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Caroline Bermeo Newcombe

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THE ORIGIN AND CIVIL LAW FOUNDATION OF THE COMMUNITY PROPERTY SYSTEM, WHY CALIFORNIA ADOPTED IT, AND WHY COMMUNITY PROPERTY PRINCIPLES BENEFIT WOMEN

BY CAROLINE BERMEO NEWCOMBE*

“Development of the community property law of the western states has gone hand in hand with the general emancipation of women from the economic bonds which have so long burdened them.”¹

INTRODUCTION

When a California wife scared hogs out of her mud kitchen in 1832, she had some things in common with a Visigothic wife living in fifth century Spain. Both women worked “shoulder to shoulder” with their husbands to survive in harsh conditions. Both women enjoyed a community property system which regarded the relationship between husband and wife as an economic partnership. Despite the fact that community property governs the marital property rights of couples in ten states, little is known about its origin, or why frontier states chose to adopt it. Instead, to lawyers and students in common law jurisdictions, community property often appears as an exotic “other.”

This article discusses the origin of the community property system in the western United States by paying particular attention to the legal and historical climate which nurtured it. It shows how this civil law system of marital property law differs from a common law system, and how it can be traced back to the Visigothic Code. The article introduces seven factors to explain why community property was adopted in California,² including the fact that conditions on the

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*Visiting Associate Professor of Community Property Law, Southwestern Law School; J.D., University of Virginia School of Law, LL.M American University, Washington College of Law. This article is dedicated to my Ecuadorian grandmother, Sara Bermeo, and to my Irish great grandmother, Jane Barry, one of the first women to graduate from the University of California in 1881. I am grateful to Comparative Law Professor Olivier Moreteau and to Community Property Professor Grace Blumberg for reading drafts of this article. Of course, any mistakes are mine.

1. *Cosper v. Valley Bank*, 237 P. 175, 176 (Ariz. 1925).

2. California is the source of much of the community property law in the United States. In addition to California itself, five states recognize California as a model for their own community property systems. See *infra* note 4.

western frontier approximated the tribal conditions out of which community property emerged. Although the article discusses historical distinctions between civil law and common law, the goal here is not to provide a survey of the marital property law of all fifty states as it exists today. The article begins by defining community property. It ends with a discussion of why community property principles benefit women, especially women who enter marriage propertyless.

I. DEFINITION OF COMMUNITY PROPERTY

Ten states have adopted a system of community property.³ Although these systems vary widely, they share some common characteristics.⁴

3. The United States jurisdictions which have adopted community property can be separated into five categories: (1) *traditional* (California, Texas, Louisiana, New Mexico, Arizona); (2) *Uniform Marital Property Act* (Wisconsin); (3) *voluntary* (Alaska); (4) *unique adoption* (Idaho, Nevada, Washington) and (5) *entity* (Puerto Rico). Although it is not a state, Puerto Rico is included because it is a United States territory.

(1) *Traditional*. This article classifies five states (California, Texas, Louisiana, New Mexico, and Arizona) as traditional community property jurisdictions because they were under Spanish rule, and the adoption of the community property system was a continuation of what was already in place. Louisiana's legal history is slightly different. It was under both Spanish and French rule. See Clarence J. Morrow, *Matrimonial Property in Louisiana*, 34 TUL. L. REV. 3, 3–4 (1959).

(2) *Uniform Marital Property Act*. This classification arises from the fact that Wisconsin became a community property state in 1986 solely as a result of the adoption of a statute similar to the Uniform Marital Property Act. WIS. STAT. ANN. §§ 766.01-97 (West 2009). To prevent confusion as to the nature of the system adopted, the Wisconsin legislature declared that, "It is the intent of the legislature that marital property is a *form of community property*." See, WIS. STAT. ANN. § 766.001(2). For an early analysis of the Wisconsin statute, see generally Howard S. Erlanger & June M. Weisberger, *From Common Law Property to Community Property: Wisconsin's Marital Property Act Four Years Later*, 1990 WIS. L. REV. 769 (1990).

(3) *Voluntary*. The "voluntary" category of community property is the newest. It exists only in the state of Alaska as a result of the enactment of the Alaska Community Property Act. This statute provides for an elective community property system popularly known as an "opt in" system. Under the Alaska system, spouses can "opt in" by classifying any portion of their property as Alaska community property. ALASKA STAT. § 34.77.060 (a) (Lexis Nexis 2010).

(4) *Unique*. The adoption of community property law by Idaho, Washington, and Nevada was unique for the nineteenth century because none of these states had been governed by Spanish or French law. Instead, Idaho Territory had a common law system before the legislature adopted the community property system. David S. Perkins & Elizabeth Barker Brandt, *The Origins of Idaho's Community Property System: An Attempt to Solve a Legislative Mystery* 46 IDAHO L. REV. 37, 38 (2009) (The authors explore the theory that the community property system was adopted in Idaho because of the eastward migration of miners from California to Idaho and because legislators wanted to exclude the growing Mormon population which practiced polygamy). Like Idaho, Washington also had a common law system, but adopted community property law "largely from the California statutes of 1850." W. S. McCLANAHAN, *COMMUNITY PROPERTY LAW IN THE UNITED STATES* 144 (1982). Nevada became the first state

A. Equality of Ownership

One characteristic of a community property system is equality.⁵ The recognition of the principle of equality between husband and wife means equal ownership of community property, regardless of the actual economic contribution each spouse makes to the community.⁶ Thus, regardless of each spouse's contribution, "each spouse owns an

to adopt community property despite the fact that "there was no background of Spanish or Mexican sovereignty...[Community property was adopted when] thousands from California moved into Nevada" after silver and gold were discovered. *Id.* at 138-139.

(5) *Entity theory.* (Puerto Rico). Under Puerto Rican law, when a couple marries, a conjugal partnership is created which becomes a separate entity with its own juridical personality similar to a corporation. *Montes-Santiago v. State Farm Ins. Fund Corp.*, 600 F. Supp.2d 339, 343 (D. P.R. 2009) (citing 31 P.R. LAWS ANN. § 3622). Although it is not a state, Puerto Rico is considered a United States jurisdiction. It is interesting to note that, like Puerto Rico, when community property was originally adopted in Washington, the relationship of husband and wife was believed to be not merely united, but *unified*, resulting in the creation of a husband and wife unit. "[T]his husband and wife *creature* acquires property." *Holyoke v. Jackson*, 3 P. 841, 842 (Wash. 1882). While the "entity" theory continues to exist in Puerto Rico, it has been abandoned in Washington. *Britt v. Damson*, 334 F.2d 896, 899 (9th Cir. 1964).

4. Some of these common characteristics can be traced to a common California origin. Five states used California as a model for their own community property systems: (1) *Arizona*. The Arizona Supreme Court announced that "the source of the Arizona community property system is California..." *Mortensen v. Knight*, 305 P.2d 463, 465 (Ariz. 1956); (2) *Idaho*. "The proximity of Idaho to California, which had been developing community property law for almost two decades...was probably the principal reason why Idaho...patterned its first statutes after those of California." *McCLANAHAN*, *supra* note 3, at 147; (3) *Washington*. "Washington adopted the Community Property System...the original act was copied largely from a statute adopted in California..." Cyril Hill, *Early Washington Marital Property Statutes*, 14 WASH. L. REV. 118, 118 (1939); (4) *Nevada*. The community property statutes "of 1864 were modeled after those existing in California" JAN P. CHARMATZ & HARRIETT P. DAGGETT, *COMPARATIVE STUDIES IN COMMUNITY PROPERTY LAW* 71 (1955). "California and Nevada have constitutional provisions which define separate property...the Nevada definition was based upon that of California." Joseph W. McKnight, *Texas Community Property Law—Its Course of Development*, 8 CAL. W. L. REV. 117, 118 n. 6 (1971); (5) *New Mexico*. The New Mexico Supreme Court declared that "[o]ur community property law chiefly was adopted from the State of California..." *Laughlin v. Laughlin*, 155 P.2d 1010, 1017 (N.M. 1945).

5. William Q. DeFuniak & Micheal J. Vaughn, *Principles of Community Property* 2-3 (2d ed. 1971).

6. "Equality is the cardinal precept of the community property system. At the foundation of this concept is the principle that wealth acquired by the joint efforts of the husband and wife shall be common property...the marriage is a community of which each spouse is a member, equally contributing by his or her industry to their prosperity...." *Id.* at 2-3. "A rational process of thought culminated in the decision that the *wife should have equal property rights* in marital property acquisitions. Community of property is the applications of this thought, and the phrase itself is merely a shorthand rendition of the whole *concept that the husband and wife are equals.*" Michael J. Vaughn, *The Policy Of Community Property And Interspousal Transactions*, 19 BAYLOR L. REV. 20, 27 (1967) (emphasis added).

equal one-half interest in community property.”⁷ The equality principle also includes equality of distribution at the termination of the marriage, whether by death⁸ or dissolution.⁹

B. Separate Property and Community Property

A second characteristic of a community property system is that it recognizes two property classifications: community property and separate property.¹⁰ A significant part of community property law is devoted to distinguishing between these two forms of property.¹¹ This is because, if an asset is classified as “community,” then each spouse has an equal ownership share.¹²

Two factors used to determine classification involve, the time of acquisition, and “the method by which property is acquired.”¹³ If

7. *In re Marriage of Benson*, 119 P.3d 1152, 1155 (Cal. 2005). It is important to note that while equality of ownership has always existed, equality of management has not. Originally, management of the community estate was given to the husband. This changed in the twentieth century, when community property jurisdictions gave both spouses equal rights of management and control. *See, e.g.*, CAL. FAM. CODE § 1100 (a) (West 2004).

8. “Upon the death of a married person, one-half of the community property belongs to the surviving spouse and the other half belongs to the decedent.” CAL. PROBATE CODE § 100 (a) (West 2002). At death, under the community property principle of existing *equal ownership*, the wife as survivor does *not take by inheritance* from her husband, “she takes her full right by dissolution of the community.” GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY 955 (2d ed. 1925).

9. Unless the parties stipulate otherwise, “marriage is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an *equal right* to succeed to the property *after its dissolution*.” DEFUNIAK, *supra* note 5, at 2 (emphasis added). One state’s community property statute provides that, “[I]n a proceeding for dissolution of marriage...the court shall...divide the community estate of the parties equally.” CAL. FAM. CODE § 2550 (West 2004). Not all community property jurisdictions follow the general rule today. Washington now allows its judges to make an equitable distribution. *Urbana v. Urbana*, 195 P.3d 959, 963 (Wash. Ct. App. 2008), *See also*, WASH. CODE ANN. § 26.09.80 (West 2005 & Supp. 2010) and TEX. FAM. CODE ANN. §7.001 (Vernon 2006).

10. As a practical matter, these two classifications generally become three classifications: (1) the community property estate belonging to the husband and wife; (2) the wife’s separate property; and (3) the husband’s separate property. *See, e.g.*, TEX. FAM. CODE ANN. §3.401 (Vernon 2006).

11. Community property is “a classification based system: all assets owned by married persons may be classified as community or separate.” GAIL BOREMAN BIRD, CALIFORNIA COMMUNITY PROPERTY 10 (9th ed. 2008).

12. “Under the community system, the wife is an equal owner with her husband in all of the community property. Their rights, title and interest are co-equal and of equal dignity.” *Rompel v. U.S.*, 59 F. Supp. 483, 486 (D. Tex. 1945) *rev’d on other grounds*, *United States v. Rompel*, 326 U.S. 357 (1945).

13. *Arnold v. Leonard*, 273 S.W. 799, 801 (Tex. 1925). With respect to the time of acquisition factor, property owned by a person *before* marriage is generally classified as

property was acquired through the toil or talent of either spouse during marriage, then it is likely to be classified as community property.¹⁴ If, on the other hand, the property was acquired through gift or inheritance, then it is more likely to be classified as separate property.¹⁵

The ability of a spouse to own separate property goes to the heart of the community property system.¹⁶ Without separate property, “the term community property would be meaningless.”¹⁷ The community of property between husband and wife can take a variety of forms. The Spanish form of community property is the dominant form in the United States.¹⁸ It is based on time and method of acquisition.¹⁹ This is a limited community of property acquired during marriage²⁰ by the labor of either spouse.²¹

separate property, while property acquired *during* marriage is generally classified as community. *See, e.g.*, TEX. FAM. CODE ANN. §§3.001-3.002 (Vernon 2006).

