

BOOK REVIEWS

POLITICS OF LAND: *Ralph Nader's Study Group Report on Land Use in California*. By Robert C. Fellmeth. New York: Grossman Publishers, 1973. Pp. 715. \$15.00 (hard cover), \$5.95 (paperback).

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In the summer of 1970, at the peak of his national influence, Ralph Nader created a task force to investigate land resource policies in the state of California. The group's 25 members, mostly Californians, were led by Robert C. Fellmeth, a veteran Nader lieutenant who had co-authored an earlier study on the Federal Trade Commission¹ and been sole author of another on the Interstate Commerce Commission.² Fellmeth and eight additional members of the task force were attorneys; many other investigators had professional training of some kind.

The task force's report was released in loose-leaf photocopy form a year later, in August, 1971. It sweepingly condemned as spineless and inept the government agencies involved in regulating use of California's natural resources. The agencies attacked in the report were outraged by it, and promptly issued press releases reproaching the task force for inaccuracies, bias, and, by implication, immaturity.³ Since the report had a limited circulation due to its method of reproduction, the media ultimately bore the responsibility of assessing the charges and countercharges for the general public. Most press reports concluded the task force's work was intemperate and sloppy, and thus largely dismissed it as unworthy of serious attention. It is clear that the report boomeranged; the policies of the state agencies criticized in the report seem to have been at most trivially affected by it; Nader's national reputation, however, has been badly tarnished by the hostile press reaction. The bloom is off the Nader rose. He faces unrest with-

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1. E. COX, R. FELLMETH, & J. SCHULZ, *THE CONSUMER AND THE FEDERAL TRADE COMMISSION* (1969).

2. R. FELLMETH, *THE INTERSTATE COMMERCE COMMISSION* (1970).

3. See note 138 *infra* and accompanying text.

in his ranks,⁴ and an increasingly large fraction of his muckraking efforts are being unfavorably received by his intended audience.⁵

Two years after the initial furor, a 700-page printed condensation of the original 1200-page California land report was made available under the title *Politics of Land*.⁶ Those who are interested can now judge for themselves both the work of the task force and the reaction of its critics. The book, deeply flawed though it is, merits attention as a major new source on resource politics in California, and also as an object lesson on the shortcomings of both amateur inuckrakers and professional journalists.

I. EDITORIAL WEAKNESSES

As project director, Fellmeth's basic objective should have been to place workable limits on the task force's investigations. Nader's investigators score best when they tackle individual agencies like the ICC, FTC, or Bureau of Reclamation. These bodies make manageable targets because their activities are well-chronicled in public documents, their statutory authority and regulations are relatively easily penetrated, and their managers are conveniently located in ironically vulnerable stone edifices in downtown Washington, D.C. The regulation of California's natural resources, however, is handled by a crazy quilt of state and local agencies. Fellmeth decided to take them all on, at least by example. In retrospect this was a mistake. In light of obvious constraints of time and money, no task force recruited by Nader could possibly have produced a competent critique of the institutions involved in agriculture, water, forestry, mining, transportation, and land use in California. The task force reached too broadly, exceeded its grasp and

4. In the summer of 1970, some 15 Nader recruits in Washington, D.C. protested against Nader's remoteness and the coldness of his organizational structure. C. MCCARRY, *CITIZEN NADER* 216 (1972) [hereinafter cited as MCCARRY]. Morale sagged badly on the Congress project, note 5 *infra*, in the summer of 1972:

The Nader white knight image was shattered for most of us early in the summer, and that disillusionment weighed heavily on the project. An even more serious repercussion is that I personally do not know a single profile writer who would work for Nader again.

Szita, *The Congress Report: A Raider Looks at Nader*, *JURIS DOCTOR*, Apr. 1973, at 35, 37.

5. The 1972 Congress project, involving hundreds of participants, centered on the production of individual profiles of Congressmen. Most profiles eventually published were generally perceived as sloppy and unoriginal. E. Z., *Reactions: The Press and the Public*, *JURIS DOCTOR*, Apr. 1973, at 40.

6. R. FELLMETH, *POLITICS OF LAND: RALPH NADER'S STUDY GROUP REPORT ON LAND USE IN CALIFORNIA* (1973) [hereinafter cited to page number only].

consequently failed to produce as effective a critique as would have resulted from a more focused effort.

Fellmeth also demanded, or allowed, the adoption of a conservationist point of view. As a result, rather surprisingly, *Politics of Land* is a book primarily about rural California. Except for a rather detailed chapter on land use planning in Santa Clara County,⁷ relatively little of the book addresses problems in metropolitan areas one would have expected to be covered. Virtually nothing is said about urban renewal, subsidized housing, urban parks and beaches, and the practices of real estate brokers, title insurance companies, mortgage lenders, and large-scale homebuilders. Two chapters, in contrast, are devoted to "wild areas"⁸ and by far the longest chapter is on agriculture.⁹ This rural slant indicates that the task force did not take many cues from urban poverty lawyers, who were certainly potential sympathizers. Rather, since the report aims tired salvos at already-bloodied environmentalist targets like the Disney development in Mineral King, the Irvine Company land swap in Upper Newport Bay, and the supersonic airport at Palmdale in the Antelope Valley, the task force seems to have used the files of the Sierra Club (which financed almost half the task force's total cost of \$18,500) as one of its major research sources.

The fervently environmentalist sections of the book are not only its least original, but also its weakest, departing as they do from the hard-headed cost-benefit approach that surfaces in other sections. Policymakers should certainly consider in their cost-benefit analyses of individual projects the impact on Sneezeweed at Mineral King,¹⁰ mud-flat invertebrates in Newport Bay¹¹ and coyotes in the Antelope Valley.¹² Some of those projects, particularly the Palmdale Airport in the Antelope Valley, may well prove not to be cost-effective when their environmental costs are considered; but to place an infinite value on not disrupting those species so that no benefit can overcome it will, in the long run, seriously discomfort man, the most numerous mammal in southern California and one presumably entitled, like other species, to having its interests weighed.

The environmentalist outlook of the report produces frequent oddities in emphasis. The section in the highway chapter on "road

7. Pp. 351-405.

8. Pp. 181-245.

9. Pp. 26-114.

10. P. 265.

11. P. 282.

12. P. 641.

selection" presents case studies of proposed roads in three virgin areas—Coyote Canyon near Borrego Springs, Malibu Canyon, and Mineral King.¹³ One wonders why these routes were chosen, rather than other equally controversial urban routes such as the Century and Beverly Hills freeways. The rise of environmentalism as a successor to the Civil Rights movement of the 1960's seems to have made concern about the disruption of remote flora and fauna more in vogue than concern about the massive uprooting of urban neighborhoods. A more balanced selection of material would have strengthened the objectivity of the report and broadened its appeal.

In addition, the task force report is simply not a careful piece of work. As it turns out, Ralph Nader has not been appreciably more successful in controlling the quality of the output of his raiders than the president of Boise Cascade has been in controlling the sales practices at that corporation's recreational subdivisions. The abilities of the task force members obviously varied widely. Like many team efforts, *Politics of Land* makes uneven reading. The reader can move from a sober and well-balanced discussion of forestry practices,¹⁴ which acknowledges that "[c]ategorical criticism of any and all clear-cutting, although popular with emotional conservationists, is simplistic . . ." ¹⁵ to a mindless chapter on highways.¹⁶ A dramatic example of unevenness is presented by the two appendices on the economics of the State Water Project that transports water from the Sacramento Delta to southern California: one is competent¹⁷ and the other is hopelessly confused.¹⁸

Perhaps because of the size of the task force and its overly ambitious mission, the errors come thicker and faster than in the average Nader report. In just its first few pages, the report incorrectly states that the federal government disposed of 5 million acres of California land during the 1960's¹⁹ (30 times the correct figure)²⁰ and presents a table on government land ownership in California that is not only too muddled to be understood, but also is in no way derived from the

13. Pp. 418-30.

14. Pp. 220-32.

15. P. 221.

16. Pp. 406-35.

17. Pp. 608-26.

18. Pp. 600-07.

19. P. 4.

20. The decline in federal holdings in California from 1960 to 1969 was 157,000 acres. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 192 (1970); U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 183 (1961).

source attributed.²¹ Errors like these appear with such frequency that all but the most ideologically blinded readers must develop a sense of unease about the report's reliability.

Even if Fellmeth and his editors arguably might be comparatively blameless for substantive errors in the material submitted to them by their field investigators, they certainly should have been able to prevent internal inconsistencies in the book, especially since they had over a year to edit it after the initial unabridged report was released to the press. Yet the task force seems to have approached even editorial functions cavalierly. The estimate of A. Allen Post, the state's Legislative Analyst, of the impact of the State Water Project on the interest rates at which the state borrows money is stated variously in the book as $\frac{1}{2}$ ²² percent and 1²³ percent. The text incorrectly describes 640 acres as a "quarter section,"²⁴ and then only eight pages later contradicts itself and correctly identifies that amount of acreage as a full section.²⁵ The report on the one hand criticizes the State Water Project as a wasteful venture that will bring unneeded water to southern California,²⁶ but at a later stage opposes construction of Palmdale Airport in a location very near to where the State Water Project aqueduct now passes, on the ground that the "water simply isn't available" to support a population boom in the Antelope Valley.²⁷ Fellmeth & Co. cannot have it both ways.

Both Nader and many of his volunteers apparently are less interested in careful research than in arousing public wrath. Nader's own writing and speeches have always been more distinguished by their tone of outrage than their devotion to the facts. Robert Fellmeth has been quoted as saying, "Now we're writing leading texts. . . . Maybe we're too concerned about *accuracy*."²⁸ An editorial bias toward provoking passion may win headlines in the short run, yet is clearly a strategic mistake for an organization as visible as Mr. Nader's now is. The mightiness of the pen ultimately depends on the truth and objectivity of what is written. Many governmental institutions justly criticized

21. P. 5. A footnote states the source of Table 1b to be the 1969 CALIFORNIA STATISTICAL ABSTRACT; that volume contains none of the figures in the table.

22. P. 687 n.54.

23. P. 601.

24. P. 262.

25. P. 270.

26. See, e.g., p. 157.

27. P. 451.

28. MCCARRY, *supra* note 4, at 195 (emphasis in original).

in the California report were able to discredit the task force's work by showing its factual errors. The Director of the State Department of Water Resources, William Gianelli, could correctly characterize the report as "a mass of misinformation."²⁹ Ellen Stern Harris, one of southern California's most prominent conservationists, delivered the coup de grace by criticizing the report's failure to acknowledge progress that had been made on environmental problems.³⁰ The Nader organization is still capable of effective muckraking, as shown by the superb recent report on the Bureau of Reclamation.³¹ Sloppy reports like *Politics of Land*, however, have proven to be ineffective, and probably lessen the impact of Nader's better efforts.

II. THE MEDIA REACTION TO THE REPORT

Mr. Nader should know from personal experience that the media can make an irresponsible investigation backfire by arousing public sympathy for those unjustly attacked. Nader's *Unsafe at Any Speed*³² became a best-seller only after General Motors had made him into a celebrity by admitting at a Senate hearing in 1966 that it had hired a detective agency to investigate his private life.³³ Nader instantly was adopted as a darling of the press³⁴ and his public image remained virtually impeccable until 1970 when an intemperate attack on Senator Muskie's anti-pollution record in an associate's study³⁵ first caused journalists to question his credibility.³⁶ The release of the California land report in summer, 1971, triggered a new theme of Nader's press coverage—his fallibility—that he has since been unable to shake.

The California report caught the attention of the *Wall Street Journal*, the *New York Times*, and virtually all California newspapers. Articles written just after its release primarily were devoted to summarizing its contents. The overly ambitious scope of the project assured that its message to the public would be diffuse. The task force had made so many recommendations that even sympathetic journalists could do little more than write short paragraphs on complex issues like tax administration, the state water quality agency, and the Palmdale Airport.

