 1005; id., Jan. 14, 1879, at 1012.

operation of the law, and quit voting.’⁷⁵ In turn, George Steele quoted from the observations of a Wyoming Supreme Court judge, on both the effects of women on voting and the effects of voting on women:

‘The general influence of woman suffrage has been to elevate the tone of society, and to secure the election of better men to office . . . I think I see already a marked change in our women, and it is a change for the better. . . . [T]hey appear more earnest, more serious, less devoted to fashion and frivolous pursuits.’⁷⁶

However, while the act of voting itself might not cause so much trouble,⁷⁷ it was the other aspects of citizenship which were portrayed as problematic when engaged in by women. Delegates expressed concern over women serving as jurors and running for office, rights and duties they apparently assumed would run with any grant of enfranchisement.⁷⁸ Caples spun out the scene, and a newspaper reporter supplied the color: "your wife a candidate for the Legislature, stumping the county. . . . [O]ne daughter locked up in a jury-room; the other daughter working on the road; you at home rocking the cradle, and reading a newspaper full of slanders and innuendoes against your wife." And should the wife be

⁷⁵Id., Jan. 14, 1879, at 1012. Pro-suffragist Steele remarked: "I presume, from the tenor . . . that he was some unfortunate fellow who had been defeated for an office in that Territory by the woman vote." Id. at 1015.

⁷⁶Id.

⁷⁷As John T. Wickes put it, "I do not see why a woman cannot take perhaps fifteen minutes once a year and go to the polls and vote." Id. at 1011.

⁷⁸Steele questioned this logic, arguing instead that women were citizens, and thus "entitled to the rights, privileges, and immunities which inure to the citizen." According to this thinking, there was no basis on which to deny women the vote. Id. at 1010. However, the parameters of women's citizenship remained undetermined even into the twentieth century. Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830-1934" 103 American Historical Review 1440 (1998).

elected, fellow male legislators "would be clustering around her like a bouquet."⁷⁹ He asked, "Do you like the picture? [Laughter.] . . . Wouldn't you wish you never had a wife - never had a female child?"⁸⁰ But J.J. Ayers, recognizing that women were already exercising correlative rights of citizenship by holding appointive office, pointed out the folly of refusing women suffrage under such circumstances:

What legitimate influence can women bring as long as they are disfranchised? They can only supplicate through their male friends for appointments from those who depend for their positions upon votes. Beyond that [women] may exercise the blandishments of their sex, and the denial to them of the vote is to give public sanction to the encroachment of an immoral temptation.⁸¹

The proposals which would have provided for impartial suffrage, either directly or through future action, went down to defeat. Blackmer's amendment came up for a vote first.⁸² Immediately following, the Suffrage Committee's

⁷⁹Debates, Feb. 14, 1879, at 1367.

⁸⁰Id., Jan. 13, 1879, at 1007. To this, one delegate curtly replied, "Serves you right." Id. (remark of Mr. Barton). Another remarked, that, while Caples might not wish to hear his wife speak in public, "[m]ore than likely she would not care to hear him, unless he would make a better speech than he did." Id., Jan. 14, 1878, at 1015 (remarks of Mr. Steele). Caples was the only delegate to speak at great length in categorical opposition to female suffrage. His oratory caught the attention of his hometown newspaper, the Sacramento Record-Union, which remarked that it was "sorry that [he] should have earned the bad distinction of opposing the proposition for the emancipation of women, and still more sorry that he should have put forward so lame and impotent an argument." Further alluding to Caples, the paper charged, "The men who refuse women the suffrage while pretending special reverence for their sex, are the worst sort of impostors." "Woman Suffrage," Sacramento Record-Union, Jan. 15, 1879, at 2.

⁸¹Debates, Feb. 14, 1879, at 1364.

⁸²Id., Jan. 14, 1879, at 1013.

proviso was voted down, garnering only 27 of 96 votes.⁸³ The tinkering then began. Steele proposed to modify the committee's provision, by requiring a 2/3 vote of the legislature in order for women to be enfranchised.⁸⁴ This too was defeated.⁸⁵ Howard's "half-baked" proposal went down as well.⁸⁶ A month later, J.J. Ayers attempted to revive the Suffrage Committee's proviso, beating back an effort to cut off debate.⁸⁷ Pro-suffrage delegates seemed to believe that the Committee's proviso may have gotten lost in the attempt to insert woman suffrage into the constitution more directly. Thus, there was hope that the delegates' attention could be refocused on the innocuousness of this provision.⁸⁸ This time, pro-suffragists required the delegates to go on record with their vote. The

⁸³Id. Actually, the convention was voting on an amendment proposed by Mr. Tinnen, to eliminate that portion of the proposed Article. The vote was 69 in favor, 27 opposed. Id.

⁸⁴Id. at 1015. Earlier, McCallum had spoken in favor of this plan, objecting to "a mere majority of the Legislature" being able to alter the constitution. Id., Dec. 24, 1878, at 833; id. Jan. 14, 1879, at 1014. With this super-majority requirement, woman suffrage "never will occur until public sentiment shall demand it, and demand it by a decided majority." Id., Dec. 24, 1878, at 883 (remarks by Mr. McCallum).

⁸⁵Id., Jan. 14, 1879, at 1016.

⁸⁶See Babcock, "Constitution-Maker," at 888; Debates, Jan. 14, 1879, at 1016.

⁸⁷Debates, Feb. 13, 1879, at 1363-1364; id., Feb. 14, 1879, at 1365. Even though this proviso had been extensively debated the month before, the vote to preempt debate was not even close, with only 45 in favor and 76 opposed. However, this strategy was nevertheless criticized by Vacquerel, who "protest[ed] against the gagging of a few." Id.

⁸⁸McFarland argued, "The action of this body heretofore shows that no positive provision for woman suffrage can be carried. The friends of the measure, therefore, now only ask that the original provision . . . be adopted." Id. at 1366.

measure was again defeated, 56-66,⁸⁹ causing Wickes to mourn, "We should have signalized this day - St. Valentine's Day - by the passage of Mr. Ayer's [sic] amendment. It is a burning shame that we did not."⁹⁰

Another tack was attempted - to enfranchise only certain women under specified circumstances. Thus, McFarland proposed the amendment which he had sent up in the opening days of the convention, that the vote be granted to unmarried women owning one thousand dollars worth of property, and married women owning two thousand dollars worth of separate property.⁹¹ His purpose was to introduce female enfranchisement gradually, by allowing the women who are "best qualified to vote" to do so.⁹² While recognizing that his proposal would go towards eliminating the injustice of taxation without representation, he was more committed to finding the most practical way to obtain gradual

⁸⁹Id. at 1368. The Debates show the tally as 55-67, however this reflects the fact that Steele changed his vote from "aye" to "nay" in order to be eligible to move for reconsideration. However, he never did so move. Id. Thus, if six delegates had voted the other way, or if certain friendly delegates had been in attendance, the motion would have carried. (The vote was actually closer than Babcock represents. Babcock, "Constitution-Maker," at 894 n.163). Of those absent, Blackmer and McCallum certainly would have voted in favor, and Terry, close friend of Laura deForce Gordon, probably would have as well. Stuart may have voted in favor, while Estee would have voted against. Interestingly, Howard voted against the proviso. Id.

⁹⁰Id. at 1370.

⁹¹Debates, Jan. 14, 1879, at 1013. McFarland's proposal also incorporated the Suffrage Committee's proviso.

⁹²Id. However, McCallum took issue with McFarland's assumption that female property-owners were presently the best qualified to vote, arguing that mothers actually take a greater interest in politics. Id. at 1014.

enfranchisement.⁹³ To that end, he considered but discarded the idea of an educational qualification, as it would be impossible to administer fairly.⁹⁴ But "women who have had control of property . . . have necessarily had their minds attracted . . . to the laws of business and the public laws of the country," and thus would be most prepared to vote," according to McFarland.⁹⁵ The proposal too went down to defeat.⁹⁶

⁹³Id. Other delegates relied on the taxation/representation argument. See id., Dec. 24, 1878, at 883 (remarks of Mr. Grace); id., Jan. 13, 1879, at 1004 (remarks of Mr. Steele); id., Jan. 14, 1879, at 1011 (remarks of Mr. Ringgold); id., Feb. 14, 1879, at 1366 (remarks of Mr. O'Sullivan).

Caples was prepared with a response. He noted that the cry of no taxation without representation was raised at a time when male suffrage was far from universal. Moreover, while he conceded that women did pay taxes, he saw this as a fair exchange for "the fact . . . that her sex is the equivalent of a patent of nobility" in this country. According to Caples, the right to suffrage rested on the ability to take up arms, and thus property ownership was irrelevant. Moreover, Caples asserted, "property, as property, never has voted anywhere." Id., Jan. 13, 1879, at 1006. See Carolyn C. Jones, "Dollars and Selves: Women's Tax Criticism and Resistance in the 1870s," 1994 University of Illinois Law Review 265, 308 (discussing use of the taxation metaphor by propertied women who sought the vote, and arguing that the taxation metaphor, invoking as it did the Revolutionary Era, "suggested the acceptability of partial suffrage" for women, not merely of a "superior" class, but also of a superior lineage and ethnicity). Jones' study is one of the only modern examinations of the partial suffrage strategy employed by advocates of female enfranchisement in the nineteenth century.

⁹⁴Debates, Jan. 13, 1879, at 1006. In an era when few held formal academic credentials, McFarland wondered, "Would you have a select committee of school ma'ams and politicians to decide who were entitled to vote? That would be a power too great and dangerous to put into the hands of any one."

⁹⁵Id. At the same time, given the ability of the legislature to extend suffrage impartially, other women would begin to prepare themselves for enfranchisement. Assumed lack of preparedness was also McFarland's reason for discriminating between married and unmarried women. According to McFarland, "The married woman having separate property, of course has the advice and counsel of her husband towards the management of it. She is not quite so apt to pay the same attention to it as the single woman who stands alone in the world." Less diplomatically, McFarland indicated that "the balance your women . . . are merely ornaments in your households," and thus not yet qualified to vote. Id.

⁹⁶Id., Jan. 14, 1879, at 1016.

The following month, in something of a last-ditch effort, Blackmer and Steele suggested that women be granted "school suffrage," that is, be allowed to vote in elections for educational officers. At the same time, they called for constitutionalizing the right that women had won in 1874, to run for those offices.⁹⁷ This proposal garnered the support of one delegate usually opposed to woman suffrage, Charles J. Beerstecher, who noted that it would "wip[e] out an absurdity which allows a woman to hold an office for which she is not qualified to vote."⁹⁸ But another delegate, Rolfe, was quick to point out the procedural difficulties with this idea: it would require separate boxes for these restricted ballots and moreover, the amendment did not provide for registration of women, when an election was due to occur prior to the next meeting of the legislature.⁹⁹ But Rolfe's primary concern, shared by perennial suffrage opponent Thomas Laine, was that it would allow the wrong women ("budding old maids" and "public prostitutes") to vote, while it was, according Laine, generally known that "our

⁹⁷Id., Feb. 14, 1879, at 1369.

⁹⁸Id.

⁹⁹Id. (remarks of Mr. Rolfe).

mothers will not be going to the polls."¹⁰⁰ The proposal was rejected by a wide margin, 73-42.¹⁰¹

While the Suffrage Committee's proviso, as well as the various amendments offered by delegates, stood defeated by the Committee of the Whole as of February 14th, the convention had yet to conclusively vote on the form that Article II, Section 1 of the proposed constitution would take. Delegates in favor of female enfranchisement let it be known that "an open expression of views by the women of [Sacramento] would aid the cause."¹⁰² Forty women answered a call published in the sympathetic Sacramento Record-Union, a few days later, to lay plans for a last-ditch lobbying effort. If the evidence is only suggestive that the springtime gathering in Sacramento consisted of those new to the cause, that regarding this meeting is conclusive, as the newspaper reported "a total absence of the too frequent rant and denunciation which characterized the suffrage meetings of a few years ago." And one participant remarked that "she respected the pioneers in the suffrage movement, but there had been too much talk and too

¹⁰⁰Id. (remarks of Mr. Rolfe and Mr. Laine). Rolfe, however, was not as pessimistic as Laine, and conceded that he would support the proposal if it restricted the voting pool to mothers and female guardians. Moreover, Rolfe was willing to restrict educational suffrage to fathers and male guardians as well. Id. at 1369-70. Jones notes that in other jurisdictions, given the direct local taxation of female property holders for the support of schools, school suffrage proposals often were linked to taxpaying. Here, on the other hand, it appears that the separate spheres metaphor predominated. See Jones at 303-305.

¹⁰¹Debates, Feb. 14, 1879, at 1370.

¹⁰²"Suffrage," Sacramento Record-Union, Feb. 19, 1879, at 4.

little action already."¹⁰³ The women expressed great enthusiasm not only for the immediate task at hand, but for forming a permanent "women's club" to advocate for female suffrage. While it is unlikely that these women were unaware of the CWSA, clearly they felt no alliance with the organization, and quite possibly they considered it defunct or at least impotent.¹⁰⁴ An organization was quickly effected, but immediately disagreement arose over how to influence the convention while in the little time remaining. One of the very few attendees with a history in the California movement suggested a traditional show of force at the Capitol, but the more conservative leaning of this group showed through in the response that "[t]o get to the Capitol in a body would not be dignified, nor would it impress their opponent."¹⁰⁵ What was decided instead was to mount a door-to-

¹⁰³Id. Activists such as Sarah Knox, Laura deForce Gordon and Clara Shortridge Foltz would have no doubt taken great offense at this characterization, given the significant amount of lobbying, in Sacramento at that, which they had done over the course of the decade. These women were not unknown to the Sacramento group. However, when one member who did have ties to the "pioneers" suggested that Foltz and Gordon be invited to the group's next meeting, and that that meeting be held in the Senate chamber, another member found the suggestion "ill-advised." Id.

¹⁰⁴Of the many names associated with this new call to action, only two stand out as having been a part of the statewide movement in its heyday earlier in the decade: Miss L.J. Kellogg, M.D. and Mrs. Lavinia G. Waterhouse. Both of these women played a very active roll in the initial meetings of this Sacramento group, no doubt because of their past experience.

Meanwhile, the paper reported of the others, "there seemed to be much embarrassment among the ladies - the desire to discuss some subject, but a timidity in doing so," underscoring their neophyte status. Id. A week later, in reporting on an increased attendance, the Record-Union, remarked, in a positive way, that many of the women present had "never before taken public action upon the woman suffrage question." "The Women Moving," Sacramento Record-Union, Feb. 21, 1879, at 3.

¹⁰⁵Id. The "old-timer," Mrs. Lavinia G. Waterhouse, continued to advocate for a mass meeting, and thus the issue was put to a vote. It was defeated, almost unanimously.

door petition drive, in order to demonstrate that ordinary women, and not just a few vocal activists, desired the vote.¹⁰⁶

The Sacramento Record-Union publicized the drive a few days later, but reiterated its stand, that whether and how many women desired the vote was irrelevant to the issue, which, as the paper saw it, was the denial of a right.

It is the duty of a Constitutional Convention to formulate and protect public rights; and woman suffrage is one of those rights If the Convention refuses to recognize this right, no doubt it has the brute force to do so, . . . [but] to take such a position is to take the position of cowards and bullies.¹⁰⁷

The newspaper encouraged the women to continue with their petition drive, urging them to do so not with "false shame," but rather "boldly and openly" without "abnormal methods of solicitation."¹⁰⁸ In counselling the women to claim suffrage as a right, and not solicit it as a favor, the newspaper may have recognized the relative timidity with which the neophytes had approached the issue.

By the time the ad hoc organization met a week later, 304 signatures had been obtained. Canvassers optimistically reported only a small minority of women unwilling to sign the petition, and believed that they could garner many more signatures with more time.¹⁰⁹ But time was running out, and the group had to

¹⁰⁶Id.

¹⁰⁷"Woman Suffrage," Sacramento Record-Union, Feb. 20, 1879, at 2.

¹⁰⁸Id.

¹⁰⁹"The Women Moving," Sacramento Record-Union, Feb. 21, 1879, at 3. Another 700 signatures were gathered in the next few days. Babcock, "Constitution-Maker," at 896.

decide on the best way to get its views before the delegates, especially those who were unfriendly to the cause. One suggestion was to simply present the petition to the convention, but others felt that more direct appeals were needed. About a fourth of the group volunteered for a lobbying effort, yet there remained resistance to lobbying in the convention chamber. One woman with ties to the early movement doubted that opponents of the cause would agree to meet socially with the women, but it was agreed that the lobbying would take place away from the convention. Meanwhile, the group settled on the goal of attempting to get the Suffrage Committee's proviso reinserted into Section 1.¹¹⁰

Petitions containing over one thousand signatures of Sacramentans were presented the next day, and then again three days later.¹¹¹ McFarland, in presenting the petition, felt the need to add that "the signers of this petition have not . . . taken any active part in this movement. They cannot be called brawlers or seekers of notoriety."¹¹² But McFarland viewed the Sacramento effort as no more than an indication that suffrage ought not to be denied women on the basis that they did not want it. He did not view the petition effort as seeking suffrage as a matter of right.

When the suffrage article came up for a vote in the convention less than a week later, a skirmish ensued. Ayers had planned to reopen the issue by citing

¹¹⁰Id.

¹¹¹Debates, Feb. 21, 1879, at 1441; id., Feb. 24, 1879, at 1449.

¹¹²Id., Feb. 21, 1879, at 1441.

new evidence of women's desire for the ballot, relying on the Sacramento efforts and pointing to the gallery, filled with local women.¹¹³ According to the ad hoc group, which later issued a denunciation of the President of the Convention, J.P. Hoge, he had promised that Ayers could have the floor. However, Hoge instead recognized an anti-suffrage delegate, James Murphy, who rose simultaneously, seeking to preempt debate.¹¹⁴ A vote was called, and suffrage supporters were unable to gain more time to debate the issue or propose amendments, although the vote was close, 67-55.¹¹⁵ As a result, the article as reformulated by the

¹¹³Babcock, "Constitution-Maker," at 898.

¹¹⁴"The Women Organize," Sacramento Record-Union, Mar. 3, 1879, at 3. Murphy, joined by others, used the parliamentary procedure of "calling the previous question," which the women referred to as "the gag rule." Babcock notes that this Murphy was the same individual who so strongly opposed the Woman Lawyer Bill in the last legislative session. Babcock, "Constitution-Maker," at 898 n.178. (Assemblyman James Murphy should not be confused with Senator Barney Murphy, who introduced and shepherded to passage the Woman Lawyer Bill.) Later, the Sacramento women, now constituted as the Woman's Central Club of California, denounced the delegates, and particularly Murphy, for employing this procedure. "The Woman Organize," Sacramento Record-Union, Mar. 3, 1879, at 3.

Meanwhile, the Record-Union, unleashed its own scathing attack on Murphy, of whom it wrote, "This Murphy has distinguished himself by similar acts, during such a part of the session as he has been present, and in no other way. Apparently incapable of originating an idea himself; neither a speaker, a thinker, nor a worker; an absentee during about half the session, and doing nothing useful when present; he has learned just enough of parliamentary rules to enable him to move the previous question, and he has done this on several occasions when to do it was little short of an outrage." The paper concluded, "It may now be said that the Convention was afraid to discuss woman suffrage, and that because it could not meet the arguments of its supporters in a manly fashion it took the coward's refuge of silencing its petitioners." "An Act of Brutal Discourtesy," Sacramento Record-Union, Mar. 1, 1879, reprinted in Debates, Mar. 1, 1879, at 1494.

¹¹⁵Debates, Feb. 27, 1879, at 1481-82. Suffrage proponents could at least force the delegates to go on record with their votes, and the official count showed several pro-suffrage delegates voting in favor of closing debate, including Grace, who had participated with Murphy in calling the question. Id. at 1482. According to the San Francisco Post, Workingmen delegates, who otherwise were pro-woman suffrage, feared that a new portion of the suffrage article, reducing the residency requirement from ninety to thirty days, might be lost if the article were reopened to discussion. Babcock, "Constitution-Maker," at 898, citing San Francisco Post, Feb. 28, 1879. At least one pro-suffrage Workingman delegate, Charles Ringgold, was so disgusted with his fellow party members' behavior, that he vowed privately to disassociate himself from the party. Letter

Committee of the Whole was submitted to the convention, and was accepted overwhelmingly, 97-27.¹¹⁶ Clearly, even supporters of woman suffrage did not feel that the issue was important enough to hold up the framing of the constitution at this point.¹¹⁷

Although woman suffrage garnered the most attention from the delegates, a number of other issues affecting women were raised at the convention. With marital property law having been enshrined in the Constitution in 1849, it was nearly certain to be discussed as a matter of course. The first constitutional convention had devoted much attention to choosing between the community property and common law marital property systems, and had the delegates here wanted to back away from a system with its roots in the Spanish/Mexican period, they certainly would have had the opportunity to do so. In the opening days of the convention, McComas proposed, as an amendment to then-Section 14,¹¹⁸ leaving the language defining the husband's and wife's separate property, but dropping the language referring to common property.¹¹⁹ In the 1849 convention, similar

from Charles Ringgold to Laura deForce Gordon, Feb. 28, 1879, in Laura deForce Gordon Collection, Bancroft Library, Berkeley, California [hereinafter LDG Collection].

¹¹⁶Debates, Feb. 27, 1879, at 1482.

¹¹⁷The Sacramento Record-Union was highly critical of the entire turn of events on that day, remarking that "[t]he Convention is placed in a very mean and contemptible attitude when it undertakes to bulldoze [sic] women," and faulting other delegates who should have known better than to follow Murphy's lead. "An Act of Brutal Discourtesy," Sacramento Record-Union, Mar. 1, 1879, reprinted in Debates, Mar. 1, 1879 at 1494.

¹¹⁸In the 1849 Constitutional Convention, this was proposed as Section 13.

¹¹⁹Debates, Oct. 11, 1878, at 117-118.

language was viewed by those delegates as calling for adoption of the common law system. However, there is no indication that McComas meant the same, and no other delegate suggested backing away from the community property system. Yet when the Committee on Miscellaneous Subjects reported out this provision (now renumbered to Section 8), with McComas' suggestion having been incorporated, this did not escape the notice of one delegate. He moved to reinsert the "common property" language, believing that its omission could open the door to a change in the law. Laine, who had proven himself a foe of the community property system while in the legislature, reassured his fellow delegate that the omitted language was "unnecessary, for the Legislature will pass these laws anyways."¹²⁰ This amendment was rejected and the section adopted, with its pared down language.¹²¹

Meanwhile, a number of amendments had been sent up in the opening days of the convention which were meant to alter and further constitutionalize

¹²⁰Id., Feb. 17, 1879, at 1392. One can almost hear a tone of resignation borne from experience in Laine's comment.