14. *Hammond v. Commissioner*, 106 F.2d 420, 422 (10th Cir. 1939). “It is a fundamental postulate of the community property system that whatever is gained during coverture [marriage], by the toil, talent, or other productive faculty of either spouse is community property.” *Id.* The description of the acquisition of property described above, refers to property acquired by “onerous” title. This is a “well known civil law concept” whose closest analogy to the common law would be consideration. MCCLANAHAN, *supra* note 3, at 39 n. 14.

15. Separate property is acquired by “lucrative,” (also known as gratuitous) title, that is, by gift or inheritance. Property acquired by lucrative title becomes the separate property of the acquiring spouse. *Id.* at 40 n.15. In most community property jurisdictions, separate property is defined as property “owned *before* marriage, or acquired during marriage by gift, will or inheritance.” CAL. CONST. art. 1, § 21 (emphasis added).

16. Ownership of separate property “seems to be the basis of community property. This is not so strange or startling when we recognize the fact...that community property presupposes the capacity of the wife to acquire rights to some extent; and those rights are hers—are separate.” MCKAY, *supra* note 8, at 24.

17. MCCLANAHAN, *supra* note 3, at 39. “The most salient characteristic of Spanish community property is its distinction between marital property—that is, property earned during marriage by the labor of the parties—and separate property...”GRACE BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 2 (5th ed. 2007).

18. Seven states chose Spanish community property law. BLUMBERG, *id.* at 2.

19. The Spanish system is different from the legal community under French law which distinguished between movable and immovable property “rather than upon the time and method of acquisition.” Clarence C. Morrow, *Matrimonial Property in Louisiana*, 34 TUL. L. REV. 3, 5 (1959).

20. This limited community in which only “property acquired during marriage by labor...fell into the collective estate” is distinct from a [primarily Dutch] *general* community of goods which “extended to all property of the spouses.” MCKAY, *supra* note 8, at 27.

21. MCKAY, *supra* note 8, at 27.

C. Presumptions

Reliance on presumption is a third characteristic of community property systems.²² The most obvious presumption is the pro-community property one that all property acquired during marriage is presumed to be community property.²³ Another presumption is that property acquired by gift is separate property.²⁴ A third presumption is the presumption of undue influence, which arises when one spouse gains an advantage over the other as a result of an interspousal contract.²⁵ The practical effect of this presumption, found in some community property jurisdictions, is that certain transactions between husband and wife will not be enforced unless the presumption is rebutted.²⁶

D. Community Property Arises by Operation of Law.

A fourth characteristic of community property systems is that they arise by operation of law.²⁷ With the exception of the elective community property system adopted in Alaska,²⁸ community property

22. In re Marriage of Haines, 39 Cal. Rptr. 2d 673, 682 (Cal. Dist. Ct. App. 1995).

23. "There is a *general presumption* that *property acquired during marriage* by either spouse other than by gift or inheritance *is community property* ..." In re Marriage of Haines, 39 Cal. Rptr. 2d 673, 682 (Cal. Dist. Ct. App. 1995). This legal presumption is rebuttable and can be demonstrated through form of title and whether "the spouses have transmuted or converted the property from separate to community or vice versa." *Id.* See also TEX. FAM. CODE ANN. §3.003 (Vernon 2006) titled "Presumption of Community Property."

24. This presumption is derived from the common statutory definition of separate property in most community property states. See, e.g., CAL. FAM. CODE § 770(a)(2) (West 2004).

25. *Haines*, 39 Cal. Rptr. 2d at 679.

26. For example, in one community property state, a court refused to enforce a promissory note and deed of trust the husband executed in favor of the wife. The court found that the transactions gave the wife an advantage and *gave rise to the presumption of undue influence* which she was unable to rebut. In re Marriage of Lange, 125 Cal. Rptr. 2d 379, 383 (Cal. Ct. App. 2002).

27. E.g., Community property law in Texas "is neither a contractual nor a consensual system...[it] results, not from voluntary agreements of the parties, but by *operation of law*, as a vital incident to the marriage relation." *Rompel v. U.S.*, 59 F. Supp. 483, 486 (D. Tex. 1945)(emphasis added).*rev'd on other grounds*, *United States v. Rompel*, 326 U.S. 357 (1945).

28. Because it does not arise by operation of law, the Alaska Community Property Act, is sometimes referred to as an "opt in" statute. Kathleen M. O'Connor, *Marital Property Law in Massachusetts: A Choice for a New Millennium*, 34 NEW ENG. L. REV. 261, 326 n. 382 (1999) "Unlike *other community property states*, where applicable rules are mandatory [arise by operation of law] unless a couple modified them by agreement, this [Alaska] statute allows couples an opportunity to opt-in to a community property regime." *Id.* The "opt-in" portion of the Alaska act is codified as ALASKA STAT. § 34.77.060 (a) (Lexis Nexis 2010).

systems in the United States arise by operation of law.²⁹ Thus, community property is not something that spouses voluntarily agree to by contract. Instead, this civil law system of marital property law *automatically springs into being* when a couple gets married.³⁰ The fact that most community property systems arise by operation of law does not mean that they cannot be modified by contract. Under the principle of contractual modification, spouses can determine whether their property will be classified as community or separate.³¹ If certain formal requirements are met, spouses can even “contract out” of a community property system.³²

29. Community property states “have legal regimes *that are imposed by statute as an incidence of marriage*, unless the parties specifically contract to the contrary.” Richard W. Bartke, *Marital Sharing-Why Not Do It By Contract?* 67 GEO. L.J. 1131, 1135 (1978). Professor Grace Blumberg writes that, “Some community property interests arise by operation of law rather than agreement of the parties...California community property also arises by operation of law.” BLUMBERG, *supra* note 17, at 1.

30. This characteristic was recognized early. The Spanish legal code which made its way from Spain, to South America, and to North America, specifically stated that the “conjugal” or “legal (community) society” between husband and wife is not founded on contract, but “upon provisions of the law.” W.W. Smithers, *Matrimonial Property Rights Under Modern Spanish and American Law*, 70 U. PA. L. REV. 259, 261 (1922).

“The community of property that is formed between husband and wife as a consequence of the celebration of the marriage ...is called ‘legal’ because *not founded by express contract* of the interested parties, but *upon the provisions of the law*. Some persons call it [a] ‘conjugal society’ in order to indicate that it is formed between spouses, but the laws more commonly call it ‘legal society.’” *Id.* (quoting Article 956, PERUVIAN CIVIL CODE).

The same scholar writes that, under a community property system, “at the moment of marriage there springs into existence a ‘conjugal society’ or ‘community.’” *Id.* at 260. Similarly, another scholar writes that, “Louisiana [is] a community property jurisdiction...[T]he basic notion of a community of property coming into existence *automatically* upon marriage if the spouses do not contract otherwise is a basic element of the state’s legal and popular culture.” KATHERINE S. SPAHT & ANDREA B. CARROLL, *LOUISIANA MATRIMONIAL REGIMES* 1 (2009).

31. BIRD, *supra* note 11, at 31.

32. *Id.* See, e.g., CAL. FAM. CODE §850 (West 2004) providing for the “transmutation” of property classifications. CAL. FAM. CODE §852 demonstrates that the requirements for a change in classification are strict. See also, e.g., LA. CIVIL CODE ANN. art. 2328 (2005) which provides that spouses can “establish by matrimonial agreement a regime of separation of property or modify the legal regime as provided by law.” *Id.* Without contractual modification, the civil law system of community property applies to contracts of marriage in most community property jurisdictions by default. This is particularly true in Louisiana where the source of the state’s community property system is found in French, as well as Spanish, law. Indeed, a portion of the state’s early marital property law was “copied verbatim in the Code of 1808 from the preliminary draft of the French Civil Code.” Clarence J. Morrow, *Matrimonial Property In Louisiana*, 34 TUL. L. REV. 3, 4–5 (1959). Perhaps this “default” type of analysis explains why the Louisiana Supreme Court stated that “It is very clear that the community property system is contractual. The law...fixes the contractual status of the parties *in the absence of other permitted contractual stipulations*.” *Creech v. Mack*, 287 So.2d 497, 503–04 (La. 1974). Thus, what appears at first blush to be a conflict over whether community property

II. HOW A CIVIL LAW SYSTEM DIFFERS FROM A COMMON LAW SYSTEM OF MARITAL PROPERTY LAW

It is not possible to fully understand the community system of marital property law without understanding its foundation.³³ The origin of community property in the United States lies outside English common law, in the distinct realm of Spanish civil law.³⁴ Courts in early community property states recognized this fact, noting that the “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.”³⁵ These civil law sources help to show how a community property system differs substantially from a traditional common law system in five distinct ways.³⁶

law arises by operation of law, or by contract, is largely semantic. About French community property law, internationally recognized Louisiana State University Law School Professor Olivier Moréteau states that, “In French law we describe Community of gains (named in French ‘communauté réduite aux acquêts’) as the ‘régime légal’ or legal regime, applicable automatically by operation of law (French Civil Code, Art. 1400 and following). It is possible to opt out completely and adopt a ‘régime conventionnel’ or contractual regime, or in part, in a matrimonial agreement making reference to the ‘régime légal’ yet with conventional changes (French Civil Code, Art. 1497). A similar approach is to be found in the Louisiana Civil Code (Art. 2325-2329). The traditional doctrine is to say that the absence of choice indicates implied acceptance of the ‘régime légal’ and is indeed indicative of a choice.” E-mail from Olivier Moreteau, Professor of Comparative Law, Louisiana State Univ. Law School, to Caroline B. Newcombe, Visiting Assoc. Professor of Law, Southwestern Law School (Mar. 8, 2011, 08:31 PST) (on file with author).

33. Unlike most states, which are common law jurisdictions, some community property states, like Louisiana, are mixed jurisdictions of common law and civil law. Traditional “mixed jurisdictions” are legal systems which contain “elements of both civil law and common law.” MATHIAS REIMANN & REINHARD ZIMMERMAN, *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 453 (2008).

34. “The Spanish Civil Law is the most influential body of law on the globe today, and even to Americans is second only to the Common Law.” Peter J. Hamilton, *Germanic and Moorish Elements of the Spanish Civil Law*, 30 HARV. L. REV. 303, 317 (1917).

35. Packard v. Arellanes, 17 Cal. 525, 537 (1861). Although early community property jurisdictions looked to Spanish sources, they did not always follow them. The court in *George v. Ransom*, 15 Cal. 322, 324 (1860) held, contrary to Spanish law, that the rents and profits of a wife’s separate property remained her separate property. Commentators have characterized the decision as “clearly erroneous.” William O. Huie, *The Texas Constitutional Definition of the Wife’s Separate Property*, 35 TEX. L. REV. 1054, 1058 (1957).

36. This section presents a general historical comparison between a *traditional* common law system and a community property system. It is not meant to be a survey of marital property law as the law exists today.

A. Partnership

First, under a system of community property, husband and wife are treated as partners.³⁷ This is different from the traditional common law notion of marriage, which saw a unity between husband and wife, such that, in the famous words of William Blackstone, spouses were “one person in law.”³⁸

Community property recognizes a different relationship between spouses;³⁹ it embraces a partnership theory.⁴⁰ Courts confirmed this theory in early community property states.⁴¹ One court announced that, the “relation of husband and wife is regarded by the civil law as a species of partnership. . .”⁴² However, it is a partnership of an economic, rather than a moral nature.⁴³ Thus, the law regards the relationship between spouses “in much the same way as it does a *commercial* partnership.”⁴⁴ This can be seen in California’s Family Code, which declares spouses “subject to the same rights and duties of nonmarital *business partners*, as provided in Sections 16403, 16404, and 16503 of the *Corporations Code*. . .”⁴⁵

37. Charles Sumner Lobinger, *The History of the Conjugal Partnership*, 63 U.S. L. REV. 250, 251 (1929).

38. 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 513 (John L. Wendell ed., Harper & Brothers 1847) (1850). American courts also recognized “the common law principle that marriage was a gift to the husband of the wife’s estate...It was a consequence of the merger of the legal existence of the wife, in that of the husband.” *Smyley v. Reese*, 53 Ala. 89, 96 (1875).