29. L.A. Times, Aug. 22, 1971, § B, at 6, col. 1.

30. *Id.*

31. R. BERKMAN & W. VISCUSI, DAMMING THE WEST (1973) [hereinafter cited as BERKMAN & VISCUSI].

32. R. NADER, UNSAFE AT ANY SPEED (1965).

33. McCARRY, *supra* note 4, at 11.

34. *Id.* at 110-14.

35. J. ESPOSITO, VANISHING AIR (1970).

36. McCARRY, *supra* note 4, at 199-203.

Later articles devoted more and more space to how negatively government officials had responded to the report, and began to point out its inaccuracies and assert its lack of originality. The title of a *Wall Street Journal* review—"Ralph Nader's Shoddy Product"—shows the general tenor of the later newspaper stories.³⁷ *Los Angeles Times* coverage, the most voluminous of all, became increasingly critical with each succeeding article.³⁸ Its editors reacted even more critically than its reporters; headline writers uniformly stressed the negative qualities of the report;³⁹ unfavorable letters to the editor were selected for publication.⁴⁰ Editorials in almost all California newspapers were damning.⁴¹

Nader, Fellmeth and associates have since mounted a counterattack. *Politics of Land* contains two afterwords (one by a sympathizer, Bob Kuttner,⁴² and one by Fellmeth⁴³) that summarize and assess the reaction of the press to the initial report. Kuttner and Fellmeth both admit it contained minor errors, but advance a more conspiratorial explanation for the hostility of the media reaction to what they consider to be a solid piece of work. They observe that the owners of most of the major newspapers in the state have large land holdings and thus a major financial stake in many of the projects and policies the task force criticized. The *Los Angeles Times'* parent conglomerate, for example, is part owner of the Tejon Ranch, which will have 28,000 of its acres irrigated by the State Water Project.⁴⁴ *Times* reporters, however,

37. Immel, *Ralph Nader's Shoddy Product*, *Wall Street Journal*, Nov. 2, 1971, at 12, col. 4.

38. See L.A. Times, Aug. 22, 1971, § I, at 1, col. 4; § B, at 6, col. 1; *id.* Aug. 26, 1971, § I, at 1, col. 1; § II, at 7, col. 1; *id.* Aug. 27, 1971, § I, at 28, col. 1; *id.* Sept. 3, 1971, § I, at 3, col. 1; *id.* § I, at 20, cols. 1, 7, 8.

39. See, e.g., *Nader Team Accuses Brown, but Its Methods are Questioned*, L.A. Times, Aug. 26, 1971, § I, at 1, col. 1; *Most of California Hit in Nader Report Wrap-up*, L.A. Times, Aug. 27, 1971, § I, at 28, col. 1; *The Raiders Look at Land Lobbyists: No New Information*, L.A. Times, Sept. 3, 1971, § I, at 20, col. 1.

40. Shortly after the release of the first section of the report, the *Los Angeles Times* printed two letters, both critical of the task force. L.A. Times, Aug. 26, 1971, § II, at 7, col. 1.

41. See, e.g., *San Francisco Chronicle*, Aug. 31, 1971; L.A. Herald-Examiner, Aug. 30, 1971, § A, at 14, col. 1; *Tulare Advance Register*, Aug. 26, 1971, at 12, col. 1; *Sacramento Bee*, Aug. 24, 1971; *San Francisco Examiner*, Aug. 24, 1971, at 26, col. 1.

42. Pp. 493-501.

43. *Id.* at 501-11.

44. The source of this figure is a June 18, 1971, letter to Keith Roberts, a task force member, from William Gianelli, Director of the Department of Water Resources (DWR); a copy of this letter was included in a DWR news release of Aug. 23, 1971.

steadfastly insist they were wholly objective in assessing the report.⁴⁵

An irony of the press reaction is that, despite its numerous errors, the Nader team showed that it was capable of considerably better investigative reporting than most journalists. Press coverage of resource politics in California is usually roughly as error-ridden as *Politics of Land*,⁴⁶ and, while rarely as shrill, is also rarely as ambitious in its inquiries. Newspaper articles on a public works project, for example, usually simply quote the sponsoring agency's assessment of the costs and benefits of the project; the Nader group at least tried to look behind those figures to see if they were accurate. In reporting the pained reactions of state agencies to the Nader report, the press similarly made little effort to see whether those reactions were justified or were primarily diversionary tactics designed to confuse the public, as seems to have been the case at least for the state Department of Water Resources.⁴⁷ Reporters at the *Los Angeles Times* who criticized the report later in fact relied on parts of it to develop feature stories on such topics as timber practices and the Southern Pacific's land holdings.⁴⁸

Nevertheless, the thrust of the press coverage of *Politics of Land* seems to have been appropriate. Government ineptness and favoritism are too widespread to be startling news. The major news story growing out of the release of the Nader California report was that the nation's number one muckraker was no longer reliable. Jess Unruh was roughly on target in his widely reported assessment that the report was "80% accurate."⁴⁹ In light of Nader's shining reputation at the time, the shocking fact was not how high the percentage was, but rather how low.

III. A FEW COUNTERVAILING STRENGTHS

The task force report has two chief virtues. The first is its fundamen-

The task force report indicates that 168,531 acres of the Tejon Ranch are in areas served by the State Water Project. P. 164.

45. Telephone interview with Phillip Fradkin, *Los Angeles Times* reporter, July 3, 1973.

46. A lengthy *Los Angeles Times* article on the Southern Pacific's landholdings in California contains two major errors in its first two sentences. The article claims that the company owns 2 million acres in the state. This figure is approximately correct for SP's nontransportation holdings but leaves out another 275,000 acres held for transportation purposes. Telephone interview with Thomas Buckley, Public Relations Manager, Southern Pacific Co., June 25, 1973. The article then states that 2 million acres is "an area about the size of Maine." Maine has 10 times that area. *L.A. Times*, Apr. 16, 1972, § C, at 1, col. 1.

47. See text at notes 138-42 *infra*.

48. Telephone interview, *supra* note 45.

49. Quoted in a *San Francisco Chronicle* editorial, Aug. 31, 1971.

tal perception that government is prone to being captured by private interests. That Mr. Nader shares this perception sets him apart from the mainstream of populist reform. The predominant reformist creed in this century, one that flowered most notably during the New Deal, holds that government regulation and enterprise should be extended widely to tame perceived evils of private business practices. This creed sees as presumptively beneficial any shift of power from the self-interested private sector to government officials, who are viewed as inherently public-spirited. This New Deal world view has come under sharp attack in recent decades from a growing and diverse body of scholars including "Chicago School" economists and "new left" heroes like Charles Reich and Gabriel Kolko. These revisionists assert that in practice public regulatory efforts have usually served to augment, not mitigate, the influence of powerful economic interests.

Ralph Nader has been solidly in this revisionist camp from the outset. Nader's biographer asserts that "[t]he idea that government and industry are handmaidens in conspiracy and corruption illuminates almost every sentence he utters."⁵⁰ Nader and his associates perceive, only a bit too simplistically, that "American life . . . is based on a straight trade—political power in return for business profits, and vice versa."⁵¹ Nader's historic role is to be the man who popularized the debunking of the world view of the New Deal by demonstrating in agency after agency the accuracy of the revisionist perception of government.⁵²

Politics of Land repeats the familiar theme. Nader asserts in the introduction that "[t]he land interests in California, to a significant extent, have bought, intimidated, compromised, and supplied key officials in state and local government to the point where these interests

50. McCARRY, *supra* note 4, at 318.

51. *Id.* at 217. Nader seems to have consciously narrowed his enemies. He rarely observes that noncorporate interests such as labor unions, career civil servants, or the military also possess the potential for capturing government.

52. Nader apparently has not yet fathomed the impact of his own findings, as he continues to propose ambitious new government programs. See text at notes 175-82 *infra*. For an impressive discussion of the strengths and weaknesses of the Nader world view, see Lazarus & Ross, *Rating Nader*, NEW YORK REVIEW OF BOOKS, June 28, 1973, at 31 [hereinafter cited as Lazarus & Ross]. The most coherent presentation of the Nader philosophy is Green & Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L.J. 871 (1973) [hereinafter cited as Green & Nader], admirably critiqued in Winter, *Economic Regulation vs. Competition: Ralph Nader and Creeping Capitalism*, 82 YALE L.J. 890 (1973) [hereinafter cited as Winter].

govern the governors."⁵³ Despite the inexcusable errors in the report, *Politics of Land* makes a rather convincing case for the validity of this major proposition. The alliance between powerful private interests and government emerges in every chapter through countless examples: the industry-dominated boards assigned to regulate timber practices⁵⁴ and water pollution controls;⁵⁵ biases in property tax assessments;⁵⁶ price discrimination in water rates for the benefit of agricultural interests;⁵⁷ favoritism in local zoning decisions;⁵⁸ and on and on. No major political figures are immune from being co-opted. For example, although Democrats have always been better known than Republicans for their anti-business rhetoric, the task force observes that Governor Edmund Brown pushed through the dubious State Water Project in 1959-60;⁵⁹ and President John Kennedy presided at the 1962 ground-breaking for the Bureau of Reclamation's San Luis project,⁶⁰ a western San Joaquin Valley irrigation program that draws a particularly scathing blast from the task force.⁶¹

The analytical power of the revisionist view of government is best illustrated in the report's discussion of the Williamson Act,⁶² which enables owners of agricultural land to achieve lower property tax assessments by signing contracts restricting their land to agricultural use for at least 10 years.⁶³ This Act, promoted by its sponsors as a means of preserving open space, might appear to be good legislation to someone unbenefited by a revisionist outlook. Fellmeth was able to see the Williamson Act for what it is—"a complicated system of tax evasion for the state's large landowners."⁶⁴

53. P. ix.

54. After the release of the report much of the California Forest Practice Act, Cal. Pub. Res. Code §§ 4521-618 (West 1972), was held unconstitutional on due process grounds for delegating excessive lawmaking power to timber interests. *Bayside Timber Co. v. Board of Supervisors*, 20 Cal. App. 3d 1, 97 Cal. Rptr. 431 (1971).

55. Pp. 23, 115-52, 234-35.

56. Pp. 165, 245, 356-66.

57. Pp. 54-60, 152-59.

58. Pp. 31-36, 351-405.

59. Pp. 615-19.

60. I H. RODGERS & A. NICHOLS, *WATER FOR CALIFORNIA*, § 50, at 59 (1967).

61. Pp. 175-78.

62. Pp. 36-42, 570-84.

63. CAL. GOV'T CODE §§ 51200-295 (West 1966).

64. P. 42. The book's assessment of the Act is irritatingly uneven. The author of the agriculture chapter seems to like the Act since he is concerned about preventing the urbanization of prime agricultural land. (The reasons for this concern, pp. 29-32, make virtually no economic sense.) Fellmeth, himself a strong revisionist, apparently opposes the Act. P. 510. He may have added the footnoted sentence during the editing stage.

The Nader world view does sometimes appear distorted. *Politics of Land* too often succumbs to the popular mythology that the interest of the "People" as an organic whole is distinct from the sum of the interests of all individual persons.⁶⁵ Nader also seems compelled to insist that things are getting worse. He has written elsewhere, for example, about the "steady slippage in the quality of American life" and our "spreading crises."⁶⁶ *Politics of Land* talks unsparingly about the grip of corporate power on the state. This vision ignores the political realities of the last few years, whose trend was visible at the time *Politics of Land* was written. Major public works projects everywhere are being delayed or blocked by lawsuits; the "land interests" identified in the Nader report were unable to block passage of the California Environmental Quality Act of 1970,⁶⁷ or the coastal initiative of 1972.⁶⁸ Its blindness to the growing power of the environmentalist forces gives the task force report an air of unreality. Because Nader and associates presumably view environmentalists as guardians of the "public interest," they probably felt they could ignore them on the premise that the environmentalists would make laudable use of government power once they gained it. Although the fundamental perception that government is a captive of private interests is a virtue of the report, a true revisionist would at least be skeptical about whether the capture of government by the environmental lobby would be a significant improvement over what had gone before.