¹²¹Id. Interestingly, during the ratification period, this section caught the eye of a female writer to the San Jose Mercury. Spinning out the classic scenario wherein a woman marries a man who has considerable separate property with no common property amassed during the marriage, she asks "what redress has she under this new Constitution, unless she presents a bill for services rendered," if he were to will this separate property to others. Apparently, she was unaware that this provision merely continued the constitutional law currently in force, as she asked whether "any of the apologists for the document [can] throw any redeeming light upon the clause under discussion; thereby relieving the minds of the married women of the State." "A Woman's Objection to the New Constitution," San Jose Weekly Mercury, Apr. 3, 1879, at 1. There is no indication that this clause and its slight change in language made any impression upon women during the drive for ratification.

married women's property rights.¹²² The content of these amendments were not unprecedented, reflecting as they did the battles which had been fought unsuccessfully in the legislature earlier in the decade. Most promising for women was Blackmer's proposition, which directed the legislature to equalize succession to the common property such that the common property would go to the surviving spouse, without administration, long a goal of women's rights activists.¹²³

Another amendment proposed that the wife have the right to administer the husband's estate without bond, "whenever the property belonging to the estate has

¹²²A number of other amendments, affecting marriage, divorce and other family rights, had also been proposed, but failed to find their way into the constitution. Regarding divorce, these included attempts to instate legislative divorces for adultery and deny the right of remarriage to guilty spouses during the lifetime of the innocent spouse. Debates, Oct. 10, 1878, at 99 (by Mr. Mansfield), and Oct. 14, 1878, at 140 (by Mr. Lindow). Neither provision would have been helpful to women, except to the minor extent that the latter may have deterred men from committing adultery. (Two years later, commenting on the "current rage of divorce reform," Clarina I.H. Nichols, long-time California women's rights supporter, noted that this movement was "dominated by men who have opposed equal rights for women." Ballot Box, June, 1881, at 5.) A majority of the Committee on Miscellaneous Subjects rejected both, although a minority supported the latter. Debates, Jan. 25, 1879, at 1162-1163. Another proposal, far friendlier to women, would have directed the legislature to enact statutes granting custody of illegitimate children to the mother, while the father would be required to pay child support to the mother and provide for the education of the child. Id., Oct. 30, 1878, at 236 (by Mr. Beerstecher).

In the end, none of these provisions were debated on the convention floor. However, an amendment to Section 12 of the Article on Miscellaneous Provisions did make it through the committee voting process. That proposal, by McComas, called for putting an end to so-called "private marriages" (also known as common law marriages), by requiring nuptials to be publicly recorded in order to be valid. Id., Oct. 11, 1878, at 117-118. When the issue came up for discussion, a motion was made to remove the provision from the section. But Laine spoke in its favor, indicating that the purpose was to protect wealthy men after their death, from women claiming to have been married to them in order to seek a portion of the estate. Id., Feb. 17, 1879, at 1392. In response, one delegate argued that constitutionalizing the matter was asking for trouble, pointing to New York's experience. When a similar provision had been found not to work, that state was faced with the task of having to amend the constitution, rather than simply repeal legislation. Id. (remarks of Mr. Campbell). The provision was discarded. Id.

¹²³Id., Oct. 14, 1878, at 138.

been acquired by the joint efforts of herself and husband."¹²⁴ While this purported to recognize the wife's efforts during the marriage, it was actually quite at odds with the one introduced by Blackmer, inasmuch as it assumed that some, if not all, of the common property would end up as part of the husband's estate. Another amendment, proposed by E.O. Smith of Santa Clara, called for permitting the wife to devise or bequeath her separate property "as if unmarried."¹²⁵ Such a provision should have been unnecessary in a community property system, but women had lost management control of their separate property as California hybridized its marital property system after statehood. Finally, Smith also proposed an amendment which would allow a husband to insure his life for the benefit of his heirs, wife included, with the proceeds payable free and clear from the claims of the husband's creditors.¹²⁶

Nearly all of these suggestions were referred to the Committee on Miscellaneous Subjects, except for Smith's proposal regarding married women's separate property, which was referred to the Committee on Land and Homestead Exemption. Later committee reports indicate that these proposals were found unacceptable, and the amendments were never repropounded on the floor of the convention. Meanwhile, although women may have been behind some of these proposals, there is no indication that they lobbied in their favor, nor is there

¹²⁴*Id.*, Oct. 10, 1878, at 100 (by Mr. Nason).

¹²⁵*Id.*, Oct. 26, 1878, at 220.

¹²⁶*Id.*, Nov. 4, 1878, at 285.

evidence that any of these had been a part of the agenda of any organization or individual activist.

The convention also gave attention to women's economic opportunities, as attempts were made to constitutionalize women's right to public employment. Early on, William F. White proposed that the state dedicate a number of employment opportunities to women. His amendment would have required the State Library and the Capitol building to be managed by a "suitable widow or unmarried woman" and the Printing Office to fill half of its positions with women, and would have required half of all clerical positions in state and local government to be filled by women. Teacher salaries would be equalized, and women would be eligible to all appointive and elective educational offices.¹²⁷ Meanwhile, however, anti-suffragist John F. Lindow proposed that teaching positions be closed off to married women.¹²⁸ Neither of these amendments appear to have been accepted by their respective committees, and they also were never reposed from the floor.

However, another proposal, which was not sent up in the opening days of the convention, but was only put forth at the last minute, met a very different fate. This amendment flowed from the victory won by Foltz and Gordon at the last legislative session, passage of the Woman Lawyer Bill.¹²⁹ By the time the

¹²⁷Id., Oct. 11, 1878, at 120.

¹²⁸Id., Oct. 26, 1878, at 220.

¹²⁹Babcock, "Constitution-Maker," provides extensive discussion of the genesis and enactment of this provision.

constitutional convention got underway, Foltz had taken advantage of the legislation and had secured admission to the bar, while Gordon was studying law. Meanwhile, however, both had attempted to enroll at the state-supported Hastings College of Law, but had been asked to leave after a day of classes. As a result, they were feeling keenly the contingent nature of the right they had won. During consideration of the Miscellaneous Subjects portion of the constitution, when a proposed section was outright rejected, a friend of the women's cause, Ringgold seized the opportunity to offer a replacement whereby no one, "on account of sex," would be disqualified from entering into or pursuing "any lawful business, avocation or profession."¹³⁰ Either Gordon, or Foltz, or both, had prepared the section and presented it to Ringgold for introduction.¹³¹ Interestingly, the new section was accepted by the delegates without any debate, and Ringgold later mused that the supporters acted from ignorance.¹³² However, the import of the

¹³⁰Id., Feb. 12, 1879, at 1395 (by Mr. Ringgold).

¹³¹3 HWS at 760; letter from Charles Ringgold to Laura deForce Gordon, Feb. 28, 1879 in LDG Collection; "Constitution-Maker," at 851 n.4, citing Foltz, "Struggles and Triumphs of a Woman Lawyer," The New American Woman, Mar., 1917; "Editorial Notes," Ballot Box, Feb., 1880, at 5; "Report of California to the National Woman Suffrage Association Convention," Ballot Box, June, 1881, at 3. Babcock notes that for the remaining fifty years of her life, Foltz consistently claimed credit for proposing this section, as well as the anti-discrimination provision of the education article, discussed below. "Constitution-Maker," at 851 n.6. See also id. at 885 n. 19 (citing secondary works attributing authorship to Foltz, alone or together with Gordon). Meanwhile, the NWSA-leaning History of Woman Suffrage and Ballot Box credit Gordon, who was loyal to that organization, and Gordon herself took credit in a report to the Ballot Box in 1881. Ringgold's letter, a contemporary source, implies that Gordon authored the provision (referring to it as "your section"). The fact that Foltz lived for about thirty years longer than Gordon presented her with the opportunity to claim credit even if it wasn't due.

¹³²Debates, Feb. 12, 1879, at 1395; letter from Charles Ringgold to Laura deForce Gordon, Feb. 28, 1879, in LDG Collection.

victory for women was not lost on the San Francisco Post, which remarked the next day that "Ringgold caught Caples off his guard."¹³³ Ringgold then saw to it that the entire section on Miscellaneous Subjects was adopted by the convention without drawing attention to this provision.¹³⁴

Closely aligned with this provision was an amendment offered by Ayers to the proposed Miscellaneous Subjects dealing with the University of California, to guarantee that the university would remain co-educational.¹³⁵ Delegate Joseph W. Winans, who chaired the convention's Education Committee and was also a University Regent, protested that the provision was unneeded. However, Ayers responded by alluding to the lawsuit that Foltz and Gordon were currently being forced to litigate in order to gain admission to Hastings.¹³⁶ Ayers' amendment was adopted overwhelmingly, 103-20.¹³⁷

In sum, while the convention was not a complete loss for women, the brass ring of suffrage proved to be beyond their reach.¹³⁸ Women's rights activists

¹³³Babcock, "Constitution-Maker," at 895, quoting San Francisco Post, Feb. 18, 1879, at 2.

¹³⁴Id. at 896.

¹³⁵Debates, Feb. 26, 1879, at 1476. Ayers' amendment read: "No person shall be debarred admission to any of the collegiate departments of the University on account of sex."

¹³⁶Id. The suit is described at length in Babcock, "Constitution-Maker," at 889-891, 899-900, and Barbara A. Babcock, "Clara Shortridge Foltz: 'First Woman'," 30 Arizona Law Review 673, 700-715 (1988).

¹³⁷Debates, Feb. 26, 1879, at 1476. On the "nay" side could be found not only women's rights foe Caples, but also O'Donnell, who had consistently voted in favor of woman suffrage.

¹³⁸The Ballot Box was probably overstating the situation when it reported later, in reference to Section 18, that, "[a]lthough the California women did not secure a suffrage amendment to the new constitution last summer, they obtained an amendment which gives to women nearly all the

could not be credited with having conducted an effective mobilization or lobby. Those delegates in favor would have done better to lay down a focused, realistic strategy, to minimize the incitement of opposition. The defeat of Blackmer's proposal certainly set the tone, and the sequential offering of sometimes half-baked alternatives made pro-suffrage delegates appear to be grasping at straws. However, even if the Suffrage Committee's proviso had been left intact, the question remains, after an examination of the legislative sessions in the decade after the convention, whether woman suffrage could have become a reality in California any time soon.

Twenty-third Session, 1880

Even though the new constitution failed to provide for female suffrage, the convention experience at least brought greater public attention to the inequalities women suffered under the law. The legislative session that opened soon after ratification would see the introduction of a multitude of bills designed to improve women's legal status, at a pace similar to that of a decade before, with seven different lawmakers championing the women's cause. In fact, one of these lawmakers, J.L. York of Santa Clara, was elected on a woman suffrage platform.¹³⁹ In addition, Clara Foltz would be serving as a clerk for the Assembly

civil and political rights that men enjoy, save suffrage." "Editorial Notes," Ballot Box, Feb., 1880, at 5.

¹³⁹Babcock, "Constitution-Maker," at 906. Babcock noted that "[t]he women's base of male support seemed broader in the 1880 legislature than ever before." Id.

Judiciary Committee, where she might exert some influence, and at least could keep a close watch on woman-friendly bills.¹⁴⁰ Further, for the first time, a strategy came to be employed whereby virtually identical bills were introduced in each house, ostensibly to increase the odds of success. Meanwhile, statewide organization had been "revitalized," with the return to California from Washington, D.C., of Ellen Sargent, long-time activist and wife of former U.S. Senator Aaron A. Sargent.¹⁴¹

In fact, the failure to gain equal suffrage through the new constitution affected legislative strategy in the 1880s in numerous ways. Most obviously, activists now turned towards progressing incrementally through the lawmaking process. Suffragists had never fully conceded that the legislature lacked the power to grant women voting rights, and the new constitution might have unwittingly provided a stronger basis for this view. To that end, a bill was drawn up to grant women "school suffrage," to enable them to vote for the educational offices which

¹⁴⁰"Letter from California," Woman's Journal, Feb. 28, 1880, at 64. In fact, Foltz was able to exert a good deal of influence. As Babcock notes, "She was . . . no demure token presence; an artist's portrayal of the historic legislature shows her with a whip over her shoulder and the legend, 'Prepared for war.'" Babcock, "Constitution-Maker," at 906. Moreover, the fact that Foltz was eligible for this attorney position was directly tied to her previous successful lobbying efforts.

¹⁴¹Ballot Box, Oct., 1879, at 3. This publication noted that the statewide organization, which had used the name California State Woman Suffrage Educational Association, had dissolved, and a new one formed in its place, under the name of the California State Woman Suffrage Society. Most likely, the same individuals were active in both groups, making the name change incidental. The Ballot Box later reported plans for conventions to be held in San Jose in November and San Francisco in December, to prepare for the upcoming legislative session. "Editorial Notes," Ballot Box, Nov., 1879, at 3.

they could already hold.¹⁴² A seemingly logical and sensible next step, this would appear to be the least controversial of any woman suffrage request. For one, it was the legislature itself which had granted women the officeholding right, and no court-based constitutional challenge had ever been launched against this action. Further, women had, in the ensuing years, displayed an undeniable interest in serving in these offices and developed a good track record when elected.¹⁴³

The partial suffrage bill was introduced in the Assembly early in the session, this at least promising the advantage of time.¹⁴⁴ Initially referred to the Elections Committee, the bill was transferred to the Judiciary Committee, which recommended that it not pass. Apparently that committee doubted the bill's constitutionality, inasmuch as the new constitution's suffrage provision retained the gendered language of the old.¹⁴⁵ Nevertheless, the bill continued along a path towards enactment, and through strategic maneuvering was placed on "special

¹⁴²Assembly Bill No. 139, introduced by Mr. York, Jan. 17, 1880. This bill permitted women to vote for all levels of school officers, as well as upon all issues dealing with taxation for school purposes. It was apparently modelled after Massachusetts' law granting women school suffrage, which had been enacted in the 1870s. "Letter from California," Woman's Journal, Feb. 21, 1880, at 64.

¹⁴³By the mid-1880s, suffragist Elizabeth T. Schenck reported that "there is not a county in the State where women had not filled positions as trustees [school board members] or been elected to the office of county superintendent." 3 HWS at 751. Moreover, two women had served successively as deputy state superintendents in the 1870s. Id.

¹⁴⁴Journal of the California Assembly, Jan. 17, 1880, at 94 [hereinafter Assembly Journal].

¹⁴⁵Id., Feb. 5, 1880, at 217; Sacramento Record-Union, Mar. 20, 1880, at 1. This was revealed during later debate, when the chair of the committee, Mr. Fox, conceded that but for this language in the constitution the committee probably would have voted to recommend the bill's passage. However, Fox himself believed the granting of school suffrage to be beyond the reach of the legislature under any circumstances. Sacramento Record-Union, Mar. 20, 1880, at 1.

order" status, thus guaranteeing final debate and consideration at a predetermined date and time.¹⁴⁶ Even still, a precious two months had elapsed in reaching this point.

Women's rights delegates from Santa Clara, Sarah Knox, now Knox-Goodrich,¹⁴⁷ Laura Watkins and Miss M.A. Walsh, were dispatched to the capital, and spent two weeks lobbying on behalf of the bill, but not until late February.¹⁴⁸ They appeared to come armed with petitions specifically favoring school suffrage.¹⁴⁹ On March 11th, the women were given use of the Assembly chamber to promote their cause, and Walsh, Gordon and Foltz, as well as L.J. Kellogg, M.D., of Sacramento, each addressed various aspects of the argument in

¹⁴⁶When the bill first came up for a third (and final) reading, it was passed on file. Assembly Journal, Mar. 10, 1880, at 487. When it came up again, an attempt was made to make the bill the special order for the following Saturday evening (probably because fewer members were likely to be in attendance at that time). That motion lost, but another motion was immediately put forward, which was victorious, making the bill the special order for the following Friday evening. Oddly enough, the first motion was made by a supporter of the bill, the second by an opponent. Id., Mar. 15, 1880, at 521-22; Sacramento Record-Union, Mar. 20, 1880, at 1. At the least, this indicated the perceived importance of the school suffrage bill, as members were attempting to manage the setting in which it would come up for a vote.

¹⁴⁷In 1879, Sarah Knox married Levi Goodrich, a successful architect and friend of the women's rights cause. Babcock, "Constitution-Maker," at 906.

¹⁴⁸Woman's Journal, Dec. 25, 1880, at 410; "A Voice from the Far West," Woman's Journal, Apr. 10, 1880, at 113. The correspondent, identified as "Secretary of Woman Suffrage Society, San Jose," also commented on Santa Clara County's disproportionate contribution to the cause: "Here has originated every legislative reform that has made the struggle for existence easier for the women of California." Id.

¹⁴⁹Journal of the California Senate, Feb. 28, 1880, at 312 [hereinafter Senate Journal]; Assembly Journal, Mar. 8, 1880, at 453. Two more petitions specific to school suffrage were presented later, one coming from Gordon's home base of San Joaquin County. Id., Mar. 19, 1880, at 553; Senate Journal, Apr. 3, 1880 at 595.

favor of woman suffrage, both generally and with regard to this bill.¹⁵⁰

Foreshadowing upcoming debate, the women were warned that any legislation to achieve suffrage would be unconstitutional.¹⁵¹ However, drawing upon her legal skills, Foltz prepared and submitted a brief to the legislature, designed to counter this obstacle. Hers was a difficult point to make, given that the legislative empowerment proviso had specifically been rejected at the constitutional convention, and the suffrage article employed the term "male" three separate times. However, Foltz argued that, inasmuch as the new article also specifically listed those persons who could not vote, i.e., the Chinese, the insane and the incompetent, it implicitly left other classes of potential voters to legislative discretion.¹⁵²

As scheduled, the bill came up for debate on Friday, March 19th, at 7 p.m. No surprise, initial discussion focused not on the merits of the proposal, but on its validity under the California Constitution. In the face of the Judiciary Committee's contention that the proposal was invalid, an ambitious interpretation of that document's suffrage clause was offered, under which not only school

¹⁵⁰Assembly Journal, Mar. 9, 1880, at 469. Even this grant of a forum was not without controversy, as one member considered calling for a reconsideration of this move. Id. at 473.

¹⁵¹Id. Babcock noted that the audience for that gathering was said to be the largest ever assembled at the Capitol. "Constitution-Maker," at 907. Apparently, an effort to put a constitutional amendment on the ballot, favored by Ellen Sargent, had been abandoned. "Notes from Letters," Ballot Box, Nov., 1879, at 3.

¹⁵²Babcock, "Constitution-Maker," at 906-907 and n.210. Another argument to get around the constitutionality obstacle was put forth by a third party, the Equal Rights Party. According to this tack, Section 18 of the Miscellaneous Subjects article, which disallowed employment discrimination on account of sex, made women eligible to hold office. And the right to vote for office-holders flowed from this. Id. at 907 n.210, citing San Francisco Chronicle, Mar. 7, 1880.

suffrage, but any form of woman suffrage, was proper fodder for the legislative process. According to this line of reasoning, the use of the term "male" did not serve to exclusively define who might vote, but rather simply protected that group from having suffrage abrogated through the legislative process. Additionally noting that the constitution embraced women as well as men in its declaration of rights - "[t]he Constitution never intended to shut out the best half of humanity in the category of 'people'" - the bill's sponsor, Assemblyman York, argued that the legislature was thereby empowered to grant the equal right of school suffrage to women.¹⁵³ Supporters also highlighted the anomaly of concluding that female educational officeholding was constitutional, while female suffrage regarding those same positions was not, and in any event they argued that a determination of constitutionality should be left to the California Supreme Court. Nevertheless, opponents appealed to the "plain" language of the constitution, and brandished a powerful weapon heretofore unavailable: the assertion that "the place to have made the contest was in the Constitutional Convention."¹⁵⁴

Turning to the bill's substance, debate over partial school suffrage was had in the shadow of arguments regarding full suffrage for women. Some of those in favor did see this proposal as providing an incremental step towards that ultimate goal, while others expressed support only for this limited grant. As with the officeholding proposal, supporters could point to women's childrearing

¹⁵³Sacramento Record-Union, Mar. 20, 1880, at 1.

¹⁵⁴Id.

responsibilities as the basis for this specialized suffrage: "[W]hy, in the name of reason, . . . should she formally not be allowed to have a voice in the selection of those who are to instruct their young minds?" Nevertheless, opponents predictably relied on a constrictive rhetoric of "woman's sphere," sweeping this partial suffrage in with a condemnation of all political involvement by women. Declaring that "he would never consent to bring woman from her exalted social plane to enter the scrambling contests in the political arena," one speaker hyperbolically warned that school suffrage "is an experiment which may prove hazardous to all our social institutions."¹⁵⁵

If nothing else, the debate appeared to reveal that the question was, at that moment, too close to call, because members agreed to put off a vote on the issue for another five days.¹⁵⁶ When the bill resurfaced, another attempt was made to keep it from a vote, with an opponent moving to have it sent back to committee for reconsideration, but this action was defeated. And, again, the issue of

¹⁵⁵Id. Interestingly, neither he nor any other opponent additionally argued that women should not be able to run for and hold educational office. Nevertheless, based on this sort of reasoning, to hold otherwise would have been quite contradictory. Again, this indicates the powerful pragmatism (rather than idealism) behind the support for female educational office holding.

¹⁵⁶It was a supporter of the bill, Anthony, who made the motion. Assembly Journal, Mar. 19, 1880, at 565. Meanwhile, reports on the debate assign it a much different tone than that which emerges from reading the transcription. According to the San Francisco Call, the bill was ridiculed and misrepresented in the Assembly, being subjected to "burlesque amendments and burlesque speech-making." Clarina I.H. Nichols, long-time suffrage advocate, elaborated, indicating that at one point a member offered an amendment that no woman, when going to vote, would be permitted to leave her children in the care of a Chinaman. According to Nichols, this amendment was unanimously adopted, amidst laughter and applause. "Woman Not School Voters in California," Ballot Box, Apr., 1880, at 3. This amendment is nowhere reported in the transcription of the debates.

constitutionality came to the fore. This time, Assemblyman George W. Tyler was prepared to discourse at length, and he began by framing the issue succinctly.¹⁵⁷ Distinguishing the two points of debate - whether the legislature had the ability to grant school suffrage, and whether the legislature wished as a matter of policy to do so, Tyler then provided a reasoned argument on the issue of constitutionality. He challenged those who would claim that women have fewer rights than men, to show "just where the less rights commence," however Tyler was willing to take on the burden of proving that, under the California Constitution as it stood, women must be treated equally with men, including in the area of suffrage.

To do so, Tyler began with the premise that suffrage was under the control of the various states. He then claimed that California's constitutional provision granting male suffrage must be read in light of Section 21 of the Constitution's Declaration of Rights, which provided that "[n]o special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislature. Nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."¹⁵⁸

¹⁵⁷Tyler's speech, as well as that of Assemblyman Elihu Anthony, was reprinted verbatim a few days later on the front page of the Sacramento Record-Union. "Female Suffrage," Sacramento Record-Union, Mar. 27, 1880, at 1.