39. “The property relation between husband and wife under the ...community property system is *radically at variance with the principles of the Common Law*, and utterly devoid of analogies with that system of jurisprudence, ...” SMITHERS, *supra* note 30, at 260 (emphasis added).

40. Indeed the phrase “sociedad conjugal,” which means conjugal partnership, appears in Spanish law from which community property developed. Charles Sumner Lobinger, *The History of Conjugal Partnership*, 63 U.S. L. REV. 250, 251 (1929). Similarly, another scholar writes that, “The merger theory of husband and wife never obtained in the Civil law.” SPAHT, *supra* note 30, at 7 (citations omitted). “The very name of the [community] system belies any notion of submergence of either individual. If the *goal...is to be one of real partnership in an economic sense...this is at least two-thirds accomplished under the community-property system.*” *Id.* at 9.

41. *Packard v. Arellanes*, 17 Cal. 525, 537 (1861).

42. *Id.*

43. *McKAY*, *supra* note 8, at 30.

44. Charles Sumner Lobingier, *The History of the Conjugal Partnership*, 63 U.S. L. REV. 250, 251 (1929) (emphasis added).

45. CAL. FAM. CODE §721 (West 2003) (emphasis added). Although marriage in community property jurisdictions is often referred to as a partnership between husband and wife, the partnership which exists is different from a commercial partnership in two ways. First, the partnership arising from a community property system is not something the spouses agree to. Instead, it arises by operation of law when the couple marry. *See supra* Part I.D.

B. Recognition of a degree of independent legal status for women

Closely related to the partnership factor, is a second factor that distinguishes a civil law system from a traditional common law system of marital property. This is the recognition of a degree of independent legal status for a married woman. The recognition of a married woman as a separate judicial entity, apart from her husband, is different from the “one person in law” unity of husband and wife under the old common law. Community property law rejected the legal oneness of husband and wife as “alien.”⁴⁶ Unlike the old common law, the civil law did not recognize that the legal existence of the wife was merged into that of her husband.⁴⁷ Instead, it regarded husband and wife as distinct legal persons with separate legal rights.⁴⁸

C. Not Title Based

A third, and very significant distinction from the common law, is that community property systems are not title based. In fact, “the community property system pays little attention to title—who has or holds title is not important, it is the *source* of the property which *determines classification.*”⁴⁹ This is one of the most difficult features

Second, the shares of property in a community property system are equal. This means that a spouse’s share of the community at dissolution does *not* depend in any way on the amount he or she contributed to the community. *See supra* Part I.A.

46. Smithers, *supra* note 30, at 260 (1922). This same article explains that the relation of husband and wife to property under a community system “is radically at variance with the principles of the Common Law, and utterly devoid of analogies with that system of jurisprudence, the reason being that the Common Law legal oneness of husband and wife is alien to the Civil Law...” *Id.*

47. Walter Lowey, *The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California*, 1 CAL. L. REV. 32 (1912). Noting that community property represents a “foreign element” in our (common) law, one early scholar wrote that the system of community property “recognizes husband and wife as distinct persons, capable of holding separate estates, and therefore *differs fundamentally from the common law* which merges the legal existence of the wife with that of the husband during coverture (marriage).” *Id.*

48. Richard A. Ballinger, *A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE UNDER THE COMMUNITY OR GANANICAL SYSTEM* 4 (1885). A foundation for this separate legal identity was the ability of a married woman to own separate property in her own name under the community property system. This ability was a primary distinction between a traditional common law system of marital property, and a civil law system. Under the old common law system, when a man and woman married, “the husband received the ownership, management and control” of his wife’s personal property which he could “dispose of without her consent.” McCLANAHAN, *supra* note 3, at 31 This prompted one writer to conclude that marriage under the common law meant that “the two became one, and he was the one.” *Id.*

49. McCLANAHAN, *supra* note 3, at 49.

of the community property system for a common law lawyer to comprehend. This is because traditional common law systems of property center around title.⁵⁰ Community property law is different. The rights of a wife in a community property system do not stem from title, but from a legally imposed undivided shared *ownership* interest in the couple's community estate.⁵¹ This has enormous practical implications if the couple divorce.⁵²

D. The Civil Law Concept of the Putative Spouse

Another factor that distinguishes a civil law system of community property from a traditional common law system is recognition of the so-called "putative" spouse. A putative spouse is a person who believes in good faith that he or she has a valid marriage, even though they do not.⁵³ Traditional common law states did not

50. "Our common law of property does not gather around ownership as its center, but around title." MCKAY, *supra* note 8, at iv.

"In title theory states, upon dissolution of marriage, courts do not have any general or equitable power to distribute property..." Jones v. Jones, 532 So.2d 574, 583 (Miss. 1988). Professor Grace Blumberg writes, "[a]s recently as 1975, many prominent states, including New York, Pennsylvania, Maryland, and Virginia, did not allow their courts to equitably distribute the spouses' property at divorce. Such states were called *title* jurisdictions." BLUMBERG, *supra* note 17, at 4.

51. "In community property states all property acquired during the marriage is deemed to be *owned* jointly by the spouses and upon a dissolution of the marriage the parties are entitled to share equally in the so-called 'marital property.'" Jones v. Jones, 532 So.2d 574, 582 (Miss. 1988) (emphasis added).

52. See Norris v. Norris, 307 N.E. 2d 181 (Ill. App.1974) discussed in text accompanying notes 171-173 *infra* and Hinton v. Hinton, 179 So.2d 846, 848 (Miss. 1965) (couple obtained a divorce from a common law court after almost twenty years of marriage; wife "did various work about the farm as any industrious farm wife would do." *Id.* at 848; farm had increased in value from \$7,900 to between \$20,000 and \$25,000. *Id.*; common law court held that the wife was not entitled to any interest in the farm because title was in her husband's name. *Id.*). See *infra*, section V D of this article, for additional discussion of the harsh results of traditional common law "title" cases. Under the traditional title system, a wife who worked shoulder to shoulder with her husband received nothing at dissolution if she did not share title to the asset she helped to improve. This changed when common law states abandoned the title system for property distribution at divorce, and began to enact equitable distribution statutes. See, Deborah H. Bell, *Equitable Distribution: Implementing the Marital Partnership Theory Through the Dual Classification System*, 67 MISS. L. J. 115, 124-125 (1997).

53. "The term, [Putative Marriage], is applied to a matrimonial union which has been solemnized in due form and celebrated in good faith by both parties but which by reason of some legal infirmity is either void or voidable. The essential basis of such marriage is the belief that the marriage is valid." In re Krone's Estate, 189 P.2d 741, 742 (Cal. App. 1948) (citing Vallera v. Vallera, 134 P.2d 761, 762 (Cal. 1943)). Although some cases use the term putative marriage, statutes which provide for this doctrine generally use the term putative "spouse." See CAL. FAM. CODE §2251 (West 2004) ("If...the court finds that either party or

recognize the putative spouse doctrine.⁵⁴ It first appeared in Spain and France and was immediately adopted by early community property states “having a civil law tradition.”⁵⁵ The purpose of the doctrine was to ameliorate the harshness to the innocent “wife” or innocent “husband” if a marriage was declared void.⁵⁶ Putative spouse status entitles a putative spouse to the same rights as a lawful spouse.⁵⁷ For example, a putative wife is entitled to the same community property division as if the marriage had been valid.⁵⁸

E. Relationship between husband and wife under the civil law is based on contract

A fifth distinction between marriage under traditional common law and civil law, is that traditional common law systems sometimes relied on the principle of covenant to characterize the relationship between husband and wife.⁵⁹ Community property law treated the

both parties believed in good faith that the marriage was valid, the court shall: (1) Declare the party or parties to have the status of a putative spouse.”)

54. GEORGE MCKAY, A COMMENTARY ON THE LAW OF COMMUNITY PROPERTY: FOR ARIZONA, CALIFORNIA, IDAHO, LOUISIANA, NEVADA, NEW MEXICO, TEXAS AND WASHINGTON 199-200 (W.H. Courtright 1910). (“At the outset one thing is clear; putative matrimony is a civil institution, and is unknown to the common law; the common law knows nothing of marriage where either spouse is a party to an existing undissolved marriage; good faith alone will not create marital rights, and there can be no marriage where there is an utter incapacity to marry, even though there may have been a bona fide belief that a former spouse was dead or the marriage dissolved.” *id.* at 199-200).

55. See Lloyd T. Kelso, *North Carolina Family Law Practice*, in *North Carolina Practice Series*, at 14 & n.3 (Thomson West Vol. 1, 2008).

56. Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1, 6 (1985). The equitable foundation of the putative spouse doctrine was explained by one judge in the following way: “A marriage contracted when one spouse is a party to a previously undissolved marriage is absolutely null; however, equity demands that innocent persons not be injured through an innocent relationship. Natural law and reason will protect innocent persons so long as they deserve or need the protection of the law.” *Lee v. Hunt*, 483 F. Supp. 826, 842 (W.D. La. 1978)(quoted *id.* at 7).

57. See Blakesley, *supra* note 56 at 6 (explaining that a putative marriage, though in reality null, “allows the civil effects of a valid marriage to flow to the party or parties who contracted it in good faith.”); *Blache v. Blache*, 160 P.2d 136, 140 (Cal.App.1945) (stating that when courts divide the gains of a putative marriage, the “rule is the same as when a valid marriage is dissolved.”). In addition, when one putative spouse dies, the surviving putative spouse is “accorded . . . the same rights as a surviving *legal* spouse.” *Estate of Leslie*, 689 P.2d 133, 144 (Cal.1984) (emphasis added).

58. “A putative spouse is entitled to the division of property acquired during the union as community property or quasi-community property.” *In re Marriage of Ramirez*, 81 Cal.Rptr.3d 180, 183 (Cal.Ct.App. 2008).

59. A twelfth century code of canon law described marriage as a “matrimonial covenant” whose properties are “unity and indissolubility.” JOHN HENRY MERRYMAN, DAVID

relationship between husband and wife as one based on a civil contract between a man and a woman.⁶⁰ Unlike a marriage based on ordinary contract law, a covenant marriage, at least under traditional common law, was supposed to be more permanent.⁶¹

Although concepts like covenant, and putative spouse, highlight the differences between community property and traditional common law, they do not explain where the community property system came from.

III. THE ORIGIN OF COMMUNITY PROPERTY

“No conception can be understood except through its history.”⁶²

The community property system in the western United States has its roots in the Visigothic Code of Spain.⁶³ It was brought to

S. CLARK & JOHN O. HALEY, *THE CIVIL LAW TRADITION* 312 (Matthew Bender 1994)(citations omitted).

60. “The law recognizes marriage only as a civil contract.” James L. Musselman, *What’s Love Got to Do with it? A Proposal for Elevating the Status of Marriage by Narrowing its Definition, While Universally Extending the Rights and Benefits Enjoyed by Married Couples* 16 *DUKE J. GENDER L. & POL’Y* 37, 40 (2009).