The report's second virtue is its admirable bent toward empiricism. Like most Nader reports, the book presents accounts of field investigations that add an earthy and up-to-the-minute flavor that is too often absent from more scholarly works. The press was less than accurate in stating that the report presented virtually no new material. Besides relishing familiar issues, *Politics of Land* contains a number of studies that were passed on to the Nader group by non-task force members. These include a computer survey of property tax assessments in

65. A table on p. 460, for example, contrasts the lobbying money spent by "land interests" with comparable expenditures by "conservation" groups and "miscellaneous people's groups." This sophomoric dichotomy between "black hats" and "white hats" fails to recognize that those with "land interests" are also "people" and the conservationists themselves have their own narrower special interests. The task force is also prone to referring to the "public interest" as if that phrase were not devoid of policy content. See, e.g., pp. 354, 356.

66. Nader, *Introduction* to M. GREEN, J. FALLOWS & S.D. ZWICK, *WHO RUNS CONGRESS 2*, 4 (1972).

67. CAL. PUB. RES. CODE §§ 21000-174 (West Supp. 1973).

68. CAL. PUB. RES. CODE §§ 27000-650 (West Supp. 1973) (California Coastal Zone Conservation Commission initiative of 1972).

San Diego and Alameda Counties (documenting the underassessment of raw land);⁶⁹ a county-by-county investigation by State Senator George Danielson on landowner use of the provisions of the Williamson Act;⁷⁰ and an unreleased Attorney General's report by a controversial ex-deputy attorney general, Marshal Mayer,⁷¹ that chronicles the development of California City, a fantastic real estate project in the bleak desert of the northern Antelope Valley.⁷²

The excerpts from this last report are one of the high spots of the book. California City contains some 100,000 acres, making it the third largest city in California in area. By 1968, after a decade of selling, the developer had sold 32,000 parcels, only about 1 percent of which had by then been improved with single family houses; many of the few completed homes were occupied by the developer's employees. Despite a tendency toward sensationalism, the Attorney General's report provides a fascinating glimpse at the financing, marketing and development practices at desert subdivisions. Best of all, the report contains data on the resale prices of lots in selected tracts at California City.⁷³ Roughly speaking, sellers in 1968 were able to recover the lot price they had paid a decade earlier—an unimpressive showing for California land during this period. Mayer's California City report is so well researched and written, in fact, that the rest of *Politics of Land* pales beside it.

Besides reporting these outside studies, Fellmeth and his staff undertook a few empirical ventures of their own. These turned out, unfortunately, to be more impressive in intention than in execution. The task force conducted a poll of Santa Clara County residents to test knowledge of the local political structure,⁷⁴ surveyed land uses on the coastline north of San Francisco,⁷⁵ and investigated the rate of construction at Boise Cascade recreational developments.⁷⁶

The task force's most ambitious project was to identify large private land holdings in California. Obtaining accurate land owner-

69. Pp. 361-64.

70. The results of this survey are presented in a 15 page appendix. Pp. 570-84.

71. L.A. Times, Aug. 26, 1971, § I, at 1, col. 1.

72. Pp. 320-48.

73. Pp. 340-41.

74. Pp. 371-72.

75. Pp. 211-12.

76. P. 182. They report that almost no homes have been built outside Boise's three most choice recreational locations. *Id.*

ship information is exceptionally difficult because of the frequency of land transfers and the use of subsidiaries, straws, and other masks of ownership. The task force worked from a jumble of sources, many of them outdated, to compile a 25-page list of major private holdings in California.⁷⁷ This state-wide list is almost certainly a mass of individual inaccuracies, but on the whole probably roughly reflects the actual degree of ownership concentration. Other lists in the report identify the alleged largest landowners in a dozen California counties, most of them rural ones in the lightly populated northern part of the state.⁷⁸

As was well known before publication of the report, there are some very large corporate land holdings in California. The Southern Pacific Company, which admits to almost two and one-half million acres, owns the most.⁷⁹ *Politics of Land* places the Newhall Land and Farming Company in second position with about a million and a half acres.⁸⁰ Altogether, the 25 largest private landowners, mostly large industrial corporations, are portrayed as holding over eight million acres, or about one-sixth of the private acreage in California.⁸¹ The degree of ownership concentration is of course higher in certain sub-parts of the state. Sierra County has the greatest degree of concentration shown; there the five largest private owners possess slightly over one-third of the private acreage.⁸²

Assuming these concentration figures are roughly accurate, what can one make of them? The task force considers land ownership concentration in California "remarkably high"⁸³ and is concerned about it because

a large landowner may be able to monopolize a particular market because he has the power to set prices on the products of his land; he may even be able to exercise control over an entire regional economy.⁸⁴

This is theoretically correct, but the facts presented in *Politics of Land*

77. Pp. 515-40. See also pp. 10-11.

78. Pp. 13-15, 541-51.

79. See note 46 *supra*.

80. P. 10.

81. *Id.*

82. P. 544. Table on p. 13 incorrectly indicates that the four largest private owners have 34.3% of the private acreage in Sierra County; the table on p. 544 has the correct calculations.

83. P. 9.

84. P. 6.

fail to make even the beginning of a case for finding a land monopoly.

Development of a concentration ratio to gauge monopoly power in a market for a resource or product requires a definition of the relevant product line, determination of the geographical boundaries of its market, and identification of a unit of measure for the market share of each firm. The task force made questionable choices on all three scores and thus exaggerated the case for finding monopoly power over the state's rural lands.

First, the concentration ratios in the report are figured only on the basis of private land holdings. This is a major distortion whether one takes as the relevant product line either raw land or timber, oil, orange trees or any other specialized product from land. Government (federal, state and local) owns roughly half the area of the state of California, and regularly leases its lands for private use. The impressive characteristic of land ownership in Sierra County, to use the report's most "highly concentrated" jurisdiction, is not that the largest private owner, Fibreboard Corporation, owns 12 percent of the total private acreage, but that government owns 65 percent of the total land in the county, or about 14 times more than Fibreboard.⁸⁵ On a state-wide basis the U.S. Forest Service owns more acres of commercial forest than all private owners put together.⁸⁶ Government-leased land competes with private land and should be included when calculating concentration ratios.

Second, county concentration ratios are a poor indicator of market power because there are at least multi-county markets in most land products. For example, the rural lands in the northernmost California counties are primarily valuable for logging. Counties are too small to contain economically separate markets for logs. Those markets might even be defined as international; the United States exports large quantities of logs to Japan. Furthermore, even if the state-wide log market were selected for analysis, the task force reports that 20 firms own about 43 percent of the state's private timberland⁸⁷—a sufficient number to impede monopoly pricing, especially in light of the Forest Service's holding.⁸⁸

Third, using acreage as the unit of measurement for determining

85. P. 13.

86. CALIFORNIA STATISTICAL ABSTRACT 125 (1969).

87. P. 11. The source is not indicated, but was probably 1969 CALIFORNIA STATISTICAL ABSTRACT 125.

88. Monopoly power over the supply of redwood logs or other rare species is

a firm's market share of land resources is like using square footage of canvas to evaluate the quality of an art museum. For most purposes land value is the relevant measure. The report's statistics on ownership concentration by value are tucked away in an Appendix.⁸⁹ Not surprisingly, the data indicate that owners of large acreage tend to own the dregs of California. The Southern Pacific owns 280 square miles in Siskiyou County, for example, but those lands have an appraised market value of only \$14 million, no more than a good-sized downtown office building.⁹⁰ Rural Siskiyou County lands have an appraised market value ranging only from \$20 to \$200 an acre.⁹¹ Undeveloped urban land in California is commonly valued hundreds, if not thousands, of times higher than those figures.

In short, *Politics of Land* contains no figures on land ownership concentration that are worth the serious attention of the Antitrust Division of the Justice Department. That 220 concerns own 35 per cent of private California crop land is certainly persuasive evidence that corporate agriculture has come of age.⁹² However, agriculture still has a way to go, to put it mildly, before it approaches the concentration ratios in the automobile, aircraft or aluminum industries.

Concentration of land ownership also has its positive side. The authors are aware that there are good reasons not to break up large landholdings that allow efficiencies of scale. They are willing to propose that California adopt Minnesota's 5,000 acre ceiling on corporate ownership of farmland only because they doubt if there are significant scale efficiencies above that size.⁹³ Ceilings on holdings, however, will cause inefficiency if further scale economies are available (as they seem to be, well beyond 5,000 acres, for commercial forests, cattle ranching, and a wide variety of agricultural uses).⁹⁴ *Politics of Land* itself observes that the checkerboard land ownership pattern that still

not an impossibility, but since redwood must compete with other woods and wood-substitutes, that species may not be an economically distinct product line.

89. Pp. 552-55.

90. P. 554. See also asterisked note at p. 552.

91. P. 554. Raw land generally tends to be underappraised for property tax assessments, and *Politics of Land* asserts that timber land in particular is systematically undervalued. Pp. 203n, 365. The SP's holdings in Siskiyou County are still hardly prime land.

92. P. 12. Consistent with the national trend, the average California farm increased almost threefold in acreage from 1940 to 1969. P. 16.

93. P. 85.

94. Thirty-five percent of the cropland harvested in the United States in 1969 was in farms of 2,000 acres or more. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 586 (1972).

continues in some places from the railroad grants of the 19th century is a "major stumbling block to sound forest management in California."⁹⁵ It notes U.S. Forest Service efforts to trade sections of land with the private owners of the alternating checkerboard squares so that both can consolidate their holdings into more useful chunks.⁹⁶ Historically, ceilings on land ownership have usually been evaded through loopholes and thus their main economic effect has been to impose wasteful administrative costs on owners and regulators. These ceilings could possibly make sense only when monopoly land power can be shown, and *Politics of Land* fails to demonstrate the existence of such power.

At some size, there may actually be disefficiencies of scale in land ownership for some uses; if so, market forces will tend to break up private land holdings. Southern Pacific's experience tends to support this hypothesis. That railroad received a federal grant of 10 alternate sections on each side of the track, within limits of 20 miles, for every mile of track it built.⁹⁷ At maximum this equalled 12,800 acres per mile of track. Southern Pacific originally acquired 6½ million acres of California through these grants,⁹⁸ but has since steadily reduced its holdings and now has little more than one-third left.⁹⁹ Moreover, apparently because it perceives that it is too big to employ this land efficiently within its internal organization, Southern Pacific leases much of its non-transportation holdings to timber, petroleum, and agricultural firms.

The task force report fails to emphasize an impediment to the efficient allocation of California land that is presently far more serious than private land monopoly. The federal government owns about 45 percent of the area of the state,¹⁰⁰ 20 times more than the Southern Pacific Company. Much of this land should no doubt remain in the public domain as wilderness preserves, recreational areas, military reservations, and the like. It is surely optimistic, however, to believe that the federal government can efficiently allocate its current vast holdings through its internal decision-making processes. Any program to break up large land holdings in California might well take the federal gov-

95. *Id.* at 259.

96. *Id.* at 259n.

97. S. DAGGETT, CHAPTERS ON THE HISTORY OF THE SOUTHERN PACIFIC 50, 122 (1922).

98. P. 18.

99. See note 46 *supra*.

100. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 189 (1971).

ernment as its first target.

