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THE ORIGINS OF IDAHO'S COMMUNITY PROPERTY SYSTEM: AN ATTEMPT TO SOLVE A LEGISLATIVE MYSTERY

DAVID S. PERKINS AND ELIZABETH BARKER BRANDT*

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I. INTRODUCTION

The actual motives that influenced the Idaho Territorial Government to abandon the common law system of marital property rights in favor of a community property system have been mostly lost to history. Although it has long been recognized that the law of com-

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munity property in the western United States can be directly traced to Spanish colonial influences,¹ Idaho, one of the original eight community property states,² does not have a significant history of Spanish settlement.³ Nevertheless, the community property system became law in the Idaho Territory in 1867.⁴

Surprisingly, Idaho's first community property act was passed by the territorial legislature and was approved by the territorial governor virtually without comment. This enactment was a radical departure from the common law, which was the law in the territory prior to the adoption of community property⁵ and was the law in the neighboring states of Utah and Montana.⁶ However, there is a noticeable lack of information concerning the motives, intent, and reasons for its enactment in the Idaho Territory. In fact, the absence of demonstrative evidence has resulted in somewhat of a legislative mystery. Did the Idaho Territorial Legislature adopt the law of community property as a way of excluding the territory's growing Mormon population, which at the time still practiced polygamy, from the easy benefit of marital property law?⁷ Or is the most commonly offered explanation more

1. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* §§ 1-4 (2d ed. 1971). This hornbook was the definitive national source for community property law well into the 1970s but because it was not revised to reflect the development of equal management in the 1970s, it quickly fell into disuse after the second edition was published. See also Raymond August, *The Spread of Community-Property Law to the Far West*, in 3 *WESTERN LEGAL HISTORY* 35, 52-60 (Chet Orloff ed., 1990) [hereinafter August I] (tracing Idaho's law from Texas via California).

2. Louisiana, Texas, New Mexico, Nevada, California, Arizona, Washington, and Idaho all either adopted community property while still territories and embraced it as state law or adopted community property laws soon after statehood. See DE FUNIAK & VAUGHN, *supra* note 1, at 68-91.

3. August I, *supra* note 1, at 60.

4. An Act Defining the Rights of Husband and Wife, 1867 Idaho Sess. Laws 65-69, ch. 9.

5. An Act Adopting the Common Law of England, 1864 Idaho Sess. Laws 527.

6. See DE FUNIAK & VAUGHN, *supra* note 1, at 69, 87.

7. Unfortunately, the presence of virulent discrimination against the growing Mormon population in the west is all too prominent in Idaho's history. The exclusion of Mormons from the political life of the state motivated the structure and leadership of the state constitutional convention in 1889 and was enshrined in the constitution. Dennis Colson described the many forces at the Idaho Constitutional Convention as follows:

There were miners vs. irrigators; laymen vs. lawyers; Democrats vs. Republicans; small counties vs. large; the north vs. the southeast vs. the southwest; consumers vs. railroads; the common man vs. monopolies; traditionalists vs. progressives; the people vs. the politicians; skinflints vs. spendthrifts; promoters vs. pioneers; Rebels vs. Yankees; fervent Christians vs. skeptics and virtually everybody vs. the Mormons.

DENNIS C. COLSON, *IDAHO'S CONSTITUTION: THE TIE THAT BINDS* 6 (1991). Colson also details the inclusion of an anti-Mormon test oath for voting and for holding public office and the careful wording of the constitutional provisions regarding religious liberty so as to exclude the Mormon practice of polygamy. *Id.* at 30-40. Moreover, Colson details the importance of excluding Mormons from Idaho's politics as a condition of admission to state-

likely—that miners traveling eastward from California looking for new sources of gold and silver brought the law of community property along with them to the new territory?⁸ Or, was Idaho's community property law, which eschewed the notion of coverture in favor of a partnership model of marital property,⁹ an early landmark in the national political campaign for women's rights?¹⁰ This article attempts to resolve this mystery and determine the probable motives for the enactment of the community property system in Idaho.

As with most things, the story of Idaho's adoption of community property law is complicated and the most obvious answers do not ex-

hood. *Id.* at 220–23. Like some of the other sources consulted for this paper, Colson's book on the Idaho Constitutional Convention is a groundbreaking source for Idaho history—particularly Idaho constitutional history.

8. Idaho is the only state in the Union settled primarily through eastward migration. It was one of the last unsettled areas of the country and its statehood was one of the many events that caused historian Frederick Jackson Turner in 1890 to declare that the frontier was closed. See FREDERICK JACKSON TURNER, *THE FRONTIER IN AMERICAN HISTORY* 38 (1920); see also HUBERT HOWE BANCROFT, 31 *HISTORY OF WASHINGTON, IDAHO, AND MONTANA 1845–1889*, at 406–41 (1890). Bancroft attributes the early settlement of the Idaho territory primarily to miners migrating east from California and Oregon. *Id.* This same theory is asserted by Professor Brockelbank. WILLIAM J. BROCKELBANK, *THE COMMUNITY PROPERTY LAW OF IDAHO 14–18* (1962). Brockelbank's hornbook was the definitive source for Idaho community property law for many years and remains the only available comprehensive academic treatment of the subject. Brockelbank was an accomplished lawyer who practiced law in Great Britain, France, and Canada, in addition to the United States, and was a pivotal figure in the history of the University of Idaho College of Law. See *id.* at viii (preface by Elmer Million). Two years after he was hired in 1943, he found himself the only faculty member and the acting dean of the college. DEBORA K. KRISTENSEN, *THE FIRST 50 WOMEN IN IDAHO LAW: 1895–1975*, at 25 (2005). Through his efforts, over the next three years, faculty members were recruited and the doors of the college were kept open. See *id.* During this time, he hired the first women faculty members at the college. *Id.* He also hired Weldon Schimke who later endowed three faculty chairs at the college. See State Board of Education, *Seventeenth Biennial Report of the State Board of Education and Board of Regents of the University of Idaho*, in 32 *IDAHO BULLETIN OF EDUCATION* A-47 to -51 (1946) (on file with the author). Brockelbank remained on the faculty until his retirement in 1965. Obituary, *William J. Brockelbank*, *IDAHOIAN* (Moscow, Idaho), Sept. 13, 1984, at 3.

9. DE FUNIAK & VAUGHAN, *supra* note 1, at 4–5 (explaining the fundamental difference between the common law system of coverture—the marital melding of husband and wife into the legal persona of the husband—and community property).

10. By the time Idaho adopted the law of community property, a national movement to accord property rights to married women was well underway. CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS: THE INNER STORY OF THE SUFFRAGE MOVEMENT* 30 (1926); SALLY GREGORY McMILLEN, *SENECA FALLS AND THE ORIGINS OF THE WOMEN'S RIGHTS MOVEMENT* 3–4, 148–49 (2008). The second wave of married women's property acts began in New York in 1848. PEGGY A. RABKIN, *FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION* 10–13 (1980); see ELIZABETH BOWLES WARBASE, *THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800–1861*, at 188–91 (1987) (describing the passage of married women's property acts in the Northeast, ten years after such acts passed in the south).

plain the enactment. At least three factors played a role in Idaho's decision to adopt the community property system: (1) the territory's close social, cultural, and legal ties with California; (2) the need to respond to the movement taking place at the time in other states to expand the property rights of women; and (3) the perception that community property afforded solutions to some of the problems associated with the territory's frontier environment.

II. HISTORY OF THE ENACTMENT OF COMMUNITY PROPERTY IN THE IDAHO TERRITORY

Prior to its organization as a territory, the land comprising present-day Idaho was part of the Oregon Territory, which was governed by a traditional common law marital property system.¹¹ The common law was also the law of the Washington Territory during the period in which the land comprising Idaho was divided between the Washington and Oregon territories, and during the period in which present-day Idaho was included completely within the Washington Territory.¹² In 1863, while the nation was entrenched in the Civil War, the Idaho Territory was organized by the United States Congress.¹³ Organization of the territory was an outgrowth of a massive migration into the region that occurred when gold was discovered in "the Clearwater, Salmon, Boise Basin, Owyhee, Bannock, and Virginia City districts, then in eastern Washington Territory, but now in Idaho and Montana."¹⁴ As a result of this migration, the population rapidly increased throughout the territory.