61. The United States Supreme Court provides the following nineteenth century description of a traditional common law marriage: Marriage “is something more than a mere contract,” *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888), and when they enter the “‘married state, they have not so much entered into a contract as into a new relation.’” *Id.* at 211 (quoting *Adams v. Palmer*, 51 Me. 481, 483 (Me.1863)). The Court continued, “‘It is a relation for life, and the parties cannot terminate it at any shorter period by virtue of any contract they make,’” *Id.* at 211 (quoting *Adams*, 51 Me. at 483), and “‘is no more a contract than ‘fatherhood’ or ‘sonship’ is a contract’” *Id.* at 211 (quoting *Ditson v. Ditson*, 4 R.I. 87, 101 (R.I.1856)). Finally, the Court added, “[a]t common law, marriage as a *status* had few elements of contract about it. For instance, no other contract merged the legal existence of the parties into one.” *Id.* at 213 (quoting *Noel v. Ewing*, 9 Ind. 36, 48 (Ind.1857)). Interestingly, a movement has begun in some states to bring back traditional common law covenant marriage by statute. The movement is based on the view that no fault divorce marriage statutes rooted in ordinary contract principles have failed. One commentator has said, “[b]ecause divorce became so easy to accomplish, the divorce rate rose rapidly,” Musselman, *supra* note 60, at 45, with “ ‘[c]hildren becoming the most tragic and numerous victims of the new family order.’” *Id.* (quoting Lynn D. Wardle, *The ‘Withering Away’ of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917–1926*, *GEO. J.L. & PUB. POL’Y* 469, 492 (2004)). Louisiana enacted the first covenant marriage law. *Id.* at 47. In addition, Florida, Georgia, Mississippi, Indiana, Illinois, and Washington have all introduced covenant marriage bills. *Id.* at 46–47 n.78. These covenant marriage statutes do not eliminate contract marriages; instead they create an elective two tiered system. *Id.* at 47. All of the covenant marriage statutes subsequently enacted “require that a couple desiring to marry make a choice between the new covenant marriage and the standard [contract] form of marriage governed by statutes in existence when the new covenant marriage law was enacted.” *Id.*

62. John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 *HARV. L. REV.* 315, 315 (1894) (emphasis added).

America by Spain, and “has remained the law of many of our states carved from that former Spanish territory.”⁶⁴

A. *The Visigoths*

As its name suggests, the Visigothic Code was developed by the Visigoths. The Visigoths, or West Goths, were a tribe of Indo-European (probably Germanic) origin.⁶⁵ As the Roman Empire disintegrated, the Goths settled in part of Spain, where they established

63. Community property is “not of common law origin; rather it originated in the custom of the Visigothic tribes of Europe and was given written form in the early codes of Spain.” BIRD, *supra* note 11, at 15. Similarly, “[t]his community . . . system was brought into Spain by the Visigoths and in turn introduced [to North America] in the territory acquired by Spain” WILLIAM Q. DE FUNIAK & MICHAEL VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 3 (The University of Arizona Press 2d ed.1971). Professor Joseph McKnight writes that, “[i]n origin, the notion of the shared gains of marriage is Germanic, VisigothicIt is a part of what the Spanish commentators sometimes refer to as their ‘common law’, thereby indicating its non-Roman origin.” Joseph W. McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CAL. W. L. REV. 117 n.2 (1971). An early California scholar, after writing that community property is an “important landmark of Spanish civilization,” declared that: “It may be asserted upon excellent authority that the community system was introduced to Spain by the Visigoths. Legal historians have reached this conclusion after careful investigation and have furnished affirmative as well as negative evidence in support thereof. At the time of the invasion of Spain by the Visigoths, in the year A.D. 414 (or 415), the law of community property prevailed among the Goths as an unwritten law.” Walter Loewy, *The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California*, 1 CAL. L. REV. 32, 33 (1912). George McKay, in his classic treatise on community property writes that sometimes a conquering people carried “community” with them to the lands that they subdued. “In the conquest of Spain by the Goths and the establishment by them of the community property system there is an instance in point.” GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY 955 (2d ed. 1925). The author then adds the intriguing statement that, “In the early days, community property sprung up among a race of people from its own customs, and not by adoption from a foreign race.” *Id.*

Finally, classical Comparative Law Professor John Henry Wigmore explains that: “In Spain, by the second century of West-Gothic rule, about A.D. 650, the laws of the two peoples, Goths and Romans, were amalgamated in a single compilation, the Forum Judicum, or (in Spanish) Fuero Juzgo. The Fuero Juzgo continued to be [used] . . . in Spanish courts into the 1800’s, and it was once [the] law in the states of Louisiana, Texas and California.” JOHN HENRY WIGMORE, PANORAMA OF THE WORLD’S LEGAL SYSTEM 838 (1936) (emphasis added). See generally, Smithers, *supra* note 30 (explaining the Spanish origins of Community Property and how the Spanish brought it to the New World).

64. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, PRINCIPLES OF COMMUNITY PROPERTY 3 (The University of Arizona Press 2d ed. 1971).

65. “It is believed, however, that [the Visigoths] were one vast branch of the Indo-Teutonic race who spread at intervals over the face of Europe.” *Id.* at 18 n. 17 (citing EDWARD GIBBON, DECLINE AND FALL OF THE ROMAN EMPIRE ch.X (H.H.Milman ed., 1845).

a Visigothic kingdom in 415 A.D.⁶⁶ After the fall of the Roman Empire, the Goths in Spain concerned themselves with unification and, in particular, legal unification.⁶⁷ In 475 A.D. this resulted in the Code of Euric, which “blended Gothic customary law with Roman elements.”⁶⁸ Later, another code was developed, popularly known as the *Fuerzo Juzgo*.⁶⁹ This code was originally written in Latin⁷⁰ and known in Spain as *Fuero de los Jueces*.⁷¹ It was made available in English translation by Professor S.P. Scott under the title, “The Visigothic Code.”⁷² This code is believed to be “a law book for the Visigoths themselves and naturally embodied the ancient customs of that people.”⁷³ One of those customs was the community of property between husband and wife.⁷⁴

B. Content of the Visigothic Code

1. Recognition of community property

Among its provisions, and quite remarkable for the fifth century, the Visigothic Code recognized the existence of marital

66. See *id.* at 43. The Visigothic kingdom became a political unit during the fifth century. P.D. KING, *LAW AND SOCIETY IN THE VISIGOTHIC KINGDOM* 1 (1972). At one time, the Visigothic kingdom extended from the Loire [in France] almost to the straits of Gibraltar [in Spain], *Id.*, and “was born from the moribund body of the Western Roman Empire: it met its death nearly two and half centuries later by the sword of Islam.” *Id.* at vii. After the Visigoths invaded Spain, “[t]he first great modification of Roman Law [in Spain] came from the Germanic conquerors of the country and particularly the Visigoths or West Goths . . . ; they were to Spanish history what Anglo-Saxons were to English.” Peter J. Hamilton, *Germanic and Moorish Elements of the Spanish Civil Law*, 30 HARV. L. REV. 303, 305 (1917).

67. KENNETH KARST & KEITH S. ROSENN, *LAW AND DEVELOPMENT IN LATIN AMERICA: A CASE BOOK* 21 (Latin American Studies Series Vol. 28, Univ. of California Press, 1975).

68. *Id.*

69. *Id.* This law exhibited remarkable longevity; it remained “in force as a supplemental source of Spanish law until 1889 . . .” *Id.* at 22.

70. Charles Sumner Lobingier, *The Forum Judicum (Fuero Juzgo): A Study in the Early Spanish Law*, 8 U. ILL. L. REV. 1, 2 (1913). The Latin title was *Forum Judicum*. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. The origin of the community property system lies “in the customs of certain Germanic tribes.” M.R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 1 (1936) (citing RUDOLF HUEBNER, *A History of Germanic Private Law*, in THE CONTINENTAL LEGAL HISTORY SERIES ix, 621–24 (Editorial Comm. of the Ass’n of American Law Sch. ed., Thomas Bell et al. trans. 1918)) The tribes’ travels “were very extensive and resulted in a widespread diffusion of the community idea. Thus, the Franks introduced it into northern France and the Goths into Spain where distinct evidences of the community appear in the second Visigothic Code in the seventh century.” *Id.* (citing Charles Sumner Lobingier, *The Marital Community: Its Origin and Diffusion*, 14 A.B.A.J. 211 (1928)).

community property. Under the heading, *Concerning Such Property As The Husband And Wife Together Have Accumulated During Their Married Life*, the Visigothic Code declared that: “When persons of equal rank marry one another, and, while living together, either increase or waste their property, where one is more wealthy than the other; *they shall share in common the gains and losses.*”⁷⁵ This portion of the Visigothic Code provides some evidence that the ultimate source of the community property legal system, which made its way to California through the law of Spain, was the Visigothic Code that composed a portion of Spain’s private law foundation.⁷⁶

2. Recognition of a married woman’s separate property

In addition to recognizing a form of community property, the Visigothic Code recognized the separate property of a married woman. Unlike other legal systems in early medieval Europe, “[t]he Visigothic wife . . . enjoyed a limited legal competence of her own. She administered her own property.”⁷⁷

The separate property of the Visigothic wife is provided for in the same section of the Visigothic Code that concerns marital property.⁷⁸ This section states that:

“[i]f the husband should acquire any property . . . by donation of the king. . . his children or his heirs shall have the right to claim it, and *shall have absolute power to dispose of it as they wish. The same rule shall apply to women who have received gifts from any source.*”⁷⁹

75. THE VISIGOTHIC CODE 126 (S.P. Scott ed. & trans. 1910) (emphasis added).

76. “The Goths were a Germanic race and had community by customary law, while they occupied southwestern France . . . , [a]nd they carried it to Spain when they conquered and occupied that country; and finally a Gothic ruler of Spain by statute made community of matrimonial gains the general law of the country.” GEORGE MCKAY, A TREATISE ON THE LAW OF COMMUNITY PROPERTY 5 (Bobbs-Merrill Co. 2d. ed. 1925).

77. KATHERINE F. DREW, LAW AND SOCIETY IN EARLY MEDIEVAL EUROPE 4 (1988). Similarly, another scholar observed that, “[e]nough is clear [about the Visigothic law], however, to indicate [that] . . . the fundamental themes [are] . . . regard for the interests of children and *enhancement of the legal condition of women.*” P.D. KING, LAW AND SOCIETY IN THE VISIGOTHIC KINGDOM 250 (1972) (emphasis added).

78. See THE VISIGOTHIC CODE 126–27 (S.P. Scott ed. & trans. 1910).

79. THE VISIGOTHIC CODE 127 (S. P. Scott ed. & trans. 1910) (emphasis added).

But how did this remarkable community property system find its way to California, the state which became the foundation for the community system of marital property law in five other states?⁸⁰

IV. WHY CALIFORNIA ADOPTED THE COMMUNITY PROPERTY SYSTEM

A. Background: The California Constitutional Convention Decided Four Foundational Questions

As indicated above, Spain brought the community property system to North America.⁸¹ Long after the Spanish arrived,⁸² the newly independent California formally recognized a community of property between spouses at the state's first constitutional convention in 1849.⁸³ Whether to adopt a community property system was one of several foundational questions that delegates at the convention faced.⁸⁴

The first question was whether California should permit slavery.⁸⁵ Delegate William K. Shannon successfully introduced a constitutional provision making California a free state.⁸⁶ A closely related question was the extent of the new territory of California.⁸⁷ The

80. The importance of California's community property system cannot be underestimated. *See supra* note 4 and accompanying text.

81. *See supra* Part III.

82. Although the Spanish first arrived in 1542, JAMES S. MCGROARTY, CALIFORNIA, ITS HISTORY AND ROMANCE 31 (1911). Spain did not officially establish California as a "province" until 1770 when Monterey became the "seat" of the "new Spanish province of California." *Id.* at 103.

83. "The community system may, in consideration of its influence upon the legal and economic development of the State, be regarded as one of the most important landmarks of Spanish civilization of California." Walter Loewy, *The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California* 1 CAL. L. REV. 32, 33 (1912). After "vigorous debate" it was adopted by the constitutional convention in 1849. *Id.* The constitution was signed on October 13, 1849 amid a 31 gun salute and shouts of "That's for California!" echoing around Monterey Bay. City of Monterey, *Constitutional Convention*, www.monterey.org/museum/convent.html.

84. *See infra* text accompanying notes 86–94.

85. In his introduction to *California Jurisprudence* federal judge W.W. Morrow wrote that: "The first article of the proposed constitution was entitled 'Declaration of Rights.' ...William E. Shannon, an Irishman by birth, a lawyer, a delegate from Sacramento,...offered the following additional section: 'Neither slavery, nor involuntary servitude...shall be tolerated in this State.' The section was unanimously adopted and an important and *critical question at that date*, was immediately set at rest." THOMAS F. PRENDERGAST, FORGOTTEN PIONEERS: IRISH LEADERS IN EARLY CALIFORNIA 158–59 (Univ. Press of the Pacific 2001) (emphasis added).

86. *See infra* notes 138–143 and accompanying text.