¹⁵⁸Article XX, Section 21. While the official records of the Assembly and Senate rarely provided more than a conclusory recommendation of legislative committees, at this late date Tyler contended that the Judiciary Committee had failed to take Section 21 into account when issuing its report on Assembly Bill No. 139. Interestingly, Tyler may have been tipped off to this argument by Laura deForce Gordon, who in a petition to the Senate (presented just after the Assembly Judiciary Committee had considered Assembly Bill No. 139) asked for the removal of her political disabilities based on Section 21 of the new constitution. Senate Journal, Feb. 5, 1880, at 172.

While Tyler agreed that rules of construction would ordinarily result in the male suffrage provision being read in an exclusionary way, Section 21's language trumped this, because "a positive right guaranteed to women in the Declaration of Rights overrides a mere rule of construction." Moreover, Tyler argued, the Declaration of Rights, being "the fundamental charter of the people's rights," took precedence over any constitutional provision which might be contrary. Finally, even if one were to concede that the Constitution and the Declaration of Rights were of equal effect, the plain language of Section 21 would override the construction of the Constitution's suffrage provision. Thus, Tyler concluded, the only reason women did not yet have the privilege of voting was because the legislature had yet to grant it.¹⁵⁹

Assemblyman Elihu Anthony made both constitutional and policy arguments in favor of the bill, particularly by tying it to the educational office statute enacted in 1874. In asserting that at that time the legislature did nothing more than it was permitted constitutionally to do, he deftly characterized this action as giving "the male class the privilege of electing women to school offices of this State."¹⁶⁰ Such an interpretation, when added to the limited nature of the school suffrage bill, supported a conclusion that here as well the legislature would not be exceeding its authority. But Anthony also drew on the experience of

¹⁵⁹Sacramento Record-Union, Mar. 27, 1880 at 1. Tyler's argument could have been used to support a grant of full suffrage as well, however Tyler did not emphasize this point in his speech.

¹⁶⁰"Female Suffrage," Sacramento Record-Union, Mar. 27, 1880, at 1.

women holding educational office, as he argued that their willingness and ability in filling those positions, as well as the successful feminization of the teaching profession, demonstrated the appropriateness of this bill.¹⁶¹

After a number of others had their say, a vote was taken, and the measure passed 42-37.¹⁶² As to be expected, a motion to reconsider the bill was introduced the next day, and notwithstanding a variety of strategic maneuvers, by a close vote of 41-38 the motion passed. In a turn of events no doubt heartbreaking to suffragists, the bill was then indefinitely postponed (and thus effectively killed) by the slimmest of margins.¹⁶³

As a last-ditch effort to keep the issue alive, Senate Bill No. 531, virtually identical to Assembly Bill No. 139, was introduced by now Senator Grove L. Johnson two days after the Assembly disappointment, but by then time was running short.¹⁶⁴ In a move to expedite consideration, the bill bypassed committee referral, but it didn't even make it to the required second (of three)

¹⁶¹Id.

¹⁶²Id., Mar. 25, 1880, at 4; Assembly Journal, Mar. 24, 1880, at 604. Interestingly, this vote revealed that two members, who had been vocal supporters in the first round of debate, Assemblymen Charles Mulholland and J.J. McDade, had in the meantime changed their positions. McDade's conversion, discussed below, is particularly telling.

¹⁶³Assembly Journal, Mar. 25, 1880, at 606-607. The Assembly Journal, tallied the vote to postpone at 41 ayes to 39 noes, but the list of those voting "aye" contains only 40 names. There was one Assembly member who voted in favor of reconsideration, but is not listed in the vote taken immediately thereafter to indefinitely postpone the bill. If indeed he voted, he most likely did so in favor of indefinite postponement, and this would explain the discrepancy.

¹⁶⁴Senate Journal, Mar. 27, 1880, at 521. Senate Bill No. 531, provided in addition, that women could vote without having first registered, although this was required of men.

readings before the end of the session.¹⁶⁵ Meanwhile, with an even less realistic chance of passage, another Senate bill, introduced by John S. Enos a couple weeks earlier, proposed to grant women full suffrage by statute.¹⁶⁶ It was referred to the Elections Committee, where a majority recommended indefinite postponement. Furthermore, in reporting on a variety of woman suffrage petitions which had been referred to it, the committee simply asserted that the time was not proper for their consideration. Johnson, a dissident member of the committee, gave notice that a minority report on the full suffrage bill would be submitted, but this never occurred.¹⁶⁷ The bill was passed on file a number of times on its way to a second reading, before the committee's recommendation of indefinite postponement prevailed a few days before the end of the session.¹⁶⁸

In explaining the defeat of the school suffrage bill, the Sacramento Record-Union remarked, "The majority never intended that it should become a law. They were amusing themselves with the questions merely, and were taken by surprise when it passed."¹⁶⁹ However, the ultimate explanation for the bill's defeat may

¹⁶⁵One petition was presented in the Senate in support of the bill, but this had no effect in furthering its consideration. Id., Apr. 3, 1880, at 595. Having failed to reach a second reading, Senate Bill No. 531 was never debated on the Senate floor.

¹⁶⁶Senate Bill No. 479, introduced by Mr. Enos; Senate Journal, Mar. 15, 1880, at 421.

¹⁶⁷Senate Journal, Mar. 15, 1880, at 421; id., Mar. 19, 1880, at 449.

¹⁶⁸Id., Apr. 12, 1880, at 691.

¹⁶⁹"The Women Defeated," Sacramento Weekly Record-Union, Mar. 27, 1880, at 4. This analysis is reinforced by a comparison of voting patterns on the issue. Leaving aside James Adams (who appeared to vote initially in favor of the bill in order to be eligible to move for reconsideration) at least six members, who voted in favor initially, consistently voted in opposition the next day. One, Samuel Braunhart, even went so far as to vote initially in favor of the bill

lie with the lobbying efforts behind it. During this session, both the Assembly and the Senate did receive a number of petitions seeking equal political rights for women, but a closer look reveals some crucial differences from women's political activity in previous sessions.

First, many of the petitions came from individual women, some known for their association with the organized women's rights movement, such as Sarah Knox-Goodrich, Laura Watkins and Laura deForce Gordon, and others not. These petitions did not ask for a change in positive law, but rather demanded that the legislature grant the particular signatories the right to vote, often based on their status as taxpayers. Meanwhile, these petitions were fairly general (i.e., asking for removal of "political disabilities") and sometimes mild (with one requesting the removal of "some" disabilities, and another for such removal "on certain occasions").¹⁷⁰ Not only did this pattern fail to send a forceful message to

immediately after speaking in opposition.

Regardless, the newspaper believed that the legislature lacked the constitutional power to grant school suffrage, "and consequently we do not think it is worth while to spend any time in lobbying for such measures." But in an inaccurate and unfair criticism, the Record-Union, went on to claim that woman suffragists had yet to realize that a constitutional amendment was "the practical recourse." Id.

¹⁷⁰A total of six petitions were presented, signed by a total of only eleven women, and another petition was signed by "several [female] citizens." Assembly Journal, Jan. 30, 1880, at 162; Senate Journal, Jan. 31, 1880, at 144-45; id., Feb. 2, 1880 at 150; Assembly Journal, Feb. 5, 1880, at 215; Senate Journal, Feb. 5, 1880, at 172; Assembly Journal, Mar. 10, 1880, at 475; Senate Journal, Mar. 12, 1880, at 409-10.

The Assembly Judiciary Committee's response to the petition presented by Sarah Knox-Goodrich, asking for suffrage based on her status as a taxpayer, was probably reflective of its position regarding all these petitions: "By the terms of the Constitution there is no office in the State to which she may not aspire, and no avocation or profession which she may not follow. The only right that is denied her is that of the elective franchise, and that is denied her by the express terms of the fundamental law of the land, and it is not in our power to confer it upon her by legislative enactment." Assembly Journal, Feb. 4, 1880, at 206-207.

the legislature, but also those petitions asking for suffrage based on an attribute, such as taxpaying status, notwithstanding positive law, would seem to have been more appropriately addressed within a judicial proceeding. Second, although some of the petitions appeared to be signed by more than just a few individuals, not a single petition was presented under the aegis of a woman suffrage society, nor did any organization take credit for proposing or drafting the school suffrage bill itself.¹⁷¹

This situation may have left representatives with the impression that women as a class were not interested in school suffrage, but at the very least, it opened the door to anyone looking for a convenient excuse not to support the bill. Evidence of this can be found in the person of Assemblyman J.J. McDade. At first, he spoke ideologically, sweepingly and strongly in support of granting school suffrage: "'What would we be without woman? Who would succeed us if there were no women? What would government be? What would society be?'"¹⁷² But less than a week later, this ardor was replaced with passive resistance, as "Mr. McDade said that until the sentiment of the ladies was fully expressed upon this

¹⁷¹Senate Journal, Feb. 28, 1880, at 312; Assembly Journal, Mar. 8, 1880, at 453; Senate Journal, Mar. 15, 1880, at 419; Assembly Journal, Mar. 19, 1880, at 553; id., Mar. 23, 1880, at 586; Senate Journal, Apr. 3, 1880, at 595. Petitions dealing with school suffrage and woman suffrage generally, were presented in the Assembly from San Joaquin County, containing signatures possibly gathered by Laura deForce Gordon, but the petitions were not identified as the product of any organization. Assembly Journal, Mar. 19, 1880, at 553; id., Mar. 23, 1880, at 586. Meanwhile, however, the Sacramento Record-Union, did hint at some lobbying efforts in support of the school suffrage bill, which may have gone on at the capital. Sacramento Record-Union, Mar. 27, 1880, at 4.

¹⁷²Id., Mar. 20, 1880 at 1.

question, he should be compelled to vote against the extension of suffrage to them."¹⁷³ Meanwhile Assemblyman Samuel Braunhart asserted the shop-worn argument that California women did not want the vote. No Assemblyman responded, not even those who had presented those women's petitions specifically calling for school suffrage.¹⁷⁴ And, as was demonstrated, McDade came to represent the crucial vote.

No doubt it did not help either that the suffrage petitions submitted to the legislature this session were referred to committees in an unpredictable and inconsistent manner. For one, unlike during the 1870s, no effort was ever made in either house during this session to create a special committee to deal with issues pertaining to women. Thus, there was no group which was, by design, friendly to the cause and felt duty-bound to give thoughtful consideration to these petitions. Further, neither were the petitions aggregated for maximum effect by referral to a single committee. Instead, they were dispersed in an ad hoc manner among the Judiciary, Election, and Education Committees, with similar types of petitions being referred to different committees, and petitions supporting the substance of a particular bill being referred to a committee other than that considering the

¹⁷³Id., Mar. 25, 1880 at 4.

¹⁷⁴Id. In the Assembly, vocal supporters Anthony and York presented such petitions prior to the start of debate, yet remained silent in the face of both McDade's and Braunhart's claims. Assembly Journal, Mar. 8, 1880, at 453; id., Mar. 19, 1880, at 563.

bill.¹⁷⁵ Such treatment made these petitions easy to ignore or dismiss out of hand.

Finally, comparing Assembly Bill No. 139's fate with the ease with which the educational officeholding bill had been enacted during the previous decade is revealing on both accounts. Recall that part of the impetus for making women eligible for school offices was the problem of getting enough men to serve and to serve diligently. Without willing officeholders the system would collapse. However, no such expediency concerns could be raised regarding school suffrage. It was not as if men were refusing or failing to vote for these offices, at least in numbers which would call into question the legitimacy of an election. And as long as the problem of the quantity and quality of nominees had been resolved, adding women to the electorate would appear to serve no useful purpose. Thus, unlike those who backed the officeholding bill, ideological supporters of Assembly Bill No. 139 could not employ practical rhetoric to fish for the additional support needed for passage here. Indicative of this circumstance, a lofty discussion of rights and abilities prevailed uninterrupted in the debate over the bill.

Meanwhile, a series of bills were introduced concerning other issues regarding women, not the least of which included unresolved inequalities in California's marital property law. Activists had been complaining for years about

¹⁷⁵For example, within days of each other, two petitions presented by Senator George F. Baker, from specific women requesting the removal of their political disabilities, were referred to, on the one hand, the Elections Committee, and on the other hand, the Judiciary Committee. Senate Journal, Jan. 31, 1880, at 144-45; id., Feb. 2, 1880, at 150.

the injustice of subjecting the widow's share of the common property to the expense and delay of probate administration, and about the fact that the widow was only guaranteed half of the common property while the widower took all, and without administration. A few unsuccessful attempts to reform the law had been made in the 1870s. In this session, Sarah Wallis set out to convince the legislature to equalize the treatment of this property, such that the widow as well would succeed to the whole of the common property, without administration.¹⁷⁶ She gathered signatures on petitions, which were presented in both houses, and worked towards getting "her bill" introduced, which occurred in the Assembly on January 27th.¹⁷⁷

The proposal, which was referred to the Judiciary Committee, was essentially a repeat of one introduced eight years previous, and it continued to suffer from drafting problems by now obvious to lawmakers. First, it called for the widow to take control over "any or all of the said property which he [the husband] possessed." While one interpretation might indicate that this referred only to the common property, the wording could have misled one into thinking that the statute would include the husband's separate property as well, property

¹⁷⁶In other words, Wallis sought to bring the law back to a state of gender neutrality, which it had originally possessed when enacted thirty years ago.

¹⁷⁷Assembly Bill No. 256, introduced by Mr. Burns; Assembly Journal, Jan. 27, 1880, at 146; Senate Journal, Feb. 28, 1880, at 312; Assembly Journal, Mar. 8, 1880, at 453; *id.*, Mar. 19, 1880, at 553. As for Wallis considering this her bill, see letter from Wallis to Laura deForce Gordon, Jan. 25, 1881, on printed petition form entitled "Petition for Equal Rights," in LDG Collection. Furthermore, Wallis' petitions were formulated similarly to the language of this bill. However, the bill's language had its roots in the very first attempt to reform this law, introduced in 1872. See Chapter Four.

over which he otherwise had full testamentary control. This probably explains Assemblyman York's introduction, only five days later, of another bill, nearly identical but replacing the problem phrase with "property that they may possess."¹⁷⁸ Nevertheless, this revision retained a phrase from the first version which was without legal meaning - family estate - to additionally refer to the community property.¹⁷⁹ The Judiciary Committee recommended that both bills be indefinitely postponed, and without any debate they were withdrawn in mid-to-late March.¹⁸⁰

Another marital property bill, to further amend Civil Code Section 137, dealing with support of the wife and children during separation or divorce actions, was offered by Assemblyman Tyler. While in the 1877-1878 session the statute had been altered to permit the wife, without filing for divorce, to sue for support when the husband had willfully deserted her, this proposal broadened that ability to include any situation where the husband "has been guilty of any act or omission entitling her to a divorce." Although this addition may have been both equitable and consistent with the spirit of the 1878 legislation, it would have created massive logistical problems. In the case of desertion, the wife was seeking support while her husband was living apart from her (thereby giving rise for her need to petition

¹⁷⁸Assembly Bill No. 293, introduced by Mr. York (emphasis added); Assembly Journal, Jan. 29, 1880, at 162.

¹⁷⁹This phrase was actually part of the 1872 bill, and its use was subject to debate at that time.

¹⁸⁰Assembly Journal, Feb. 28, 1880, at 345; id., Mar. 13, 1880 at 516; id., Mar. 20, 1880, at 571.

the court). But Tyler's proposal required no such set of circumstances, thus theoretically allowing the court to inject itself into an on-going (albeit troubled) marriage where the spouses were continuing to cohabitate. As an added practical nightmare, the proposal also permitted the court, upon petition of the wife, to divide the common property instead of ordering permanent support.¹⁸¹ Nevertheless, the Judiciary Committee recommended passage of this bill with minor amendments. However, after adopting these amendments, the Assembly apparently let the bill die out with the ending of the session.¹⁸²

Meanwhile, the Assembly Judiciary Committee was actually motivated, by otherwise minor pieces of legislation, to take a significantly proactive stance towards sweeping reform of two areas of law affecting women. The first instance arose as a result of a bill initially introduced in the Senate by Theodore H. Hittell, which called for slight, nonsubstantive changes to two sections of the sole trader provisions of the Code of Civil Procedure.¹⁸³ The bill sailed through the Senate without debate, but then the Assembly Judiciary Committee seized upon it as an opportunity to attempt to revisit the entire portion of the Code dealing with sole traders, which had seen no legislative attempt to modify its draconian provisions in

¹⁸¹Assembly Bill No. 363, introduced by Mr. Tyler; Assembly Journal, Feb. 10, 1880, at 250.

¹⁸²Id., Mar. 22, 1880, at 576.

¹⁸³Senate Bill No. 176, introduced by Mr. Hittell; Senate Journal, Jan. 26, 1880, at 108.

the past eight years.¹⁸⁴ Contending that "[t]he amendments proposed in this bill . . . do not go far enough," the committee suggested that it was interested in seeing the whole of the law in this area significantly liberalized. Unfortunately though, while the committee spent the remainder of the session attempting to work out the particulars of such reform, it ran out of time to introduce a sweeping amendment.¹⁸⁵

The other area of law which the Assembly Judiciary Committee wanted overhauled was that chapter of the Code of Civil Procedure dealing both with provision for family support after the husband's death and with the declaration of homestead. What motivated the Committee here were two proposals, one introduced in each house, providing in identical manner for gender-neutral treatment of surviving spouses vis-a-vis property set aside for the family's use.¹⁸⁶

¹⁸⁴At the start of the 1876 session, the CWSA had listed, as one of its six grievances, dissatisfaction with the sole trader statute, calling it a "humiliating, tedious and expensive process." "Woman Suffrage in California," Woman's Journal, Feb. 12, 1876, at 56. However, the organized movement did not appear to launch any concerted reform campaign at that or subsequent legislative sessions.

Meanwhile, assuming that Hittell had a role in drafting Senate Bill No. 176, it is surprising that he ignored the harshness of the sole trader statute, while otherwise devoting attention to this area of the law, given that he was a reliable supporter of women's rights.

¹⁸⁵Assembly Journal, Apr. 15, 1881, at 867-77. The Committee did issue a report recommending at least the passage of Hittell's "housekeeping" modifications, but it did so on the last day, too late in the session. When the voters returned Hittell to the Senate for the following session, he reintroduced his minor bill, now with full success. Senate Bill No. 23, introduced by Mr. Hittell; Senate Journal, Jan. 4, 1881, at 9; id., Jan. 13, 1881, at 61; Assembly Journal, Feb. 17, 1881, at 317; Senate Journal, Mar. 3, 1881, at 379. As it happened, the 1881 Assembly Judiciary Committee simply recommended passage, declining to look into the matter of the sole trader statute any further. Assembly Journal, Jan. 24, 1881, at 127. This ended for the decade any move by the legislature either to liberalize this area of the law, or harmonize it with the philosophies of a community property regime.

¹⁸⁶Senate Bill No. 184, introduced by Mr. Wendell; Senate Journal, Jan. 26, 1880 at 109; Assembly Bill No. 265, introduced by Mr. Harris; Assembly Journal, Jan. 27, 1880 at 147.

As it was, this entire portion of the code dealt almost exclusively with family provisions after the death of the husband/father, but was mostly silent for when the decedent was the wife/mother.¹⁸⁷ The particular code section being addressed by these two bills, Code of Civil Procedure Section 1468, directed the apportionment of the set-aside property between the widow and any minor children left by the decedent husband.¹⁸⁸ The proposals would have enlarged this section to deal as well with property apportionment when the decedent was the wife/mother. In addition, however, these proposals attempted to add language to the section specifying the manner in which homestead property should be divided.¹⁸⁹

Like the sole trader bill, the Senate version of the family support bill moved quickly through that house but when the proposal came before the Assembly Judiciary Committee, it was determined that this entire chapter of the Code of Civil Procedure needed comprehensive revisions, and further that Section 1468 would need additional amending under such global reform. Acknowledging that it had already directed the drafting of a new bill revising the entire chapter,

¹⁸⁷California Code of Civil Procedure Sections 1464 et. seq.

¹⁸⁸California Code of Civil Procedure Section 1468.

¹⁸⁹Where the bills differed was in each one's treatment of a homestead carved out of separate property. Under the Senate version, if the homestead was carved out of separate property of the deceased, the court could set it apart for only a limited period, with the title otherwise vesting in the heirs of the deceased. Under the Assembly version, if no property had been properly designated as a homestead during the lifetime of either the husband or wife, the court was entitled to set apart as a homestead separate property of either spouse. This property then would not vest in the heirs of that spouse until the death of the survivor.

the committee recommended that this bill not pass, thus effectively killing it.¹⁹⁰

However, again no comprehensive bill was ever introduced during this session.¹⁹¹

Twenty-fourth Session, 1881

While the 1880 session had seen renewed and differently-formulated attempts to achieve some equal political and property rights for women under California's new constitution, almost none of these attempts was successful. Not surprising, then, the 1881 session ushered in mostly repeats of the previous

¹⁹⁰Assembly Journal, Feb. 24, 1880, at 347. At the same time, the Assembly Judiciary Committee reported on Assembly Bill No. 265, also recommending that it not pass.

¹⁹¹As with the sole trader statute, continuity in membership between this session and the next allowed Senator J.T. Wendell's version to be reintroduced in 1881, where it sailed through the Senate. Senate Bill No. 59, introduced by Mr. Wendell; Senate Journal, Jan. 6, 1881, at 19; id., Jan. 13, 1881, at 62. And again, with the Assembly Judiciary Committee apparently not in a reformist mood, it simply recommended passage of these minor revisions. Assembly Journal, Jan. 24, 1881, at 127. While the bill almost got tripped up at the stage of a second reading, on reconsideration the denial of such was overturned. The bill went on to pass the Assembly by a wide margin and be signed by the Governor two days later. Id., Feb. 14, 1881, at 294; id., Feb. 15, 1881, at 302; id., Feb. 17, 1881, at 317; Senate Journal, Feb. 23, 1881, at 317.