Shortly after the Idaho Territory was organized in January of 1864, the First Territorial Legislature passed an act that provided for the continuation of the common law in the Idaho Territory which declared: "The common law of England so far as the same is not inconsistent with the provisions of the constitution and laws of the United States, the organic act and laws of this territory, be the law of the land in this territory."¹⁵ As a consequence of this act, the common law system of marital property remained the law of the Idaho Territory during the first three years of its existence.

In December of 1866, nearly three years later, the fourth session of the territorial legislature passed a bill abandoning the common law

11. M. R. Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 WASH. L. REV. 1, 8 (1936); BROCKELBANK, *supra* note 8, at 14.

12. *Id.* at 8.

13. An Act to Provide a Temporary Government for the Territory of Idaho, ch. 117, 12 Stat. 808 (1863). Colson describes the political maneuvering that led to the creation of Idaho Territory. COLSON, *supra* note 7, at 1-6; *see also* BROCKELBANK, *supra* note 8, at 14-15 (1962).

14. CORNELIUS J. BROSNAN, *HISTORY OF THE STATE OF IDAHO 182* (5th ed. 1948).

15. An Act Adopting the Common Law of England, 1864 Idaho Sess. Laws 527.

system of marital property and adopting a community property system.¹⁶ Territorial Governor David W. Ballard, a physician from Yamhill County, Oregon,¹⁷ approved the act on January 2, 1867.¹⁸ Professor Brockelbank provided a concise summary of the provisions of the community property act:

Besides the usual provisions defining separate and community property it provided for the filing of an inventory of the separate property of the wife, for the management of the common property and the separate property of the wife by the husband, and for the appointment of a trustee in case of his mismanagement. The act abolished dower and curtesy. . . . Then there are provisions for the disposal of the common property upon dissolution of the community by death or divorce, a section providing that the separate property of the husband shall not be liable for the debts of the wife contracted before marriage, provisions for the antenuptial contract, its limitations, its recording and effect. All things considered this was a pretty complete package.¹⁹

By passing the community property act, the territorial legislature altered the property relationships that existed between husband and wife and departed dramatically from the dominant common law system of marital property law prevalent in most other states.

III. THE CAUSES OF THE LEGISLATIVE MYSTERY

Because the enactment of a community property system in the Idaho Territory was a significant change from the more dominant common law system, it is surprising that little is definitively known about the reasons for its passage in Idaho. The enactment of community property law is even more mysterious since Idaho, in contrast to most other jurisdictions that have adopted the community property system, had not been governed by the Spanish or French systems of

16. An Act Defining the Rights of Husband and Wife, 1867 Idaho Sess. Laws 65–69, ch. 9.

17. BROSANAN, *supra* note 14, at 194.

18. BROCKELBANK, *supra* note 8, at 15; see also JOURNAL OF THE FOURTH SESSION OF THE COUNCIL OF IDAHO TERRITORY 114–15 (Boise City, Idaho “Statesman” Publishing Co. Printers 1867) [hereinafter JOURNAL]. These journals, available in the Special Collections of the University of Idaho Library, contain detailed minutes of the official acts of the territorial legislature. They also contain excerpts from important political speeches by the early territorial governors and other political leaders of Idaho.

19. BROCKELBANK, *supra* note 8, at 15.

civil law—the legal systems from which American community property law is borrowed.²⁰

At the time the community property act was passed, it was not the custom of the legislature to provide a preamble or statement of purpose for legislation. Thus, like most statutes of the era, no language in the statute itself sheds light on the rationale for its enactment.²¹ Furthermore, the surviving legislative history does not reveal any indication regarding the legislature's intent. There are no surviving records of the legislative debates that must have taken place.²² The only existing legislative records are the legislative journals.²³ While the entries in these journals provide a detailed chronological history of the procedural process that took place within the legislative chambers, the entries do not suggest a rationale, intent, or motive for the legislature's passage of the community property act.

An examination of the background of the councilman who introduced the community property bill, S. P. Scaniker, also fails to produce direct evidence regarding the motives for passage of the community property act.²⁴ Scaniker was a member of the Democratic Party,

20. See August I, *supra* note 1, at 34, 56–64 (providing a history of the spread of community property); BROCKELBANK, *supra* note 8, at 7–18; DE FUNIAK & VAUGHN, *supra* note 1, at 55–61, 73–75; Kirkwood, *supra* note 11, at 1–11; Charles Sumner Lobingier, *The Marital Community: Its Origin and Diffusion*, 14 A.B.A. J. 211, 215–17 (1928).

21. See 1867 Idaho Sess. Laws 65–69, ch. 9.

22. A plausible reason for the lack of governmental records from the territorial era is provided by William McConnell:

Up to [the time the State Capital Building was built in 1885] there was no permanent depository for the records of the different departments. The first records made were kept in Lewiston until the capital was located in Boise and then, what were not lost, were removed to that city. There the territory owned no buildings, and [the records] were, together with those accumulated during a period of many years before the capitol building was built, moved around from one building to another, as quarters could be rented. Take the foregoing into consideration, with the further fact that as soon as one officer, or set of officers, vacated to make place for their successors, those who retired from the office usually retired from the territory, and it is not to be wondered that many of the records of the early proceedings are not to be found among the archives of the state.

W. J. MCCONNELL, *EARLY HISTORY OF IDAHO* 291 (1913). McConnell was a businessman known as the "Merchant Prince of Idaho." The Latah County Historical Society, The McConnell Mansion Museum, <http://users.moscow.com/lchs/mansion.html> (last visited Jan. 9, 2010). He was also a leading Idaho Republican. *Id.* He moved to Idaho from Oregon in 1878 and eventually became a state senator and governor. *Id.* He is generally credited with securing Moscow, Idaho as the location for the University of Idaho. *Id.* Although he was not present in Idaho at the time the community property law was adopted, his arrival soon after makes his history and memoir close to a firsthand account of the times.

23. See JOURNAL, *supra* note 18.

24. The Idaho territorial legislature consisted of two houses—the Council and the Senate. LEONARD J. ARRINGTON, *1 HISTORY OF IDAHO* 214 (1994). Scaniker was part of the Council. See GEORGE H. CURTIS, *TWENTY-SEVENTH BIENNIAL REPORT OF THE SECRETARY OF STATE OF IDAHO: THE POLITICAL FOUNDERS OF IDAHO* 73 (1945).

as were almost all of the other members of the Fourth Territorial Legislature.²⁵ With the Civil War raging, being a Democrat had unique political significance in Idaho. As William McConnell explained: "Those who voted the Republican ticket were Union men while, generally speaking, those who supported the Democratic nominees were Secessionists. There were a few Democrats in Idaho who were loyal to the Union and the Flag, but none such could obtain recognition in Democratic nominating conventions."²⁶ The extent, if any, that Scaniker sympathized with the Secessionists is not specifically known. However, Scaniker's party affiliation and his public criticisms of Governor Ballard,²⁷ who was a Republican,²⁸ indicate that he likely supported secessionist ideals.

During the third and fourth Idaho territorial legislative sessions, Scaniker represented Boise County in the Territorial Legislative Council.²⁹ He was elected in 1865 to a two-year term of office.³⁰ At the time of his election, he resided in Idaho City,³¹ which was the mining center of the Boise Basin.³²

During the two years Scaniker participated in the Idaho territorial legislature, he served on a variety of standing committees. During the third legislative session, he served on the Mines and Mining Committee, the Incorporational Committee, the Military Affairs Committee, and the Territorial Affairs Committee.³³ During the fourth session, he was a member of the Education Committee, the Mileage Committee, and the Judiciary Committee.³⁴ It was the Judi-

25. See *infra* App. A: Summary of the Available Information Concerning Members of the Fourth Territorial Legislature.

26. MCCONNELL, *supra* note 22, at 113; see also Merle L. Borrowman, A History of Party Politics in Idaho, 1860-1900, at 2-3 (1947) (unpublished M.A. thesis, University of Idaho) (on file with the University of Idaho Library).