In urban areas, contrary to the thrust of the task force, the concentration of private land ownership should be encouraged, not deplored. *Politics of Land* presents in its appendices complete data on only one urban county, Sacramento.¹⁰¹ As one would expect given the value of urban land, concentration ratios of land ownership are much lower in urban areas than in rural ones. The four largest private landowners by acreage in Sacramento County are reported to own together 7.6 percent of the private land area of the county. Using the valuation of land (excluding improvements) as the measure of market share, the four largest owners hold 4.9 percent of the assessed land value in the County.¹⁰² (Interestingly, none of the four top owners by assessed land value are even in the top 20 owners by acreage.) These data should dispel fears of significant monopoly power over land resources in Sacramento. The more serious economic problem in urban areas is usually that land ownership is too fragmented for optimally efficient development. The consolidation of fragmented land parcels should be facilitated, as it is, say, through the urban renewal process, to permit development of facilities which have widespread external benefits that can be internalized to their sponsor only if he owns a large surrounding tract.¹⁰³

IV. THE CALIFORNIA WATER PROJECT

The most controversial section of *Politics of Land* is its critique of the State Water Project, a multi-billion dollar system that is now transporting water from northern California to the dry southern regions of the state.¹⁰⁴ A review of the Project's history will be useful for illuminating the dynamics of public works planning, the failures of the Fellmeth task force, and the nature of press coverage of complex public financial arrangements.

The State Water Project is the *raison d'être* of the California State

101. Pp. 550, 552-53.

102. The task force incorrectly states their share to be 2 percent, a considerably lower figure. P. 552. They apparently used for the denominator of the calculations the total assessed valuation in Sacramento County in 1968 (\$1,207 million), a figure that includes improvements and personal property, rather than the total raw land valuation in the County (\$387 million). See CALIFORNIA STATISTICAL ABSTRACT 193 (1969).

103. Aggregation of large urban parcels by private transactions is seriously hindered by holdout problems and the need for vacation of public streets and easements.

104. Pp. 152-74; 600-26. For background on the Project, see generally C. MEYERS & A. TARLOCK, WATER RESOURCE MANAGEMENT 345-64 (1971).

Department of Water Resources (DWR). After a decade of planning, the Project's construction was assured in 1960 by voter approval of a \$1.75 billion bond issue. The DWR then built the massive Oroville Dam on the Feather River, a tributary of the Sacramento. The dam enables DWR to pump water from the Sacramento Delta to the southern part of the state along the west side of the San Joaquin Valley by means of the Project's second major monument, the 300-mile long California Aqueduct. The main branch of the Aqueduct runs to the Tehachapi Mountains where the giant A. D. Edmonston pumping plants¹⁰⁵ boost the water 2,000 feet up and over the Tehachapis, and down to metropolitan Los Angeles.¹⁰⁶

The California Aqueduct will deliver at capacity about 4 million acre-feet of water a year, an enormous volume approximately equal to the total quantity now being consumed annually by all users in metropolitan Los Angeles, San Francisco, and San Diego. The DWR does not sell water directly to consumers, but wholesales it to 31 local water agencies in the middle and southern part of the state with whom it has long-term supply contracts.¹⁰⁷ The largest of these agencies is the Metropolitan Water District of Southern California (MWD), a regional body whose service area includes half the population of the state. The MWD was formed in 1928 to build and operate the aqueduct from the Colorado River to the Los Angeles basin. MWD has contracted to buy an eventual 2 million acre-feet of water a year from DWR, or almost one-half of the California Aqueduct's volume. To handle the northern water, which is almost twice the volume carried by the Colorado Aqueduct, MWD has embarked on a \$1.3 billion construction program that is now about one-half complete.¹⁰⁸

105. The energy needs of this facility are staggering. The DWR estimates the Edmonston plant will consume about 2 billion kilowatt-hours of electricity per year during the 1970's and about 5 billion kilowatt-hours by the end of the century. DWR, Bulletin No. 132-72, at 34 (1972). The total maximum annual energy requirements for the State Water Project's 22 pumping plants is 13.5 billion kilowatt-hours, some 8 billion more than the power output of the Project. *Id.* at 180. For comparison, the City of Los Angeles' Department of Water and Power sold about 17 billion kilowatt-hours to ultimate consumers during fiscal 1972. Annual Report 1971-72 at 14.

106. Original plans for the State Water Project included a Peripheral Canal to bypass part of the Sacramento Delta, a drain to remove waste waters from the San Joaquin Valley, and a diversion of part of the flow of the Eel River across the coast mountain ranges into the Sacramento River. Construction of these elements has been postponed and some of them may never be completed.

107. These contracts usually run 50 years, a term sufficient to assure prospective buyers of DWR bonds that the Department will have a continuing source of income.

108. MWD, Official Statement of Offering of \$100 million Series D Waterworks Bonds 37-44 (1970) [hereinafter cited as MWD].

The MWD is itself a wholesaler of water for its 27 member agencies, mostly cities and water districts. One of the MWD's members is the City of Los Angeles' Department of Water and Power (DWP). DWP has been buying about 10 percent of its water from the MWD, obtaining the rest from local wells and two city-owned aqueducts to the Owens River Valley located east of the Sierras.¹⁰⁹ Three sales are thus necessary for residents of the City of Los Angeles to receive State Water Project water: DWR to MWD; MWD to DWP; DWP to consumer.

A complex public program like the State Water Project is best evaluated by applying two criteria: efficiency and equity. Efficiency can be assessed through cost-benefit analysis; equity, by tracing the distributional impacts of the Project—the windfalls it bestows and the losses it imposes. The Nader critique of the Project basically follows this format, although it frequently muddles the two criteria.

The State Water Project was a sitting duck for the Naderites under both standards for evaluation. The prospective efficiency of the project was at best doubtful when it was first approved in 1959-60. Although there are considerable scale efficiencies in building large canals and reservoirs,¹¹⁰ water agencies have historically tended to overbuild. In one of the classic cost-benefit studies in all of economic literature, Hirshleifer, DeHaven and Milliman concluded as long ago as 1960 that the State Water Project was vastly over-designed, and at minimum should be postponed or built in stages.¹¹¹ Another eminent team of economists, Bain, Caves and Margolis, reached the same conclusion in 1966.¹¹² These critics pointed out that water has tended to be underpriced, and that proper pricing would by itself greatly reduce future water consumption.¹¹³ They also deflated one of the main rationalizations for the Project—the prospective loss to Arizona of over one-half of the MWD's entitlements to Colorado River water.¹¹⁴ Arizona and

109. DWP, Annual Report 1971-72, at 8.

110. J. BAIN, R. CAVES & J. MARGOLIS, *NORTHERN CALIFORNIA'S WATER INDUSTRY* 210-23 (1966) [hereinafter cited as *NORTHERN CALIFORNIA'S WATER INDUSTRY*].

111. J. HIRSHLEIFER, J. DEHAVEN & J. MILLIMAN, *WATER SUPPLY* 295-356 (1960) [hereinafter cited as *WATER SUPPLY*].

112. *NORTHERN CALIFORNIA'S WATER INDUSTRY*, *supra* note 110, at 402-03, 561-72, 719-29.

113. *WATER SUPPLY*, *supra* note 111, at 109-11; *NORTHERN CALIFORNIA'S WATER INDUSTRY*, *supra* note 110, at 360-61.

114. Widely predicted at the time of the 1960 vote on the Project's bond issue, the loss of California water was confirmed in *Arizona v. California*, 373 U.S. 546 (1963).

the other claimants, they noted, were unlikely to make use of their full entitlements to Colorado River water for many decades. More important, California's total entitlement to Colorado River water will always be at least 4.4 million acre-feet annually, or four times the capacity of the present Colorado River Aqueduct that brings water to Southern California. California's senior entitlements to Colorado River water are held by the Palo Verde, Imperial, Yuma, and Coachella irrigation districts, which use the water primarily to irrigate the Imperial Valley. If Arizona ever exercises its claim to the water it has been permitting MWD to take, the Colorado River Aqueduct needn't drop to one-half use. To improve allocation of water within the state, Hirshleifer, DeHaven and Milliman argued the MWD should then replace the water claimed by Arizona by either buying, or being authorized to condemn, the senior Imperial Valley entitlements and converting them to urban use.¹¹⁵ Through this example and others, these economists contended that if more water were needed, there were alternative sources cheaper than bringing it down from the Sacramento Delta and pumping it over the Tehachapis.

A combination of demographic, technological and political developments have made the State Water Project an even more vulnerable target today than it was when Hirshleifer, Bain, and their associates did their work. Since the time the Project was planned the national birthrate has dropped precipitously and migration to California has slowed to a trickle. In 1960 the DWR had projected, for example, the 1990 population of Los Angeles County at 10.3 million, an increase of 4.3 million over its 1960 population.¹¹⁶ Los Angeles County planners now estimate the County's 1990 population at 7.7 million,¹¹⁷ an increase from 1960 only 40% of that projected earlier by the DWR. In addition, per capita water consumption has not gone up as much as expected because of the increased incidence of apartment living in Southern California.¹¹⁸ Efforts by industry and local agencies to reclaim sewage have become more widespread than was anticipated.¹¹⁹

115. WATER SUPPLY, *supra* note 111, at 320-22. See also *id.* at 227-29.

116. Charles T. Main, Inc., Interim Report [on the State Resources Development System] 4-6 (1960).

117. L.A. Times, May 28, 1973, § I, at 24, col. 2. The new projection is based on the U.S. Census Bureau's "E" projection of fertility which assumes each generation will just manage to replace itself. Fertility is currently running at approximately that rate.

118. MWD press release, Oct. 13, 1970, reported, *e.g.*, in L.A. Times, Oct. 25, 1970, § C, at 3, col. 5.

119. *Id.*

The U.S. Bureau of Reclamation's Central Arizona Project, a pet bit of pork-barrelling of the late Senator Hayden, has been substantially delayed and thus Arizona will not threaten the MWD's Colorado River water source until 1983 at the earliest.¹²⁰ The MWD now admits that, if the Central Arizona Project is built, it will not lose as much Colorado River water as expected if means can be found to augment that river's flow.¹²¹ Lastly, during the 1960's, the City of Los Angeles' DWP, not satisfied by the prospect of expensive state project water, built a second Los Angeles Owens River Aqueduct, thus considerably increasing local water supplies in southern California.

As a result of this combination of developments, the DWR, and its primary purchaser, the MWD, now must deal with a monumental excess capacity in their water carrying facilities. The DWR's own reports show a surplus of one million acre-feet of water in urban southern California in 1990.¹²² The MWD oddly boasts that, "with its new water supply from the State Water Project, the District can meet increasing water demands until well into the next century."¹²³ As will now be shown, if costs and benefits are discounted to present values, these agencies have little to be proud of except their political savvy in getting funding for projects decades before they could be self-supporting.

From the start, public officials sponsoring the State Water Project issued misleading statements about its costs and benefits. The DWR released an analysis in 1960 that predicted \$2.50 in benefits for every dollar invested, and calculated total Project construction costs at \$1.9 billion.¹²⁴ The distortions necessary to reach these results included: exclusion of provisions for working capital; exclusion of the \$0.5 billion Oroville Dam from Project costs (although the Dam was a key element and one of the first facilities constructed); failure to provide an allowance for inflation of construction costs (a customary precaution in public works planning); and additional miscellaneous errors all generous to the Project.¹²⁵ The DWR's financial statements since 1960

120. MWD, Annual Report 1972, at xxix, 102. For a critical discussion of the Central Arizona Project, concluding that it should not be built, see BERKMAN & VISCUSI, *supra* note 31, at 105-30, 210.

121. MWD, *supra* note 108, at 29.

122. DWR, Bulletin No. 160-70, at 31 (1970).

123. MWD, Annual Report 1972, at xii.

124. DWR, Bulletin No. 78 (1960).

125. See generally Dillon, Read & Co. Inc., Interim Report [on Financial Aspects of the State Water Project] (1960); WATER SUPPLY, *supra* note 111, at 335-38; pp. 608-11.

have additionally failed to include depreciation of plant and equipment as an operating expense (contrary to the practice of both MWD and DWP) and have consistently omitted the provision of adequate reserves for replacements.