A few weeks after Senate Bill No. 59's enactment, another amendment to this portion of the Code of Civil Procedure was attempted, this time focusing on Section 1465. Senate Bill No. 256, introduced by Mr. Zuck; id. Jan. 24, 1881 at 116. As it stood, Section 1465 allowed the probate judge to set aside, for the use of the family, all property exempt from execution, included the homestead. If no homestead had ever been designated, this section also permitted the judge to select a homestead out of the real estate "belonging to" the decedent husband or wife. J. C. Zuck's bill clarified the source of the homestead, allowing the judge to set aside only those homesteads which had been selected from the common property, or from the separate property of those persons participating in the selection. If no homestead had been selected, or it had been selected by the survivor out of decedent's separate property, then the judge was empowered to set aside a homestead out of the common property, and if none, out of real estate belonging to the decedent. Further this proposal would have allowed the judge, in cases where there was no real estate, to set aside up to \$4,000 of the decedent's personal property for the benefit of the family. This proposal was most likely meant to protect a wife's separate real property from being designated as homestead by her husband, unbeknownst to her. (Upon her death the court was empowered to do such, but only when there was no common property.) The bill was referred to the Judiciary Committee, which recommended against passage of this patriarchal judicial arrangement, effectively killing the bill. Id., Feb. 10, 1881, at 228.

session's submissions.¹⁹² However, while legislators might have thought they could both build on momentum from the previous session (for example, there were, after all, a significant number of Assembly members who had supported the school suffrage bill) and learn from the mistakes of that session, many of the renewed attempts in 1881 made even less progress through the enactment process than had their predecessors.

Nevertheless, the organized women's rights movement set out to establish a far greater presence in 1881 than it had in the previous session. The CWSA began gearing up for this session even before the 1880 session had ended, no doubt sensing the missed opportunities, and met again in June, 1880, deciding to give the issues of school suffrage and widowhood succession top priority.¹⁹³ Through Sarah Wallis, the organization circulated petitions statewide covering both matters, and appointed a lobbying delegation which read like a veritable "who's who" list of California women's rights activists.¹⁹⁴ As a result, gone were

¹⁹²With only months between the end of the Twenty-third Session and the beginning of the next, this provided a greater opportunity for reelection of those who served in 1880, which in turn facilitated the reintroduction of failed bills.

¹⁹³"Letter from Hon. J.A. Collins," New Northwest, Mar. 4, 1880, at 11; "Annual Suffrage Meeting," San Jose Weekly Mercury, Jul. 1, 1880, at 2. This emphasis represented a paring down from four topics which had been chosen in March, including petitioning for a suffrage amendment to the constitution and a bill to allow women to vote for Presidential electors. "Letter from Hon. J.A. Collins."

¹⁹⁴While gathering signatures, Wallis was able to garner a good deal of media exposure for this endeavor. See, Woman's Journal, Dec. 25, 1880, at 410; "News and Notes," id., Jan. 29, 1881, at 37; "The Cause in California," New Northwest, Nov. 25, 1880, at 4; "Woman Suffrage," San Jose Weekly Mercury, Dec. 2, 1880, at 3, reprinted from the Sacramento Record-Union, Nov. 19, 1880; "The Rights of Woman," id., Dec. 6, 1880, at 2, reprinted from the Courier-Item. The San Jose Mercury noted Wallis' "indefatigable labors in the cause so dear to her heart." "From the Capital," San Jose Weekly Mercury, Jan. 13, 1881, at 2. When the legislative session opened, Sarah Wallis,

the odd petitions from individual women asking for equal rights for themselves alone. Rather, a number of petitions, covering each topic and containing identical wording, were introduced fairly early in the session.¹⁹⁵ Signatures reportedly

Sarah Knox-Goodrich, Laura Watkins, Laura deForce Gordon, Clara Shortridge Foltz, Jeanne Carr and Rowena Steele were on hand to represent the CWSA, as duly elected delegates. "Delegates to Sacramento," *San Jose Weekly Mercury*, Dec. 23, 1880, at 2; *Woman's Journal*, Jan. 29, 1881, at 37.

Apparently, however, dissention within the ranks arose not long after the session opened. Just before presentation of the petitions, Wallis is found complaining bitterly to Laura deForce Gordon that the suffrage association had inexplicably removed her from lobbying "my bill," and substituted others. Letter from Sarah Wallis to Laura deForce Gordon, Jan. 25, 1881, on printed form entitled "Petition for Equal Rights," LDG Collection. This may have resulted in Wallis being reinstated, given that the *San Francisco Chronicle* later recounted that she had been "'intrusted the stalwart duty of logrolling the bill through the legislative and executive departments.'" "The California Suffragists," *Woman's Journal*, Oct. 15, 1881, at 336.

¹⁹⁵*Assembly Journal*, Jan. 26, 1881, at 145; *Senate Journal*, Jan. 28, 1881, at 142; *Assembly Journal*, Jan. 29, 1881, at 174; *Sacramento Record-Union*, Jan. 29, 1881, at 1; *id.*, Jan. 31, 1881, at 4. The record regarding those petitions submitted in the Senate on Jan. 28th is very confused, as to the specific Senators who submitted the petitions, the subject matter of the member's petition, and the committee referral of the petitions. Further, the record regarding the petition submitted in the Assembly on Jan. 29th also contains a discrepancy regarding its committee assignment.

According to the *Senate Journal*, at one point in the proceedings, three petitions were submitted regarding school suffrage, which were referred to the Judiciary Committee, and four petitions were submitted regarding the widow's succession to community property, which were referred to the Elections Committee. That these committee referrals were recorded backwards is supported both by logic and by a concurrent report indicating such in the *Sacramento Record-Union*.

Another discrepancy exists regarding the Senators who submitted these various petitions. One member who was listed in the *Senate Journal* as having submitted a school suffrage petition was listed in the *Record-Union*, as having submitted a community property petition. And two members who were listed in the *Journal* as having submitted community property petitions were listed in the *Record-Union*, as having submitted school suffrage petitions. Given the incorrect committee references in the official record, it seems fair to conclude that the *Record-Union*, and not the *Senate Journal*, is correct here as well.

Additionally, the *Record-Union* lists four petitions of each type as having been submitted, and credits certain other members with submitting these petitions. Specifically, the *Record-Union* credits school suffrage petitions as being submitted by Langford, Sears, Lamson[sic], and Carlock, and community property petitions as being submitted by Enos, Sears, Hill and Moreland. The only point of agreement between the *Record-Union*, and the *Senate Journal* is Moreland's submission of a community property petition.

Finally, the *Record-Union* alone reported that Langford's school suffrage petition was signed by 17,000 citizens, this specificity lending further credence to the accuracy of the *Record-Union*, over the official record. This accorded with the suffragists' report. "The California Suffragists," *Woman's Journal*, Oct. 15, 1881, at 336.

As for the school suffrage petition submitted to the Assembly the following day, the

numbered well over ten thousand.¹⁹⁶

Bills addressing school suffrage and widowhood succession, drafted by Wallis, were introduced on the heels of her petitions.¹⁹⁷ Identical school suffrage proposals were put before both houses (Assembly Bill No. 109 and Senate Bill No. 264), and in the Assembly yet an alternate school suffrage bill (Assembly Bill No. 343) was introduced as well.¹⁹⁸ Meanwhile, the widowhood succession bill (Senate Bill No. 188), which had been considered only in the Assembly last year, was introduced this time in the Senate, by Mr. Enos, who also put forth that house's school suffrage bill.¹⁹⁹

Like the previous session, no special committees were established to consider these or any other issues impacting women. Instead, the Senate referred school suffrage Bill No. 264 to the Education Committee, and Enos' widowhood

Assembly Journal, indicates that it was referred to the Elections Committee, while the Record-Union, lists it as being referred to the Education Committee. In this instance, it appears that the official record is the correct one, given that the bill itself had been referred to the Elections Committee.

¹⁹⁶In a report to the Woman's Journal, the California State Incorporated Woman Suffrage Educational Association (the latest denomination of the CWSA) recounted that the marital property rights petition contained "eighteen yards of closely-printed names," representing "[o]ver 11,000 signatures" from "citizens of all portions of California." The association crowed that "[e]x-Governor Leland Stanford's signature headed the list." "The California Suffragists," Woman's Journal, Oct. 15, 1881, at 336.

¹⁹⁷Id.; "From the Capital," San Jose Weekly Mercury, Jan. 13, 1881, at 2. The Mercury believed that the Governor was prepared to sign these bills if they passed the legislature. Id.

¹⁹⁸Assembly Bill No. 109, introduced by Mr. Hendrick; Assembly Journal, Jan. 7, 1881, at 46; Senate Bill No. 264, introduced by Mr. Enos; Senate Journal, Jan. 25, 1881, at 121; Assembly Bill No. 343, introduced by Mr. Wentz; Assembly Journal, Jan. 26, 1881, at 151.

¹⁹⁹Senate Bill No. 188, introduced by Mr. Enos; Senate Journal, Jan. 13, 1881, at 57.

succession bill to the Judiciary Committee.²⁰⁰ The Assembly referred school suffrage Bill No. 109 initially to the Elections Committee and then, about a month later, kicked it over to the Judiciary Committee for an evaluation of its constitutionality. The alternate school suffrage bill, No. 343 was referred to the Judiciary committee at the outset.²⁰¹

The corresponding petitions were referred to committee also, but in a very ad hoc fashion, and not necessarily consistent with the underlying bill's referral. In the Assembly, school suffrage petitions appear to have been referred to both the Education Committee and the Elections Committee. No doubt in connection with the handing off of Assembly Bill No. 109 from the Election to the Judiciary Committee, the supporting petitions also found their way to the Judiciary Committee, where they were returned "without recommendation."²⁰² School suffrage petitions presented in the Senate were referred en masse, probably to the Election Committee, but that committee made no response.²⁰³ Meanwhile, although no relevant bill was introduced there, the Assembly referred its widowhood succession petitions to the Judiciary Committee, which returned them as well without recommendation.²⁰⁴

²⁰⁰Senate Journal, Jan. 25, 1881, at 121; id., Jan. 13, 1881, at 57.

²⁰¹Assembly Journal, Jan. 7, 1881, at 46; id., Feb. 1, 1881, at 185; id., Jan. 26, 1881, at 151.

²⁰²Id., Feb. 9, 1881, at 256; Sacramento Record-Union, Jan. 31, 1881, at 1.

²⁰³See discussion above.

²⁰⁴Assembly Journal, Jan. 26, 1881, at 145; id., Feb. 9, 1881, at 256; Sacramento Record-Union, Feb. 9, 1881, at 1.

As for the school suffrage bills themselves, the duplicate bills were very similar to last session's Assembly Bill No. 139, but this time the language was more explicit regarding the residency requirements for voter registration, and appeared to provide greater latitude regarding issues upon which women could vote.²⁰⁵ Not surprising, constitutionality remained a sticking point. In the Assembly, the Judiciary Committee concluded that the bill was unconstitutional, and thus recommended against passage, while in the Senate, the Education Committee apparently never reported on its bill.²⁰⁶ These actions effectively killed both bills, without any floor debate ever taking place.

This difficulty appears to have been anticipated, as an alternate strategy was put in motion even before the committees could consider the possibility of granting women suffrage statutorily.²⁰⁷ Another bill was introduced in the Assembly resurrecting somewhat the constitutional convention's suffrage points, this time in the form of an amendment to be put before the electorate at the next general election. The amendment would explicitly permit the legislature to grant

²⁰⁵The 1880 bill called for women to vote for all levels of school officers, and "upon all questions of taxation for school purposes." Assembly Bill No. 139, Section 1. The 1881 bills contained similar language regarding school officers, but instead allowed women to vote "on all questions relating to and regulating the management, control, and support of the public schools." Assembly Bill No. 109, Section 1; Senate Bill No. 264, Section 1.

²⁰⁶Assembly Journal, Feb. 2, 1881, at 256. Nor was there any record of a report on this bill from the Senate's Elections or Judiciary Committee.

²⁰⁷J.J. Owen, the editor of the San Jose Mercury, predicted the outcome of the school suffrage proposal, reporting a couple weeks prior to the committee report that the bill "is likely to encounter a Constitutional snag," and conceded that "an amendment to the Constitution will be in order." "From the Capital," San Jose Weekly Mercury, Jan. 27, 1881, at 2. Nevertheless, Owen himself believed that the constitutional issue was "an open one, and it could do no especial harm to let the Supreme Court have a chance to decide the matter." Id.

women school suffrage.²⁰⁸ Although this strategy might flush out those using the constitutionality debate as a cover for opposition to the idea of any form of woman suffrage, the Judiciary Committee recommended against passage of this alternate proposal as well, and it went no further.²⁰⁹

Meanwhile, this session's widowhood succession bill also benefitted from some redrafting. First, the legally undefined term "family estate" was eliminated. Second, this bill directly referenced the two relevant Civil Code sections, amending them to provide equal treatment of the husband and wife. Nevertheless, the drafter chose to keep the issue split over two code sections, thereby retaining some redundancies, rather than gender-neutralizing one section and repealing the other.²¹⁰ Regardless of the improvements, the Judiciary Committee recommended that John Enos' bill be indefinitely postponed, and the Senate took no further action on it.²¹¹ Less than two weeks later, a different attempt was made to improve the relationship of the widow to the common property. Rather than equalizing the rights of the surviving spouses, this bill called for the widow to take the entire of the community property, but only if the husband had either

²⁰⁸Assembly Bill No. 343, introduced by Mr. Wentz; Assembly Journal, Jan. 26, 1881, at 151.

²⁰⁹Assembly Journal, Feb. 18, 1881, at 322.

²¹⁰As it was, Civil Code Section 1401 dealt with the widower's rights to the common property, and Section 1402 dealt with the widow's rights.

²¹¹Senate Journal, Jan. 31, 1881, at 162; id., Feb. 12, 1881, at 248 (passed on file when came up for second reading).

failed to testamentarily dispose of "his" half or had left no descendants.²¹² The Judiciary Committee actually recommended passage of this niggardly amendment, but the Senate appeared to take no other action on it.²¹³

Taken together, the 1880 and 1881 sessions yielded no more than minor progress for women, notwithstanding the focused, sustained efforts of the organized women's rights movement in 1881. Suffrage in any form remained a sticking point, although at the least more men supportive of women's rights were getting elected to the legislature. However, while many issues were broached, only suffrage reached the point of debate, making it difficult to assess the broader views of these representatives. Yet with so much unproductive effort expended on women's rights during these two sessions, it is not surprising that a sort of doldrums set in, with significantly fewer bills introduced over the next three sessions. While the organized movement promised "another herculean effort . . . to have the [widowhood succession] bill enacted into a statute at the next session," it must have proved difficult to marshal the same level of resources which were expended for naught in this session.²¹⁴ Moreover, the biennial nature of the legislature hindered activists in maintaining interest in securing women's rights

²¹²Senate Bill No. 346, introduced by Mr. Cheney; Senate Journal, Feb. 10, 1881, at 230. The organized women's movement had called for the equalization embodied in Enos' bill. There is no reason to believe that it viewed W.A. Cheney's bill as a reasonable substitute or alternate strategy.

²¹³Id., Feb. 14, 1881, at 256. J.J. Owen predicted this result as well. Around January 20th, he reported that the widowhood succession bill "was meeting with more favor" than the school suffrage bill, "although we apprehend the Judiciary Committee will hardly concede to the full measure of equality asked for." "From the Capital," San Jose Weekly Mercury, Jan. 27, 1881, at 2.

²¹⁴"The California Suffragists," Woman's Journal, Oct. 15, 1881, at 336.

during the off-year.²¹⁵ In addition, the growing variety of causes open to women's involvement drained foot soldiers from the suffrage movement.²¹⁶ Finally, mundane family responsibilities could be put on hold only for so long.²¹⁷

Twenty-fifth Session, 1883

While the peculiar petitioning actions of women in the 1880 session may have sent an unfortunate message to legislators that the vast majority of California women "had all the rights they wanted," the more typical organized petitioning behavior of the next session was not maintained over the 1883 session. Further, it was a month and a half into this, a shortened session, that any women's rights

²¹⁵Mrs. H.M. Tracy Cutler, an AWSA suffragist of national repute who was visiting Northern California again in 1882, reported back to the Woman's Journal that "our [California] friends are resting on their oars, waiting for next year's campaign." "Letter from California," Woman's Journal, Feb. 4, 1882, at 33.

²¹⁶In a report to the Thirteenth Annual meeting of the AWSA, Sarah Knox-Goodrich complained, "there is not as much interest taken in suffrage work directly as I would like to see, a great many of our old workers having gone off into other channels, such as temperance work, Veterans' Home entertainments, Chatauqua societies, social science sisterhoods, co-op societies, silk culture, etc., etc." What is notable about this list is that, for the most part, these activities (except, to some degree, temperance) did not involve the direct sort of law reform in which the suffragists had been active (no doubt, Knox-Goodrich was including the other matters on the suffragists' legislative agenda, including marital property reform, when she spoke of "suffrage work"). Knox-Goodrich recognized the foremost importance of law reform, arguing, "[i]t may be that these will all lead to suffrage in the end, but I am too impatient to secure the ballot to be even interested in any side issues. We consider woman suffrage the foundation for all other reforms, and the temperance unions will never succeed until woman suffrage has been established as a fact, and the women of America are acknowledged as citizens, . . . and given the same chance to earn an honest living." Woman's Journal, Aug. 30, 1882, at 307.

²¹⁷Laura Watkins acknowledged, "The most of us are women with large families . . . and we cannot do all that we wish for suffrage." Id. While noting that women as individuals have been supporting the cause, she admitted that even the local Santa Clara county organization had not been very active in the past year. Tellingly, although Watkins alluded to a possible report from the state organization, none was forthcoming that year. Id.

petitions were even introduced. The only petition which appeared to have been circulated called generally for "removing the political disabilities of women and placing them on an equality with men citizens," but the official record was silent regarding the number of signatories or the county of residence. Indicative of the legislature's belief regarding the manner by which such a removal of disabilities could occur, referral of this petition was to the Committee on Constitutional Amendments.²¹⁸

On the same day, a petition was presented in both the Senate and Assembly from Laura deForce Gordon, much like the one she submitted in 1880, asking for the removal of her political disabilities.²¹⁹ In the Senate, it was referred to the Elections Committee, which issued its report the very next day.²²⁰ While little attention must have been paid to Gordon's petition, the committee nonetheless was not of one mind on it. The majority of four found that "the question submitted by this petition is settled by the organic law of the State, lately submitted to the people, and we deem it impolitic to recommend any change in the law in that respect," however, the minority of three was able both to discern and respond to Gordon's ultimate purpose. It concluded "that no special relief should be granted to petitioner, but that an amendment to the Constitution, striking out the word, 'male,' . . . should be submitted to the people of the State

²¹⁸Assembly Journal, Feb. 16, 1883, at 350.

²¹⁹Senate Journal, Feb. 16, 1883, at 200; Assembly Journal, Feb. 16, 1883, at 350.

²²⁰Senate Journal, Feb. 16, 1883, at 200; id., Feb. 17, 1883, at 211.

for their decision thereon." Yet, this probably indicated less a support for woman suffrage, than a weariness with continual legislative revisiting of the issue; the minority report called for a popular vote in order "thereby [that] the 'vexed question' would be settled."²²¹

About two weeks later, the Assembly Committee on Constitutional Amendments issued its report on the more general political equality petition, actually recommending that the House consider the issue.²²² However, with the session due to end in about a week and no constitutional amendment having actually been proposed, this ostensibly positive move seemed poised to become little more than an empty gesture. Nevertheless, given that some official support for woman suffrage was now on record, there was reason to think that the issue might make some other sort of progress of one sort or another during this session.

Not ready to give up on the notion that school suffrage could be granted statutorily, two legislators introduced identical bills to that end in each house on the same day, just a few days after the report on Gordon's petition.²²³ This strategy certainly increased chances of passage, but with the bills' introduction

²²¹Senate Journal, Feb. 17, 1883, at 211. The 1879 constitutional convention's nightmare of continual female lobbying for suffrage was coming to pass, even with the delegation having rejected the provision empowering the legislature to grant women the vote.

²²²Assembly Journal, Mar. 1, 1883, at 522.

²²³Assembly Bill No. 486, introduced by Mr. Murdock; Assembly Journal, Feb. 19, 1883, at 378; Senate Bill No. 336, introduced by Mr. Cross; Senate Journal, Feb. 19, 1883, at 219. The Assembly Bill was introduced "by request," probably indicating that Mr. Murdock was simply acting as a conduit and had not authored the bill. Most likely it was Gordon who saw to it that the bill was introduced.

occurring less than a month before the end of the session, chances remained slim nonetheless. The concern of this drafter seemed to revolve around the issue of voter registration, although there had never before been any recorded debate surrounding female voter registration procedures. Nevertheless, concerns surfaced that intransigent registrars might work to block women's registration, thereby defeating female suffrage rights ad hoc.²²⁴ As a result, in this latest version, while

²²⁴ The historical record certainly lent support to this suspicion. In the early 1870s, as part of the New Departure suffrage strategy, many women had attempted to register to vote and cast a ballot, on the basis that the 14th and 15th Amendments had enfranchised them. While some, most notoriously Susan B. Anthony, reached the point of actually casting a ballot, others were prevented from registering to vote and thus, as part of the strategy, brought suit against the registrar. In California, the charge was led in 1871 by Ellen Van Valkenburg, a property-owning, tax-paying widow from Santa Cruz. Her suit was designed as a test case from the start, as the county clerk, an active supporter of woman suffrage, was in on the plan to refuse Van Valkenburg's voter registration. The lawsuit came before a sympathetic Judge McKee, however, no one expected the court to rule in the widow's favor. McKee rejected the argument that the Civil War Amendments could be read to confer political rights on women (although he did urge the petitioners to seek a constitutional amendment), allowing Van Valkenburg to bring an appeal before the California Supreme Court. Carolyn Swift and Judith Steen, eds., Georgiana: Feminist Reformer of the West 37-40 (1987). No surprise, the high court, in a rather unremarkable opinion, also denied that the Amendments served to enfranchise women. Van Valkenburg v. Brown, 43 Cal. 43 (1872).

Interestingly, the timing of this test case was deliberate and meant to coincide with Elizabeth Cady Stanton and Susan B. Anthony's visit to California and particularly Santa Cruz. Leaving San Francisco, the two women arrived in Santa Cruz just after Judge McKee issued his ruling in August of 1871. Of course, their lectures in that town included commentary on the suit, and as a result, the local women hoped that Stanton and Anthony would assist in bringing Van Valkenburg v. Brown before the United States Supreme Court. Swift and Steen at 39-40; letter from Ellen Van Valkenburg to Laura deForce Gordon, Oct. 15, 1871, in LDG Collection ("Mrs. Stanton assured us that there were strong hopes of our receiving a favorable decision"). While this was not to be, nevertheless, the local women felt an important point had been made simply in the prosecution of the lawsuit. At the time, Van Valkenburg wrote that it "has caused a deal of discussion and many who were opposers of the movement have come around and now think favorably and are working with us." Id. Years later, Elizabeth Schenck lauded Van Valkenburg and others like her, stating, "[w]e cannot too highly appreciate the bravery and persistence of the few women who have furnished these test cases and compelled the highest courts to record their decisions," and noting that these cases "have been of inestimable value in the progress of the movement, lifting the question of women's rights as a citizen above the mists of ridicule and prejudice, into the region of reason and constitutional law." 3 HWS at 766. On Susan B. Anthony's suit, see Joan Hoff, Law, Gender, and Injustice: A Legal History of U.S. Women 152-161 (1991).

women were still required to meet residency requirements in order to vote, they were made exempt from the registration process. Instead, an unusual procedure was proposed whereby, upon a judge's satisfaction that a particular woman otherwise met electoral criteria, her vote was required to be received.²²⁵ This version also required women to be given a restricted ballot pertaining only to school issues and to have those ballots deposited separately.²²⁶ In addition, this version of school suffrage legislation incorporated the right of women to run for educational offices, with eligibility for such offices now predicated on qualifying as an elector. Consistently, this version did not restrict women from holding any particular educational offices, mostly no doubt, because those restrictions stemmed from women's inability to be electors.²²⁷

Interestingly, the Assembly version was referred to the Judiciary Committee, possibly indicating continued doubt as to the bill's constitutionality, while the Senate's bill was referred to the Elections Committee.²²⁸ This committee reported the bill out without recommendation, apparently unconcerned with possible unconstitutionality, while the Assembly Judiciary Committee

²²⁵Assembly Bill No. 486, Section 1; Senate Bill No. 366, Section 1 (1883).