27. BANCROFT, *supra* note 8, at 468 & n.44; Maude Cosho Houston, Idaho Territory: Its Origins, Its Governors, and its Problems 84-85 (1951) (unpublished M.A. thesis, University of Idaho) (on file with the University of Idaho Library).

28. ARRINGTON, *supra* note 24, at 247.

29. CURTIS, *supra* note 24, at 73.

30. *Id.*; IDAHO TRI-WEEKLY STATESMAN, Dec. 6, 1866.

31. GEORGE OWENS, A GENERAL DIRECTORY AND BUSINESS GUIDE OF THE PRINCIPAL TOWNS EAST OF THE CASCADE MOUNTAINS, FOR THE YEAR 1865, at 48 (San Francisco, Towne and Bacon 1865), *microformed on* History of the Pacific Northwest, PNW, No. 216 (Research Publications).

32. 1 HIRAM T. FRENCH, HISTORY OF IDAHO: A NARRATIVE ACCOUNT OF ITS HISTORICAL PROGRESS, ITS PEOPLE AND ITS PRINCIPAL INTERESTS 59 (1914).

33. IDAHO TRI-WEEKLY STATESMAN, Dec. 12, 1865.

34. IDAHO TRI-WEEKLY STATESMAN, Dec. 8, 1866.

ciary Committee that considered the community property bill and recommended its passage to the general legislative council.³⁵

Scaniker was a lawyer who wasn't admitted to practice law in the Idaho Territory until January 15, 1867.³⁶ However, in 1865, he was listed as practicing law with the firm "Scaniker & Snelling." Scaniker and his partner, R. B. Snelling, maintained their office on Main Street in Idaho City.³⁷ Additionally, Scaniker advertised his legal practice in a Boise paper as early as 1866.³⁸ After his service in the fourth legislative session, Scaniker practiced law before the Idaho Territorial Supreme Court.³⁹ Sometime prior to 1882, however, he left the Idaho Territory,⁴⁰ and from 1871 to 1886, apparently practiced law in California.⁴¹ Scaniker died in 1886 in Sacramento, California.⁴² He did not appear to leave papers or notes explaining his involvement with the adoption of community property in Idaho.

The executive branch of the territorial government, like its legislative counterpart, also failed to record its motive for approving the community property act. Governor Ballard did not specify his motives in his message notifying the legislature of his approval of the bill.⁴³ Nor did the Governor identify a need for changing the marital property system during his opening message to the legislative session. Rather, Ballard discouraged the legislature from adopting new laws, stating:

With regard to legislation to be done at the present session, I have but few recommendations to make. Indeed it seems to

35. JOURNAL, *supra* note 18, at 83; BROCKELBANK, *supra* note 8, at 26–27 (providing excerpts from the journals relevant to the procedural history).

36. Attorneys and Counselors at Law, Licensed and Admitted from the Organization of the Territory to the September Term, 1881, 1 Idaho 1, 3 (1882).

37. OWENS, *supra* note 31, at 48.

38. See IDAHO TRI-WEEKLY STATESMAN, Dec. 11, 1866 (advertisement reading: "S. P. Scaniker, Attorney and Counselor at Law, Boise City, I.T.").

39. A review of the Territorial Supreme Court decisions from 1866 to 1881 reveals the following cases that list Scaniker individually, or his partnership, as counsel of record: Lamkin v. Sterling, 1 Idaho 120 (Idaho Terr. 1867); Smith v. Sterling, 1 Idaho 128 (Idaho Terr. 1867); Roth v. Duvall, 1 Idaho 149 (Idaho Terr. 1867); People v. Sloper, 1 Idaho 158 (Idaho Terr. 1867); Purdy v. Steel, 1 Idaho 216 (Idaho Terr. 1868); People *ex rel.* Glidden v. Green, 1 Idaho 235 (Idaho Terr. 1869); Kraft v. Greathouse, 1 Idaho 254 (Idaho Terr. 1869); and Hazard v. Cole, 1 Idaho 276 (Idaho Terr. 1869). Additionally, Scaniker was himself a party in Cady v. Scaniker, 1 Idaho 168 (Idaho Terr. 1867).

40. Attorneys and Counselors at Law, Licensed and Admitted from the Organization of the Territory to the September Term, 1881, 1 Idaho 1, 3 (1882).

41. He is listed as counsel of record in the following California cases: Randall v. Falkner, 41 Cal. 242 (1871); White v. Lyons, 42 Cal. 279 (1871); Ross v. Brusie, 30 P. 811 (Cal. 1883); Estate of Billings, 4 P. 639 (Cal. 1884); State v. Carrasco, 7 P. 766 (Cal. 1885); State v. Lyons, 7 P. 763 (Cal. 1885); and State v. Smith, 12 P. 121 (Cal. 1886).

42. CURTIS, *supra* note 24, at 73.

43. JOURNAL, *supra* note 18, at 114–15; BROCKELBANK, *supra* note 8, at 29–30 (providing excerpts from the governor's message to the legislature).

me that no great amount of legislation is at present required. It is thought that familiarity with the existing statutes is of greater consequence to the people than increased legislation.⁴⁴

The judicial branch of government similarly neglected to articulate the government's motive for enactment of a community property system. Although it is likely that the Territorial Supreme Court was in a position to provide insight into the legislative intent,⁴⁵ a review of the early community property decisions, up through the turn of the century, does not provide a definitive statement regarding the reason for the legislative enactment.⁴⁶ The court did, however, allude to the understanding that community property was favorable to women's rights and might attract more women to the state.⁴⁷ Nevertheless, the court never seized the opportunity to directly take judicial notice of, or comment definitively upon, the territory's departure from the common law marital property system.

The newspapers of the period likewise fail to provide definitive explanations for the passage of community property in the Idaho Territory. While at least two territorial newspapers reported the procedural steps taken by the legislature with regard to the community property bill—including the introduction of the bill, its passage within the Council, its passage in the House of Representatives, and its approval by Governor Ballard—they did so without editorial comment.⁴⁸

There are at least two reasons that may account for the lack of editorial comment. First, the newspapers of the period were much different than the newspapers of today. In 1866, newspapers contained

44. JOURNAL, *supra* note 18, at 115; 1 HISTORY OF IDAHO: THE GEM OF THE MOUNTAINS 164 (James H. Hawley ed., 1920). It is interesting to note that the Governor did call for the following legislative actions: (1) appointment of a commission to codify and revise the territorial statutes, (2) organization of a militia to control the hostile Indians, (3) soliciting Congress for increased territorial appropriations, (4) cooperation with the federal government in establishing a railroad line from the "navigable waters of the Columbia river, via Boise Valley, to the Salt Lake Valley," and (5) an act to authorize a tax for common school purposes. JOURNAL, *supra* note 18, at 116–17.

45. The Territorial Supreme Court heard cases in Boise beginning in its first term in January of 1866. See Preface, 1 Idaho iii (1882).

46. The following cases were reviewed: Ray v. Ray, 1 Idaho 566 (Idaho Terr. 1874); Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co., 3 Idaho 126, 28 P. 396 (1891); Bassett v. Beam, 4 Idaho 106, 36 P. 501 (1894); Young v. First Nat'l Bank of Hailey, 4 Idaho 323, 39 P. 557 (1895); Dernham v. Rowley, 4 Idaho 753, 44 P. 643 (1896); Von Rosenberg v. Perrault, 5 Idaho 719, 51 P. 774 (1898); Jaeckel v. Pease, 6 Idaho 131, 53 P. 399 (1898); Wilson v. Wilson, 6 Idaho 597, 57 P. 708 (1899).