87. The debate over the boundaries of California lasted three days. REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE

delegates believed that a free state the size of Spanish California could not enter the union,⁸⁸ and so the size of California was reduced.⁸⁹

A third foundational question was what system of marital property law California should adopt.⁹⁰ The convention voted in favor of the civil law system of community property.⁹¹ It did so by providing married women with a constitutional (as opposed to merely a statutory) right to own separate property, and by recognizing the concept of property “held in common.”⁹²

The fourth foundational question was whether, like Louisiana, the civil law should be adopted for all areas of private law; not just for marital property.⁹³ California decided that civil law should *not* be

CONSTITUTION XIX, (J. Ross Browne, ed.) (1850) [hereinafter DEBATES]. Delegates debated whether to take all of California “as it existed when a department of Mexico” or to “divide the whole Territory.” *Id.*

88. “The insistence that California be a free state necessitated new borders, for the delegates knew that Congress would never approve the admission of a free state the size of Mexican California.” KEVIN STARR, CALIFORNIA 93 (2005).

89. The land that would later become Arizona, Nevada, Utah and part of Colorado was “trimmed away, leaving the suggestion that slavery might be introduced into these territories at a later date.” *Id.*

90. One delegate articulated this issue in the following way: “At the time the common law was introduced, woman occupied a position far inferior to that which she now occupies...I cannot see any of the evils...in introducing into this Constitution,...a provision for the protection of the wife’s property.” REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION 263, (J. Ross Browne, ed.) (1850).

91. See CAL. CONST. art. XI, §14 (1849); see *infra* notes 144-148 and accompanying text.

92. CAL. CONST. art. XI, §14 (1849). Whether to make the provision a constitutional right, or leave it to legislative enactment, had substantial consequences for the property rights of married women as the following portion of the Constitutional debates demonstrates.

DELEGATE LIPPITT:“...I am inclined to admit that there are abuses connected with the present marriage system which need correction. What I contend against is, trying the experiment in our Constitution. This *Constitution is irreparable* until the people choose to meet in Convention again. It is *not so with the statute—with the law passed by the Legislature*. If the law is found to be a bad one, or does not work well...it is easy to repeal it; a majority of the Legislature can always repeal...Not so with the Constitution. This provision, if we insert it here, will be the *fundamental law of the land*.” DEBATES, *supra* note 87 at 258 (emphasis added).

93. There are references in the debates indicating that the delegates recognized that community property was part of the civil law. REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION 263, (J. Ross Browne, ed.) (1850). For example, the question of whether to adopt the civil law as the rule of decision for *all* areas of law was articulated by Delegate Dimmick in the following way: “The only country I have ever lived in where the civil law prevails is California...I admire many provisions of the civil law. I am, however, in favor of the adoption of the common law, but while we adopt that, there are certain provisions of the civil law which I prefer...” *Id.*

adopted as the rule of decision in areas other than marital property.⁹⁴ Instead, on April 13, 1850, the California legislature declared that the common law “shall be the rule of decision in all courts of this State.”⁹⁵

B. Seven Reasons Why a Frontier State Like California Adopted the Community Property System

The 1849 decision to continue the civil law system of community property in California, while adopting the common law as the rule of decision in all other areas of law, was based on seven factors.

1. The Example of Texas

First, California looked to the experience of Texas. Both territories had been under Spanish and Mexican rule.⁹⁶ Both territories had substantial American populations, and both territories eventually became independent from Mexico.⁹⁷ The delegates at the constitutional convention saw Texas as an example of how a civil law community property system “had not been found incompatible” with a common law system in areas of law other than marital property.⁹⁸

2. The Gold Rush factor and a concern for the protection of women's property from “wild speculation”

A second factor influencing the adoption of community property was the discovery of gold in 1848, only one year before the

94. See Brian McGinty, *Common Law and Community Property: Origins of the California System*, 51 CAL. ST. B. J. 478, 537 (1976).

95. *Id.* (quoting Statutes of 1850, ch. 95).

96. By the time Texas became independent from Mexico in 1836 Americans “outnumbered those of Spanish and Mexican descent.” McCLANAHAN, *supra* note 3, at 117. Similarly, by 1850, after California became independent from Mexico, Americans “outnumbered Californians by 6 to 1.” *Id.* at 130. “Like California, Texas had been wrested from Mexico by a large and aggressive population of Anglo-American immigrants...” McGinty, *supra* note 94, at 481.

97. *Id.*

98. McGinty, *supra* note 94, at 533. Texas played another role in the adoption of community property in California. The California provision recognizing a “common” system of marital property was copied directly from the Texas constitution. The new California Supreme Court was aware of this fact, noting that the “fourteenth section of the eleventh article of our Constitution is taken from the Constitution of Texas.” *Selover v. American Russian Commercial Company*, 7 Cal. 266, 270 (1857).

convention took place.⁹⁹ People rushed to California.¹⁰⁰ Thousands of Americans “borrowed money, mortgaged homes, or spent their life savings” to come to California.¹⁰¹ The fact that the convention took place during the frenzy caused by the rush to the gold fields¹⁰² prompted a concern on the part of some delegates for the protection of a wife’s property. Delegate Tefft noted the “wildness of speculation” that characterized many California citizens,¹⁰³ and the possibility of “an idle, *dissipated, visionary, or impractical man, bring[ing] his family to penury and want.*”¹⁰⁴ For this reason, he announced that it was “our duty” to put the separate property/community provision into the Constitution.¹⁰⁵ Similarly, another delegate declared that:

99. Gold was discovered on a tract of land in the Sacramento Valley owned by Johann Sutter. LEONARD R. RICHARDS, *THE CALIFORNIA GOLD RUSH AND THE COMING OF THE CIVIL WAR* 10 (2007).

100. These included people from all over the world. For example, Frenchmen were encouraged to go to California or to invest in California, by “enormous advertising campaigns” in Paris. Henry Blumenthal, *The California Societies in France, 1849-1855*, 25 PAC. HIST. REV. 251, 252 (1956). In addition, five thousand Mexicans walked across the Sonora to California as well as “dozens of British convicts sentenced to labor in Australia.” RICHARDS, *supra* note 99, at 20 (2007). Forty thousand Chinese crossed the Pacific and arrived in San Francisco. *Id.*

101. THE AMERICAN EXPERIENCE, *The California Gold Rush*, www.pbs.org/wgbh/amex/goldrush/peopleevents/e_goldrush.html (last viewed March 19, 2010). Eight hundred ships carrying forty thousand people set sail from the East Coast “for the gold country.” LEONARD R. RICHARDS, *THE CALIFORNIA GOLD RUSH AND THE COMING OF THE CIVIL WAR* 20 (2007). Ships also sailed “for the gold region” from Norfolk, Philadelphia, New York and Baltimore. *Id.* Most of the Americans on these ships were comparatively wealthy. “The cost of a berth on every ship was steep, as much as most Americans made in a year....” *Id.* at 21. The only poor men on board the ships “were the members of the crew.” *Id.*

102. The frenzy was described by the *California Star* newspaper at the time in the following way: California ports, towns, and “nearly every rancho from the base of the mountains in which the gold has been found, to the Mission of San Luis, south, has become suddenly drained of human beings. Americans, Californians, Indians...[Eventually, we] will witness the depopulation of every town, the desertion of every rancho, and the desolation of the once promising crops of the country...” *California Star*, June 10, 1848. *available at* www.sfmuseum.net/hist6/star.html (last viewed Feb. 17, 2010). Interestingly, the *California Star* ceased publication four days later, on June 14, 1848, because “the staff rushed to the gold fields.” *Id.*

103. DEBATES, *supra* note 87, at 258.

104. *Id.* at 259 (emphasis added).

105. *Id.* Similarly, another delegate said that he favored community property, because it provided protection for the rights of the wife “against the misconduct or misfortune of the husband....” *Id.* at 267. Echoing the same theme, Delegate Myron Norton, said that he supported the community property provision because: “Every one here can relate to you instance after instance where the property of the wife has been sacrificed through idle habits, carelessness or dissipation of the husband....” *Id.* at 266.

“we are peculiarly situated here; in a country. . .where lucrative *speculations are made every day*. . .No man can tell how soon he may tumble down from that lofty height. . .if, in the meantime, *he takes to himself a partner, it is necessary that she should be protected against the recklessness of speculation.*”¹⁰⁶

3. *California residents had always lived under a system of community property*

Third, and equally as significant a factor as the gold rush, was the fact that “Californians . . .have always lived under this law.”¹⁰⁷ Community property was the system that had existed in California “for many centuries.”¹⁰⁸ Introducing a common law system of marital property would have been nothing short of a revolution.¹⁰⁹ By adopting community property, the delegates were voting for something that was already “in place.”¹¹⁰

As one delegate explained,

“[T]his section proposed in the Constitution is, and *always has been, the law* of this country. When we propose. . .to put it in the Constitution, we are not stepping upon untried ground. We are only reiterating that which is already the law of the country. *For this*

106. *Id.* (emphasis added).

107. *Id.* at 258. Actually, the full quote set forth below reflects three things: (1) first, that the delegates were very much aware of the civil law nature of community property; (2) second, that it was already “the law of the land” which families in California have already “lived and died under; and (3) that it protected the separate property of the wife.

“MR TEFFT: “It was said this evening that this was an attempt to insert in our Constitution a provision of the civil law. Very well—suppose it is. . .I think that to strike this section out would be a very decided invasion upon the people of California. . .[This proposition] deeply concerns the interests of. . .native Californians. It would be an unheard of invasion, not to secure and guaranty the rights of the wife to her separate property; and of all the classes in California, where the civil law *is the law of the land, where families have lived and died under it, where the rights of the wife are as necessary to be cared for as those of the husband[.] [W]e must take into consideration the feelings of the native Californians, who have always lived under this law.*” *Id.* (emphasis added).

108. MCGINTY, *supra* note 92, at 480. “The Spanish law governing the ‘community of acquets and gains’—what is today commonly referred to as ‘community property’—had prevailed in Spain and its American colonies for many centuries.” *Id.*

109. One delegate said that, imposition of the common law “will make a *great change* over the laws as they *now exist*. . .” DEBATES, *supra* note 87, at 262.

110. *See* MCGINTY, *supra* note 94, at 480.

*reason I am in favor of making it a constitutional provision.”*¹¹¹ I

4. *Desire to attract women settlers*

A fourth factor underlying the adoption of community property was the desire to attract women to the frontier.¹¹² Many delegates were young bachelors.¹¹³ Delegate Halleck stood up and announced that, although he was a bachelor, he hoped that “some time or other I may be wedded.”¹¹⁴ He then went on to “*call upon all the bachelors* in this Convention to vote for [community property].”¹¹⁵ He argued, “it is the very *best provision to get us wives* that we can introduce into the Constitution.”¹¹⁶

Marriage seemed to be on the mind of Delegate Norton too. He announced that he was in favor of the amendment because “I expect myself, sir, at some future time to take to myself a wife. She may be possessed of some little property, and I am not sure but that if it is not secured to her, I may squander it.”¹¹⁷ Another delegate argued that by inserting the community property provision into the Constitution, this would attract, not just women, but “women of fortune.”¹¹⁸ They would want to come to California because they knew their property would be protected.¹¹⁹

5. *Protection of the wife’s property from the husband’s creditors*

Closely related to the factor of inducing “women of fortune” to come to California, was concern for the protection of the wife’s property from her husband’s creditors.¹²⁰ Indeed a primary reason for *opposition* to adoption of community property was a concern on the part of some of the delegates for creditor’s rights.¹²¹ This was

111. DEBATES, *supra* note 87, at 262 (emphasis added).

112. *Id.* at 259.

113. *Id.* “The forty-eight delegates convening at Monterey were young (thirty-two) of them were under age forty)...” KEVIN STARR, CALIFORNIA 92 (2007).

114. DEBATES, *supra* note 87 at 259.

115. *Id.* (emphasis added).

116. *Id.* (emphasis added).

117. *Id.* at 267. Earlier, the same delegate announced that he was in favor of the community property provision because: “The section ...is one providing for the rights of the wife against the misconduct or misfortune of the husband...[N]o matter whatever misfortune should happen to him, her property shall not go to the common wreck.” *Id.*

118. *Id.* at 259.