Actual Project construction costs, of course, have far exceeded the \$1.75 billion available from the 1960 bond act, and the DWR has been incessantly scrambling for additional funds since 1960. By 1973, the DWR had sold \$345 million in bonds authorized in the 1930's for the unbuilt Central Valley Project, sold revenue bonds secured by the income of Project power plants, and, in its most controversial foray, obtained a loan of \$376 million from the state's tidelands revenues.¹²⁶ Despite these efforts and an expected \$199 million in additional tidelands funds by 1980, the DWR estimates that it still has insufficient capital funds to complete the construction program it plans for the rest of the 1970's.¹²⁷

In addition to underestimating costs, the agency has overestimated benefits. Like most water agencies, the DWR projected future water "requirements" in its 1960 cost-benefit analysis as if demand for water were totally inelastic—that is, as if the amount demanded were wholly unresponsive to changes in price. Since Project water is expensive to the consumer, this approach permitted an optimistic forecast of revenues. The "requirements" approach is of course an economic absurdity¹²⁸ because demand for both irrigation water and urban residential water is far from perfectly inelastic.¹²⁹

The DWR's most serious error was its choice of a low interest rate for discounting future costs and revenues. Ambitious undertakings like the State Water Project involve expenditures over several decades and generate revenues and other benefits for a long period thereafter. Because society values present consumption greater than an equal amount of future consumption, these flows of costs and benefits must be discounted to present value to be compared. If a 7 percent discount rate is chosen, 2 dollars of project revenues in 10 years are needed to counterbalance 1 dollar of current construction expenditures; if a 3 percent rate is chosen, only \$1.34 in revenues would be necessary.

126. W. Gianelli, Report on Financial Status of the State Water Project in 1973 (presented to California Assembly Committee on Water, Feb. 20, 1973) [hereinafter cited as Gianelli].

127. *Id.* The shortfall is \$37 million.

128. See WATER SUPPLY, *supra* note 111, at 347.

129. NORTHERN CALIFORNIA'S WATER INDUSTRY, *supra* note 110, at 173-90.

Public works planners therefore have a strong self-interest in applying low discount rates, and historically have been apt to choose the current borrowing rate of their own agency. Thus the DWR's cost-benefit analysis of 1960 adopted a 3.5 percent discount rate,¹³⁰ one somewhat higher than the amazing 2.5 percent the U.S. Bureau of Reclamation was using at the time.¹³¹ Virtually all economists agree that these rates are far too low because public borrowing imposes opportunity costs on private citizens by obviating alternative private investment. Bain, Caves and Margolis suggest that public agencies use as a discount rate "the marginal rate of time preference of the taxpayers or agency constituents who ultimately finance the bulk of investment in water projects,"¹³² a rate they believe to be roughly equal to the marginal rate of return on marginal long-term private investments (about 5-6 percent when they wrote in 1966, and at least 7-8 percent in 1973). Hirshleifer, DeHaven and Milliman suggest a rate of 10 percent,¹³³ one currently applied by the Department of Defense for military construction.¹³⁴

Application of these higher rates is of course devastating to the State Water Project. Hirshleifer, DeHaven and Milliman concluded that the costs of the Project would exceed its benefits even at a 2.7 percent discount rate and that its inefficiency would prove awesome at a 10 percent rate.¹³⁵ Bain, Caves and Margolis, applying 6 percent, calculated no better than 70 cents of benefits per dollar of costs.¹³⁶

The slowdown in population growth and other unpredicted developments no doubt had made the benefit/cost ratio of the Project even more unfavorable by the time Nader mobilized his California task force in 1970. Regrettably, a revised cost-benefit analysis of the Project proved to be beyond the capabilities of the Fellmeth team. Such an analysis would have involved a determination of the flow of both the costs and benefits of the project, and then a discounting of both those flows to a selected date so that they could be compared. The task force member assigned to calculate the cost of the State Water Project did not understand the discounting process; to determine the total capital cost of

130. WATER SUPPLY, *supra* note 111, at 342.

131. BERKMAN & VISCUSI, *supra* note 31, at 85, 229 (1973).

132. NORTHERN CALIFORNIA'S WATER INDUSTRY, *supra* note 110, at 268.

133. WATER SUPPLY, *supra* note 111, at 146-48.

134. BERKMAN & VISCUSI, *supra* note 31, at 89.

135. WATER SUPPLY, *supra* note 111, at 338-47, 351-56.

136. NORTHERN CALIFORNIA'S WATER INDUSTRY, *supra* note 110, at 569-72; 719-

the project, he simply added all interest payments due on Project bonds through the year 2035, and thus "discovered" a hidden interest cost of some \$5 billion.¹³⁷ Incredible as it may seem, Fellmeth and his fellow editors never caught this error and it went through to publication in *Politics of Land*.

Although the task force's critique of the State Water Project contained many valid criticisms gleaned from the Hirshleifer and Bain studies, this one colossal mistake effectively blunted its attack. The DWR's director, William Gianelli, wisely pointed out this and other less glaring task force errors in a press release responding to issuance of the original report,¹³⁸ and thereby successfully turned the media's attention from the financial shortcomings of the Project to the failures of the task force. The DWR also took this opportunity to disseminate additional misinformation about Project financing. The task force report had asserted that construction monies provided from state tidelands funds, perhaps ultimately as much as \$1 billion, were going to be repaid without interest, and that this arrangement thus constituted a very substantial taxpayer subsidy to the Project.¹³⁹ The DWR press release contained a letter from Mr. Gianelli that tried to deny the existence of this subsidy:

Since all construction, operation, and maintenance costs of the project which are allocated to the project water users are repaid with interest by the project water users, the users are charged for repayment of principal plus interest with regard to tideland funds.¹⁴⁰

That the DWR is obligated to pay interest on the state's tidelands loan would be interesting news to DWR's bondholders. The DWR's 1972 report on the State Water Project, written after the Nader charges, clearly states that the tidelands funds are not required to be repaid with interest,¹⁴¹ and contains financial projections that show a mere return of principal after 20 years' interest-free use of the funds.¹⁴² The press was apparently either unable to discover the DWR's misrepresentation, or was too busy discrediting the Nader report to find it worthy

137. Pp. 600-07, 159. Some Nader associates understand discounting, even some who served on the California task force. See pp. 609-10; BERKMAN & VISCUSI, *supra* note 31, at 83-89.

138. DWR, News Release, Aug. 23, 1971. See also L.A. Times, Aug. 22, 1971, § B, at 6, col. 1.

139. Pp. 601, 158.

140. DWR, News Release, Aug. 23, 1971.

141. DWR, Bulletin 132-72, at 84 (1972).

142. *Id.* at 67-71.

of mention. But the greater error was the task force's; its incompetence had led to the garbling of one of its most important messages—that Californians collectively were going to take massive losses on the State Water Project.

The task force's inquiry into the distributional effects of the Project was more competent than its efficiency analysis. *Politics of Land* repeats the familiar but credible allegation that large landowners in the western San Joaquin Valley are the Project's major beneficiaries.¹⁴³ (It might have added that materials suppliers, building trades unions and heavy building contractors would have an interest in promoting a multi-billion dollar construction project.) How irrigation water is priced determines whether agricultural landowners obtain "windfall" gains from an irrigation project. Most retail water agencies sell water for agricultural use at rates much lower than for domestic and municipal use. The Metropolitan Water District, for example, currently sells water for agricultural use at roughly one-half the price it charges for water for domestic use, and plans to reduce the fraction to one-third over the next several decades;¹⁴⁴ the DWP's pricing policy favors irrigators even more than MWD's.¹⁴⁵ Some of this disparity in price is justified because irrigation water need not be as pure as residential water and because its distribution network is usually less elaborate. However, these differences in the cost of supplying water could justify only a small part of the price variation.

Price discrimination theoretically could be employed by a water agency, like any other monopolist, to capture the "consumer surplus" some buyers would obtain if the agency charged uniform prices. Agricultural water prices seem to be too low, however, for that to be the entire explanation for the price differential. If a water agency practiced effective price discrimination, the value of agricultural lands would not be significantly affected by the availability of water because a landowner's benefits from its supply would be largely offset by his liabilities to the water agency in tap-in fees and unit water charges. If the Nader task force is correct in reporting that isolated Kern County locations have risen over one hundred dollars an acre in value in anticipation of the availability of Project water,¹⁴⁶ current price discounts to agricultural users seem excessive and hard to justify.¹⁴⁷

143. Pp. 163-66; 619-23.

144. MWD, *supra* note 108, at 87.

145. DWP, Annual Report 1972, at 28-29.

146. P. 166.

147. As explained in text at note 149 *infra*, water agencies should be commended

The losses imposed by the State Water Project will far outweigh the windfall gains it bestows. Although the DWR tries to create the impression that the costs of the Project will be paid for primarily by water users, the Fellmeth team correctly charged that the Project is blessed by substantial subsidies. All California taxpayers, for example, suffer when the state foregoes possible income by making an interest-free loan of tidelands funds to the Project. The largest subsidy is provided by local property taxpayers in Central and Southern California. The DWR has passed on most Project losses to the 31 water districts that have contracted for Project water; those water districts in turn have begun to pass on their deficits on Project water operations to their residents through property tax levies.

Water agency officials defend their use of property taxes to supplement revenues from user fees on the ground that those taxes are a device for recapturing increases in land value that result from market recognition of improved water supply in an area.¹⁴⁸ Even if one ignores the impact of the Williamson Act, this rationale is unpersuasive because the most direct means for preventing speculative gains from the availability of new water supplies is to impose higher rates on water users, not to tax *all* real property regardless of its utility for water-intensive activities. Property tax support of a water agency like the MWD might be justified, however, to permit it to sell some water at its marginal cost of providing it. Most economists favor marginal cost pricing by public utilities whose fixed costs are sunk. That policy assures optimal use of its existing facilities—that is, the right amount of production, and the distribution of that entire production to consumers.¹⁴⁹ When a water agency's marginal cost of providing water is less than its average cost, it needs an additional source of revenue, other than unit water charges, to permit it to price at marginal cost. The MWD's marginal cost of delivering additional Project water to Southern Californians during the next few years, for example, may be as low as \$30 an acre-foot,¹⁵⁰ and should probably be sold at that marginal cost to assure

for employing marginal cost pricing to allocate their water. If only agricultural water rates are set to equal marginal costs, however, the agencies have the burden of explaining why agricultural consumers alone are offered the lower prices.

148. J. Lauten, Comments on Nader Report, Aug. 31, 1971, at 12 (unpublished memorandum by MWD's general counsel) [hereinafter cited as Lauten]; M. Holburt, letter-to-the-editor, L.A. Times, Aug. 26, 1971, § II, at 7, col. 1.

149. For a superb discussion of municipal water pricing, see *WATER SUPPLY*, *supra* note 111, at 87-113. The task force's treatment of this topic is woefully simplistic. See pp. 60, 165.

150. See notes 153 & 162 *infra*.

proper allocation. The MWD's average cost will be many times that, however, and it will suffer serious financial losses from these operations. Retail water agencies like DWP that are not tax-supported use fixed monthly services charges on outlets to make up this deficit; a wholesaler like the MWD, however, unless it can devise a system of fixed periodic service charges against its 27 constituent members, must raise the balance of its revenues through taxation.

The MWD's future losses on its Project water operations can be roughly estimated. Like other Project contractors, the MWD is obligated, regardless of its water purchases, to make fixed payments to the DWR over a 50-year period to cover its share of the DWR's construction costs and fixed operating costs. The MWD's share of capital costs exceeds that of all other contractors combined; it must reimburse the DWR, for example, for over \$1 billion of Project facilities south of the Sacramento Delta alone.¹⁵¹ In 1972 the MWD paid the DWR over \$50 million to meet these fixed obligations,¹⁵² although it received only a trivial amount of Project water that year. The DWR, following an efficient marginal cost pricing strategy, also imposes two charges that vary with the quantity purchased by a contractor. These consist of a unit charge for water at the Sacramento Delta and a charge to cover the state's variable operating costs of delivering it. For the next decade or two these charges should total less than \$20 an acre-foot for MWD purchases at Castaic Lake.¹⁵³ Although this marginal price is attractive to the MWD and should elicit substantial purchases, the MWD's average purchase price for this water is of course monumental because of its fixed contractual obligations.