47. See Jacobson, 3 Idaho at 134, 28 P. at 398 (commenting that the abandonment provisions of the community property statute were intended to protect wives); see also *infra* notes 79–81 and accompanying text.

48. See IDAHO TRI-WEEKLY STATESMAN, Dec. 13, 1866 to Jan. 12, 1867; IDAHO WORLD, Dec. 15, 1866 to Jan. 19, 1867.

proportionally more official news, public notices, and advertising, while providing much less commentary and analysis.⁴⁹ The newspapers of the period were also much shorter.⁵⁰ The second possible reason for the lack of editorial comment is that other events overshadowed the passage of the community property act. The limited newspaper space that was allocated for editorial comment was devoted to more glamorous issues.⁵¹

The general historical accounts of the period also neglect to explain, or even mention, the adoption of community property in the Idaho Territory.⁵² Commenting on the lack of historical discussion of the issue, Professor Brockelbank stated: "It would seem that the adoption of the community property system in Idaho was not worthy of historical mention, or perhaps to be fair it is better to say that other events of a more spectacular nature crowded the adoption of community property out of the limelight."⁵³

Academic writers who have discussed the subject have done little more than gloss over the issue. Even those works dealing directly with the topic of community property, including those dealing specifically with Idaho, present only a cursory treatment of the motives behind the enactment of community property in the Idaho Territory.

IV. PROBABLE SOLUTIONS TO THE LEGISLATIVE MYSTERY

Throughout the academic writings dealing with the subject of community property, several reasons are given for the enactment of community property laws in the Idaho Territory. These explanations can be grouped into three general theories.

One theory suggests that community property was enacted as a result of social, cultural, and legal ties that existed between the Idaho Territory and California. Another theory posits that community property was adopted in response to the national women's rights movement. A final theory suggests that the Idaho Territory enacted com-

49. See IDAHO TRI-WEEKLY STATESMAN, Dec. 13, 1866 to Jan. 12, 1867.

50. Compare *id.* with IDAHO STATESMAN, Dec. 2009.

51. Examples of the issues reported in newspapers during the fourth legislative session include: developments in the Civil War, national politics, territorial finances, Governor Ballard's use of troops to suppress an uprising within the legislature, revision of the territorial statutes, a contested council seat, the arrest of three Boise gold dust counterfeiters, Indian problems, and the celebrations surrounding Christmas and New Years. See, e.g., IDAHO TRI-WEEKLY STATESMAN, Dec. 1866 to Jan. 1867.

52. The following general histories of Idaho completely omit reference to Idaho's adoption of a system of community property: BROSNAN, *supra* note 14; 1 BYRON DEFENBACH, IDAHO: THE PLACE AND ITS PEOPLE (1933) [hereinafter DEFENBACH I]; BYRON DEFENBACH, THE STATE WE LIVE IN: IDAHO (1933) [hereinafter DEFENBACH II]; THOMAS DONALDSON, IDAHO OF YESTERDAY (1941); FRENCH, *supra* note 32; 1 HISTORY OF IDAHO, *supra* note 44; MCCONNELL, *supra* note 22; and H. L. TALKINGTON, POLITICAL HISTORY, STATE CONSTITUTION, AND SCHOOL LAWS OF IDAHO (1911).

53. BROCKELBANK, *supra* note 8, at 17.

munity property as a solution to some of the problems created by the territory's frontier environment. Each of these possibilities appear to have played some part in the decision of the territory to move from the common law to a community property system in 1867.

At first blush, the notion that Idaho's adoption of community property was part of its anti-Mormon heritage⁵⁴ has provocative appeal. After all, the law of community property, based on the separate and equal marital personas of husband and wife, is not easily adapted to the practice of plural marriage.⁵⁵ However, none of the evidence supports the theory that passage of the community property act was designed to prevent the spread of Mormon polygamy into the territory.⁵⁶

A. Community Property Was Enacted as a Result of the Connections Between California and the Idaho Territory

One probable solution to the legislative mystery is that eastward-migrating miners brought the law of community property to Idaho from California. Since 1928, scholars examining Idaho community property law have repeatedly stated that the relationship between California and the Idaho Territory caused the territory to adopt a community property system.⁵⁷ This explanation was also embraced by

54. See COLSON, *supra* note 7, at 30–37.

55. The LDS Church did not adopt its manifesto abandoning plural marriage until 1890. See Official Declaration—1, Wilford Woodruff, President, Church of Jesus Christ of Latter-day Saints (1890), available at <http://scriptures.lds.org/od/1>.

56. Evidence was discovered indicating: (1) There was a strong distaste for polygamy in the Idaho Territory. See IDAHO TRI-WEEKLY STATESMAN, April 1, 1865 & Jan. 22, 1867. (2) There was a national anti-Mormon movement and national anti-polygamy legislation. Morrill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862); see also GUSTIVE O. LARSON, THE "AMERICANIZATION" OF UTAH FOR STATEHOOD (1971); COLSON, *supra* note 7, at 220–23. (3) Anti-Mormon sentiment was so widespread that it (probably along with the history of persecution suffered by Mormons) led to the creation of a militia. Richard C. Roberts, *The Utah National Guard and Territorial Militia*, in UTAH HISTORY ENCYCLOPEDIA 596–98 (Allan Kent Powell, ed. 1994), available at <http://www.media.utah.edu/UHE/u/UTAHNATIONALGUARD.html>. Nevertheless, history suggests that polygamy, or Mormonism for that matter, did not enter into the decision to enact community property in Idaho. It appears that the anti-Mormon movement wasn't a significant factor in Idaho politics until 1871. See ARRINGTON, *supra* note 24, at 367–69. Although the Anti-Mormons were particularly concentrated in the mining camps, the Mormons were politically aligned with the Idaho Democrats, the party which was responsible for passing the community property statute. *Id.* at 68–69. For these reasons, it appears that neither anti-Mormonism nor a distaste for polygamy had a consequential effect upon the enactment of community property law within the Idaho Territory.

57. Lobingier, *supra* note 20, at 217 (1978). Lobingier's statement that Idaho's community property statute was "borrowed from California" seems to have been the conventional wisdom regarding Idaho community property law. *Id.*; Kirkwood, *supra* note 11, at 8; BROCKELBANK, *supra* note 8, at 18 (citing Lobingier).

a more modern historian, Ray August, of Washington State University. Mr. August concluded, "In states with no French or Spanish roots, the law's adoption resulted from migration. For the most part, the migrants were California miners who regarded the system as a cultural link to their immediate past."⁵⁸ In addressing the Idaho Territory more specifically, he commented, "The explanation for Idaho's decision is not apparent in the existing records, but, like Washington, its territorial legislature may have preferred to align its laws with California's (the predominant industry in Idaho was mining, and most of its miners had come from California)."⁵⁹

A significant amount of circumstantial evidence is available to support this explanation. First, a comparison between Idaho's original community property act and the statute enacted by California in 1850 reveals that the acts were substantially the same.⁶⁰ With the exception of section 9 and section 12, the Idaho act copied the California act.⁶¹ The fact that the Idaho act appears to be patterned after the California act provides strong support for the argument that California law was a strong influence in the enactment of community property law in the Idaho Territory.

The massive migration from California to the Idaho Territory also suggests that connections with California contributed to Idaho's adoption of community property. A significant percentage of Idaho's early territorial population was comprised of miners who came to the territory from the California gold fields. Although it is difficult to find exact statistics, a rough estimate can be derived from available sources. In 1870, there were approximately 6,579 miners in Idaho.⁶² It is estimated that during that same year, the total population was about 14,999.⁶³ Thus, in 1870, somewhere in the neighborhood of forty-three percent of Idaho's territorial population was composed of

58. August I, *supra* note 1, at 35.

59. *Id.* at 62 (internal citations omitted).