119. *Id.*

120. See text accompanying notes 125–129 *infra*.

121. See, e.g., DEBATES, *supra* note 87, at 268–69.

articulated by one delegate who worried about the effect adoption of community property would have on the ability of creditors to get paid.¹²² The delegate's concern for creditors was well founded. One object of the constitutional provision was to protect the wife's property by classifying it as "her separate property."¹²³ This prevented seizure by her husband's creditors.¹²⁴

The debtor-friendly goal of the adoption of community property in California and Texas¹²⁵ was not lost on other states. In a debate over married women's rights in Wisconsin, one Wisconsin legislator declared Texas to be a "*noted asylum* for all the desperadoes in the country . . . *on the collection of debts.*"¹²⁶

6. *The community property system was well suited to women who worked hard alongside their husbands to survive in a harsh frontier environment.*

As well as protecting women from their husband's creditors, another reason for the adoption of community property is that it was well suited to the frontier pioneer environment of the western states.

122. "DELEGATE BOTTS: I want to know to whose benefit is this [separate property/ community property] provision to enure? What is the provision? That a married woman shall enjoy the use and control of her own property without any regard to the acts and doings of her husband...I ask you what honest woman could see the creditor knocking at the door appealing for the payment of what is justly due to him, and send him away? Who is it then that it benefits? The fraudulent husband and the colluding wife[,] who, after they have enjoyed the benefit of what gentlemen call speculation, seek to defraud honest men of their means.

...The proposition amounts simply to this: that if the husband's speculation turns out well, both husband and wife are to enjoy the benefit of it; but if it fails, *the loss is to fall upon the creditor.*" DEBATES, *supra* note 87, at 268–69 (emphasis added).

123. Section 14 of the 1849 Constitution provided that: "All property, both real and personal, of the wife, owned or claimed by marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property..." CAL. CONST. OF 1849, art. XI, § 14.

124. After the constitutional amendment was passed, the California Supreme Court wrote that: "We think 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.*" *George v. Ransom*, 15 Cal. 322, 323 (1860) (emphasis added).

125. In a famous case, the Texas Supreme Court protected a wife's property (a set of mules) from seizure by her husband's creditors despite the fact that the husband had "cared for the mules [during] marriage, and the community estate furnished [food]." *Stringfellow v. Sorrells*, 18 S.W. 689 (Tx. 1891). About the impact of community property principles under Texas law, one author wrote that, "Protecting married women's property from creditors of negligent husbands responded to two socioeconomic realities: the large number of debtors in Texas and the inability of married women to control their own property. Marital property laws followed the function of the homestead laws—each group of laws sought to safeguard family assets from creditors." Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEXAS L. REV. 689, 702–03 (1990).

126. James W. Paulsen, *Community Property and the Early American Women's Rights Movement: the Texas Connection*, 32 IDAHO L. REV. 641, 685 (1995) (citations omitted).

“*[T]he community system is most frequently found to exist. . . among. . . those who do not own great worldly possessions, those who must labor from day to day to maintain themselves and their children, those among whom the husband and wife work equally together in one capacity or another.*”¹²⁷

Put another way, community property would not have flourished in California, or in any other state, unless the same economic and social forces that gave birth to the system in the first place were present.¹²⁸ As explained in part III of this article, the community property system that was brought to the United States first appeared as a custom of Germanic tribes.¹²⁹ The origin of the system is important because it provides another reason why community property was adopted.

The life of a frontier wife in California was more like that of her Visigothic sister than of her feudal sister out of which English common law developed. The life of a Visigothic wife was described by one scholar as hard and dangerous;

“the wife fully shared the dangers and vicissitudes of daily life with her husband. She was on the battlefield with him to fight when necessary. . . *The activity of each spouse was directed to making marriage a ‘going concern,’ to provide food for the family, shelter, clothing. This tangible evidence of the wife’s work . . . was the operative force which created a community of goods between husband and wife.*”¹³⁰

127. DE FUNIAK & VAUGHN, *supra* note 5, at 21.

128. “The history of community property does not consist so much of a bare account of the place where the system first arose, . . . as it does of the social and legal forces that gave it birth. . . .” MCKAY, *supra* note 8, at 2.

129. “The idea of mutual contribution to a joint fund had its inception in a custom of the Germanic tribes. The wife who fought at the side of her husband was entitled to her share of the spoils—an individualistic notion based on equality of effort.” Harriett S. Daggett, *The Civil Law Concept of the Wife’s Position in the Family*, 15 OR. L. REV. 291, 296 (1936). In addition to the Visigoths in Spain, other Germanic tribes sowed the seeds of community property in France. MCKAY, *supra* note 8, at 6.

130. WILLIAM A. PEPPY, CYNTHIA SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 5 (2009) (quoting Vaughn, *The Policy of Community Property and Inter-Spousal Transactions*, 19 BAYLOR L. REV. 20, 33 (1967)) (emphasis added). Similarly, the Louisiana Supreme Court explained that it was the “industry” of the Visigothic wife that produced the community property system.

“The doctrine of the community of acquests and gains was unknown to the Roman law;..The best opinion appears to be that it took its rise with the Germans [Visigoths, Franks], among whom[,] at a very early period of their history, the wife took, by positive law, the one-third of

Some of the same social and economic factors that nourished the development of the community property system among the Visigoths, were also present on the western frontier. Indeed, as the following excerpts demonstrate, life on the California frontier was closer to the conditions that a Visigothic wife encountered, than to the conditions of a “noble” common law wife in nineteenth century England.

a. Life of a frontier wife

A letter from Mary Ballou, a New Hampshire woman who came to California with her husband in 1832, provides a glimpse of the life of a pioneer woman on the frontier.

“[T]his morning. . .I went and looket [*sic*] into my kitchen. the mud and water was over my Shoes. . .your Father put on his Boots and done the work in the kitchen. . .I will try to tell you what my work is . . . I am washing and Ironing. I am making mince pie and Apple pie and squash pies. . .and then again I am Stuffing a Ham of pork that cost forty cents a pound. Somtimes [*sic*]. . .I am feeding my chickens and then again I am scareing [*sic*] the Hogs out of my kitchen sometimes I am taking care of Babies and nursing at the rate of Fifty Dollars a week but I would not advise any Lady to come out here and suffer the toil and fatigue that I have suffered . . .there I hear the hogs in my kitchen turning the Pots and kettles upside down so I must drop my pen and run and drive them out.”¹³¹

As demonstrated by the quote above, frontier society, like Visigothic society, was not class-based.¹³² Marital property law under

all the gains made during coverture. *It is very probable that it was the real, or presumed, care and industry of the wife, which first produced this legislation*; and, in an early state of society, the facts most probably . . . justified [the] rule.” *Cole’s Widow v. His Executors*, 7 Martin, N.S. 41, 48–49 (1828) (emphasis added).

131. Christiane Fischer, ed. LET THEM SPEAK FOR THEMSELVES: WOMEN IN THE AMERICAN WEST, 42–46 (1977) available at <http://historymatters.gmu.edu/d/6512>(quoting Mary B. Ballou, “*I Hear Hogs in My Kitchen*” : *A Woman’s View of the Gold Rush*, Archibald Hanna ed.(Yale Press 1962)). The quotation is from a letter, written in 1832, from Mary B. Ballou to her son.*Id.* The spelling is original.

132. “[Unlike feudal society] [t]hese Germanic tribes did not have a complex form of society, with gradation of classes. . . .” DE FUNIAK & VAUGHN, *supra* note 5, at 20. “[Thus], the existence of the community system, even though found in only some of our states, is *much more natural to our way of life, to our habits and customs*, than is a system or concept of

the common law emerged out of a class-based feudal society much different from frontier life, or from the world of the Visigoths. This is because, in England, “the ‘law for the great becomes the law for all’ and the habits of the great folk are more important than the habits of the small.”¹³³

b. The feudal class-based common law system of marital property was unsuited to life on the frontier.

The following passage from a piece of historical fiction, written in the nineteenth century, provides an example of the traditional common law system of marital property law operating in the class-based context out of which it emerged.¹³⁴ Specifically, this particular passage dramatically illustrates three features of the common law marital property system that developed among the aristocratic classes in England. First, the passage shows a class-based society in which a married woman with a title was taught to be ignorant about financial matters. Second, it gives an example of the disappearance of an aristocratic common law wife’s (Lady Clonbrony) substantial property, because of her profligate husband. Third, the passage also shows the same Lady Clonbrony pleading with her son to marry an heiress so that, under the common law notion of “oneness,” he could obtain control of the heiress’s money to pay *his* family’s debts.

MOTHER Lady Clonbrony:

“There are difficulties for ready money, I confess, when I ask [your father] for it, which surprise me often. I

marital property rights coming to us from privileged and aristocratic classes...” *Id.* at 21 (emphasis added).

133. DE FUNIAK & VAUGHN, *supra* note 5, at 21. “[T]he upper classes in turning their faces against the community system effectively strangled its development....” *Id.* Professor DeFuniak credits classic common law scholars, Pollock and Maitland, as suggesting that “the community of goods is found among the ‘lower strata of society’” *Id.*

Regarding the feudal class based origins of common law marital property law, one well known nineteenth century New York legislator, David Dudley Field, is credited with seeing a relationship “between feudalism and married women’s lack of civil capacity.” 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 BUFF. L. REV. 683, 715 (1975). William Sampson repeatedly called for the elimination of the common law on the ground that one purpose of the American Revolution was to end feudalism, and that the common law was a feudal institution imported into the United States from England. As such, common law institutions were “made for us” rather than “by us.” This was the argument made by William Sampson in his writings, and in a speech he gave before the New York Historical Society in 1823. *Id.* at 699, 700.

134. See MARIE EDGEWORTH, *THE ABSENTEE* (1895).

know nothing of affairs—ladies of a certain rank seldom do, you know. But, considering your father’s estate, and the fortune I brought him,” added her ladyship, proudly, “*I cawnt (sic) conceive it at all.*”¹³⁵

...
 “I hope,” said [her son], “that you will not take it unkindly of me, my dear mother, if I tell you, at once, that I have no thoughts of marrying at present—and that *I never will marry for money: marrying an heiress is not even a new way of paying old debts. . .*”¹³⁶

7. *Women and Slaves should be free under Enlightenment principles and natural rights.*

Turning from the history of marital property law, a less obvious factor in favor of passage of the community property provision in California in 1849 was the intellectual climate in which the debate took place. It took place in an intellectual era of the Enlightenment and concern for natural rights.¹³⁷ A natural rights provision was even inserted into the new constitution’s Bill of Rights.¹³⁸

The debate over whether a married woman should be allowed to own separate property occurred at the same time that the convention discussed whether California should be a free state.¹³⁹ This follows a pattern in legislative debates in other states comparing the status of

135. MARIE EDGEWORTH, *THE ABSENTEE* 15 (1895) (emphasis added). This book was written by the nineteenth century daughter of an absentee English landlord who owned estates in Ireland, but lived in England. The income from the absentee landlord’s estates was produced by the labor of Irish tenants. The passage contains nineteenth century spelling.

136. *Id.* at 18 (emphasis added).

137. BRIAN P. JANISKEE & KEN MASUGI, *THE CALIFORNIA REPUBLIC: INSTITUTIONS, STATESMANSHIP, AND POLICIES* 41 (2004) [hereinafter JANISKEE & MASUGI]. With respect to the Enlightenment, another scholar wrote that a nineteenth century legislator who supported the right of a married woman to own separate property, was “clearly influenced” by the Enlightenment. James W. Paulsen, *Community Property and the Early American Women’s Rights Movement: The Texas Connection*, 32 *IDAHO L. REV.* 641, 663 (1995) (citations omitted).

138. This provision was introduced by Delegate William E. Shannon. Thus, the new California Bill of Rights provided that: “SECTION 1. All men are by *nature* free and independent, and have *certain unalienable rights...*” *DEBATES, supra* note 103, at 33. (emphasis added). According to one scholar, by introducing this provision, “Shannon placed California in the *natural rights tradition* begun by the founders of the...Constitution in June 1776.” JANISKEE & MASUGI, *supra* note 137, at 41.