The MWD has compounded its original mistake of contracting for vast quantities of State Water Project water; it is now undertaking its own \$1.3 billion project to construct facilities for distributing it. Debt service on the bonds financing MWD's own construction is projected to range between \$30 million to \$55 million per year over the next several decades.¹⁵⁴ Since MWD is using internal funds to finance about one-third of the cost of this construction,¹⁵⁵ the opportunity cost of those funds is also substantial. Table I provides a rough approxi-

151. DWR, Bulletin No. 132-72, at 150.

152. *Id.* at 154, 158.

153. *Id.* at 161, 170.

154. MWD, *supra* note 108, at 66-67.

155. *Id.* at 44.

mation of the losses the MWD will incur on Project water operations in selected years through 1990, the last year for which full data are available. The Table is generous to the MWD because it uses DWR's projections of operating costs that fail to provide for inflation,¹⁵⁶ assumes that MWD will be able to sell its entire supply of Project water at its domestic and municipal use rates, and selects MWD's borrowing rate as the proper discount rate. Despite these rosy assumptions, the MWD is shown to have been losing roughly \$85 million a year for the last few years because of its involvement with the Project, and is projected to continue sustaining comparable annual losses for the next several decades.

TABLE I
AUTHOR'S APPROXIMATION OF MWD'S COSTS AND REVENUES FROM
PARTICIPATION IN THE STATE WATER PROJECT
(\$ in millions)

	Year			
	1972	1973	1980	1990
1. DWR deliveries to MWD (acre-feet) ¹⁵⁷	60,000	110,000	828,000	1,400,000
2. Total Transportation Charge ¹⁵⁸	\$ 52.7	\$ 58.2	\$ 66.3	\$ 77.9
3. Total Delta Water Charges ¹⁵⁹	\$ 0.5	\$ 1.0	\$ 7.4	\$ 16.8
4. Debt Service on bonds Financing MWD's Construction ¹⁶⁰	\$ 22.4	\$ 26.8	\$ 37.4	\$ 54.3
5. Opportunity Cost of MWD's Internal Construction Funds ¹⁶¹	\$ 11.2	\$ 13.4	\$ 18.7	\$ 27.2
6. MWD's Variable Delivery Costs at \$10 per acre-foot ¹⁶²	\$ 0.6	\$ 1.1	\$ 8.3	\$ 14.0
7. Total Cost to MWD	\$ 87.4	\$100.5	\$138.1	\$190.2
8. MWD Domestic Water Sales Price (in dollars per acre-foot) ¹⁶³	\$ 48	\$ 52	\$ 66	\$ 82
9. MWD Revenues (\$ millions) (line 1 x line 8)	\$ 2.9	\$ 5.7	\$ 54.6	\$114.8
10. MWD Loss (line 7 less line 9)	\$ 84.5	\$ 94.8	\$ 83.5	\$ 75.4

Even if these deficits are eliminated thereafter, immediate costs

156. DWR, Bulletin No. 132-72, at 98.

157. *Id.* at 120-22.

158. *Id.* at 169.

159. Calculated by multiplying the quantities in line 1 of the Table by the appropriate Delta Water Charges presented in *id.* at 170.

160. MWD, *supra* note 108, at 66-67.

161. Calculated at 50 percent of line 4.

162. This is probably a conservative estimate. MWD incurred \$23 million in total operating expenses in 1972 while delivering 1,250,000 acre-feet of water, or an average of almost \$20 per acre-foot. MWD, Annual Report 1972, at 140.

163. MWD, *supra* note 108, at 87.

weigh more heavily than future benefits when one discounts to present value. By conservative estimate, the MWD's involvement in the State Water Project has a present worth to Southern Californians of *minus* \$0.5 to \$1 billion.

Inefficient aqueducts are not a new problem for the MWD; it had great difficulty selling Colorado River Aqueduct water for the first 20 years of that system's operation. The MWD made up those deficits by levying property taxes, the same strategy it is now pursuing to cover its losses on its contract with the DWR. In 1972, the MWD assessed a 17-cent tax on the \$29 billion assessed valuation in its district, thereby producing roughly \$49 million in revenues,¹⁶⁴ an amount almost sufficient to cover its fixed contractual obligations to DWR. Contrary to the DWR's statements that the Project is self-supporting, Southern Californians will probably be making up its deficits through property taxes for much of the rest of this century.

MWD applies an essentially uniform property tax rate to the District's property owners. The rate for an area does not correlate significantly with the amounts of MWD water purchased by that area's member city or water district. Residents of the City of Los Angeles, for example, paid MWD \$220 in taxes in 1972 for every acre-foot of MWD water consumed; residents of San Diego County contributed only 1/12 as much, \$18 per acre-foot.¹⁶⁵ One way to deter a water wholesaling agency like MWD from undertaking overly ambitious projects is to require it to raise the revenues it needs to carry on marginal cost pricing only through annual service charges on its member agencies. These charges could be keyed to the amount of their past and projected future consumption of MWD water. This policy would have thrown more of the costs of the California Aqueduct on San Diego and Orange counties and might have discouraged property owners in those areas from supporting the Project since they would have known they would be less able to shift its losses onto non-users elsewhere in Southern California.

Most of the costs of the State Water Project are sunk and can no longer be avoided. It is thus most unlikely that it would make economic sense at this point to shut down the California Aqueduct. Water agencies can maximize efficiency hereafter by evaluating the

164. MWD, Annual Report 1972, at 141.

165. Calculated from Tables 14 and 36, *id.* at 27, 152. MWD offers some water to the City of Los Angeles at special agricultural rates. Lauten, *supra* note 148, at 19-20. This appears to be token conscience money, given to counter the seeming inequities of MWD's tax structure.

marginal costs and benefits of each incremental construction project or operating program they might undertake. Southern California has other relatively inexpensive sources of water available to it. Both water agencies and industrial corporations, for example, are increasingly experimenting with reclaiming waste water; the MWD could buy additional entitlements to Colorado River water to keep that Aqueduct at maximum capacity. Marginal analysis might thus indicate that large parts of the DWR's \$398 million construction program for the rest of the decade,¹⁶⁶ including perhaps the Peripheral Canal, are not cost-effective. The MWD has mercifully pushed back the construction schedule of the \$0.7 billion Foothill Feeder¹⁶⁷ and a new cost-benefit analysis would likely warrant further postponements. The huge electrical requirements for pumping water over the Tehachapis¹⁶⁸ also warrant reevaluation of the efficiency of continuing to install additional pumping units at the A. D. Edmonston plant, especially since it now seems those pumps will require construction of new nuclear power plants in the southern San Joaquin Valley. In short, DWR should negotiate contract revisions with MWD and its other customers to prevent the people of California from throwing good money after bad.

V. ANALYTICAL POVERTY LEADS TO PERVERSE POLICY SUGGESTIONS

The authors of *Politics of Land* go beyond reporting; they suggest specific policies for improving resource management in California—stronger conflict of interest legislation;¹⁶⁹ decreased reliance on special districts as governing units;¹⁷⁰ less property taxation of land improvements;¹⁷¹ and the like. These policy suggestions often seem like after-thoughts, are never well developed, and on balance appear likely to make things worse. Mr. Nader and his associates have always lacked an analytical framework for probing social problems that was powerful enough to generate reliable policy prescriptions. Without an analytical framework to discipline it, a team effort like *Politics of Land* cannot escape ending up as a mélange of environmentalist clichés.

The editors of the book apparently tried unsuccessfully to impose some sort of coherent analytic framework on the contributions of team

166. Gianelli, *supra* note 126, at 8.

167. MWD, *supra* 108, at 37-45.

168. See note 105 *supra*.

169. Pp. 486, 491-92.

170. Pp. 401-02.

171. Pp. 359-60.

members. In his Foreword, Fellmeth, a one-time Goldwater supporter,¹⁷² proposes guidelines for policy-making that even a Chicago School economist would find acceptable:

We were guided by one major economic premise which is best stated at the outset: Insofar as possible, those who benefit from the expenditure of public monies should generally pay the cost of providing that benefit and those who impose costs—whether long-range, speculative, or indirect—on others, should bear those costs. . . . Suggestions for reform seek correction through the adjustment of self-regulating systems, so that they may properly function, rather than through the imposition of additional layers of bureaucracy dependent on the perpetuation of the problem they were designed to solve.¹⁷³

These principles constitute an excellent starting point. The text of *Politics of Land*, however, only occasionally reflects devotion to them.

The task force did try to develop a system of “zoning up” fees to internalize the external benefits of installation of utility lines.¹⁷⁴ This effort was only half-hearted and its presentation is confused. In most chapters of the report, the task force abandoned the search for self-regulating mechanisms, and retreated to the shopworn notion of comprehensive master planning. Thus the transportation chapter proposes creation of “a single comprehensive Transportation Agency, which would coordinate and regulate air, rail, water and road transportation.”¹⁷⁵ The agriculture chapter suggests that state ownership of all California water rights would be preferable to the current “maze of private water holdings,”¹⁷⁶ and implicitly endorses state acquisition of valuable agricultural lands for lease back to private farmers.¹⁷⁷ Establishment of a statewide comprehensive land planning agency is endorsed recurrently.¹⁷⁸

Suggestions like these give *Politics of Land* the schizophrenic character that several reviewers have discerned in Nader publications.¹⁷⁹ Although their exposés have documented as well as anyone’s the tendency of regulatory agencies to become handmaidens of narrow private

172. McCARRY, *supra* note 4, at 184.

173. Pp. xv, xvi. Cf. Green & Nader, *supra* note 52.

174. Pp. 402-04.

175. P. 454.

176. P. 60.

177. P. 43.

178. Pp. 42, 289-90, 401-03.

179. See, e.g., Lazarus & Ross, *supra* note 52; Winter, *supra* note 52.

interests, Nader & Associates continue to propose centralized governmental solutions to social problems. *Politics of Land* describes the futility of comprehensive planning in the City of San Jose.¹⁸⁰ If land planning proved to be an exercise in frustration at the local level, why should the task force think that it would operate any better state-wide? Government may tend in fact to be more efficient the more local it is. The water agencies discussed in this review, for example, can be ranked in the following rough hierarchy of inefficiency: the U.S. Bureau of Reclamation is the most wasteful;¹⁸¹ the state DWR and regional MWD perform slightly less profligately; and the least inefficient agencies are the local water retailers like DWP. This hierarchy suggests that the most efficient strategy for providing water supply is to allow local agencies to make incremental efforts to develop new sources, rather than to establish a state-wide agency to project the "requirements" for California water over the next half century and to plot out a massive system like the State Water Project for meeting all those requirements.¹⁸²

Self-regulating, market-oriented mechanisms for dealing with social problems are more subtle than splashy new centralized government agencies. These mechanisms involve such devices as cash, not categorical, government aids to individuals and other governments; regulatory techniques that permit regulated parties to choose among different ways of carrying out their activities; institutional mechanisms (analogous to bankruptcy) for ousting public officials who make consistent mistakes in resource management; and the like. Development of these mechanisms requires harder thinking than this particular Nader team was willing to exert. *Politics of Land* demonstrates throughout the vicissitudes of centralized planning, but asks us to try more of it.

180. Pp. 378-80, 383-89.

181. See generally BERKMAN & VISCUSI, *supra* note 31.

182. Cf. WATER SUPPLY, *supra* note 111, at 296-97.

IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS. By Raoul Berger. Cambridge, Massachusetts: Harvard University Press, 1973. Pp. 345 (hard cover). \$14.95.