²²⁶Senate Bill No. 366 at Section 2.

²²⁷Assembly Bill No. 486, Section 1; Senate Bill No. 366, section 1 (1883).

²²⁸Assembly Journal, Feb. 19, 1883, at 378; Senate Journal, Feb. 19, 1883, at 219.

recommended against passage.²²⁹ Each bill then died without any floor debate occurring.

The other petition which confronted the Assembly was quite a bit more eclectic. It was submitted by Mrs. E.P.W. Packard, a rather unique character with a national reputation in law reform.²³⁰ After having experienced involuntary commitment by her husband to a mental asylum in 1860, and then winning her freedom through use of the judicial system, yet losing custody of her children when her husband packed them up and moved away, Packard transformed these personal experiences into a national crusade for law reform. She tackled the issue of involuntary institutional commitments,²³¹ but worked as well for increased married women's rights under the common law system of coverture. While Packard conducted most of her law reform activities in Illinois and in the East, her efforts extended to California by the early 1880s, when one of her sons moved to Pasadena.²³² Apparently, during her visits with him, Packard took the opportunity to approach the California legislature, and there is evidence that she first did so early in the 1881 session, based on a rather unusual bill introduced that

²²⁹Senate Journal, Mar. 3, 1883, at 317; Assembly Journal, Feb. 28, 1883, at 500.

²³⁰Elizabeth Parsons Ware Packard became known as Mrs. E.P.W. Packard "during her crusading years." Barbara Sapinsley, The Private War of Mrs. Packard xv (1991). Unfortunately, Sapinsley's work is of limited use as a scholarly biography of Elizabeth Packard, inasmuch as it contains no definitive citations to source material.

²³¹Under these laws, which became known as personal liberty, or Packard, laws, a jury trial on the issue of mental illness was required prior to an involuntary commitment. Hendrick Hartog, "Mrs. Packard on Dependency," 1 Yale Journal of Law and the Humanities 79, 82-83 (1988).

²³²Sapinsley reports that the son relocated to Pasadena some time between 1870 and 1883. Sapinsley at 195. As discussed below he was probably in California by late 1880.

January, which bore the mark of Packard's life experiences and reform interests.²³³

Elizabeth Packard's role as a law reformer seemed to reprise that of Californian Marietta Stow.²³⁴ Stow and Packard had much in common: for one, they certainly reflected the middle-class Victorian norms of their time, embracing as they did the ideology of separate spheres and the cult of domesticity.²³⁵ Yet, both women relied heavily on their particular life experiences to shape far-reaching reform efforts.²³⁶ Not surprising then, Packard as well as Stow worked apart from the organized women's rights movement, a situation explained also by the fact that both were devoted to reform causes which they believed superseded the organized movement's tight focus on woman suffrage. Nevertheless, both women came to realize later in their crusades the necessity of women having the vote.²³⁷ Finally, their styles and strategies were extremely similar: they wrote and

²³³Senate Bill No. 204, introduced by Mr. Hill; Senate Journal, Jan. 17, 1881, at 70.

²³⁴See Donna C. Schuele, "In Her Own Way: Marietta Stow's Crusade for Probate Law Reform Within the Nineteenth-Century Women's Rights Movement," 7 Yale Journal of Law and Feminism 279 (1995).

²³⁵See Barbara Welter, "The Cult of True Womanhood: 1820-1806," 18 American Quarterly 151 (1966).

²³⁶Hartog at 84; Schuele at 280-285.

²³⁷Hartog at 83, n. 20; Schuele at 290, 292-293. Packard's rejection of female suffrage was based on her belief that women would not need the vote if the system operated properly to provide them with their rightful protection. "Petition for Passage of a Law, Known as the Identity Act," Assembly Journal, Mar. 8, 1883, at 611-12. Stow's apathy towards female suffrage, meanwhile, was more of a statement against the organized women's rights movement, from which she had separated early on. Unlike Packard, she believed that the system operated properly only when it provided women with the tools to be their own legal protectors. As a result, Stow was able and willing to recognize female suffrage as one means to this end. Schuele at 281, 287.

sold polemical tracts as a way to support themselves and spread their messages, drew up reform legislation, and personally lobbied their bills both on the federal level and before individual state legislatures.²³⁸

However, Elizabeth Packard was far more successful in developing and articulating through her writings a complex challenge to the Victorian legal view of marriage, which in turn was more readily accepted by various lawmaking bodies. First, she based her legislative work on behalf of married women on a well-developed, yet somewhat unique, understanding of the legal identity of the wife, which included the right to be protected by her husband, and should he fail in this, to be protected by the male state.²³⁹ According to legal historian Hendrik Hartog, under Mrs. Packard's view, "[t]he right to be a married woman was thus both a gendered vision of roles and rights and, at the same time, a radical invocation of the power of the law to compel change in a husband." This "public recognition of the right to be a married woman" would in turn require the legal system to drop the pretense that marriage was a part of the private sphere (which had functioned to serve well the interests of those who held the power within the system), and instead embrace the idea that marriage was a public institution,

²³⁸Hartog at 82; Sapinsley at 188-91; Schuele at 285-290.

²³⁹See Hartog at 93-97, for a full discussion of Elizabeth Packard's views on the legal identity of the married woman. Clearly, Packard's philosophies were diametrically opposed to those of Elizabeth Cady Stanton on the autonomy of women, and were also at odds with Stow's belief that legislation should operate as a vehicle to allow women to protect themselves.

whereby on-going relationships could legitimately be subject to state intervention.²⁴⁰ Packard knew well that she could have regained a legal identity by divorcing her husband. However, what she wanted was to remain a married woman with her children around her and a husband to protect her, and she wanted to be able to employ the force of the legal system to attain this.²⁴¹

To implement her goals she turned to legislatures, not courts, believing that "[o]nly the legislature . . . would have the power to protect [the wife], by changing the rules governing her relationship with her husband."²⁴² In doing so, she was quite successful, with male legislators "for the most part accept[ing] her characterization of her legal situation," and finding "her vision persuasive enough to justify legislative relief."²⁴³ It was at this point that Packard parted company with Stow, who was quite unsuccessful in her appeal to various legislatures. While

²⁴⁰*Id.* at 94. By the mid-nineteenth century, states were beginning to exercise regulatory power at the point of entrance into marriage, and had a longer tradition of exercising power over the exit from marriage. Michael Grossberg, "Guarding the Altar: Physiological Restrictions and the Rise of State Intervention in Matrimony," 26 *American Journal of Legal History* 197 (1982). However, the notion of state interference in an on-going marriage was mostly foreign to American legal culture at this time.

²⁴¹Hartog at 86, 90-91, 96.

²⁴²*Id.* at 97, 99. Hartog explains further that Packard drew upon a burgeoning postbellum notion within American legal culture which held that those without substantive legal rights (e.g., married women) nevertheless had "recourse to a body of constitutional aspirations (sometimes called rights) that served as a critique and a delegitimation of ostensibly vested rights." In practice, Hartog explains, this played out as "the constitutional right to demand of the legislature that it stop authorizing [Packard's or any other] husband in his exercise of corrupted and immoral power." *Id.* at 93.

²⁴³*Id.* at 85. Packard campaigned for law reform in over twenty-five states, as well as the federal government, and is credited with responsibility for changing the law regarding commitment and treatment procedures in anywhere from twenty-one to thirty-four jurisdictions. Sapinsley at 192.

Stow couldn't avoid emphasizing her goal of autonomy for widows in the estate administration process, Packard's strategy called on male legislators to engage in a sort of "legislative patriarchy," based on a particular quality of manliness.²⁴⁴

According to Packard, manliness could and should be a characteristic of male, public institutions, such as a legislature, as well as of individual men. And, "as a principle of legislative action . . . manliness described the impulse to institute those changes that would protect the autonomy of married women and that would undo women's enforced legal dependency on potentially unmanly men."²⁴⁵ Thus, Packard's appeal to the manliness of legislators was an appeal to their virtuous selves, calling on them not only to provide her with a sympathetic hearing, but also to support changes in the law which would serve to undermine the illegitimate aspects of the husband's traditional authority. But this notion of institutional manliness, combined with the idea of individual manliness, allowed legislators to

²⁴⁴Hartog at 95. This term borrows from Michael Grossberg's identification of "judicial patriarchy," a phenomenon involving the illusory extension of rights to wives and mothers through judicial lawmaking in the nineteenth century. Grossberg, Governing the Hearth: Law and Family in Nineteenth-Century America ch. 8 (1985) [hereinafter Grossberg, Governing the Hearth].

Rather than relying on the courts, Packard put her faith in the legislature's ability to create positive law which would clearly assist all women. She defined manliness as "a willingness to defend and protect the dependent and vulnerable." Hartog at 99. On one level, manliness was the quality which motivated individual husbands to forego the exercise of their common law-based authority over their wives, and instead respect and protect their autonomy. Id. at 99, 101. But, more importantly for Packard, "manliness was also the quality that characterized those legislators who were willing to change the laws constitutive of married life." Id. at 99.

Thus, Packard set out to regain custody of her children, not by appealing to the judiciary and its emerging maternal preference, or tender years, doctrine. Rather, she successfully campaigned in Illinois for a bill equalizing parental rights, and was aided by the fact that such rights had already been established by statute in Massachusetts, where her children were now living with their father. Sapinsley at 172-173. Nevertheless, Packard's success with this strategy was the exception, as Grossberg notes that legislatures were cool to the idea of a blanket equalization of custody by statute. Grossberg, Governing the Hearth, at 244-247.

²⁴⁵Hartog at 101.

believe that such reforms were appropriately limited, inasmuch as they were meant to touch only the marriages of deviant men, and not those of true men such as themselves, who behaved of their own volition in a manly fashion.²⁴⁶ Thus, Packard's strategy was an extremely flattering one, appealing to the paternalistic authority of legislators.²⁴⁷

While most of Mrs. Packard's legislative efforts were geared towards gaining liberty rights for those who had been involuntarily committed to institutions (especially wives by husbands), she devoted some energies to campaigning more generally for married women's rights under the system of coverture, including property and child custody rights. Packard opposed the paradoxical situation whereby the only way a married woman could get fair treatment under the law was to give up that very identity, i.e., by obtaining a divorce.²⁴⁸ Thus in 1866, she drew up a bill and circulated a petition in support, to establish in the law a partnership notion of marriage, which was introduced into the Connecticut legislature.²⁴⁹ She was then invited to address the relevant legislative committee, her first public speaking appearance. At the hearing, no

²⁴⁶Id. at 101, 101 n. 68.

²⁴⁷Id. at 95.

²⁴⁸Id. at 94.

²⁴⁹Sapinsley at 130. In order to accomplish this, she raised money by selling copies of her book, lobbied many men, and persuaded 250 of them to sign the petition supporting her bill. Id. The bill began by requiring that a "woman entering the marriage relation, shall retain the same legal existence which she possessed before marriage, and shall receive the same legal protection of her rights as a woman, which her husband does as a man." Hartog at 96.

opposition to the bill was expressed, but later the committee recommended against it, and requested that she withdraw her petition.²⁵⁰ Packard had more success in her domicile, Illinois, during the next two years, where, with the help of a lawyer son, she drafted and lobbied to passage bills giving married women control over their finances, and making husbands and wives equal partners in various aspects of marriage, including parenthood.²⁵¹

During the 1870s, Packard appears to have returned to campaigning mostly for rights for those involuntarily committed to state-run institutions. However, in 1881, a bill was introduced into the California Senate which bore the marks of Packard's earlier efforts on behalf of married women. Although her name was not to be found connected with it in any of the official records, the language of the first section was virtually the same as the bill Packard urged upon the Connecticut legislature seventeen years earlier, while the second section reflected Packard's Massachusetts efforts to equalize the rights and responsibilities of parenthood.²⁵² Not surprisingly, the Judiciary Committee recommended that the bill not pass, and the Senate appeared to take no further action.²⁵³ Two years

²⁵⁰Sapinsley at 130-131. Packard attributed the legislature's opposition to denigration she received both in the media and privately after the hearing, while the committee was considering her bill. Although this bill dealt with married women's rights generally, Packard believed that the source of the discreditation campaign were psychiatrists, who "felt that the practice of their profession was threatened by the laws she advocated." *Id.* at 131.

²⁵¹*Id.* at 172-3.

²⁵²Senate Bill No. 204, introduced by Mr. Hill; *Senate Journal*, Jan. 17, 1881, at 70. Interestingly, W.J. Hill represented the San Benito and Monterey areas; thus, his sponsorship of the bill fails to shed light on Packard's relationship with the State of California in 1881.

²⁵³*Senate Journal*, Feb. 10, 1881, at 228.

later, Packard emerged from the shadows to present her "Petition for Passage of a Law, Known as the Identity Act" to the Assembly.²⁵⁴ With minor revisions, the Act mirrored the 1881 Senate Bill and the 1866 Connecticut proposal, declaring that "[h]enceforth woman shall retain the same legal existence after marriage as before marriage, and shall receive the same protection of all her rights, as a woman, which her husband does as a man."²⁵⁵ The accompanying petition bore the clear mark of Packard's distinctive voice, and although Packard tried to minimize the controversial nature of "The Identity Act," she couldn't help but conclude with the rather grand declaration that "[t]his legislation is an entirely 'new departure' in the woman's rights movement."²⁵⁶

Nevertheless, the petition began with an attempt to make her proposal more palatable to legislators, as she called it an "important, just and sensible" bill which "ought to have been passed in every State . . . years ago," but hadn't been, due to "mere oversight." It then went on to allude to Packard's theories on manliness, explaining that "[t]he custom of this civilized age recognizes [the wife] as an identity, the companion or partner of her husband." But, Packard complained, the common law's slave-like treatment of married women, and the twisted result of coverture whereby a wife had to obtain a divorce in order to

²⁵⁴Assembly Journal, Mar. 8, 1883, at 611-12.

²⁵⁵Id. at 612.

²⁵⁶Id.

reclaim her identity, created an anomalous situation. The Act, then, would "simply make her legal position . . . correspond to her present social position."²⁵⁷

Further attempting to minimize the radical character of her proposal, Packard claimed it to be a superior alternative to giving women the ballot. With "The Identity Act," the manly legislature would give women in one fell swoop all the rights they needed, thus making it unnecessary for them to have to employ the ballot to gain these rights for themselves. Packard continued to believe that defining a married woman's identity in the law would allow the wife "to demand her right 'to be protected' by man, her natural protector, and this would place woman in a far nobler, higher position than the ballot would confer upon her."²⁵⁸

Clearly, Packard had not lost her highly gendered view of marriage, and while her proposal on its face appeared consistent with California activists' on-going attempts to secure equal treatment for wives, not a one would have agreed with Packard's reasoning behind the bill. In addition, Packard's petition (and to some extent her bill) displayed an ignorance of the community property

²⁵⁷Id. at 611. Regarding the rhetoric of slavery in post-bellum critiques of marriage, see Elizabeth B. Clark, "Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America," 8 Law and History Review 25, 30-38 (1990).

²⁵⁸Assembly Journal, Mar. 8, 1883, at 611. Strategically, Packard also attempted to appeal to those who supported woman suffrage, by arguing that the establishment of the wife's identity in law was a necessary precursor to granting her the ballot, inasmuch as "a nonentity or slave is not a legal voter." Nevertheless, Packard couldn't help adding that, should her bill be enacted, "we see no claim left her for the ballot, for the ballot only confers upon her man's rights and man's responsibilities, whereas this identity [sic] Act simply confers upon her woman's rights and woman's responsibilities." Id. at 611-612.

system.²⁵⁹ California wives were not explicitly bound by the strictures of coverture, including the hallmark loss of identity, even if California judges and legislators often found it difficult to shed their commitment to that portion of common law legal culture. If enacted, Packard's bill could have introduced even more chaos into an area of law which had already been subjected to enough inconsistency. It was for the best, then, that this "carpetbag" proposal was ignored by the Assembly, introduced as it was very late in the session.

However, the unequal treatment of the widow and widower vis-a-vis the community property was an issue which was not going to go away this session, as two bills were introduced which were very similar to those put forth during the 1881 Session. The first followed one of the previous session's bills almost verbatim, giving the widow the entire of the community property but only if the husband died either without making testamentary disposition of his half or without descendants.²⁶⁰ The second, like Enos' bill last session, was more radical as it called for equal gender-neutral treatment of the spouses whereby the whole of the community property would go to the survivor. Further, this latest draft showed additional improvement over last year's in terms of eliminating redundancies. While the Civil Code as it stood dealt with the husband and wife in separate code

²⁵⁹Curiously, however, in her Connecticut petition many years earlier Packard had displayed an awareness of the notion of joint property principles by calling for legal recognition of the social reality of the wife as a "joint partner with [her husband] in his [sic] family interests." Sapinsley at 207, reprint of "Bill Presented to Connecticut Legislature." It is difficult to understand why Packard ignored the expression of joint property principles in California law as she approached this legislature.

²⁶⁰Assembly Bill No. 172, introduced by Mr. Storke, Assembly Journal, Jan. 15, 1883, at 63.

sections, this draft simply called for repealing that section which addressed the widow's treatment, and made the other gender neutral.²⁶¹

Obviously, these bills were mutually exclusive, yet oddly enough, they were introduced by the same lawmaker on the same day. At best the strategy may have been to get at least a crumb for widows (Assembly Bill No. 172) by also asking for the whole loaf (Assembly Bill No. 173). At worst, Assemblyman C.J. Storke was behaving disingenuously towards supporters of full equality, thereby undercutting their efforts. Either way, at least the initial results were predictable: the Judiciary Committee, to which both bills were referred, recommended that the more radical not pass, while it recommended passage of the other more limited provision, albeit in amended form.²⁶² The full Assembly concurred in that amendment, although the bill died short of coming up for a vote.²⁶³ Meanwhile, no other action was taken on the promise of full equality vis-a-vis the community property.

Finally, legislators' antipathy towards women during this session is probably best illustrated by a small bill, to allow the clothing of each spouse to be considered his or her separate property.²⁶⁴ While the proposal called for the Civil Code section regarding husbands' separate property to be amended in like manner of that regarding wives' separate property, the real import of the bill no

²⁶¹Assembly Bill No. 173, introduced by Mr. Storke, Assembly Journal, Jan. 15, 1883, at 63.

²⁶²Assembly Journal, Jan. 31, 1883, at 174.

²⁶³Id., Mar. 2, 1883, at 536-37.

²⁶⁴Assembly Bill No. 52, introduced by Mr. Terry; Assembly Journal, Jan. 11, 1883, at 23.

doubt was to protect a wife from the husband's conveyance of her wardrobe, inasmuch as the law otherwise permitted him to unilaterally give away community property. As despicable as such a conveyance might be, this prohibitory bill could not pass in the Senate, although it did win in the Assembly.²⁶⁵ And this progress was probably due in no small part to the fact that the sponsor of the bill, Samuel L. Terry, chaired the Judiciary Committee, to which it was referred, and was thus able to shepherd the bill more closely through to passage.²⁶⁶

Twenty-sixth and Twenty-seventh Sessions, 1885 and 1887

The next two sessions represented the doldrums for legislative reform regarding women. Not only were few bills introduced, but those that were put forth simply repeated previous unsuccessful attempts. There was no evidence of fresh ideas, and little sign of energy, especially from female activists. Not surprising, these stale issues generated no real floor debate. Further, for the first time this decade, there was not a single woman suffrage bill of any sort introduced.

One of the few areas of interest surrounded the reintroduction of a bill treating widows equally with widowers by giving the surviving spouse the entire of the community property. Its sponsor was a long-time champion of women's rights,

²⁶⁵Assembly Journal, Jan. 26, 1883, at 147 (two Assemblymen voted against passage).

²⁶⁶Id., Jan. 11, 1883, at 23; id., Jan. 17, 1883, at 73.

former Assemblyman, now Senator John M. Days.²⁶⁷ During the 1871-72 Session, Days had chaired the Special Committee to consider women's rights, and had authored its highly favorable report. One of the bills which Days had introduced, based in part on recommendations contained in the report, would have given widows ownership and control of the entire marital community upon the death of the husband.²⁶⁸ Thus, Days' 1885 bill represented another attempt, a full thirteen years later, to equalize the widow's relationship to the common property.

From the start, the State of California had treated the widow and widower differently with regards to the property of the marriage. Yet, an honest acknowledgement of the wife's contribution in a common property scheme, or at least an interest in theoretical consistency, would have led to equal treatment of the widow and widower. Further, adherence to the Spanish/Mexican system would have given the surviving spouse extensive management powers over all of the common property during his or her lifetime. Instead, the legal regime clearly conveyed the notion that the community property was "really" a product of the husband's efforts alone, and not of some partnership between the husband and wife (or of the efforts of the wife alone).

During the 1871-72 Session, the Civil Code was enacted, which included provisions for the distribution of the common property upon the death of either spouse. However, unlike with certain other code sections, the drafters did not

²⁶⁷Senate Bill No. 10, introduced by Mr. Days; Senate Journal, Jan. 19, 1885, at 117.