60. Compare 1850 Cal. Stat. 254-55, ch. 103, with 1867 Idaho Sess. Laws 65-69, ch. 9. Interestingly, however, in 1860, the California Supreme Court declared unconstitutional a provision of California's community property law, stating that the rents and profits of a spouse's separate property are community property. *George v. Ransom*, 15 Cal. 322 (1860). The Idaho statute retained the language of the original California statute and treated rents and profits as community property. To this day the traditional Spanish approach (and the original California rule that the income and profits from separate property acquired during the marriage are community property) is the law of Idaho. IDAHO CODE ANN. § 32-901 to -929 (2006).

61. Compare 1850 Cal. Stat. 254-55, ch. 103, with 1867 Idaho Sess. Laws 65-69, ch. 9.

62. Raymond S. August, *Law in the American West: A History of its Origins and its Dissemination* 291 tbl.6-3 (1987) [hereinafter August II] (unpublished Ph.D. dissertation, University of Idaho) (on file with the University of Idaho Library).

63. *Id.* at 344 tbl.6-11.

miners. Most of these miners likely came from the California gold fields.⁶⁴

Strong cultural and political ties also existed between the Idaho Territory and California. Besides the direct social links that were formed through migration, there were other significant connections. One of the most important of these was informational. During the years preceding 1867, much of the published information in the territory came through California. An early Idaho historian, “[w]ho was present and cognizant of the events narrated,”⁶⁵ stated:

There was no railroad across the continent in those days, and no telegraph lines in Idaho. Hence news of events transpiring in the outside world was slow in reaching us. Our main dependence was the *Sacramento Union*, a daily newspaper published in Sacramento, California, and usually it did not reach us until about two weeks after its publication.⁶⁶

In addition, because California was the location of the region's major publishing companies, California had an expanded impact on the available information within the Idaho Territory.⁶⁷ The importance of California publishers to the territory was suggested in Governor Ballard's message to the fourth territorial legislature:

Since the adjournment of the last Legislature the laws enacted at that and the preceding session have been printed, in separate volumes, each of which has been appropriately and conveniently indexed. The publishing work has been well executed, in good type and on good paper, with substantial binding, but for want of funds to pay for the work the books still remain in the hands of the Publishers at San Francisco.⁶⁸

The personal backgrounds of the members of the Fourth Territorial Legislature also provide evidence suggesting that the connections with California were factors behind Idaho's enactment of community property. As Appendix A illustrates, seven of the nine members of the territorial legislature about whom the information could be found came to the Idaho Territory from California.⁶⁹ In addition to those who came to Idaho directly from California, others appear to have

64. *Id.* at 298, 317 tbl.6-8; DEFENBACH I, *supra* note 52, at 286; DEFENBACH II, *supra* note 52, at 195.

65. MCCONNELL, *supra* note 22, at Title Page.

66. *Id.* at 184-85.

67. August II, *supra* note 62, at 311-12.

68. JOURNAL, *supra* note 18, at 15.; 1 HISTORY OF IDAHO, *supra* note 44, at 164; IDAHO TRI-WEEKLY STATESMAN, Dec. 6, 1866.

69. *See infra* App. A.

maintained close California connections. For example, one councilman named Miller was a law “partner of E. J. Curtis in [California] and Silver City.”⁷⁰ Moreover, Appendix A illustrates that five of the nineteen members of the legislative session on whom information was found were miners, or had close ties to mining, indicating the strong possibility of additional connections between these legislators and California.⁷¹

Additionally, throughout Idaho’s territorial existence, the laws in the territory were closely connected with the laws of California. The Idaho territorial courts often looked to California case law to fill gaps left by the lack of case law in the territory. During the era in which the community property act was passed, there was still a significant lack of law and legal precedent in the Idaho Territory. The problem had been present in the territory since the time of its organization. In his message to the Second Idaho Territorial Legislature, in 1864, Governor Caleb Lyon complained:

I would respectfully submit for your consideration the laws passed by the last legislature, and urge upon you a thorough revision and codification of the same, either by an Act authorizing the appointment of a Commission or otherwise. The many typographical errors, omissions, repetitions and conflicting sections prevent the masses of the people as well as the officers in the Territory from knowing what is law, and are of no small detriment to the courts. This opinion is maintained by many able jurists, and it seems that some remedy is indispensable.⁷²

The lack of legal authority was still a continuing problem in the territory during the fourth legislative session. Just prior to the opening of that session, a local newspaper commented:

The people, the lawyers and the courts, are alike often unable to tell what the law is, and this confusion and uncertainty are not only many times embarrassing but absolutely ruinous to individuals. The laws, copied frequently from the statutes of other Territories, without the necessary modifications to adapt them, are illy enough suited to our wants. . . . If the suggestion [for revising the statutes] is adopted by another year we may hope to know as much about the laws that govern our own community as we do those of our sister States and Territories; whereas now we know less of our own stat-

70. CURTIS, *supra* note 24, at 70.

71. *See infra* App. A.

72. Caleb Lyon, Governor of Idaho Territory, Message of Caleb Lyon Governor of Idaho Territory to the Territorial Legislature of Idaho 5 (Nov. 16, 1864) (transcript available in the University of Idaho Library—Special Collections).

utes than of those of our neighbors. We believe, indeed, that "Bancroft's Practice Act" is now about the only unchallenged authority in the Idaho Courts. And it is a shame which the legislature should remove.⁷³

Governor Ballard, in his opening message to the Fourth Territorial Legislature, also called for a revision of the statutes stating:

The first Legislature, which assembled at Lewiston in 1863, enacted a code, but as the duration of their session was limited, it was necessarily passed in much haste, and with much less consideration than its importance demanded. . . . The result is, that our laws are inharmonious and abound in perplexing discrepancies. It is believed that the best method of securing a perfect code of laws, and remedying the existing evils, is by the appointment of a commission to codify and revise the whole body of our statutes.⁷⁴

To compensate for the lack of available law, California law was often utilized to fill in the gaps of precedent within the Idaho Territory. In an 1870 criminal case, the territorial supreme court went so far as to state: "The laws of this territory are conceded to be copies from the laws in force in California; that being so, the supreme court of Idaho may very properly, in construing its laws, follow the decisions of the supreme court in California."⁷⁵

During the period of Idaho's enactment of its original community property act, Idaho courts routinely relied upon California legal precedent. During the first and second terms of the Idaho Territorial Supreme Court in 1866, if the court actually cited any precedent at all, it would frequently cite California cases. As is shown in Appendix B, the only precedent that was cited more frequently than California during these two terms was the United States Supreme Court and the Idaho territorial statutes.⁷⁶ This fact alone establishes that the territorial courts recognized California authority as highly persuasive in interpreting and applying Idaho's community property act.⁷⁷

73. IDAHO TRI-WEEKLY STATESMAN, Dec. 1, 1866.

74. JOURNAL, *supra* note 18, at 15-16; IDAHO TRI-WEEKLY STATESMAN, Dec. 6, 1866.

75. *People v. Ah Choy*, 1 Idaho 317, 319 (Idaho Terr. 1870); *but see* *Kohny v. Dunbar*, 21 Idaho 258, 121 P. 549 (1912) (declining to follow California precedent) and *Labonte v. Davidson*, 31 Idaho 644, 654, 175 P. 588, 592 (1918) (Budge, C.J., dissenting) (chastising the majority for disregarding pre-1867 California cases that he believed were incorporated into the Idaho statute when it was copied from California).

76. *See infra* App. B.

77. It is a well established rule of statutory construction that "a statute which is adopted from another jurisdiction will be presumed to be adopted with the prior construc-

The reliance of the territorial courts upon California precedent was even more prevalent in the early Idaho cases that involved community property. In the first reported decision dealing with the Idaho community property system, the only authorities cited by the territorial supreme court were three California cases, one United States Supreme Court case, three legal treatises, and the territory's community property statute.⁷⁸ An even more dramatic use of California precedent is found in Idaho's second community property case, *Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co.*⁷⁹ The court's opinion and the arguments of the attorneys in that case relied extensively on California case law.⁸⁰

The similarity between the texts of California's and Idaho's community property statutes, the ties of individual legislators to California, the social, cultural, and informational connections between the two states, and the reliance of early Idaho lawyers and courts on California community property cases all suggest that the enactment of community property was, in significant part, an effort to follow the legal course established by California.