REVIEWED BY JEFFERSON B. FORDHAM†

Raoul Berger, in his new book concerned with the constitutional aspects of impeachment at the national level in the country,¹ has shared the fruits of his study at an extraordinarily relevant time in American experience. His book is an impressive scholarly product that does particular credit to the craft of the legal historian. There can be no doubt that historical perspective is of uncommon significance for constitutional interpretation on the subject of impeachment. In federal constitutional interpretation the Supreme Court has held the tribunal to be relatively free, as we all know, to resort to "legislative history." Actually this involves, as to the original document, not only the proceedings of the 1787 Convention but also those of the state ratifying conventions. The author here has been diligent in resorting to both sources. As an historian he has explored, of course, tertiary sources, such as *post hoc* observations of members of the 1787 Convention.²

In an overview, one must add that there remain distinctly more questions than answers. This Review will focus on some of the major issues treated in Mr. Berger's book and offer brief commentary on his positions. All pertinent federal constitutional provisions are reproduced in a footnote in aid of ready reference.³

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1. R. BERGER, IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS [hereinafter cited to page number only].

2. There is, of course, question as to what authority an interpreter of the Constitution is warranted in giving such tertiary expressions. There is precedent for such consideration as in *Wesberry v. Sanders*, 376 U.S. 1 (1964), where such evidence was considered in holding that the article I, section 2, provision for election of members of the House by the "people" of the states demanded one person/one vote representation.

3. U.S. CONST. art. I, § 2, para. 5: "The House . . . shall have the sole Power of Impeachment."

I. OFFICERS SUBJECT TO IMPEACHMENT

The President, Vice-President and all civil officers of the United States are impeachable. Does the "civil officer" class include members of the Congress? In 1797, in the case of Senator William Blount, the Senate set a precedent against impeachability of a member of Congress that Mr. Berger challenges. This has a rather academic ring, especially since each house has the expressly granted authority to expel a member. One might speculate about the availability of judicial review of an act of expulsion, in the light of the decision in *Powell v. McCormack*⁴ as to exclusion, but that, too, is not on a front burner.

It is only fair to say that the Berger position is supported, as he notes, by English experience, and that a case can be made for interpreting "civil officers" to apply to members of Congress as well as to judges.

In contrast with the posture of legislative representatives, there is no doubt that federal judges are civil officers subject to impeachment, if practical interpretation means anything. Mr. Berger's complaint is that in the United States impeachment has been a process used largely as a means for the ouster of corrupt judges. One might essay to draw a distinction between judges of constitutional courts and so-called statutory courts, in this respect, but how it could be effectively rationalized is not evident.

U.S. CONST. art. I, § 3, paras. 6-7:

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

U.S. CONST. art. II, § 2, para. 1: "The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."

U.S. CONST. art. II, § 4:

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

U.S. CONST. art. III, § 2, para. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . ."

U.S. CONST. amend. XXV, § 1: "In case of the removal of the President from office, or of his death or resignation, the Vice President shall become President."

4. 395 U.S. 486 (1969).

What officers in the executive branch are impeachable? Clearly those of cabinet level and those of ambassadorial rank in the diplomatic service are covered. How far beyond this impeachability reaches, the Berger study does not trouble to explore. Perhaps this is just as well, even though impeachment would appear to cover high level personnel in the subcabinet category and perhaps some below who had a substantial measure of authority and discretion. But the inquiry is not of practical moment. Here, as was decided in *United States v. Myers*,⁵ the executive power to appoint carries with it the power to remove. Would a responsible President be likely to retain in a cabinet post one whose conduct was highly suspect and who was *persona non grata* to the Congress?

The top level officers in an independent agency occupy a different stance. As to them Congress may provide for appointment for a fixed term subject to removal only for cause and may determine the procedure for such removal.⁶

II. CAUSE—GROUNDS FOR IMPEACHMENT

The stated grounds for impeachment are "treason, bribery or other high crimes and misdemeanors." There is one part of this branch of the larger subject, which, despite the scholarship of the learned author, deserves but short shrift. We are told that in the light of English practice, "high crimes and misdemeanors" refer to great offenses in presidential impeachment, but that those terms embrace lesser offenses in impeachment of judges. As the book concedes, this presents difficulties. Whatever the English experience drawn upon by the framers may have been, the constitutional language plainly does not differentiate between impeachable officers in this respect.

A central issue discussed by Mr. Berger is whether the grounds for impeachment comprehend conduct that is not an offense punishable under the criminal law. The Constitution, indisputably, uses the language of the criminal law and process in its treatment of impeachment. For example, it excepts impeachments from the pardoning power. Mr. Berger takes note of all this, but, in light of English history, what went on at the 1787 Convention, and congressional interpretation in actual cases, he has achieved the confident judgment

5. 272 U.S. 52 (1926).

6. *Humphrey's Executor (Rathbun) v. United States*, 295 U.S. 602 (1935). This case did not involve a procedural challenge. The conclusion offered in the text proceeds from a premise that "cause" is not meaningful without fair process.

that the legal grounds for impeachment are not confined to indictable crimes. More particularly, he explains the pardon power clause as an instance of superabundant caution by the framers. While one may question this, since it is criminal offenses to which pardons relate, it should be added, at once, that the author is not suggesting that there are no limits. He rejects out of hand the position taken by Congressman Gerald Ford a few years ago in relation to the case of a Supreme Court Justice, that an impeachable offense is whatever the House and Senate consider it to be. The Ford view is utterly political; it denies the rule of law in impeachment proceedings.

Mr. Berger makes an impressive historical case, supported by the fruits of his research in English experience, that "high crimes and misdemeanors" are words of art denoting a category of political (*i.e.*, not necessarily indictable) crimes that the founding fathers doubtless well understood to be such. He identifies treason and bribery as clearly political crimes and easily accords "high crimes and misdemeanors" a like characterization by association through resort to the canon, *nos citur a sociis*. This is curious reasoning. Whatever the English impeachment background, treason is defined as a crime by the Constitution in the judicial article with the element of sanction left to the Congress. The definition appears to be intended for all purposes, including impeachment. Thus, the reference to "other" high crimes and misdemeanors in the impeachment provision seems to associate them with treason as in the criminal category. It may be suggested that a proscribed act can be both a political crime and a crime in the general criminal law sense.

Since there is no federal common law of crimes, the only offenses against the United States are those defined by statute. This was settled by the Supreme Court in 1812.⁷ Thus, if only punishable offenses were grounds for impeachment, there could have been no such actual grounds until Congress enacted some criminal law. What we are told is that this was a later development not anticipatable by the men in the Convention. It must be recalled, however, that there were those who in the 1780's thought that there was a common criminal law of the United States. Perhaps leading figures in the Convention anticipated that there would be. An influential delegate to the North Carolina ratifying Convention, James Iredell, a number of whose observations as such are prominently noted by Mr. Berger, took the posi-

7. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812). Treason is the one exception; it is defined by the Constitution.

tion later as a Supreme Court Justice riding the circuit that violation of neutrality was a common law crime punishable in the federal courts.⁸

The limited congressional precedents support the Berger view that impeachment is not confined to punishable offenses. This is not to be taken lightly. On the other hand, even if impeachment judgments are not reviewable by the courts, as I shall suggest is the case, the Senate might depart from the precedents. Such departures are not uncommon in the judicial sphere.⁹

The book does not neglect the policy element. What is the thrust of impeachment under the Constitution? The objective is to get an individual as to whom grounds for impeachment exist out of office and to disqualify him from further officeholding. That is exactly the effect of a conviction by the Senate.

State experience with impeachment since 1789 is not taken into account in the Berger study. It is of interest that while the federal model has influenced the states, they have not been slavish in tracking it. The Missouri provision, for example, includes misconduct, habitual drunkenness and incompetency in the grounds for impeachment.¹⁰ The object is riddance and the grounds are not confined to criminal offenses.

What Mr. Berger contends is that since only lesser judges were held to criminal accountability under English practice, leaving high court judges to be acted upon by impeachment, the framers might well have concluded that indictability was not the test of impeachment of high court justices. This leads him to argue that surely the framers would not have exacted a more severe standard of impeachment for district court judges than for supreme court justices. But this can be turned around; the framers might have been choosing the more stringent test for both.

It is a Berger thesis that impeachment proceedings are not criminal in character. His principal reliance here is upon the incompatibility of the impeachment process with the criminal procedure safe-

8. II G.J. McREE, *LIFE AND CORRESPONDENCE OF JAMES IREDELL* 410, 416 (1858). There remains the debated question whether a *staté* crime may be a ground for impeachment.

9. A conspicuous example is *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), *overruling* *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

10. Mo. CONST. art. VII, § 1.

guards of the Bill of Rights. What, for example, of the fifth amendment right to grand jury action in relation to an infamous crime, or the privilege against self-incrimination or the ban upon double jeopardy? The point, of course, is that it is incongruous to apply at least some of these safeguards to the impeachment process. This is true of double jeopardy by force of the express language of the basic impeachment clause.

It may be suggested that two other approaches to the applicability of the Bill of Rights are open. The first is to regard impeachment as something of a unique character—a device unto itself—to which the Bill of Rights was not intended to apply. An intermediate approach is to apply Bill of Rights safeguards to impeachment to the extent compatible with the nature of the impeachment process. Thus, the privilege against self-incrimination should apply for it obviously bears upon subsequent criminal proceedings. The presence of the right to counsel is equally free from doubt.

We come, perhaps belatedly, to the question: why have provisions for impeachment? The framers were sophisticated political thinkers who both saw the need for checks and balances and particularly feared abuse of executive authority. They were not embracing parliamentary government. The chief executive was to be elected for a fixed term of office. There was occasion for a strong safeguard against excesses in his uses of power and serious neglect of duty. Thus, as perceived by Mr. Berger, they found in the English conception of high crimes and misdemeanors enough play to cover serious, albeit not indictable, abuses of authority and neglect of duty.

Authority can be abused either directly or through subordinates. The book quotes Madison as saying in the Virginia ratification convention that “if the President be connected in any suspicious manner with any person, and there be grounds to believe that he will shelter him” he may be impeached.¹¹

Does impeachment lie for conduct outside of office? Suppose a Vice-President were to engage in conduct out of office that was clearly treasonable. The Constitution refers simply to treason; it does not except activity unrelated to office. Suppose a cabinet officer used his influence to get a corporation to make an illegal political contribution to the national treasury of the former's political party. That would be an abuse of his position and would bear upon his fitness as a mat-

11. P. 89.

ter of character and respect for federal law. In both cases, under the Berger view, the conduct would be impeachable.

III. REMOVAL OF JUDGES

There is the familiar contention that, since federal judges hold their offices during good behavior and since the Constitution makes express provision for no method other than impeachment for removal of judges, "misbehavior" should be considered a ground for impeachment. The basic impeachment provision lends no support to this; it makes no distinction, as to grounds for impeachment, between classes of offices covered. If this be the case, how may a judge whose behavior as such is less than good be removed? The Berger answer is that there is constitutional basis for a judicial process of removal. And he devotes the longest chapter of the book to judicial "good behavior."

While the author draws upon English experience in resort to *scire facias* to effect removal of minor judges at least, he rests his case upon his conception of the constitutional design. If judicial tenure is made by the Constitution to depend upon good behavior, there must be means of termination of service upon the happening of the condition subsequent, that is, bad conduct or misbehavior. All that it would take, he suggests, would be congressional action based upon the necessary and proper clause. The impeachment clause is not expressly exclusive and surely we are not to allow a mere canon of interpretation, like *expressio unius, exclusio alterius est*, control so important a matter.

Interestingly, impeachment is identified in the first sentence of the book as a process which, in America, is largely a means for the ouster of corrupt judges. If there has been power in Congress all along to avoid or greatly reduce this burden by providing another method of removal, why has such action never been taken? The Berger answer is that it is never too late to see the light and heed the voice of reason. Certainly, Congress could give it a try and leave all of us to look to the Supreme Court for the last word.