²⁶⁸Assembly Bill No. 758, introduced by Mr. Days, Mar. 27, 1872.

take much advantage of the opportunity to liberalize the law in this area. One section, 1401, dealt with the widower's right to the common property, giving him ownership of the whole of the community property, without administration, provided that he had not abandoned and lived separate from his wife. If he had, however, half of the community property was at her testamentary disposition, or would go to her descendants. The other, Section 1402, dealt with the widow's rights to the common property. She was to receive only one-half of the community property, which would be subject to administration. Meanwhile, the husband was entitled to make testamentary disposition of the other ("his") half, and if he died intestate, the statute set forth the manner by which the property would descend.²⁶⁹

Over the course of thirteen years, from 1872 to 1885, ten bills were introduced to reform the law in this area. Some, not surprisingly, would have brought the law more in line with its Spanish/Mexican roots by treating the survivors alike, but would have moved beyond that to give the survivor ownership of the entire marital community. Others modifications would have continued to address the spouses' rights separately, sometimes equalizing these rights and sometimes not. Radical or conservative, none of these bills came even close to passage, although over the course of this period broad support existed both in the

²⁶⁹Of small consolation, under Section 1401 the abandoning husband could never take an intestate wife's portion of the common property (and presumably circumstances would be such that she would not will him the property), while under Section 1402, the widow could take as a testamentary beneficiary, or through intestate succession, if the property came to be divided in the manner set forth for disposition of the husband's separate property. California Civil Code Sections 1402, 1386 (1872).

media and at the grassroots level for bringing greater fairness to this area of law. While the legislature's obstinacy in the face of this support was mostly to blame for the bills' failure, it was not the only factor. For one, a number of these bills suffered from drafting problems, and for another, seemingly competing bills were sometimes introduced in the same session.

Only the first proposal, introduced by Days in 1872, predated the Civil Code, however the two bills introduced in 1880 made no mention of either of the relevant code sections, and instead mimicked the 1872 bill.²⁷⁰ Another problem with the 1872 and 1880 bills lie in the use of the term "family estate" to additionally refer to the community property.²⁷¹ While this may have been meant to convey the reality of the wife's contribution to the accumulation of the marital property, it was both without legal meaning and redundant. As such, it provided an easy excuse for the Judiciary Committee²⁷² to refuse to recommend the bill for passage, or for opponents to nitpick in debate.²⁷³ Nevertheless, compared with

²⁷⁰Assembly Bill No. 256, introduced by Mr. Burns, Jan. 27, 1880; Assembly Bill No. 293, introduced by Mr. York, Jan. 29, 1880.

²⁷¹In addition, but of little consequence, the first 1880 bill carried over from 1872 the use of the term "common" rather than "community" property. As explained in the annotations to the 1872 Civil Code, the nomenclature was now being changed from "common" to "community" property. California Civil Code Section 1401 Annotated (1872).

²⁷²All ten of these bills were referred to their respective Judiciary Committees.

²⁷³See e.g., Sacramento Weekly Record-Union, Apr. 6, 1872, at 2. Inasmuch as the language of these bills followed closely the language of the petition which was circulated by Sarah Wallis in 1880 and 1881, and the 1872 bill seemed to reflect the agenda of the organized women's rights movement, it is not unreasonable to assume that these bills may have actually been authored by members of a suffrage organization, and not by a legislator, thereby accounting for the drafting problems. In addition, given that the first 1880 bill was nearly an exact replica of the 1872 bill, this appears to indicate that Mr. York, who introduced the bill, was simply acting as a conduit,

related bills, these bills had a straightforward elegance about them, accomplishing both the equal treatment of widows and widowers, and treatment of the community property in a manner most beneficial to the family unit, that is, preserving it for use as a whole. Less elegant was a similar bill introduced by Mr. Enos in 1881. While it attempted both an admirable gender neutrality and preservation of the whole of the community property, it was redundant in its drafting, attempting to retain both code sections by splitting up requirements for the handling of the community property which could have just as easily been contained in one code section.²⁷⁴

It was not until 1883 that the drafter seemed to get it right by putting forth a bill which provided for gender neutrality and preservation of the whole of the community property in just one code section, 1401, while repealing section 1402.²⁷⁵ Then, in 1885, Days improved upon the entire concept of gender neutrality by proposing that Section 1401 read "Upon the death of either husband or wife, the entire community property, without administration, belongs to the surviving husband or wife," while also proposing, for the first time, that the children of the marriage, rather than a subsequent stepparent, take this community property upon the death of the surviving parent.²⁷⁶ Not only would

and that this proposal had been "taken off the shelf" after eight years.

²⁷⁴Senate Bill No. 188, introduced by Mr. Enos, Jan. 13, 1881.

²⁷⁵Assembly Bill No. 173, introduced by Mr. Storke, Jan. 15, 1883.

²⁷⁶Senate Bill No. 10, introduced by Mr. Days; Senate Journal, Jan. 19, 1885, at 117.

this arrangement recognize the "family estate" characteristic of the property accumulated during the marriage, but it would in most cases provide the most equitable outcome for the original family.²⁷⁷

Yet the only one of these bills ever approved was the first, which the Assembly passed quickly but not without some debate. Nevertheless, it died in the Senate when that Judiciary Committee recommended against passage in the waning days of the session. It appears significant that the 1872 bill had bypassed committee referral in the Assembly, inasmuch as the Judiciary Committee proved to be the impossible hurdle for later similar bills. In 1880 and 1881, the committee recommended indefinite postponement of all three gender-neutral bills, and they were later withdrawn from consideration.²⁷⁸ In 1883 and 1885, the committee simply recommended that the bills not pass.²⁷⁹

Meanwhile, other attempts over the years to reform this area of the law concerned themselves not with maintaining the community property as a whole upon the death of one spouse or the other, but instead with recognizing the decedent spouse's individual rights over that property. In other words, these reforms essentially sought to reduce the widower's rights over the common property rather than increase the rights of the widow, and in this way institute equal treatment of surviving spouses. Interesting, this strategy was first launched

²⁷⁷Nevertheless, logistical problems created by commingling could result.

²⁷⁸Assembly Journal, Feb. 24, 1880, at 345; id., Mar. 13, 1880, at 516; id., Mar. 20, 1880, at 571; Senate Journal, Jan. 31, 1881, at 162.

²⁷⁹Assembly Journal, Jan. 31, 1883, at 174; Senate Journal, Jan. 26, 1885, at 142.

by the organized women's rights movement, when similar but competing bills were introduced within days of each other during the 1875-76 Session, the second bill providing greater gender equality than the first.²⁸⁰ However, in the 1880s, activists may have been wishing that they had not initiated this strategy, as it appeared by then to be used as a competing proposal to that which called for gender-neutral treatment whereby the surviving spouse would take the whole of the community property, the strategy that the movement had now embraced. In both the 1881 and 1883 Sessions, when this situation arose, the Judiciary Committee gave favorable recommendation to the bill that allowed a split the community property on the death of either spouse, while recommending against the proposal now supported by the organized movement.²⁸¹ While neither strategy gained enough support to move any of the bills towards debate or a vote, the competition probably contributed towards maintaining the status quo, to the complete detriment of those in favor of women's rights.

No doubt mindful of the long history of this reform attempt, Days, a member of the 1885 Senate Judiciary Committee, now fought back against the

²⁸⁰Assembly Bill No. 198, introduced by Mr. Maguire, Jan. 12, 1876; Senate Bill No. 227, introduced by Mr. Edgerton, Jan. 19, 1876. By 1880, Wallis appeared to have moved away from the strategy of "what's good for the gander is good for the goose," towards one of "what's good for the goose is good for the gander," which gave the widow the same rights of ownership in the whole of the common property as the widower had.

²⁸¹Senate Bill No. 346, introduced by Mr. Cheney, Feb. 10, 1881, and Assembly Bill No. 172, introduced by Mr. Storke, Jan. 15, 1883 (calling for a reduction in the widower's rights); Senate Bill No. 188, introduced by Mr. Enos, Jan. 13, 1881, and Assembly Bill No. 173, introduced by Mr. Storke, Jan. 15, 1883 (calling for an increase in the widow's rights); Senate Journal, Feb. 14, 1881, at 256 (recommending passage), Assembly Journal, Jan. 31, 1883, at 147 (recommending passage with amendment), Senate Journal, Jan. 31, 1881, at 162 (recommending indefinite postponement), Assembly Journal, Jan. 31, 1883, at 162 (recommending against passage).

majority of the committee's attempt to kill his bill. He issued a lengthy minority report, recalling the report issued by 1872 Special Committee. He began by noting his involvement in the 1872 efforts, emphatically stating that "he believed then, as he believes now, that the present law in relation to community property is an injury to the children, a robbery to the wife, and a disgrace to the statutes."²⁸² While there had been little public legislative debate on this reform over the years, Day laid bare here the resistance to this and similar bills: "[I]t is objected to allowing the widow to succeed to the whole of the community property on the ground that it was earned by the husband, by virtue of his personal foresight, enterprise, perseverance, and business energy, and that therefore it belongs to him. That he should have the power to provide for his children when he dies, for his widow might marry again and neglect them."²⁸³

In answering this objection, Days paid the usual homage to woman's separate sphere, arguing that by her noneconomic contributions (in homemaking and childrearing) she "performs more good to her family and society than her husband can perform" even were he to accumulate a fortune. But, more importantly, he went further, taking issue with the view that the marital property is always accumulated solely through the efforts of the husband, by recognizing the economic contributions of wives:

²⁸²Senate Journal, Jan. 26, 1885, at 142. Interestingly, as Days went on to describe the present state of the law regarding the marital community, he referred to it as "the family estate."
Id.

²⁸³Id. at 143.

Who does not know that hundreds of wives in California have not only performed the household duties . . . , but have actually done as much as the husband in earning the means of livelihood, and more, in saving and acquiring the community property? Who does not know that hundreds of wives in California, by their skill, industry affection, and love for their husbands and families, not only acquire the community property but support children and husband besides.²⁸⁴

Evidencing its impact, one thousand copies of this report were then ordered printed.²⁸⁵

Despite the negative recommendation by the committee majority, Days was able to push the bill forward in the Senate. First, he and another Senator presented petitions specifically calling for passage of Senate Bill No. 10.²⁸⁶ Then, when the bill came up for a second reading, Days offered an amendment to the otherwise straightforward, gender-neutral treatment contained in Section 1401. According to the amendment, upon the death of the husband, the community property would be liable for community debts, except when the value of the community property failed to exceed \$1,500.²⁸⁷ In effect, this amendment was meant to put the widow and children ahead of any creditors when the estate was quite small, and practically speaking, such an exception was probably designed to help keep the surviving family from becoming dependent on the state. This amendment, then, was meant to be protective rather than empowering, a view

²⁸⁴Id. (emphasis added).

²⁸⁵Id.

²⁸⁶Id., Feb. 5, 1885, at 218. The petitions were referred to the Judiciary Committee.

²⁸⁷Id., Feb. 10, 1885, at 253.

which is further supported by the fact that a similar exception was not granted to the surviving husband.

The change was accepted, but then Days ran into trouble trying to move the bill ahead towards engrossment and a third reading. Only nine of thirty-one Senators were willing to see the bill advance, leading Days to push for a reconsideration the next day.²⁸⁸ When the issue came up for reconsideration, at least one Senator, Knight, indicated that his vote the day before had been completely uninformed, admitting that he had paid little attention to the bill, thinking that he would have needed to be a lawyer to understand it.²⁸⁹ Yet somehow, overnight, he had gained a very clear understanding of the practicalities of the issue, as he set forth the current state of the law in plain language:

The first thing is the law takes the view that the wife is a fool, and has community property that she is not able to manage. It takes the view also that she is dishonest, and puts her under a bond double the amount of the property; then, if she can give this bond, she is carried on from four months to a year or more trying to get the other half of the property that belongs to her. . . . [I]t has always seemed to me like a downright injustice.²⁹⁰

Meanwhile, the opposition to this bill characterized it as "a very radical change," and instead described the current law as having "been handed down to us

²⁸⁸Id. at 253-54. On this vote, Days voted against moving the bill ahead, in order to be eligible to move for reconsideration of this question.

²⁸⁹The Sacramento Record-Union recorded no debate on the matter upon its second reading. This, along with the Senator's comments, is good indication that the vote had been taken without any illumination of the issues beyond Days' committee report.

²⁹⁰Sacramento Record-Union, Feb. 12, 1885, at 4.

from a remote time, and [having] been very successful in its operations."²⁹¹ This Senator correctly noted that any husband was free to will his portion of the common property to his wife, and characterized Days' earlier example of the injustice flowing from when the wife was sole breadwinner as an exception not worthy of legislative attention.²⁹² What this Senator did not do, however, was attempt to justify the fact that the law treated the widow differently than the widower with respect to the common property.

Either some significant lobbying was accomplished overnight, or Knight's comments alone proved highly persuasive, because the nearly 3 to 1 deficit was now turned around to a 22-15 victory, and the bill was ordered engrossed and to the third and final reading.²⁹³ Even so, Days must have continued to hear rumblings of dissatisfaction with his proposal, as he moved to refer the bill back to himself for modifications. The first pertained to the small estate exemption which had been accepted by amendment earlier, where the threshold was now raised from \$1,500 to \$6,000. The second dealt with Days' use of Section 1402 to keep a stepparent from taking the whole of the property of the previous marriage, to the

²⁹¹Id. Although the reference is more implied than explicit, even at this late date the Senator seemed to be operating under the misunderstanding that California's law regarding marital property had its roots in the common law.

²⁹²Id.

²⁹³Senate Journal, Feb. 11, 1885, at 259. Not counting Days, eight members changed their votes from "no" to "aye." All the members originally voting in favor of moving the bill forward maintained their position, and were assisted by the addition of four new voters. The losing side picked up a net gain of one voter, as two Senators dropped out while three new members now participated.

detriment of the children of that marriage. The bill was now modified, so as to provide for the children to receive half of the community property immediately upon the remarriage of the surviving spouse, and, in the event the surviving spouse did not remarry, and to provide that half the community property descend to the children upon the death of the surviving parent.²⁹⁴ Nevertheless, after all this, the reconsideration victory, as well as Days' continued willingness to make the bill more palatable, were for naught. There is no record of it ever receiving a third reading, and indeed it did not pass the Senate. This was the last time during the decade that an attempt would be made to reform this area of community property law.

Also pulled off the shelf in 1885 was the curious bill first introduced in 1880, which would have allowed a wife to seek permanent maintenance for herself and her children, without filing for divorce, if grounds for divorce otherwise existed.²⁹⁵ This latest rendition was a bit better drafted than the 1880 version, and removed the provision which permitted the court to divide the community property in lieu of making an award of permanent maintenance. However, it was more liberal than the earlier version, both in allowing a wife who was the victim of

²⁹⁴Id., Feb. 16, 1885, at 290-91; id., Feb. 17, 1885, at 297. On the one hand, this amendment undermined any policy expressed in this reform that it was to the benefit of the surviving spouse and children to maintain the whole of the marital property. However, it provided for the injustice which could flow if a surviving spouse was given full testamentary powers over what had been the common property. Nevertheless, this amendment of proposed Section 1402 would have been more difficult to administer.

²⁹⁵Assembly Bill No. 363, introduced by Mr. Tyler, Feb. 10, 1880, amended in Assembly, Mar. 22, 1880.

husbandly desertion, neglect or intemperance, to seek such support without having to endure a year of the maltreatment, and in permitting a wife who had been a resident of California for less than six months to seek such support, requirements which would otherwise have to be met in order to gain a divorce.²⁹⁶

Nevertheless, once again this bill did not require the wife to be living separate from the husband, and thus failed to resolve the logistical problems raised by the 1880 version. This time the Judiciary Committee recommended against passage, and the bill was withdrawn four days later.

Finally, another attempt was made to revise various code sections dealing with property to be set aside for family support upon the death of the husband or wife. Efforts had been made in 1880 and 1881, where one bill, first introduced in 1880 to amend Section 1468 of the Code of Civil Procedure, was enacted during the following session. The current attempt included amending Sections 1464, 1465, and 1468 once again. The primary purpose of this bill was to provide, in each of these code sections, not just for the decedent's spouse and minor children, but also for any "unmarried female relatives" of the decedent, who were living in the household and dependent on the decedent. Apparently, this provision was being made in recognition of the practice of many families to take in "dependent" female relatives who may have lost the protection of a husband or father. Thus, mothers, sisters, aunts, nieces, cousins, etc., of the decedent would be protected,

²⁹⁶Assembly Bill No. 25, introduced by Mr. Firebaugh; Assembly Journal, Jan. 12, 1885, at 16.

along with the surviving spouse and minor children, in the immediate aftermath of the death in the family. In addition, the portion of the bill dealing with Section 1465 brought over most of the proposed amendments which were floated in the failed 1881 Senate Bill No. 256.²⁹⁷ While most of the sections in this chapter of the code covered decedent mothers, fathers, husbands and wives, Section 1464 failed to cover decedent wives and mothers. Interestingly, however, the drafter of this most recent bill retained this exclusion.

While referrals of the previous bills had been made to the always-overburdened Judiciary Committee, this proposal was referred instead to the new Homestead and Land Monopoly Committee.²⁹⁸ Nevertheless, it took this committee about a month to issue its report, recommending that the bill not pass.²⁹⁹ The bill was ordered to a second reading, but it appeared to die before being subjected to even any floor debate.³⁰⁰

The Twenty-seventh Session proved to be the bleakest in the 18 years since women had gained a voice in the legislative process. During 1887 only one bill was introduced addressing the concerns of women, a bill which would make

²⁹⁷However, this new rendition dropped Senate Bill No. 256's proposal that the Court be permitted to set aside four thousand dollars in personal property of the decedent if there be no real property from which to select a homestead. Thus, the current proposal did not retain the previous proposal's attempt to provide for less wealthy families who had never been able to amass real property.

²⁹⁸Assembly Journal, Jan. 14, 1885, at 41.

²⁹⁹Id., Feb. 13, 1885, at 278.

³⁰⁰Id., Feb. 27, 1885, at 471.

mothers, along with fathers, eligible for guardianship of their children. This idea had first been floated in the 1871-72 session, when a proposal had been introduced which would, among other things, have prohibited a guardian appointed by the father from taking the children away from the mother without cause, as found by the court.³⁰¹ Remedying the unequal eligibility of mothers to become guardians of their own children had become a part of the agenda of the organized women's rights movement early on. But the issue appeared to have been dropped for over fifteen years, until this bill was introduced. The text of the 1887 bill contained language providing a basis for this position: that mothers, "being themselves respectively competent to transact their own business," were owed such an entitlement.³⁰² Nevertheless, the Judiciary Committee recommended that the bill not pass, thereby killing it.

Twenty-eighth Session, 1889

The failure of any suffrage bills to be introduced during the previous two sessions, along with the apparent quiet of the organized women's rights movement, masked a real and rapid growth which had begun in 1885, especially in Southern California, which heretofore had supplied few activists. Elizabeth Kingsbury, a participant in the movement back East, formed the first woman suffrage

³⁰¹Assembly Bill No. 118, introduced by Mr. Luttrell, Jan. 15, 1872.

³⁰²Assembly Bill No. 538, introduced by Mr. W.A. Brown; Assembly Journal, Feb. 17, 1887, at 388.

association in Los Angeles in the spring of 1885, and served as president during its first five years.³⁰³ By all appearances, women made a comeback in this session, with the introduction of ten bills supporting their interests. Seven bills dealing with marital property law were championed by two Senators, W.E. Dargie of Alameda, and Stephen M. White of Los Angeles.³⁰⁴ Meanwhile, Laura deForce Gordon, now president of the statewide association, prepared three suffrage bills, which were introduced by three different Senators.³⁰⁵

Gordon astutely formulated three distinct plans to secure female enfranchisement. She probably considered the first to be introduced, proposing to grant partial, municipal, suffrage by way of constitutional amendment, to be the least controversial and thus the most promising, and in this effort she was backed by Southern California women. Just prior to introducing the proposed amendment, Senator J.E. McComas of Los Angeles presented a petition from Kingsbury's Woman Suffrage Club of Los Angeles, praying for municipal suffrage.³⁰⁶ The petition, signed by nearly 2,500 women, set forth a number of

³⁰³4 History of Woman Suffrage at 494. The History of Woman Suffrage notes that, at first, the organization concentrated on education rather than activism, which would explain why it had no presence in the 1887 legislative session. While this account has Southern California activists lobbying for municipal suffrage during that session, and sending a large petition to the legislature, there is no record of this. Id. at 494-495. Most likely, the History of Woman Suffrage was referring to the efforts expended in the 1889 session.

³⁰⁴White went on to be elected to the United States Senate in 1893, where he continued to advocate female enfranchisement. Id. at 495.

³⁰⁵Id. at 484.

³⁰⁶Senate Constitutional Amendment No. 9, introduced by Mr. McComas; Senate Journal, Jan. 15, 1889, at 52, 60.

grounds on which they were claiming suffrage, and they did so as a right, not as a privilege. Some grounds were traditional, while others reflected the growing influence of women in the public sphere notwithstanding their disfranchisement. Moreover, many of these grounds foreshadowed the changing notions of the role of government during the Progressive Era.³⁰⁷

The signers claimed the right to "guard by vote" those laws which affect women; to "do our share" in protecting children, based on "the inalienable right our motherhood confers"; to "aid in the protection of our homes," a right which logically could not be denied by those who claimed that the home is indeed "woman's proper and peculiar sphere"; to enjoy the right to vote along with the duty to be taxed; to have a voice in the laws that regulate charitable work, "[s]ince a large proportion of [that] work . . . is carried on by women"; "to make the laws that regulate the relations of capital and labor, of work and wages," based on the fact that more and more women work and provide capital; to vote for and against wars, inasmuch as "war bears more heavily on women than men, forcing upon them terrible and unnatural burdens"; and to "tender their services in the way of house-cleaning," inasmuch as men, by their own admission, have rendered politics "foul and corrupt."³⁰⁸

³⁰⁷Senate Journal, Jan. 15, 1889, at 52.

³⁰⁸Id.

McComas' request, that this petition be referred along with his bill to the Constitutional Amendments Committee, was honored.³⁰⁹ However, oddly enough, when he presented two companion petitions a month later, signed by an additional 3,500 residents of Los Angeles, those petitions were referred to two distinctly different committees, one on local governance and the other on elections.³¹⁰ This did not portend well for the bill, nor did it indicate that McComas had much power in shepherding it through the legislative process. The Constitutional Amendments Committee was noncommittal, reporting the bill out "without recommendation," and it appears that it died before getting even a first reading.³¹¹ Gordon may not have chosen the most adroit sponsor.

Gordon's proposal which sat at the other end of the spectrum, to grant women full suffrage by way of statute, actually made it a bit further in the process. Albert F. Jones, of Butte County, introduced this bill, which was referred to the Judiciary Committee.³¹² On the same day that the McComas bill was reported out without recommendation, this committee, not surprisingly, recommended against passage of this bill.³¹³ Opponents must have become nervous when the bill made it to a second reading, as a move was made to kill it by striking the

³⁰⁹Id., Jan. 15, 1889, at 60. Another petition, presented by McComas two days later, signed by 930 residents statewide, was also referred to this committee. Id., Jan. 17, 1889, at 74.

³¹⁰Id., Feb. 13, 1889, at 439; id., Feb. 13, 1889, at 451.

³¹¹Id., Feb. 6, 1889, at 326; id., Feb. 8, 1889, at 392; id., Feb. 18, 1889, at 521.