B. Community Property Was Enacted in Response to the National Women's-Right Movement

Another factor that likely played a role in the adoption of the community property system in the Idaho Territory was the national women's rights movement—or, at least, the perception by early Idaho legislatures that community property protected women's rights. It is probable that the territorial legislators were either sensitive to, or acting in direct response to, the developing movement.⁸¹ A succinct statement of this theory was expressed by Professor Kirkwood:

tion placed upon it by the courts of such other jurisdiction." *Nixon v. Triber*, 100 Idaho 198, 200, 595 P.2d 1093, 1095 (1972).

78. *Ray v. Ray*, 1 Idaho 566 (Idaho Terr. 1874)

79. 3 Idaho 126, 28 P. 396 (1891). This case, incidentally, was the first community property case to be heard by the Idaho Supreme Court after Idaho achieved statehood.

80. *Id.* at 127–28, 131 (only the Idaho Reporter provides a list of authorities relied on by the parties to the action whereas the Pacific Reporter omits this material). The court cited California law three times and Nevada law once. *Id.* at 131. The appellant relied extensively on California law—citing twelve California cases and nine cases from five other states. *Id.* at 127–28. The respondent relied almost exclusively on California law. *Id.* at 128.

81. August, one of the only historians to examine the evolution of community property in the recent past, entirely discounted this theory with regard to Idaho, stating: "Except for New Mexico, the spread of the system after its initial adoption in Louisiana, Texas, and California did not result from its civil-law heritage or the women's-rights movement . . ." August I, *supra* note 1, at 64. Unfortunately, he did not specify his reasons for concluding that the women's movement was not a contributing factor in Idaho's adoption of community property. However, he did provide the following explanation with regard to the state of Washington: "Possible explanations include an active women's-

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 in the property status of the married woman, its particular form being in large measure influenced by California legislation.⁸²

This theory also appears to be the explanation accepted by the Idaho Territorial Supreme Court and the Idaho State Supreme Court. Although, as discussed previously, the reported Idaho decisions do not directly address the legislature's motives for passing Idaho's first community property statute, several of these decisions contribute indirect revelations into the rationales behind acceptance of community property in the Idaho Territory. In them, the court makes clear an underlying assumption that the community property act was adopted, at least in part, because it was protective of women's property rights.

The first reported Idaho case dealing with community property was *Ray v. Ray*.⁸³ In that case, a wife sought to regain some cattle that her ex-husband had sold to an accomplice the day before they were divorced.⁸⁴ At trial, the court determined that since the sale occurred after the couple had physically separated, and after the wife had filed for divorce, the sale was made only as an attempt to deprive the wife of her share of the community property.⁸⁵ The trial court held that the transfer was void.⁸⁶ The Territorial Supreme Court reversed the trial court and indirectly shed some light on the motive of the legislature that passed the community property statute.⁸⁷ After briefly discussing the property rights of women under the common law, the court made the transition into its discussion of the territory's community property act by stating:

It would be useless to trace the different stages by which the rights, duties, and privileges of married women have been enlarged, under the spirit of a more enlightened age, by statutory enactments, and we will therefore content ourselves with a reference to so much of our statute as can be supposed to have any bearing upon the case before us.⁸⁸

rights movement (but that is not revealed in the territorial newspapers), and a desire by legislatures to align Washington's laws more closely with those of California" *Id.* at 62.

82. Kirkwood, *supra* note 11, at 11.

83. 1 Idaho 566 (Idaho Terr. 1874).

84. *Id.* at 567-68.

85. *Id.* at 575-76.

86. *Id.* at 571-72.

87. *Id.* at 577-81.

88. *Id.* at 578.

In another case, *Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co.*,⁸⁹ the newly convened Idaho State Supreme Court provided additional insight into what it perceived as the legislative intent of the community property statute. In responding to the defendant's argument that Idaho's community property statute was only applicable if the wife lived within Idaho, the court responded:

This act takes from the wife her estate of dower in the realty of which her husband seised, which was in no wise affected by residence, and, if the contention of the defendant is correct, gives her nothing in the place of it, should she not be so fortunate as to be a resident of the state. When we remember how very many married men there were in Idaho whose wives were non-residents at the time of the passage of this act; when we remember, to their credit, *how exceptionally careful our legislatures have been in preserving and protecting the rights of women*—we are slow to believe that they ever intended to perpetrate such an outrage upon the rights of married women as the construction of this statute contended for by defendant would be.⁹⁰

In the final decision of the nineteenth century addressing the possible legislative motive for the enactment of community property, *Bassett v. Beam*,⁹¹ the Idaho Supreme Court once again linked the community property statute to the rights of women. In that case the court stated:

Counsel contend that a married woman comes under the class defined . . . as 'persons deprived of their civil liberty.' While, as an exhibition of masculine courage, this proposition may elicit our admiration, as a legal conclusion, based upon the statutes of Idaho, we are unable to give it recognition. *If it ever was the intention of the legislature of Idaho to deprive the married women of this state of their 'civil liberties,' they have prudently avoided giving it expression in any of their enactments, as the following provisions of the statutes would seem to indicate . . .*⁹²

The court's statements regarding the legislative attitude toward women's rights are consistent with the support of Idaho legislators for women's suffrage. One early writer on the subject, who actually

89. 3 Idaho 126, 28 P. 396 (1891).

90. *Id.* at 133, 28 P. at 398 (emphasis added).

91. 4 Idaho 106, 36 P. 501 (1894).

92. *Id.* at 108, 36 P. at 501 (emphasis added) (citing the Idaho community property statute as one of the examples of legislation protective of women's rights).

played a part within the suffrage movement, described Idaho's experience as follows:

[T]he submission of a woman suffrage amendment was passed by the Idaho Legislature of 1895, unanimously in the Senate and by 33 to 2 in the House. . . . In August, 1896, four State political party conventions met in Boise; the Republicans splitting into Regulars and Silver Republicans, the Populists and Democrats fusing. All four endorsed the suffrage amendment and many of the campaigners of all parties spoke for it. The campaign was simple and normal, costing only \$1,800. The amendment carried without organized opposition by a majority of 5,844—12,126 for and 6,282 against.⁹³

In addition to the Idaho legislative attitude toward women, there appears to be additional evidence supporting the theory that the women's rights movement was a factor in Idaho's adoption of community property. At the time the statute was approved in 1867, the national women's rights movement was gaining force.⁹⁴ As Catt states, "After 1800 the legal disabilities of women also began to receive attention. In 1809 Connecticut gave married women the right to make a will. From that date legislative changes concerning the civil status of women were frequent."⁹⁵ With each passing decade, the women's rights movement increased in scope and force.⁹⁶ Indeed,

year by year, and State by State, the legal disabilities of women had been seriously debated. Between 1844 and 1848 the Legislatures of Maine, Mississippi, New York and Pennsylvania, in the order named, granted property rights to women. The right to make a will had been granted in some states.⁹⁷

The growing women's rights movement embraced women's property rights as a central issue and a number of significant events highlighted the movement's national agenda. One of these events, the meeting of women that would become known as the annual Women's Rights Convention, took place in Seneca Falls, New York in 1848 and, with the exception of 1857, was held every year for the next decade.⁹⁸ The initial convention produced a Declaration of Rights and Senti-

93. CATT, *supra* note 10, at 122-23.

94. *Id.* at 30.

95. *Id.* at 12.

96. *Id.* at 21-31.

97. *Id.* at 21.