139. Thus, “discussion on the rights of women paralleled the discussion on slavery and ‘free negroes.’” JANISKEE & MASUGI, *supra* note 137, at 47.

women with the status of slaves; “[t]he moment the nuptials are tied, her bondage was as complete as that of a southern slave.”¹⁴⁰

The intellectual climate of the mid-nineteenth century had a positive impact for women, and for African Americans. On September 10, 1849, Delegate William E. Shannon,¹⁴¹ the same delegate who inserted the natural rights provision into California’s Bill of Rights, introduced a provision outlawing slavery.¹⁴² The provision passed, and one year later California entered the union as a free state.¹⁴³

On September 27, 1849, another addition to the new California Constitution was introduced. It provided for *recognition of the separate property of married women*, and recognition of property *held in common* (or community) between husband and wife.¹⁴⁴ Delegate Lippitt rose in opposition on the ground that it would “change entirely

140. Statement of a legislator during debates about the New York married women’s property acts quoted in James W. Paulsen, *Community Property and the Early American Women’s Rights Movement: The Texas Connection*, 32 IDAHO L. REV. 641, 686 (1995). Nineteenth century women civil rights advocates echoed the same theme. Emily Collins wrote that “[a]ll through the Antislavery struggle, every word of denunciation of the wrongs of the Southern slave, was, I felt, equally applicable to the wrongs of my own sex. Every argument for the emancipation of the colored man, was equally one for that of woman...” Paulsen, 32 IDAHO L. REV. at 686 n. 295.

141. Shannon was born in Co. Mayo, Ireland. MICHAEL C. O’LAUGHLIN, *IRISH FAMILIES ON THE CALIFORNIA TRAIL* 157 and Appendix F-33 (2003). He came to the United States, studied law, and was admitted to the New York bar at the age of 24. THOMAS S. PRENDERGAST, *FORGOTTEN PIONEERS* 156 (2001). He was given command of a company of soldiers which arrived in San Francisco by sea on the brig *Susan Drew* in 1847. O’LAUGHLIN, *id.* at F-33. He became an alcade of the town of Coloma, “an office under the Spanish system combining the quality of mayor with town judge.” PRENDERGAST, *id.*, at 157. After serving as a delegate at the California Constitutional Convention, *id.* he practiced law in Sacramento and was elected to the state’s first legislature. *id.* at 160. He died at the age of 28 from the cholera epidemic of 1850. O’LAUGHLIN, *id.* at F-33.

142. He introduced the provision after a draft of the proposed new constitution failed to contain a provision barring slavery. PRENDERGAST, *supra* note 141, at 155. The transcript of the constitutional proceedings show that on September 10, 1849:

“MR. SHANNON: moved to insert, as an additional section, the following: *Neither slavery nor involuntary servitude* unless for the punishment of crimes, *shall ever be tolerated in this State.*” DEBATES, *supra* note 103, at 43.

143. The admission of California as a free state in 1850 had enormous national consequences because it “broke the equilibrium rule of free and slave state parity” in the government. JANISKEE & MASUGI, *supra* note 137, at 26.

144. DEBATES, *supra* note 87, at 257. The new provision provided that, “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... to her separate property as that *held in common* [community of property between husband and wife] *with her husband....*” *Id.* (emphasis added).

the nature of the married relations.”¹⁴⁵ Another delegate announced that any opposition was based on “barbarous” principles, and that “in this [enlightened] age of civilization, it has been found that the wife has certain rights.”¹⁴⁶ The provision granting married women the right to own separate property “was then adopted.”¹⁴⁷ Following the directive of this new constitutional provision to pass laws providing for “common” property, the California legislature enacted a statutory system of community property based on Spanish and Mexican law.¹⁴⁸

V. WHY COMMUNITY PROPERTY PRINCIPLES BENEFIT WOMEN

The quotation at the beginning of this article suggests that the expansion of community property law “has gone hand in hand” with the expansion of women’s economic rights.¹⁴⁹ This section presents five historical reasons why this is true.

A. Economic Recognition of Women Who Work at Home

First, a community property system gives recognition to the contribution of women who work at home.¹⁵⁰ Recognition of the contribution of a wife who works at home is possible because the

145. DEBATES, *supra* note 87, at 257. He went on to tell the convention that he had lived in France, “where this principle is carried most completely into effect, ..the principle of setting the *wife up as an equal*, in every thing whatever, to the husband—*raising her from the condition of head clerk to partner*. The very principle, Mr. Chairman, is contrary to [the laws of] nature, and contrary to the real interests of the married state.” DEBATES, *supra* note 87, at 257 (emphasis added).

146. DEBATES, *supra* note 87, at 264.

147. DEBATES, *supra* note 87, at 269.

148. BIRD, *supra* note 11 at 16. Seventy-five years after the 1849 California Constitutional Convention, the Dean of the San Francisco Bar Association wrote about the convention’s accomplishments. He emphasized the emancipation of married women and freedom for African Americans. Jeremiah F. Sullivan, *Seventy-Five Years of Law in California*, THE BULLETIN (Sept. 8, 1925), available at www.sfmuseum.org/hist3/laws.html. He wrote that, “While securing the freedom of other races, the legislators believed in the emancipation of the married woman . . . [T]hey abolished the common law penalties of loss of identity and loss of property inflicted on the women of property who married.” *Id.*

149. *Cosper v. Valley Bank*, 237 P. 175, 176 (Ariz. 1925).

150. “When women as a group were making their efforts in the home only, the community-property system gave them protection” Daggett, *supra* note 129, at 296. Similarly, Professor Grace Blumberg writes that, “the notion of a spouse’s present equal interest in marital property has considerable symbolic force. It clearly announces that spouses are understood to contribute equally to the family without regard to the actual division of labor. It *dignifies the work of the homemaker*” GRACE BLUMBERG, COMMUNITY PROPERTY IN CALIFORNIA 7 (5th ed. Aspen 2007).

community system rests on the theory that property acquired during marriage was obtained through the joint effort of both spouses.¹⁵¹

Although a stay at home mother might fulfill a different function than her husband, her contribution, which might consist of homemaker, child rearing, along with love, “are of inestimable value.”¹⁵² One scholar wrote that a wife is “just as busy at home” as the husband is at his work, and that the community property system recognizes that it is the efforts of both that creates the means to live.¹⁵³

Community property recognizes and protects the stay-at-home spouse by providing for equal sharing of the total earnings of both spouses.¹⁵⁴ This has enormous practical consequences for a stay-at-home mother who is a non-earning spouse. This is because the community property system provides her with an automatic share of the income produced by her higher earning husband.¹⁵⁵

B. Community Property Allowed Married Women to Retain a Separate Legal Identity.

The recognition of a married woman as a separate juridical entity, apart from her husband, provided a second reason why the decision to adopt community property system was significant for women.¹⁵⁶ Under a traditional common law system, the “legal existence of the woman [was] suspended during marriage.”¹⁵⁷ In contrast, married women under a community property system, continued to enjoy a distinct legal personality separate from their

151. “The central theory . . . [of] the matrimonial community, stated in general terms, is that it results from the joint industry of the spouses.” WILLIAM WIRT HOWE, *STUDIES IN THE CIVIL LAW* 189 (2d ed. 1905). “The general cause of community is found in the natural impulse toward a *suitable provision for the wife’s support* . . .” MCKAY, *supra* note 8, at 23.

152. DEFUNIAK & VAUGHN, *supra* note 5, at 27.

153. HOWE, *supra* note 151, at 189–90.

154. “[T]he spouses contribute equally to those acquisitions *by performing the many acts of family partner*. The relative value of these direct and indirect contributions cannot be put in issue, and *because the contributions are considered of equal value, the interests of the husband and wife are equal*.” BIRD, *supra* note 11, at 22 (emphasis added).

155. BARTKE, *supra* note 29, at 1132.

156. “Since the policy of community property is one of equality . . . its cardinal principles are based upon the *separate identity of each spouse* and their mutuality of interest in all marital property acquisitions, as opposed to the common law doctrine of the merger of the identity of the wife into that of the husband.” REPPY & SAMUEL, *supra* note 130, at 5 (emphasis added).

157. PAULSEN, *supra* note 126, at 655 (quoting a Texas delegate who was in favor of community property).

husbands.¹⁵⁸ While even the Restatement of Contracts recognized that women in a common law system were under certain disabilities with respect to contract formation,¹⁵⁹ women in community property jurisdictions could enter into contracts, even with their husbands.¹⁶⁰ The ability of a married woman to contract with her husband, according to one twentieth century scholar, has “long represented in the community property system the advanced state that is only now being reached through statutory modifications in common law jurisdictions.”¹⁶¹

C. The Community Property System Protected a Married Woman’s Separate Property From a Dissolute Husband or His Creditors.

The recognition of a married woman’s right to own separate property provided another reason why the community property system benefited women. Separate property protected a married woman’s property from her husband’s creditors.¹⁶² It also protected her property from a husband who might waste it by drunkenness and gambling. One legislator argued in favor of community property because, under a common law system, a wife “might be forced to ‘sit weeping by, and see the whole of her property wasted in midnight frolics by a drunken

158. “A marked distinction exists between the civil and common law in respect of the civil rights and capacities of the husband and wife. The civil law does *not* recognize in the spouses that *union* of persons, by which the rights of the wife were incorporated and consolidated, during coverture, with those of her husband . . . On the contrary, [civil law community property] regards the husband and *wife as distinct persons, with separate rights* and capable of holding distinct and separate estates.” RICHARD A. BALLINGER, *A TREATISE ON THE PROPERTY RIGHTS OF HUSBAND AND WIFE, UNDER THE COMMUNITY OR GANANCIAL SYSTEM* 4 (Bancroft-Whitney Co. 1895). Another scholar wrote that, “[R]ecognition 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.” DEFUNIAK & VAUGHN, *supra* note 5, at 5.

159. “At common law a married woman had no capacity to incur contractual duties . . .” RESTATEMENT (SECOND) OF CONTRACTS § 12 cmt. d (1981).

160. “In the ancient Spanish law there was no prohibition against the husband and wife contracting together or obligating themselves jointly or solidarily in their common interests.” Nina Nichols Pugh, *The Spanish Community of Gains in 1803: Sociedad de Gananciales*, 30 LA. L. REV. 1, 25 (1969–70) (second citation omitted) (citing Labbe’s Heirs v. Abat, 6 La. 279, 284–85 (1831)). This even included the ability to “contract out” of the community property system itself which automatically arose by operation of law. “[T]he partners to a marriage in Spain *could* contract against a regime of community gains prior to marriage . . .” *Id.* at 2 n.3.

161. DEFUNIAK & VAUGHN, *supra* note 5, at 5.

162. Paulsen, *supra* note 126, at 654.

or gambling husband.”¹⁶³ Similarly, a delegate to the Texas constitutional convention colorfully declared that without the community property principle of separate property, the vices of the husband might reduce the wife to the “drudgery of the wash tub.”¹⁶⁴ “Why not secure the daughter a sufficient amount of property to relieve her from the drudgery of the wash tub, to which the vices or improvidence of her husband may reduce her? . . . [I]t is the opinion of the age, that women should be protected in their property.”¹⁶⁵

D. Unlike Married Women’s Property Acts, Community Property Benefits Women Who Enter Marriage Propertyless.

Aside from keeping a married woman’s property safe from an improvident husband, the community property system also benefited women who entered marriage propertyless. In the nineteenth century, when so-called married women’s property acts,¹⁶⁶ began to emerge in “reform” common law states,¹⁶⁷ scholars referred to *similarities* between these common law statutes and the community property system.¹⁶⁸

163. *Id.* (emphasis added) (quoting a delegate at the Texas Constitutional Convention of 1845, although it appears to be equally applicable to the thoughts of delegates in other frontier states).

164. *Id.* at 655.

165. *Id.* at 655 (emphasis added) (citations omitted) (quoting pro-community property Texas Delegate James Davis).

166. These statutes were designed to protect the property a woman owned before marriage from the control of her common law husband. *Self v. Self*, 376 P. 2d 65, 66 (Cal. 1962).

167. States which adopted these acts were referred to by some scholars as “reform common law” jurisdictions. Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California’s Community Property System, 1849–1975*, 24 UCLA L. REV. 1, 3–4 (1976). “[T]hree basic approaches to marital property . . . are the traditional common law, the reformed common law, and the Spanish civil law community of property.” *Id.* at 3. “The essential element of the *reformed common law* embodied in *married women’s property acts* was quite revolutionary. . . .” *Id.* at 4 (emphasis added) (citations omitted).