³¹²Senate Bill 457, introduced by Mr. Jones; Senate Journal, Feb. 1, 1889, at 294.

³¹³Id., Feb. 8, 1889, at 389.

enacting clause.³¹⁴ Promisingly, that motion passed by just one vote, leading to a notice of a motion for reconsideration the following day.³¹⁵ The bill's sponsor, Jones, so moved, although he and his supporters then voted to postpone the reconsideration until the bill was reached in its regular order. This motion passed, no doubt because it attracted the support of some who believed that, with only two weeks left in the session, time might run out before the bill could come up again.³¹⁶ That appears to be precisely what occurred.

However, the one suffrage bill that did come close to being enacted represented Gordon's middle position. It was a polished-up version of a bill which had been introduced in the 1883 session, to add school suffrage to women's right

³¹⁴Id., Feb. 14, 1889, at 469; id., Mar. 2, 1889, at 717.

³¹⁵Id., Mar. 2, 1889, at 717, 718. There is some question as to why the motion to strike the enacting clause passed. A senator had to vote on the winning side in order to move for reconsideration. Senator Preston, who is listed as voting "aye" was the one who so moved. However, one wonders why he would not have simply voted "nay" on the motion, which would have then been defeated by one vote. Moreover, it is unclear just who moved for reconsideration the following day. The Senate Journal, lists Jones as having done so (Preston was probably absent, inasmuch as he is not listed in a vote which occurred following this motion). Thus, Preston's vote may have indicated his true colors, and his notice of motion may have been simply a favor to Jones, the bill's sponsor. Id., Mar. 4, 1889, at 745.

³¹⁶It is not inconceivable that a senator would follow a motion to reconsider with a motion to postpone, inasmuch as a motion to reconsider had to be brought, if at all, no later than the day after the original vote. Given that Jones was accompanied by other women's rights supporters in voting to postpone the reconsideration, it is probably the case that they felt the time was not right for reconsideration. Id.

A comparison of the votes taken on Mar. 2nd and Mar. 4th indicate the fated nature of this bill. Three senators, who voted to postpone reconsideration, and thus were probably supporters of the bill, had not voted on whether to strike the enactment clause (they were probably absent on the 2nd). And one of these senators, Caminetti, undoubtedly would have voted against striking the enactment clause. Thus, it was truly by the slimmest of margins that this bill was effectively killed.

to run for educational offices.³¹⁷ It must have seemed a good idea to Gordon to have Senator A. Caminetti, chair of the Education Committee, introduce the bill, inasmuch as he could see to it that the bill was referred there, where it would be expected to be given a more friendly reception and where Caminetti could exert control over its fate.³¹⁸ However, the committee took over two weeks to report it out, two weeks that, in the end, proved to be time not available to waste. Nevertheless, of the three suffrage bills, this was the only one which received a favorable committee recommendation.³¹⁹ It took another month for the bill to come to a vote, but when it did, it passed overwhelmingly, 24-7, without any parliamentary wrangling, and easily withstood a motion for reconsideration.³²⁰ As a result, the proposal made its way over to the Assembly, but by then it was the closing day of the session. A valiant effort was made to move the bill to passage, through a declaration of urgency which would have dispensed with the requirement that the bill be read over several days. This motion garnered a majority, but inasmuch as a 2/3 vote was required, it lost by a margin of three

³¹⁷The bill benefitted from some reworking, as it smoothed out the registration problems inherent in the 1883 version.

³¹⁸Senate Bill No. 399, introduced by Mr. Caminetti; Senate Journal, Jan. 29, 1889, at 235.

³¹⁹Id., Feb. 14, 1889, at 452.

³²⁰Id., Mar. 14, 1889, at 974; id., Mar. 15, 1889, 1012, 1023. Given the margin of victory, a motion for reconsideration could only have reflected the depth of the opposition, whose desperation was evident in the variety of parliamentary maneuvers meant to buy more time, possibly to sway others to its side. However, with support for the bill so overwhelming, these tactics utterly failed, and the motion for reconsideration was turned back with virtually the same margin, 27-7.

votes out of the sixty cast.³²¹ The motion was brought again, although this time it lost by a wider margin.³²² The defeat must have been especially bitter for women, as this was the closest a suffrage bill had ever come to passage.

Meanwhile, Senators White and Dargie took charge of a number of bills affecting wives' marital property rights.³²³ No petitions were submitted in support of any of these bills, the women having concentrated their efforts on gaining municipal suffrage. White introduced a bill aimed at resolving the unequal treatment of the wife with regard to community property upon dissolution of the community by death - this time aimed at the aftermath of the wife's death. The proposal, to amend Civil Code Section 1401, was an interesting combination of two bills introduced in 1876, by Assemblyman Maguire and Senator Edgerton. It purported to give the wife testamentary power over "her half" of the community property, and if she died without making such a disposition, the property would descend or be distributed in like manner as her separate property. This bill also

³²¹Assembly Journal, Mar. 16, 1889, at 1021.

³²²Id. at 1022 (based on a comparison of this vote tally with the original vote tally, it appears that the Journal misreported this tally, switching the "ayes" and "noes"). Although the motion was brought again probably just a few minutes later, there had been quite a turnover in members present. Nine assemblymen who had voted on the motion the first time did not vote the second time. Meanwhile, the second vote reflected sixteen new members. The margin of difference in the votes can be attributed to the greater number of members who switched their votes to "no," and the greater number of newly voting members who voted "no."

³²³There appears to have been some duplicated effort, as the senators introduced similar bills at times.

made the entire community liable for her debts.³²⁴ Interestingly, the proposal would have made it difficult to consider the wife's right in the community a mere expectancy, although such a change could very well have been an unintended consequence.³²⁵ Nevertheless, on the face of it, this bill gave the wife no power over the community during her lifetime, and thus there would be little she could do to stop a husband from dissipating the community (and consequently, "her half"). The bill was referred to the Judiciary Committee, which recommended passage of a substitute instead.³²⁶ However, it does not appear to have gotten past a first reading.³²⁷

On consecutive business days, the two Senators each introduced bills to amend Civil Code Section 172, to prohibit the husband from making gifts of the community property without the wife's consent.³²⁸ Both were referred to the

³²⁴Senate Bill No. 427, introduced by Mr. White; Senate Journal, Jan. 30, 1889, at 258. Edgerton's plan would have given the wife testamentary control over "her half," while Maguire's plan would have allowed "her half" to descend, except that the husband would take the entire community if the wife left no descendants. White's bill combined both features, however it dropped the language specifying that the husband took the entirety if the wife died without disposing of "her half." Meanwhile, White's bill made the entire community liable for the wife's debts, while the previous bills would have charged only "her half."

³²⁵Inasmuch as the wife lacked testamentary control over "her half" in Maguire's plan, and the property merely descended upon her death, it could still have been argued that, during her lifetime, she never held an ownership interest in the property.

³²⁶Senate Journal, Jan. 30, 1889, at 258; id., Feb. 11, 1889, at 409. The committee's report did not contain any information about the language of the substitute.

³²⁷Id., Feb. 14, 1889, at 471.

³²⁸Senate Bill No. 113, introduced by Mr. White; Senate Journal, Jan. 11, 1889, at 38. Senate Bill No. 159, introduced by Mr. Dargie; Senate Journal, Jan. 14, 1889, at 46. Unfortunately, the text of Dargie's bill is unavailable, thus the degree of similarity between the bills cannot be ascertained.

Judiciary Committee, which recommended that Dargie's not pass, and White's pass as amended.³²⁹ However, while Dargie's bill made it to a first reading, there is no indication that White's bill made it that far.³³⁰ Next, they introduced proposals to amend Civil Code Sections 1186 and 1187, and repeal Civil Code Sections 1093 and 1094.³³¹ The effect of these bills was to give married women the power to convey separate property and acknowledge those conveyances as if unmarried. Both were referred to the Judiciary Committee, and the duplication was not lost on that group. The committee recommended against passage of White's bill, on the basis that the matter was covered by Dargie's bills, which it recommended should pass.³³² Dargie's proposals continued, in tandem, through

³²⁹Senate Journal, Jan. 11, 1889, at 38; id., Jan. 14, 1889, at 46; id., Jan. 21, 1889, at 155; id., Feb. 2, 1889, at 308. The committee did not describe in its report the recommended amendment of White's bill.

³³⁰Id., Feb. 6, 1889, at 345. During the next legislative session, a substantially similar bill was enacted. Act of March 31, 1891, ch. 220, [1891] Cal. Stat. 425. According to Susan Westerberg Prager, this statute marked a turning point in the development of California's marital property law, because it implied that the wife did have certain *intervivos* rights in the community property. It was at this point that the legislature finally began to address the unequal treatment of the wife vis-a-vis the common property. "The Persistence of Separate Property Concepts in California's Community Property System, 1849-1975," 24 UCLA Law Review 1, 47, 49 (1975).

³³¹Senate Bill Nos. 157 and 158, introduced by Mr. Dargie; Senate Journal, Jan. 14, 1889, at 45, 46; Senate Bill No. 303, introduced by Mr. White; Senate Journal, Jan. 22, 1889, at 170. Senate Bill No. 157 called for a repeal of Section 1186, and then Senate Bill No. 158 combined and amended the substance of Sections 1186 and 1187. Senate Bill No. 303 retained Section 1186 in amended form, without combining it with 1187, which it would amend as well. Meanwhile, Senate Bill No. 157 also called for the repeal of Sections 1093 and 1094, relating to acknowledgments of married women. Thus, White and Dargie were introducing effectively similar measures.

³³²Senate Journal, Jan. 14, 1889, at 45, 46; id., Jan. 22, 1889, at 170; id., Feb. 2, 1889, at 307; id., Feb. 11, 1889, at 408. The Senate apparently took the committee's recommendation regarding White's bill, as there was no more activity on that proposal.

the Senate's process, and were passed overwhelmingly.³³³ The bills were then sent to the Assembly, where they were referred to that Judiciary Committee, however they died in that house.³³⁴

Finally, Senator White had the distinction of introducing one other bill which was eventually enacted into law, a provision to amend Civil Code Section 164, such that any property conveyed to the wife during marriage by a writing would be presumed to be her separate property, and any property conveyed to her along with another, including her husband, would be presumed also to be her separate property.³³⁵ The distinction was dubious, however, because this provision, rather than working to bring theoretical harmony to California's marital property system, served to further hybridize the scheme. Yet, from another angle, this proposal, like the Married Women's Property Acts which modified the common law system, served the purpose of protecting some property from the husband's creditors. However, with women in California having no management control over their separate property, under this bill they would remain actually

³³³Id., Feb. 6, 1889, at 345; id., Feb. 21, 1889, at 591; id. Feb. 25, 1889, at 605. Senate Bill No. 157 passed by a vote of 29-3, while Senate Bill No. 158 passed by a vote of 30-4. There were some oddities regarding these votes: two senators voted to repeal the subject Civil Code sections, but then voted against the substantive bill. Moreover, those senators who distinguished themselves this session as anti-suffrage voted in favor of these two bills, while one senator, Caminetti, who had championed female enfranchisement, voted against both bills.

³³⁴Assembly Journal, Feb. 26, 1889, at 553; id., Feb. 27, 1889, at 582.

³³⁵Senate Bill No. 304, introduced by Mr. White; Senate Journal, Jan. 22, 1889, at 171.

worse off than their Eastern sisters.³³⁶ The Judiciary Committee recommended passage, and the Senate voted unanimously in favor of the bill, a mere three weeks after its introduction.³³⁷ The bill moved over to the Assembly, where it gained passage, with little opposition, on the second last day of the session.³³⁸ In this way, the so-called "special presumption" was born.³³⁹

Thus, the 1889 session appeared as a harbinger of changing times. Woman suffrage was finding more support in the legislature, while activists were boldly claiming suffrage as a right. This claim was based not just on a classic understanding of citizenship, but also on an understanding of the place of the citizen in a proactive, regulatory state. Meanwhile, when it came to the unequal treatment of wives with respect to marital property, greater acceptance of moves to empower women (although not to treat them as equal to husbands) at least

³³⁶In all fairness, it must be noted that the Senate did vote to permit married women to convey their separate property, which, in tandem with this bill, would have benefitted women. However, it was hardly in women's best interest to provide the possibility whereby the enactment of this bill could occur without permitting wives this right of conveyance, and it was just this possibility that came to pass.

³³⁷Senate Journal, Jan. 22, 1889, at 171; id., Jan. 25, 1889, at 209; id., Jan. 29, 1889, at 240; id., Feb. 8, 1889, at 400; id., Feb. 12, 1889, at 434.

³³⁸Assembly Journal, Feb. 13, 1889, at 372; id., Feb. 20, 1889, at 480; id., Mar. 15, 1889, at 999; Act of Mar. 19, 1889, ch. 219, [1889] Cal. Stat. 328.

³³⁹Prager at 43. This bill was consistent with a more limited bill which had been enacted in 1870, dealing with stock transactions by married women. Act of Mar. 4, 1870, ch. 138, section 2, [1869-1870] Cal. Stat. 132.

According to Prager, "the expressed rationale for this reversal of the general presumption [that the property was common] was to further the intention of the parties. Since a married woman could control only separate property, it was thought that labeling property in her name alone as separate was essential to insure her managerial authority. . . . Apparently it was inconceivable that conveying title to the wife might represent an intent to create shared management of the community. Instead, the basic scheme was distorted." Prager at 44.

demonstrated an awareness that the system was unfair. According to Susan Westerberg Prager, the next legislative session, in 1891, would find lawmakers beginning "to address more directly the status of community property which was the central imbalance in California's marital property law."³⁴⁰ In this way, then, the 1889 session also represented the end of an era, of thorough-going refusal on the part of the legislature to formulate a marital property regime which would deliver what it promised, both historically and theoretically, in terms of equal rights for women.

³⁴⁰Id. at 47.

CHAPTER SIX

Conclusion: Women's Rights in Nineteenth-Century California and Beyond

Summary of Findings

As Susan Westerberg Prager persuasively contended over twenty years ago, it will never be clear why the Select Committee's version of Section 13, containing reference to the civil law category of common property, was adopted at the 1849 constitutional convention, and thus it will never be entirely clear what the Committee, or the delegation as a whole, believed the effect of that section ought to have been. The community property system was certainly in force during the Spanish/Mexican territorial period, and nothing in the extant historical research indicates that this law was not relied upon by the Hispanic population. However, David Langum's work demonstrates that Anglo-Americans arriving after the American conquest conducted business between themselves, based not on local legal doctrine, but instead on the common law, even knowing that they could not seek enforcement under those terms. While Langum does not focus on testation practices among Anglo-Americans, there is every reason to believe that this aspect of private ordering, as with contracting, was conducted according to common law doctrine as well. Thus, it is safe to conclude that, by the opening of the

constitutional convention in 1849, native Californios and Anglo-Americans relied on vastly different marital property systems to govern family assets.

Those who have studied the genesis of the State of California's marital property law have tended to focus mostly on the recorded debate regarding the proposed versions of Section 13, in their attempts to tease out an explanation for why the common property version was adopted, and to determine whether the first legislature remained true to the intentions of the convention.¹ While most of these historians were aware that Californio delegates were disproportionately represented on the Select Committee, which produced the common property version, none considered the possibility that, in putting forth this proposal, that committee may have intended something different than did the delegation as a whole. If this is the case, then the answer to why the committee's version ended up in the constitution actually involves a two-layered inquiry.

Piecing together admittedly circumstantial evidence, I have concluded that the Select Committee's version reflected two interests that may not have been entirely compatible: first, to afford native Californios, who had ordered their private affairs in reliance on the Spanish/Mexican community property system, enforcement of that ordering, but second, to place California at the forefront of American jurisdictions that were beginning to turn away from the unyielding

¹See Susan Westerberg Prager, "The Persistence of Separate Property Concepts in California's Community Property System," 24 UCLA Law Review 1 (1976); Ray August, "The Spread of Community-Property Law to the Far West," 3 Western Legal History 35 (1990); Donald E. Hargis, "Women's Rights: California 1849," 37 Southern California Quarterly 320 (1955); Orrin K. McMurray, "The Beginnings of the Community Property System in California and the Adoption of the Common Law," 3 California Law Review 359 (1915).

common law by enacting statutory reforms according property rights to wives. That the Committee did not intend merely to set the state on a reformist path is indicated by the significant Californio presence there, as well as comments made during the debate regarding the need to guard the expectations of the native population. That the Committee did not intend merely to retain a system of law currently in place is indicated by the probable pedigree of the section itself.

The Committee's version was most likely drafted by Henry W. Halleck, a New Yorker. Clearly the wording of the section was not Halleck's creation - he borrowed it verbatim from Texas' constitution. But Halleck probably did not borrow from Texas simply because Texas and California shared Spanish/Mexican roots. No doubt the fact that the term "common property" had a definite meaning within each jurisdiction's legal system made a difference, but more important may have been the experience of Halleck's home state with the Texas provision. Just three years earlier, New York came very close to inserting in its constitution a marital property provision which was openly borrowed from Texas. The delegates to New York's constitutional convention clearly understood the proposed section to import civil law principles into that state's jurisprudence, notwithstanding a modification of Texas' "common property" language. What motivated proponents in New York was an interest in ameliorating the common law's inequitable treatment of the wife's interest in marital property, not merely as a way to protect her and the family, but also as a way to reflect her contribution to, and thus her rights in, assets accumulated during the marriage. Given the New York

experience, it makes sense that Halleck and other Anglo members of the Select Committee also saw the Texas provision as a reform measure.

Consequently, the Committee appeared to be looking both forward and backward in proposing its version of Section 13. It saw itself as at once retaining law in effect during the Spanish/Mexican period and adopting reforms which would place wives in a better position than they would be in under the common law. However, the ensuing debate, over this version and the alternative which did not make reference to common property, indicates that the dual motivation of the Select Committee was not apparent to the delegation. The debate, conducted entirely among the Anglo delegates, was little focused on the specifics of the proposals, but instead veered off towards the issue of the protection of the wife, and the best way to insure that. Not surprising, the discussion reflected almost entirely a common law mindset. Hence there were those who, believing that the husband was the best source of the wife's protection, advocated adoption of a pure common law of marital property. In opposition were others who, recognizing the reality of California's frontier and mining environment, believed that the legal system ought to have a role in guaranteeing that the wife's property interests were protected. Nonetheless, by ignoring the Select Committee proposal reference to common property, and by not realizing that the term "separate property" had different meanings in the civil law and common law frameworks, this group failed to comprehend that the renditions of Section 13 provided wifely protection in very different ways. And this group certainly did not realize that the civil law's nearly

identical treatment of the spouses, and its lack of coverture principles, actually did more than protect women; it empowered them.

While the convention delegation might have been able to ignore the reference to common property when it adopted the Select Committee's version, the first legislature could not do so as easily. Nevertheless, an even more powerful common law mindset gripped this lawmaking body. While the legislature did construct a marital property scheme reliant on certain civil law principles, it additionally determined that California would operate within the jurisprudential framework of the common law. As a result, what the legislature did was to engraft of just one portion of the civil law on a common law framework. Yet, this was not done with the requisite care, nor was it done with any real commitment to the community property regime. In fact, it was not even accomplished in accord with the delegation's desire to protect the wife's property interests. As a result, it was left to the state's courts, and the California Supreme Court in particular, to deal with the inconsistencies, loose ends and gaps resulting from the incomplete and unfocused drafting. Only here and there did subsequent nineteenth-century legislative representatives show any interest in revisiting the subject.

If the first legislature displayed a commitment to the common law to such an extent that not even the protective mandate of Section 13 was fulfilled, the California Supreme Court proved all the more intractable over the next twenty year or so. Unable or unwilling to alter its common law mindset, time and again the Court engaged in remarkable mental gymnastics in order to resolve issues

dealing with common property, a category not recognized in the common law. Moreover, the Court did so without an ounce of self-consciousness, and with nary a dissenting voice. Granted, parties' attorneys did not often direct the Court's attention to applicable Spanish/Mexican marital property law, but even when they did, the Court mostly ignored their efforts. As a result, by 1870, the California Supreme Court had done nothing to hold the legislature to Section 13's mandate. Nor had it done much to iron out the inconsistencies and fill in the gaps in the statutes in accord with the civil law's marital property scheme. In fact, over this period the Court made its own mess of California's marital property law, through decisions which were blatantly wrong and inconsistent themselves. But while the Court and the legislature stripped the category of common property of any vitality by 1870, nonetheless they had not eliminated the principle of joint ownership from California law. This circumstance provided the opportunity for interested reformers to call lawmakers to task for the government's unjust and unjustifiable treatment of women, and to seek reform of the marital property law by forcing the legislature to conform the statutes to the philosophy of gender-neutral, equal treatment which formed the basis of community property law.

Interest in modifying this area of law developed by the early 1870s, as a direct result of the formation of local and statewide woman suffrage associations in 1869. While prior to this, women's voices had been unheard in the political arena, the seeds of organized resistance to unjust lawmaking were being sown among Anglo women from the beginning of statehood. In the subsistence

environment of the frontier era, California women contributed in essential ways to the survival of their families, making any relegation to second-class status seem all the more unjust. For example, by the mid-1850s, a few literate, middle-class women in the San Francisco area began publishing newspapers and magazines, aimed particularly at a female audience. Although the editorial position of these periodicals could best be described as pre-feminist, their publishers were, after all, working women. Taking advantage of media control, these individuals did not shrink from illuminating the difficulties faced by fellow urban women in the workforce. With typesetting being one of the fields rife with gender discrimination, female publishers (who were often printers on the side) were in a unique position not simply to draw attention to unfair male dominance, but also to take action against it, by training and hiring women typesetters themselves. As a result, these periodicals helped to create a gender consciousness among middle-class Anglo women through their call for equal economic rights, even though time and again their publishers disavowed any interest in seeking equal political rights for women. Finally, in 1869, this equivocation was challenged by Emily Pitts, who bought out a general-circulation literary weekly and turned it into the first true women's rights publication on the West Coast, aptly renaming it the Pioneer.

Meanwhile, by the mid- to late-1860s, individual women had begun to come out against political inequality, no doubt influenced by the suffrage movement coalescing in the East. Here and there, letters to editors of general circulation newspapers could be found, sometimes sparking an extended debate over female

enfranchisement. More significantly, however, certain women began speaking in San Francisco's public lecture forum, promoting a broad-based program of equal rights, including political rights. Most of these women were Spiritualists, members of a sort of religious movement, which got its start in 1848, in the same place and around the same time as the Seneca Falls women's rights convention. Before too long, this unorthodox group found a hospitable environment on the Western frontier. Spiritualists believed equally in the elevation of the slave and woman, and, as a result, continued to advocate for women's rights during the Civil War. Thus, when the machinations of post-war politics caused the abolitionism-based women's rights movement to narrow its focus to female enfranchisement, Spiritualists maintained an expanded agenda as expressed in the Seneca Falls Declaration of Sentiments. Moreover, Spiritualism afforded unique opportunities for women to take public leadership roles, absent in more traditional religions. Because it was a religion without much organization and almost no hierarchy to exercise control over its members, the market determined the access and success of Spiritualist speakers. In addition, these lecturers reached an general audience of believers and non-believers alike, as many attended lectures merely as a form of entertainment. Consequently, public acceptance of female Spiritualist lecturers, especially in California, was quite high.