98. MCMILLEN, *supra* note 10, at 104, 110.

ments and a series of resolutions focusing on the full range of political, social, and economic rights for women.⁹⁹ Also during this period, those women who were involved in the Seneca Falls Conventions and others were instrumental in securing the passage of Married Women's Property Acts which freed the property of married women from the control of their husbands.¹⁰⁰ By 1850, twenty-five states had enacted such laws.¹⁰¹

The circumstances surrounding the introduction of Idaho's community property bill into the Territorial Legislative Council adds additional support to this explanation. At the time Scaniker introduced the community property bill, he also introduced bills representing: "an act in respect to Insurance of lives for the benefit of married women"; "an act regulating marriages in Idaho Territory"; and "an act authorizing married women to convey real estate."¹⁰² The simultaneous introduction of these four bills strongly indicates a theme and sense of shared purpose of protecting the rights and financial stability of married women was behind each of these bills.

Women's rights were a central theme of the constitutional debates in Texas, California, and Nevada regarding the adoption of community property laws. The substance of these debates demonstrates that politicians viewed community property as favorable to women and tied to the women's rights movement. When Texas became a state in 1845, its constitution included a community property provision.¹⁰³ During the course of the Texas constitutional debates, the subject of women's property rights was an issue at several points.¹⁰⁴ In analyzing the Texas debates, August pointed out that:

By looking upon community property as a way of insuring the wife's right of succession, the Texas constitutional convention

99. *Id.* at 90-93.

100. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 209-11 (1973); Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L. J. 1359 (1982-1983); Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution?*, in 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 69, 75-76 (D. Kelly Weisberg ed., 1982);

101. See August I, *supra* note 1, at 48 tbl.1.

102. IDAHO TRI-WEEKLY STATESMAN, Dec. 13, 1866, at 1.

103. BROCKELBANK, *supra* note 8, at 8-9. That Texas adopted a community property law is hardly surprising. The territory comprising Texas had been part of Mexico and was governed by Mexico's version of Spanish community property law. August I, *supra* note 1, at 49. The community property law adopted in Texas, however, was a substantially revised version of the original Spanish law. *Id.* at 49-50. August argues that this substantially revised community property law became the basis for community property statutes throughout the West—including California and Idaho. *Id.* at 56-62.

104. August I, *supra* note 1, at 50-52; see James W. Paulsen, *Community Property and the Early American Women's Rights Movement: The Texas Connection*, 32 IDAHO L. REV. 641 (1995-1996) (arguing that the Texas constitutional provision influenced the development and spread of married women's property acts throughout the eastern United States).

was acting within the mainstream of the nineteenth-century movement to reform marital property. The protection of the wife in Texas differed little from the rights granted her in the marital-property reform statutes enacted in the common-law states.¹⁰⁵

In California in 1849, the subject of women's rights was similarly addressed. A few statements made during these debates provide an indication of the passion that surrounded the issue. Delegate James McHall Jones expressed his support for the provision by arguing:

[the common law] had its origin in a barbarous age, when the wife was considered in the light of a menial, and had no rights. . . . For forty or fifty years the States of the American Union have been trying to modify and simplify this principle of the common law. . . . I want no such system; the inhabitants of this country want no such thing; the Americans of this country want no such thing.¹⁰⁶

Another proponent of the provision, Delegate H. W. Halleck, adopted a more utilitarian approach in his argument for adoption of the provision. He pleaded:

I would call upon all the bachelors in this Convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce into the Constitution.¹⁰⁷

The opponents of the community property provision, many of them attorneys, also addressed the issue of women's rights. One of these delegates, Delegate Charles T. Botts, stated:

I believe this plan by which you propose to make the wife independent of the husband, is contrary to the laws and provisions of nature—contrary to all the wisdom which we have derived from experience. This doctrine of woman's rights, is the doctrine of those mental hermaphrodites, Abby Folsom, Fanny Wright, and the rest of that tribe.¹⁰⁸

105. August I, *supra* note 1, at 52.

106. J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 264 (Washington, John T. Towers 1850).

107. *Id.* at 259.

108. *Id.* at 260.

Women's rights activists were likely present in Idaho just after the time the community property statute was adopted. Abigail Scott Duniway, who later spoke in favor of women's suffrage at the state constitutional convention, had been an active lecturer on women's rights in the region and had published an activist newspaper—*The New Northwest*—which was distributed throughout Idaho.¹⁰⁹

In the absence of actual legislative records, there is no way of conclusively determining for certain if securing women's property rights actually was a factor behind the adoption of Idaho's community property system. However, the rationales and concerns addressed earlier in the other community property jurisdictions seem to be just as applicable to the Idaho Territory as they had been in those jurisdictions. This is particularly true when considering that the move toward reform of women's property rights had gained strength during the relatively lengthy period between the constitutional debates in Texas and California and the enactment of community property in the Idaho Territory.

C. Community Property Was Enacted as a Means of Dealing with the Territory's Frontier Environment

Another plausible factor in Idaho's decision to adopt the community property system is that community property was likely perceived as a means of dealing with the unique problems resulting from the territory's frontier nature. In much the same manner, it is likely that community property was viewed as a method of facilitating the promotion of territorial settlement.

At the time the Fourth Territorial Legislature enacted the community property act, permanent settlements were beginning to spring up throughout the territory. It was a time of transition. Insight into the territorial situation can be gained from another part of Governor Ballard's statement:

For the first two years after the settlement of our territory, Idaho was looked upon as a theatre for speculation, and as a place for a temporary residence, where, by enduring the necessary toil and privations, rapid fortunes might be acquired. The territory was first peopled by those whose object was the acquirement of a speedy fortune and this being done, to return either to the Pacific or Atlantic States; but this feeling is rapidly subsiding and the abundant success attending both mining and agricultural pursuits during the past year is fast re-

109. COLSON, *supra* note 7, at 142-46; RUTH BARNES MOYNIHAN, *REBEL FOR RIGHTS: ABIGAIL SCOTT DUNIWAY 96-98* (1983).

moving the prejudices that have formerly existed against Idaho as being a desirable location for permanent residence.¹¹⁰

Community property offered a system that provided practical solutions to some of the many problems faced by the Idaho Territory during the period.

One advantage provided by the community property system was that it allowed married men, who came to the Idaho Territory seeking their fortune, to transfer real property without the consent or signature of their wives.¹¹¹ Under the common law, wives held a dower estate in the property owned by their husband. The dower became a clog on alienation because it prevented a husband from conveying, devising, or transferring land due to his wife's lifetime claim on the property.¹¹² In discussing the problem, as it existed in the rocky mountain region, one writer explained:

The roughness of life in a new mining field made the region at first largely a 'man's country,' with the women left at the old homes, some to be brought west if things went well, and others unceremoniously abandoned. There were men who, for reasons good or bad, came with changed names, and burning their bridges behind them. The possibility of procuring the deed or release of a distant and perhaps unknown woman was remote. In mining claims dower was unthinkable; in business generally it was impracticable.¹¹³

The facts of *Jacobson v. Bunker Hill & Sullivan Mining & Concentrating Co.*¹¹⁴ and the court's opinion in that case provide a ready example of this sort of situation. The court in its opinion indicated that

110. 1 HISTORY OF IDAHO, *supra* note 44, at 164.

111. At first glance, this appears to be inconsistent with the theory that community property was enacted in response to the women's right movement. However, a closer look demonstrates that is not the case. Although community property took from the wife her common law dower estate, which was a future interest that was contingent upon her husband's death, it gave her a present ownership interest. Idaho's community property law gave a married woman the right to own separate real and personal property. Additionally, it gave wives a one half interest in the marital property in the event of dissolution of the marriage. It also allowed a wife to seek judicial appointment of a trustee should her husband mismanage or waste her separate property. See An Act Defining the Rights of Husband and Wife, 1867 Idaho Sess. Laws 65-69, ch. 9.

112. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1664 (2002-2003).