168. *Id.* at 21 n.108. “Functionally, the marital property law which developed in California between 1850 and 1890 was *closely akin* to that of a common law state which had adopted a married women’s property act. In spite of the nominal disparity between ‘community’ and ‘separate’ property systems, the substance of the *marital property law* was *extraordinarily similar*.” *Id.* at 46 (emphasis added). However, this scholar was careful to note that the delegates who supported the California provision in 1849 may *not* have been completely for “establishing reformed common law married women’s property rights.” *Id.* at 22. *If the author had suggested that the community property system adopted in California came from so-called reformed common law married women’s property acts, this would have been wrong.* In fact, the opposite is true. See *supra* Part III.A. The community of property between husband and wife is much older than the common law. It existed as a custom before it was codified in 693 A.D. DEFUNIAK & VAUGHN, *supra* note 5, at 3. In contrast, the common

The suggestion that the two systems were similar, or “akin” to each other, ignored the fact that married women’s property acts *only helped women who came into a marriage with property*. These statutes *did nothing for women who come into a marriage propertyless*. It is for these women, women who come to a marriage propertyless, but who work hard alongside their husbands, either to create property, or to increase the value of property that the husband owned before marriage, that the community property system has had its greatest impact. This is because the community property system rests on principles of separate legal identity, of partnership, and of ownership.¹⁶⁹ Unlike a traditional common law system, the community system does not rest on title.¹⁷⁰ The non title-based foundation of community property has enormous consequences for women who enter marriage propertyless. This can be seen in the result of the following traditional common law cases.

In *Norris v. Norris*,¹⁷¹ a divorced Illinois farm wife of twenty-two years was left with her “clothing and personal effects” because *title* to the 265 acre farm she lived on *was in her husband’s name*.¹⁷² The traditional common law court did not consider the wife’s twenty-two year contribution to the marriage which consisted of “cooking, cleaning, gardening, preserving considerable quantities of food, and helping her farmer husband by preparing the five or six daily meals for hired hands who were needed occasionally.”¹⁷³

Similarly, a common law court in Mississippi held that a wife who worked “about the farm” was not entitled to any interest in the

law, which arrived in America with the English colonists, did not even appear in England itself until 1066. R.C. VAN CAENEGEM, *THE BIRTH OF THE ENGLISH COMMON LAW* 4–5 (2nd ed. 1988).

169. Deborah H. Bell, *Family Law at the Turn of the Century*, 71 *MISS. L.J.* 781, 791 (2002).

170. “In contrast to the title system, the system of community property views marriage very differently. Rather than viewing a married couple as distinct individuals acquiring property for their own benefit, the community property system acknowledges a married couple as an economic unit. Under this system...[r]egardless of how title is held, each spouse owns one-half of all marital property...Thus, spouses equally own whatever their efforts during marriage produce, but keep separate ownership of property that does not result from their efforts.” *Id.*

171. 307 N.E. 2d 181 (Ill. App. Ct. 1974).

172. *Id.* at 181–82. The farm “and livestock, was declared the sole *property of the defendant [husband]*, title always having been in his name alone.” *Id.* at 182 (emphasis added).

173. *Id.* at 181–82.

farm because title was in her husband's name.¹⁷⁴ The common law court was aware of the fact that the outcome would have been different in a community property jurisdiction: "To hold that complainant is entitled to one-half of the property of defendant would be *tantamount to adopting to a limited extent the community property system*. We have declined to engraft on the laws of this State the features of that system."¹⁷⁵

The reason the outcome would have been different is because community property law recognizes the value that a spouse, "though non-employed[,] contributes to a marriage."¹⁷⁶ A second reason the outcome would have been different, and why the community property system benefits women who enter marriage propertyless, is because the system is not title based.¹⁷⁷

The wife in the Mississippi case above had worked on the farm for approximately seventeen years.¹⁷⁸ At dissolution, the value of the

174. *Hinton v. Hinton*, 179 So.2d 846, 848 (Miss. 1965). The couple married in 1948. At the time of their divorce in 1965, the farm had increased in value from \$7,900 to over \$20,000. *Id.*

175. *Id.* (emphasis added) (citations omitted). Another court justified the rule that common law courts had "no authority to divide the real property belonging to the husband so as to give the wife a title interest in his property . . . [because] 'the right of the husband to the services of his wife is a reciprocal marital obligation to that of the wife's right to the support from her husband.'" *Pierce v. Pierce*, 267 So. 2d 300, 301-02 (Miss. 1972) (citations omitted).

176. *Boggs v. Boggs*, 82 F.3d 90, 96 (5th Cir. 1996) *rev'd on other grounds*, 520 U.S. 833 (1997). "It was assumed under the civil law that the spouses had contributed equally to the acquisition of [] property, even though one spouse (usually the husband) had actually acquired the property, while the other spouse (the wife) had devoted her time to the management of the home. It was this aggregate of property acquired during the marriage by either of the spouses by onerous title [e.g., a farmer's wife preparing food for the farm hands and feeding the livestock] which became the community property of the spouses." *McCLANAHAN*, *supra* note 3, at 38.

177. The community property system views marriage very differently from a traditional common law title based system. "Rather than viewing a married couple as distinct individuals acquiring property for their own benefit, the community property system acknowledges a married couple as an economic unit. Under this system[,]...[r]egardless of how title is held, each spouse *owns one-half of all marital property*... Thus, spouses equally own whatever their efforts during marriage produce, but keep separate ownership of property that does not result from their efforts." *Bell*, *supra* note 169, at 791 (emphasis added). For example, "Under California law, income from either spouse's personal services is community property." *In re Boyd*, 410 B.R. 95, 99 n.2 (Bankr. N.D. Cal. 2009) (citation omitted). In addition, California law also holds that, "[W]hen community property income is used to pay down the principal on a debt secured by real property that is the separate property of one spouse, the community obtains an interest in the real property to the extent of the community property contributions plus a proportionate share in any appreciation." *Id.* at 99 (footnote omitted).

178. *Hinton*, 179 So. 2d at 848.

farm had increased over 150 percent.¹⁷⁹ In a community property jurisdiction, even if title to the farm was in her husband's name, at the very least, the wife would have received a proportional share of the farm's appreciation which her community labor helped make possible.¹⁸⁰

The difference between the treatment of rich and poor women under a traditional common law system, versus a community property system, can also be seen in the development of various "marriage settlements."¹⁸¹ These were agreements that the father of a woman with property negotiated with her husband.¹⁸² These marriage settlement agreements enabled a woman with property "to designate certain property as her 'separate estate,' free from her husband's common law rights."¹⁸³ But as with the married women's property acts,¹⁸⁴ *these settlement agreements primarily benefited women who owned property before marriage.* Regarding the existence of these settlement agreements, one scholar concluded that: "*there was one law for the rich and another for the poor.*"¹⁸⁵ In short, like married women's property acts, these marriage settlement agreements benefited women who entered marriage with property, but did nothing for poor women who entered marriage propertyless.

E. Common Law States and Community Property Principles

A final, and very compelling, factor which demonstrates that community property principles benefit women, is that some common law states have brought community property principles into their equitable distribution statutes.¹⁸⁶ The emergence of equitable distribution statutes in common law states gives courts authority "to

179. A year after their marriage in 1948, the husband purchased the farm for under \$7,900. At the time of their divorce, 17 years later in 1965, the value of the farm had increased to between \$20,000 to \$25,000. *Id.* at 848.

180. Unlike a traditional common law system, the community system recognized a wife as "a full and equal partner in the marriage enterprise, with a corresponding financial stake, the *title system completely ignored her contribution...* Under community property systems, a homemaker left marriage with assets titled permanently in her name. However, in a titled state, her counterpart often left the marriage with no assets..." Bell, *supra* note 52 at 122 (emphasis added).

181. PAT JALLAND, *WOMEN, MARRIAGE AND POLITICS 1860-1914*, at 59 (1986).

182. These settlement agreements were secured by a trust and enforced in England by Chancery courts. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* (emphasis added).

186. BIRD, *supra* note 63, at 9.

award property *legally owned* by one spouse *to the other spouse* in the context of divorce.”¹⁸⁷

For example, Oregon requires an equitable distribution of the parties’ assets in a marital dissolution.¹⁸⁸ No longer is property divided solely on the basis of title. Instead, if a couple divorce, the Oregon statute instructs that consideration be given to what appear to be the following four community property principles.¹⁸⁹

1. Recognition of women who work at home

First, the Oregon statute recognizes the contribution that women who work at home make to the acquisition of marital property.¹⁹⁰ Specifically, the statute instructs judges at dissolution “to consider the *contribution of a spouse as a homemaker as a contribution to the acquisition of marital assets.*”¹⁹¹

2. Presumption of equal contribution

Second, and strikingly similar to most community property jurisdictions, the Oregon statute creates a presumption of equal contribution.¹⁹² There is “a *rebuttable presumption that both spouses contributed equally* to the acquisition of property during the marriage. . .”¹⁹³

187. *Id.* at 9 (emphasis added). The result of the enactment of equitable distribution statutes by common law states had been to blur the distinction between common law and community property systems *Id.* This is not without problems arising from arguments of an unconstitutional taking of property. See BLUMBERG, *supra* note 17, at 23 (citing Fratangelo v Fratangelo, 450 A.2d 1195, 1200 (Pa. Super. 1987)).

188. OR. REV. STAT. § 107.105(1)(f) (2009).

189. *Id.*

190. *Id.*

191. *Id.* (emphasis added).

192. *Id.*

193. *Id.* (emphasis added) While Oregon adopted the community property presumption of equal contribution by statute, other common law states have adopted community property principles through the courts. For example, the Mississippi Supreme Court declared that: “If the breadwinner happens to be the husband and has all property in his name, this serves to relegate the non-breadwinner wife to the equivalent of a maid—and upon division of the marital estate entitled to minimum wage credit for her homemaking service. We abandon such an approach.¶ *We today recognize that marital partners can be equal contributors whether or not they are both at work in the marketplace.*¶ We define marital property for the purpose of divorce as being any and all property acquired...during marriage...We assume for divorce purposes that the contributions ...of the marital partners, *whether economic, domestic, or otherwise are of equal value.*” *Hemsley v. Hemsley*, 639 So.2d 909, 915 (Miss. 1995)(emphasis added).

3. *Not title-based*

Third, and in flat contradiction of traditional title-based common law system, the Oregon statute declares that the presumption of equal contribution exists “whether such property is jointly or separately held.”¹⁹⁴

4. *Co-ownership*

Closely related, is the statute’s articulation of a fourth principle of community property—namely, that “the rights of the parties in the marital assets shall be *considered a species of co-ownership*, and a transfer of marital assets. . . shall be considered a *partitioning of jointly owned property*.”¹⁹⁵

This Oregon statute is remarkable in that while the state still remains a common law jurisdiction, it appears to use community property principles to guide its courts in property division at dissolution. Presumably, this is because community property principles benefit women.

CONCLUSION

For some scholars, the adoption of community property was simply the result of a larger conscious movement towards women’s rights.¹⁹⁶ While this may be true today, it was not true in the nineteenth century when the majority of western states adopted the community property system. Instead, the factors discussed in this article demonstrate that the decision of a frontier state, like California, to adopt community property was more pragmatic. These factors included convincing women to come west so that the young delegates could marry. Other practical reasons included the fact that community property was already “in place” as a result of Spanish settlement. Of course theoretical notions, motivated by enlightenment principles, existed in the minds of some of the delegates.¹⁹⁷ But it was primarily practical considerations, along with the remarkable similarity between the conditions confronting the Visigothic wife and her frontier

194. *Id.*

195. *Id.* (emphasis added).

196. “It seems safe to assume that the adoption of the community system in all these western states was simply a reflection of the larger movement toward improvement of the property status of the married woman . . .” M. R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 11 (1936).

197. *See supra* Part IV.B.7.

sister,¹⁹⁸ that nurtured the community property system in California and other western states. Thus, while the *result* of the adoption of the community property system may have been the realization of women's rights, it appears that the decision to adopt the system itself had a very practical foundation—a practical foundation underscored by the reasons why community property principles benefit women.

198. See *supra* Part IV.B.6.