Conditions were ripe, then, for the formation of an organized women's rights movement in California in mid-1869, and the upcoming biennial session of the state legislature in December of that year provided added impetus for

association. Activists eagerly pursued an agenda focusing on suffrage, presenting the legislature with a lengthy petition, filled with signatures of both men and women, gathered statewide. The legislature, in turn, provided an opportunity for women to press the cause before it, an opportunity eagerly seized and ably fulfilled by experienced Spiritualist lecturers. After this session, the platform of the movement expanded, particularly to include legislative reform of marital property rights. Three factors contributed to this enhanced agenda. First, sympathetic male judges, lawyers and legislators generously gave of their time to educate women in relevant California law, and to inform them of their unequal treatment under that law. Second, inasmuch as California's marital property system was fundamentally a creature of statutory enactment, the legislative process was clearly the appropriate venue for seeking reform. Finally, as the women's rights movement was narrowing nationally to a focus on the female enfranchisement, the Spiritualist influence in California prevented activists from seeking only political rights, given its expansive view of women's emancipation.

Thus, women's voices began to be heard in the California legislature in 1869, never to be silenced again. The decade of the 1870s began with a high degree of optimism among activists, who believed that the granting of female suffrage was right around the corner, and that marital property law reform would occur just as soon as legislators were made aware of the disparate treatment the law provided to husbands and wives. The legislature responded to the women's petitions and statutory proposals by forming special committees for their

consideration, and, more often than might be expected from today's vantage point, these committees gave favorable hearings to the women's causes. While none would go so far as to recommend woman suffrage, their reports displayed an acute understanding of the pernicious effects of the inequities existing in California's marital property system, and these lawmakers were not afraid to issue a call for reform in this area.

However, victories were few and far between, and the circumstances which allowed them to occur were particularized. For example, the advantageous reforms embedded in the new Civil Code slipped through in 1872 as part of a legislative package that received little scrutiny from lawmakers. The bills ushered to passage by Senator Tweed in 1870 benefitted from that lawmaker's tenure as chair of the Judiciary Committee. Another reform, the 1874 statute which accorded women the political right of officeholding for school matters, was probably enacted as a result of an unusual coalition of women's rights supporters and those concerned with the proper functioning of government. Meanwhile, defensive victories benefitted from the institutional roadblocks built into California's legislative branch, especially its bicameral form and the abbreviated length of its sessions.

Only the guarantee of equal pay for male and female teachers and the enactment of the Woman Lawyer's Bill (as well as its counterpart in the new constitution), can be attributed, I believe, to a true acceptance of rights which would empower women. California had a significant history of female

participation in the labor market, stemming from the subsistence environment facing arrivals during the gold rush period. Later, it was the always volatile economy which led women, married and single, to work to support themselves and their families. As a result, the notion of equal pay for equal work had already gained broad acceptance, and advocacy for women's economic rights had occurred well in advance of advocacy for equal political rights. In such a setting, a bill guaranteeing equal pay to male and female teachers would not have been considered a radical threat to the prevailing order.² Additionally, while the vision of female attorneys in the courtroom challenged notions of the appropriate sphere for women in Victorian society, it also resonated with a belief in equality of economic opportunity that had received much support in nineteenth-century California.³ However, these bills demonstrated another fact: even if a proposal affecting women was not viewed as threatening, it still required intensive, astute lobbying by dedicated activists in order to overcome those institutional roadblocks of form and function.

Meanwhile, the 1870s were generally marked by a belief that the right of suffrage was part of California's organic law, and as a result could be achieved

²Along these lines, it is also worth noting that the teaching profession, while by the 1870s fairly feminized, was also gender-stratified, such that women were clustered in teaching the primary grades. Meanwhile, the statute only guaranteed equal pay within a stratification, which allowed secondary school teachers, mostly male, to continue to be paid a higher salary. Thus, the actual limited reach of the statute also rendered it less threatening.

³Not surprising, women during this period did not seek to have the government regulate economic opportunity in the private sector. These laws reached areas of accepted state regulation, public employment and the legal profession.

only by constitutional modification. Although women had made virtually no headway with an amendment, they found optimism in the calling of a constitutional convention in 1878-79. However, at that point in time, opportunities for female enfranchisement were, to a large degree, tied to the anti-Chinese sentiment which had been sweeping the state. First, the constitutional provision setting the parameters of suffrage was sure to come under sustained examination, having been enacted prior to the addition of the Civil War Amendments to the federal constitution. While these amendments begged a redetermination of which groups of men should be permitted to vote, this circumstance could actually open the door to the issue of woman suffrage. Second, and more particularly, the fear that the state could not legally prevent the enfranchisement of Chinese men could lead to a reevaluation of white women's vote. In much the same way that women were needed to run for school offices which might otherwise have gone unfilled, it could be reasoned that white women's votes would be needed to counteract those of Chinese men. Finally, if a majority of the convention delegates could be persuaded to accept a suffrage provision which included women, then the electorate would have to consider the issue as part of a package proposal. The hope would be that those male electors, who might oppose woman suffrage if the issue were placed squarely before them, would be reluctant to vote down a new constitution which they found otherwise palatable, especially in its treatment of the loathed Chinaman.

In a number of respects the women calculated accurately: anti-Chinese sentiment, along with new federal constitutional requirements, did force an examination of the suffrage article. And some delegates did consider the possibility that white women's votes could prove useful to counteract those of the Chinese. But the "package deal" arrangement did not go unnoticed by delegates, and this provided even supporters of female enfranchisement with a reason to oppose placing this "radical" idea in a document which had to be sent to the electorate for ratification. However, probably the most damaging factor for advocates was the fact that, by the late 1870s, the organized women's rights movement in California had lost a great deal of steam. The statewide infrastructure had crumbled, and with it the lobbying force which would have been necessary for success at the convention. As a result, no sustained effort was made to assure that sympathetic delegates were elected, and woman suffrage appears to have mostly a non-issue during the campaign period. Even after delegates were elected, women's rights activists engaged in no lobbying in advance of the opening of the convention. It was only after a good deal of debate had been conducted and opinions had crystallized among the delegates that any sort of organized advocacy emerged. However, it emerged among a local group of women naive and inexperienced in the ways of lawmaking, and thus it is not surprising that these efforts amounted to little.

Women's lack of success at the constitutional convention had serious ramifications beyond this instance, as it significantly impacted the strategies open

to suffrage advocates in the next decade. With the issue having been given sustained consideration, it would now be virtually impossible to achieve enfranchisement through a constitutional amendment, for it could be handily argued that its rejection by the delegates, along with acceptance of the proposed constitution by the electorate, indicated a decided public opinion against female enfranchisement. As a result, the convention defeat contributed to a turning away from a commitment to universal suffrage, and towards the strategy of seeking suffrage for particular women under particular circumstances - i.e., partial suffrage. In one sense, this change in ideology resonated with the nativist sentiment of the times, but in another sense, this seemed to be the only way that activists could convince the legislature that it had the power to act. Nevertheless, women's rights advocates rose to the occasion, and instead of admitting defeat, they approached the 1880s with something of a renewed sense of purpose.

Meanwhile, with suffrage becoming less of a "grand" issue, and more of just another topic for ordinary statutory reform, it seemed to take a seat beside, rather than above, issues of marital property reform. Thanks to one woman in particular, Sarah Wallis, this issue continued to be pressed in a variety of forms during the 1880s. In comparison with bills submitted during the 1870s, the proposals in the next decade were marked by improved drafting, crucial given the complexity of this system of law. In addition, the marital property bills were accompanied by petitions containing the signatures of numerous citizens, praying for an equalization of property rights between husbands and wives. This latter

circumstance indicated that Wallis and her compatriots had successfully distilled this issue to allow for a greater legal awareness among ordinary Californians. However, with the legislature was growing more comfortable with these proposals as well, gone was the impulse to create special committees for their consideration. Consequently, these proposals had to line up with all others in the race to the end of the session. In addition, it appeared that the more winnable battles had been fought, leaving advocates to press for more controversial reforms. Thus, although the introduction of bills regarding women's political, economic and property rights was nearly continuous during this decade, the victories were even slimmer than in the 1870s, both in number and substance.

The last legislative session considered in this study, in 1889, represents the end of an era, but also was the harbinger of enhanced rights for married women, rights which were meant to be empowering and not merely protective. Not only did this session see a significant increase in the introduction of bills targeting women's property rights, but an idea contained in two of these proposals, calling for limits on the ability of the husband to convey the common property during the marriage, did become law in the next session, in 1891.⁴ This represented the first crack in the notion that the husband had full, unfettered rights in the common property during the marriage, ushering in a new period, in which, according to Prager, "attempts to balance the husband's power moved beyond the expansion of married women's separate property rights, as the legislature began to address

⁴Act of March 31, 1891, ch. 220, [1891] Cal. Stat. 425.

more directly the status of community property which was the central imbalance in California's marital property law."⁵

Women's rights advocates in California burst onto the law reform scene in 1869, and remained an active force for the following twenty years of this study. For a group which had no electoral power, their lobbying influence was unmatched. As individuals and under the aegis of organizations, these advocates exhibited a broad understanding of women's unequal place in society, and they attacked this inequality on a variety of fronts. They did not seek protection through special treatment; they sought empowerment through equal treatment. They demanded enfranchisement on the same terms as men, although their strategy came to encompass as well the incremental granting of political rights. In addition, activists sought to establish an equalization of the treatment of husbands and wives, particularly towards the common property. Here as well the possibility for empowerment was breathtaking. Not only would an equal right to the property acquired during the marriage indicate an equal valuation by the state of the wife's contribution, but it would also have the potential to redefine the traditionally private aspects of the marriage relationship. However, in devising a strategy for equalizing marital property rights, these women were a product of their times as much as legislators and judges were. As a result, they did not conjure up the Spanish/Mexican roots of California's community property law, but rather relied on the Anglo-American feminist rhetoric of joint property ownership.

⁵Prager at 47.

Nevertheless, the Spanish/Mexican heritage provided a well-defined legal category, common property, which could serve these activists well.

That activists' unrelenting efforts over twenty years yielded little success in the areas of political and property rights is a testament to the level of the entrenchment of California lawmakers' views regarding woman's place in society. But these views were not particular to California; the legislative treatment of women was consistent with a nationwide trend of reform, which was based in the common law. In this mode, lawmakers carved out special, individual property rights for wives by relying on the category of the wife's separate property, in common law systems, or the separate property of the wife, in community property jurisdictions. Moreover, these enhanced rights were often illusory, flowing from a legislative patriarchy willing to provide family protection but not female autonomy, and sometimes were accorded in substitution for a grant of political rights. Meanwhile, lawmakers resisted mightily giving women any sort of ownership rights in property which had accumulated during the marriage. To have done so would have required legislators to acknowledge wives' contribution to the economic life of a marriage, and at the same time would have given them rights which could only be considered empowering.

Yet, in the end, the state's refusal to accord women equal rights in the common property worked against the less controversial goal of family protection as well, as women and children could increasingly be found turning to the state for economic support. Consequently, by the early twentieth century, activists began to

work towards the formation of public law, rather than the reform of private law, to provide women rights to state support in the form of mothers' pensions.⁶ While it could be argued that mothers' pensions had a greater reach, including over those women whose marriages never did produce enough assets to have allowed them to support their families after the loss of the male breadwinner, in reality they operated in favor of widows with middle-class values.⁷ In this respect, mothers' pensions might be viewed as an alternative route to providing for these women when changes in marital property law may have accomplished similar results.⁸ As a result, from this angle, mothers' pensions appear as merely another protective measure, with their enactment highlighting the unwillingness of legislators to permit women to become empowered through enhanced property rights.⁹ Thus, the history of activists pressing for reform of marital property rights

⁶See generally, Theda Skocpol, Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States (1992), esp. chs. 6-9. On the California experience, see Sherry Katz, "Socialist Women and Progressive Reform," in William Deverell and Tom Sitton, eds., California Progressivism Revisited 121-127 (1994); Danielle Swiontek, "A Regional Matter: Women's Clubs, Organized Labor, and San Francisco Politics in the Campaign for Mothers' Pensions in Progressive-era Politics," paper presented at the 38th Annual Meeting of the Western History Association, Oct. 17, 1998. California adopted mothers' pension legislation in 1913, one of the first states to do so. Katz at 122, 127.

⁷See Skocpol at 465-479. Skocpol reports that San Francisco blatantly established a "two-tier system" whereby the Widows' Pension Bureau provided fairly generous aid only to "the most respectable widows," leaving others to seek what they could from alternative agencies. Id. at 475.

⁸However, the fact that these programs were chronically underfunded actually rendered them poor substitutes for increased marital property rights for wives and widows. See id. at 471-477.

⁹Moreover, it should be noted that, not only were mothers' pensions highly protective in nature, they also allowed the state to exercise a great deal of social control over recipients. The marital property scheme, meanwhile, did not include on-going state oversight of the widow's management of the family assets, at least past the estate administration stage, if any. Id. at 467-469. Notably, part of the reform agenda in California included eliminating the requirement that the widow's share of the common property be subject to estate administration where the widower's

in the face of the legislature's continual refusal to grant such, does not stand alone as a problem rectified only a hundred years later with the advent of no-fault divorce.¹⁰ Rather, it represents the early chapters of a continuing history of the tension in California between the need to keep women from becoming economically dependent on the state while, at the same time, to prevent them from gaining the power necessary to operate autonomously from men.¹¹

Contribution to the Literature

This dissertation has set out to trace the nineteenth-century development of California's marital property law and the efforts by reformers to render the system more just for women. But, more than that, this study attempts to demonstrate that the fact that the state's marital property regime was connected to the Spanish/Mexican civil law renders the history of this system different from the history of marital property regimes based in the common law. Moreover, the development of marital property law affected the agenda of the women's rights movement in California, so that it too developed differently than the Eastern-based movement. As a result, this dissertation challenges a bias in the historical

share was not.

¹⁰Prager at 68-81.

¹¹According to Skocpol, "mothers' pensions in practice truly boomeranged . . . by pushing poor women into marginal wage-labor markets." *Id.* at 476. However, there may be reason not to characterize this, as Skocpol does, as an "unintended" consequence. The enactment of mothers' pension programs indicates the unwillingness of lawmakers to remove state-sanctioned economic disabilities which prevented women from competing in the labor market. See *id.* at 469, 476.

literature of marital property law, manifested not only by historians' attempts to generalize across the United States from the study of one or a few common law jurisdictions, but also by historians' acceptance of the common law as the benchmark, with the community property system being seen as deviant.

In addition, this study seeks to enrich our understanding of female political activism in nineteenth-century America. Histories of the suffrage movement, for example, have tended to focus on particular "campaigns," times of concentrated activity in the electoral (rather than representative) arena, or have been biographic in nature.¹² Studies of statutory law reform affecting women have tended to focus as well on just a few discrete attempts to gain enactment of legislation, and more often than not in these studies the protagonists meet with success.¹³ But these works run the risk of portraying activists as dilettantes dipping into the political arena just here and there, or of slighting the efforts of many by focusing on one reformer. This dissertation instead attempts to recreate in a more complete way the reality of women's rights activism in California during the 1870s and 1880s, by demonstrating the unrelenting efforts of numerous

¹²See e.g., Ellen Carol DuBois, Feminism and Suffrage: The Emergence of an Independent Woman's Movement in America, 1848-1869 (1978); Susan Scheiber Edelman, "'A Red Hot Suffrage Campaign': The Woman Suffrage Cause in California, 1896," 2 California Supreme Court Historical Society Yearbook 49 (1995); Ruth Barnes Moynihan, Rebel for Rights: Abigail Scott Duniway (1983); Barbara Sapinsley, The Private Wars of Mrs. Packard (1991).

¹³See e.g., Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York (1982); Barbara A. Babcock, "Clara Shortridge Foltz: 'First Woman'," 30 Arizona Law Review 673 (1988); "Clara Shortridge Foltz: Constitution-Maker," 66 Indiana Law Journal 849 (1991).

devoted reformers, year after year, legislative session after legislative session, defeat after defeat.

This is not, then, an optimistic story, where the heroines ride victorious into the sunset. Neither is it a study where the actions of those who held the power to bring about justice but did not can be easily dismissed. Rather, this portrayal requires the reader to confront the fact that the legal and political systems of nineteenth-century California not only refused to grant women political equal rights, but also actively frustrated the constitutional guarantee of marital property rights as well.

Finally, by focusing on a jurisdiction in which the parameters of the marriage relationship were, in the first instance, deliberately determined by a representative body, this study challenges the efficacy of the public/private dichotomy employed by scholars to examine the legal and social order. Only recently have historians come to see that women's rights within the ostensibly private institution of marriage were anything but private for the nineteenth century, and moreover, that woman's status within marriage had serious implications for woman's status as a citizen and a member of the polity.¹⁴ This dissertation demonstrates that nineteenth-century lawmakers and women's rights activists themselves realized the artificiality of the public/private division, but also recognized its power to maintain male hegemony.

¹⁴See Nancy F. Cott, "Marriage and Women's Citizenship in the United States, 1830-1934," 103 American History Review 1440 (1998).

This appears to be the first longitudinal study of its kind, tracing women's rights activism in one state over a significant period rather than for discrete campaigns, and including all activists and organizations rather than focusing on just one player. This is not surprising, considering that the dissertation involved the tracing of nearly seventy bills affecting the political, economic and legal status of women, which required page-by-page consideration of poorly indexed legislative journals, along with the interweaving of legislative debate recorded in a local newspaper and the search for the women's role, which was revealed not in the official record but only in sympathetic publications scattered across the state and nation.¹⁵ In addition, this study required an intrinsic understanding of and sensitivity to the institutions of the California legislature and Supreme Court as they set about the lawmaking task, a subject given little or no attention in social histories. Thus, while this dissertation makes clear that the Eastern-based experience of female activism surrounding legal and political reform is not altogether generalizable across the United States, it is unclear at this point whether the California experience, of sustained legislative involvement by a dedicated group of women, was duplicated in other jurisdictions, either in the East or the West.

¹⁵It goes nearly without saying, moreover, that the history of unsuccessful legislative action is usually much more obscure, making its telling that much more difficult.

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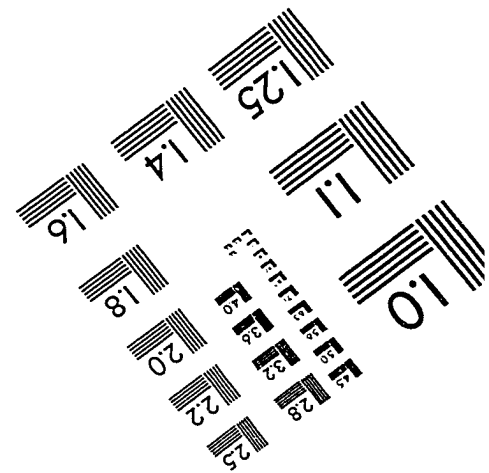
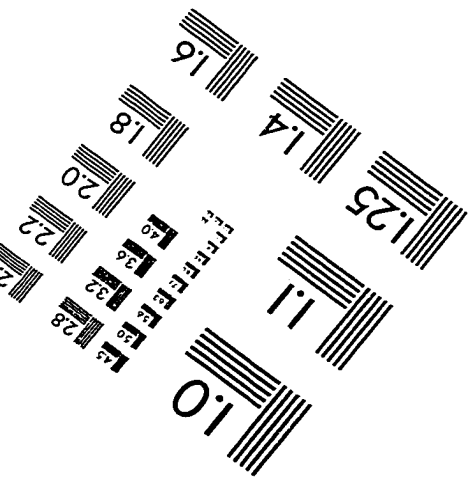
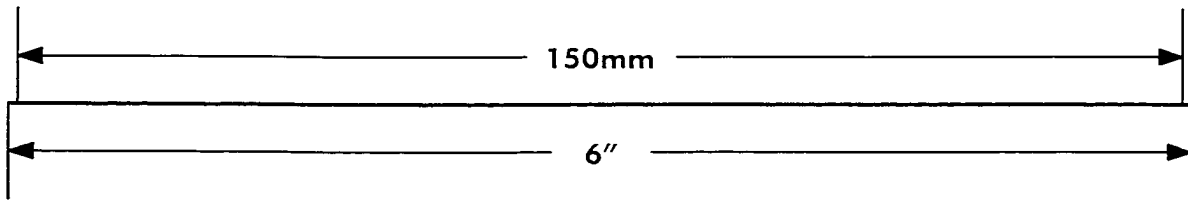
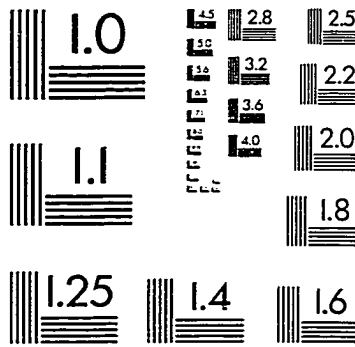
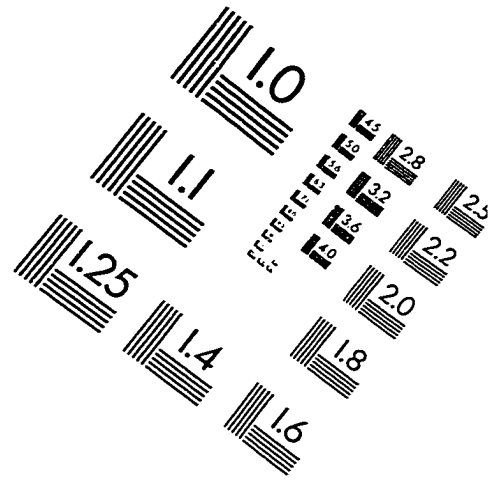
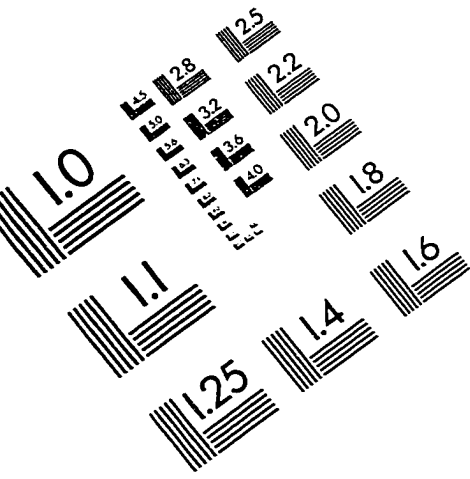
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