113. Henry A. Dubbs, *The Unfolding of Law in the Mountain Region*, 12 A.B.A. J. 679, 685 (1926).

114. 3 Idaho 126, 28 P. 396 (1891).

the separation of married men from their wives was fairly common during the early days in the Idaho Territory.¹¹⁵

Community property presented an acceptable solution to this problem. Under the Idaho Territorial statute, there was no dower estate to be contended with. As the Territorial Supreme Court explained, under the community property system “[a] husband has the absolute power to dispose of the common property of himself and wife, to the extent, and in the same manner, as he has of his separate property”¹¹⁶ Thus community property was a means of dealing with a problem caused by the frontier environment.

Community property may also have been adopted as a means of promoting territorial development. As the Texas, California, and Nevada legislative and constitutional debates on community property reveal, community property was perceived as creating an inducement to draw women into a jurisdiction.¹¹⁷ It is probable that the appetite for settlement and the desire for more women played at least some role in Idaho’s adoption of community property.

Lack of women was apparently a problem in the Idaho Territory. Evidence of the problem is provided by McConnell, who described the reaction in Boise to the arrival of the first wagon trains, whose passengers included women, in 1863. He stated:

[T]he card games, billiard halls and saloons were quickly deserted, even the “barkeep” and the “lookout” for the “faro” games, with their hair parted in the middle, were soon in the front row along the sidewalks, craning their necks to get a peep. “Goo-goo” eyes were seen on the Boise streets for the first time that day.¹¹⁸

It is possible, therefore, that the desire to attract women into the territory was an additional reason for the enactment of a community property system in the Idaho Territory.

Community property law afforded solutions to the problems of the frontier environment. For the married men who had come to the territory without their wives, community property increased their authority to manage and alienate real property such as mining and mineral rights. For the single men of the territory, it offered the promise of drawing more women into the Idaho Territory. And, for the married women, it offered the perception of enhanced property rights. By affording advantages to the frontier citizens, while providing solutions to some of their numerous problems, community property law was both practical and acceptable. It therefore seems likely that these

115. *Id.* at 134, 28 P. at 398.

116. *Ray v. Ray*, 1 Idaho 566, 581 (Idaho Terr. 1874).

117. August I, *supra* note 1, at 52–55.

118. MCCONNELL, *supra* note 22, at 190.

practical reasons were yet another consideration in the decision to adopt a community property system in the Idaho Territory.

V. CONCLUSION

Because no legislative record was preserved, it is impossible to determine with absolute certainty the rationales behind the Fourth Territorial Legislature's adoption of the community property system. However, based upon circumstantial evidence, reasonable inference, and historical perspective, a likely explanation may be fashioned. An analysis of the available evidence suggests that a plausible solution can be crafted from three broad components: (1) the territory's close social, cultural, and legal ties with California; (2) the national movement towards recognizing and expanding the property rights of married women; and (3) the practical relief community property offered to some of the problems created by frontier life. Each of these components appears to have had at least some influence on the decision to adopt community property in the Idaho Territory. As such, the combination of these components constitutes a plausible solution to this legislative mystery.

Appendix A: Biographical Information of the Members of the Fourth
Territorial Legislature¹¹⁹

Members of the territorial legislature when the community property bill was passed:

Council:

Name	Party	Occupation	Previous State(s) of Residence	State of Residence at Death
L. P. Brown	Rep.	Businessman	Cal. & Or.	Idaho
M. A. Carter	Dem.	Attorney		Left Terr.
S. S. Fenn	Dem.	Attorney/miner	Cal.	Idaho
W. H. Hudson	Rep.	Merchant		Idaho
R. T. Miller	Dem.	Attorney		Idaho
H. C. Riggs	Dem.	Farmer	Cal. & Or.	Idaho
S. P. Scaniker	Dem.	Attorney		Cal.
E. A. Stevenson	Dem.	Politician/miner	Cal.	Idaho
H. C. Street	Dem.	Editor		Idaho

House:

Name	Party	Occupation	Previous State(s) of Residence	State of Residence at Death
J. A. Abbott	Dem.	Farmer	Or.	Tex.
F. W. Bell	Dem.			Left Terr.
J. Cozad	Dem.	Farmer	Cal.	Idaho
N. Davis	Rep.	Miner/brewer	Cal.	Idaho
A. W. Flournoy	Dem.	Politician		Idaho
J. C. Harris	Dem.			
A. P. Mitchell	Dem.			
B. J. Nordyke	Dem.	Miner/hotel	Cal.	Idaho
H. Ohle	Dem.	Stage operator		
W. H. Parkinson	Dem.			
G. W. Paul	Dem.			Idaho
J. S. Taylor	Dem.			Or.
W. W. Thayer	Dem.	Attorney	N.Y. & Or.	Or.

Members Voting Against Community Property Bill:

House:

Name	Party	Occupation	Previous State(s) of Residence	State of Residence at Death
A. Englis	Dem.			
J. W. Knight	Dem.			
W. L. Law	Dem.	Attorney		
A. McDonald	Rep.			

Members Who Were Absent and Did Not Vote on the Bill:

House:

Name	Party	Occupation	Previous State(s) of Residence	State of Residence at Death
W. T. McMillen	Rep.			
D. G. Monroe	Dem.	Miner		

119. See CURTIS, *supra* note 24, at 59-77.

Appendix B: Jurisdiction of the Cases and Statutes Cited by the
Territorial Supreme Court, and the Attorneys Arguing Before It,
During the Court's First Year

January Term, 1866

	None	Cal.	Idaho	Ill.	Nev.	N.Y.	Wash.	U.S.	Fed
1 Idaho 33	-	2	-	-	-	1	-	2	-
1 Idaho 41	X	-	-	-	-	-	-	-	-
1 Idaho 44	-	-	2*	-	-	-	-	-	-
1 Idaho 48	X	-	-	-	-	-	-	-	-
1 Idaho 49	-	-	1*	-	-	-	-	-	-
1 Idaho 50	X	-	-	-	-	-	-	-	-
1 Idaho 52	-	-	1*	-	-	-	-	-	-

August Term, 1866

	None	Cal.	Idaho	Ill.	Nev.	N.Y.	Wash.	U.S.	Fed
1 Idaho 55	-	-	-	-	-	-	-	1	1
1 Idaho 62	-	2	1*	-	-	1	1	5	-
1 Idaho 74	-	-	1*	-	-	-	-	-	-
1 Idaho 78	-	-	-	-	1	-	-	-	1
1 Idaho 85	X	-	-	-	-	-	-	-	-
1 Idaho 88	-	2	1*(1)	2	-	-	-	1	-
1 Idaho 92	X	-	-	-	-	-	-	-	-

TOTALS: 5 6 7*(1) 2 1 2 1 9 2

* statutes

The Territorial Supreme Court decided fourteen cases its first year: *Bloomington v. B. M. Du Rell & Co.*, 1 Idaho 33 (Idaho Terr. 1866); *Jacobs & Co. v. Dooley & Co.*, 1 Idaho 41 (Idaho Terr. 1866); *People v. B. M. Du Rell & Co.*, 1 Idaho 44 (Idaho Terr. 1866); *Henry v. Jones*, 1 Idaho 48 (Idaho Terr. 1866); *People v. Farrell*, 1 Idaho 49 (Idaho Terr. 1866); *Beachy v. Lamkin*, 1 Idaho 50 (Idaho Terr. 1866); *People v. Gillesie*, 1 Idaho 52 (Idaho Terr. 1866); *Moore v. Koubly*, 1 Idaho 55 (Idaho Terr. 1866); *People v. Slocum*, 1 Idaho 62 (Idaho Terr. 1866); *People v. Dunn*, 1 Idaho 74 (Idaho Terr. 1866); *Flannagan v. Newberg*, 1 Idaho 78 (Idaho Terr. 1866); *People v. Williams*, 1 Idaho 85 (Idaho Terr. 1866); *People v. Bugbee*, 1 Idaho 88 (Idaho Terr. 1866); *Lamkin v. Sterling*, 1 Idaho 92 (Idaho Terr. 1866).