In treating of the removal of judges, Berger does not lay much store by reasoning which explains the presidential power of removal as something derived by implication from the power to appoint. He fails to note why the situation of appointive judges is not parallel to appointees in the executive branch. The judges are members of a distinct branch of the government, whereas appointees in the executive

branch are there to work under the chief executive in getting done the job for which he has overall responsibility.

One wonders why the author does not resort to the rules of the House and Senate as a responsible interpretation of the constitutional provisions on impeachment. That they are to be accorded some weight is beyond serious challenge. In connection with his proposal for statutory provision for judicial removal of judges, he raises a serious question as to the constitutionality of the proposal by Preble Stolz for congressional streamlining of the impeachment process. Professor Stolz calls, in part, for use of a master or masters to conduct formal evidentiary hearings for the Senate and submit proposed findings of fact and conclusions of law.¹² Mr. Berger doubts that the hearing function could be delegated constitutionally. He does not refer to the fact that in 1936 the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials were so amended as to provide for a committee of twelve senators to receive evidence and take testimony with full Senate powers for the purpose.¹³

As a further word anent federal judges, one agrees with Professor Kurland that attention should be given to the operative judicial selection process in which, particularly as to district judges, individual senators play such an at once central and extra-constitutional role.¹⁴ Somehow we should have done with this aspect of Senate clubbiness, a system that subordinates independent merit appointment to partisan politics.

IV. JUDICIAL REVIEW

The Berger thesis that an impeachment judgment is subject to appellate review by the Supreme Court is, to say the least, astonishing. He relies heavily upon the case of *Powell v. McCormack*,¹⁵ which involved judicial review of House action in refusing to seat one elected to that body. He does not refer to the fact that in the *Powell* case collateral attack was launched at the district court level nor to the fact that the Court recognized that it could act only as against employees of the House—not on members—in view of the barrier of the speech or debate clause. Is it to be said that the Court could act on the Senate as a body? In the case of an impeachment judgment against a Presi-

12. Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?*, 57 CALIF. L. REV. 659, 667 (1969).

13. SENATE MANUAL, SEN. DOC. NO. 1, 93d Cong., 1st Sess., § 110 (1973).

14. See Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. CHI. L. REV. 665, 666 (1969).

15. 395 U.S. 486 (1969).

dent, would the Chief Justice preside over the Court on review, as well as in the Senate trial? Arguably, a federal court might entertain a collateral attack upon an impeachment judgment on the ground that the Senate had exceeded its jurisdiction by acting on the basis of a charge or ground that was neither treason nor bribery nor other high crime or misdemeanor. This position is supported by the opinion in a Texas case, in which it was said that the courts may determine, in a proper case, whether the state senate had acted outside its constitutional authority in an impeachment trial.¹⁶

The trouble with allowing such collateral attack is that the Senate sits as a court with "sole" jurisdiction in impeachment and, as such, can be said to have power to make authoritative determinations of jurisdictional issues just as the Supreme Court does in the federal court sphere. The judicial power extends to federal questions and diversity of citizenship cases in law or equity. Would direct review of an impeachment judgment be such?

Nor does Mr. Berger take account of congressional authority to regulate the appellate jurisdiction of the high court. The judicial code makes no provision for appellate review of an impeachment judgment. Is it to be said that the Court could do so *sua sponte*? What process could be used to get the Senate record before the Court for review? Certiorari? Is the Senate to be viewed as an inferior court?

The author's concern about political influences in the Senate elicits sympathy, but there is no obviating the political element in a legislative trial, as his accounts of the Chase and Johnson impeachments bring out forcefully. As he has noted with respect to the Johnson impeachment, not even the Chief Justice as presiding functionary can control the political forces. What chance is there in this country today of truly keeping partisan attitudes and influences in check in an impeachment trial? This is not to say that there should be no resort to impeachment.

The study does not deal with the question whether judgment of

16. *Ferguson v. Maddox*, 114 Tex. 85, 263 S.W. 888 (1924). This case involved the political fortunes of Ma and Pa Ferguson, who, in their day, were much in the national news.

In *State ex rel. Olson v. Langer*, 65 N.D. 63, 256 N.W. 377 (1934), which involved impeachment of William Langer, another nationally known person, the Supreme Court of North Dakota granted quo warranto, at the behest of the lieutenant governor, ousting Governor Langer from office on the ground of "disability" brought about by Langer's conviction of a federal felony. In doing this, of course, it first determined that the question of disability was justiciable.

impeachment must occur before a civil officer could be charged, tried and convicted under the criminal law on the same matter. The objection was not pursued in the recent income tax evasion case against Mr. Agnew for the obvious reason that he had resigned from the vice-presidential office. Certainly there is no express determination of a controlling order. In the case of the President, involvement as a defendant in a criminal trial and the application of punitive sanctions—notably imprisonment—would be incompatible with the performance of his duties. There is no provision for suspension from office during impeachment proceedings.¹⁷ Conceivably, the disability provisions of the twenty-fifth amendment could be said to apply.¹⁸ There would be no comparable incompatibility as to performance of the functions of other civil officers covered by the impeachment clause. Federal judges have been tried in the criminal courts without being subjected to impeachment proceedings in the first instance.¹⁹ It could be said again that the function of impeachment is removal from office and disqualification for further federal officeholding and, thus, that the constitutional clause as to subsequent criminal prosecution was designed simply to make it clear that criminal liability was not barred by an impeachment conviction.

It is an interesting if hardly fruitful speculation as to whether the overhang or potential of impeachment has been an influence of any substance upon official conduct. This observer regards the matter with a welter of skepticism so far as the influencing of rectitude and fidelity to duty are concerned.

There remains the function of impeachment to get a bad “un” out. This Review is not an appropriate vehicle for expressing personal views about resort to impeachment of the incumbent President. But it can be said in general terms at this time that the House has a responsibility to make thorough inquiry and, if it finds probable cause to exist, to proceed with exhibiting articles of impeachment to the Senate. The possibility—perhaps probability—that impeachment proceedings would be protracted and highly political should not be a deterrent.

17. Some state constitutions do ordain suspension. *E.g.*, UTAH CONST. art. VI, § 20.

18. *See* U.S. CONST. amend. XXV, § 4.

19. At p. 168 Mr. Berger refers to a district judge case in Pennsylvania in the 1930's. He reports that the judge was acquitted and later resigned when impeachment threatened. Recently a court of appeals judge, Otto Kerner, was convicted in federal court without any prior impeachment proceedings. *United States v. Isaacs & Kerner*, No. 71 C.R. 1086 (N.D. Ill. 1973), *aff'd*, at App. No. 73-1409, -1410 (7th Cir., Feb. 19, 1974). It is the reviewer's apprehension that the immediate point was not raised.

SEXUAL FREEDOM AND THE CONSTITUTION. By Walter Barnett. Albuquerque: University of New Mexico Press, 1973. Pp. 333 (hard cover). \$10.00.

REVIEWED BY D. J. WEST†

A book which analyses the unsatisfactory state of American law on homosexuality is to be welcomed. It is noteworthy that the author uses the title sexual freedom rather than homosexual freedom, when the latter seems to be his main theme.

Two important chapters are devoted to a review of the state of scientific knowledge about the causes of a homosexual orientation and the prospects of modifying it with the aid of medical and psychological techniques. The moral drawn from this survey is that homosexuals cannot be held personally responsible for their sexual inclinations, that for many of them the prospects of change by means of any known treatment are remote, and that the community could well afford to allow them to enjoy the love life they need without harassment from the criminal justice system. These sentiments, which are heartily endorsed by the present reviewer, would seem to point toward the desirability of a policy of decriminalisation, such as was implemented in England and Wales by the Sexual Offences Act of 1967,¹ which exempted consensual homosexual behaviour between two adults in private from any criminal action. Despite a long standing recommendation of similar legislation by the American Law Institute,² Professor Barnett is skeptical of the likelihood of its adoption in many states of the Union, since public opinion is generally thought to be antagonistic toward such reform. So far only seven states have enacted the necessary legislation, and this was done only through technical revisions of the criminal codes by legal experts without much political discussion and without reference to the voters.

Whether this pessimism about the prospects for meaningful legal

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1. Sexual Offences Act of 1967, c.60.

2. MODEL PENAL CODE § 207.5, Comment at 277-79 (Tent. Draft No. 4, 1955).

reform is fully justified is open to question. Anyone who studied the diatribes against homosexuals in the parliamentary debates and in the English popular newspapers, at the time the Wolfenden Committee³ first made the proposal to liberalise the anti-homosexual laws, might be forgiven for supposing that public intolerance would never permit such a change. Yet 13 years later it happened. Moreover, the legal change produced none of the dire consequences foretold by the opponents of reform. Apart from the brassy propaganda of a small minority of "gay" activists, there has been no homosexual revolution, and according to the criminal statistics no increase in the incidence of the homosexual offences that remain (namely importuning, public indecency, and misconduct involving young persons). Furthermore, there has also been no sign of any substantial puritanical backlash against homosexuals. The mass media have become conspicuously better informed and less unsympathetic in their references to the homosexual minority. Serious biographers, playwrights and novelists have tended to give franker and more understanding accounts of the homosexual as well as the heterosexual aspects of life. Among civilised Englishmen, the paranoid attitudes toward homosexuals so prevalent a few decades ago are no longer fashionable. The old anti-homosexual criminal code, so widely accepted a short time ago, is now seen to be absurdly archaic.

There may be a lesson to be drawn from this for an understanding of the place of the criminal law in the determination of standards of morality. The criminal code reflects, rather than creates, sexual mores, but social changes begin to modify sexual mores before they produce corresponding modifications of the criminal law. The criminal law therefore tends to support the more old-fashioned and conservative concepts of sexual morality. In countries where the law continues to stigmatize abortion, homosexuality or adultery as crimes, sections of the public who disapprove of these things have an unfair monopoly of denunciation. The individuals concerned cannot answer back without the risk of incurring penal sanctions, while their supporters are handicapped by the fact that they seem to be advocating defiance of established law. Once such matters cease to be crimes, and become purely moral issues, they can be discussed on their merits. The continued existence of outmoded laws discourages unprejudiced debate and may indeed impede the development of enlightened moral concepts. Al-

3. See WOLFENDEN REPORT, REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION app. III (authorized Amer. ed. 1963).

though it is fashionable to draw a contrast between law and morals, there is an important interaction between the two. This was felt strongly by many of the advocates of homosexual law reform in England, who saw that a certain moral stigma, and an inevitable association with the seedy underworld, was inseparable in the public mind from any category of persons officially defined as criminals.

It used to be argued in England, and is still argued in some quarters in America, that more harm than good may come from agitating against laws that have become obsolete. Why bother to repeal statutes which forbid certain sexual acts when, in practice, people are no longer prosecuted for what they may do discreetly in private: The answer is that so long as a law stands, someone, somewhere, may apply it. Malicious denunciation from motives of personal enmity, or prosecutions resulting from over-zealous police inquiries—perhaps as a by-product of investigations into other matters—are still possibilities to be reckoned with.

Professor Barnett advocates a line of attack not available in England. He claims that the various state laws against sodomy may be invalidated on the ground that they contravene provisions of the American Constitution. The bulk of his book consists of a survey of legal arguments and relevant legal cases bearing upon this contention. It is a most impressively documented and scholarly survey. Whether it will convince experts in American constitutional law remains to be seen. To a layman, some of the arguments seem both ingenious and unexpected. For instance, it is argued that the first amendment, which prohibits laws respecting an establishment of religion, not only prevents government from making any particular religion the official one, but also implies that the state may not impose rules of conduct which originate in the dictates of any particular religion. For example, in the case of *Epperson v. Arkansas*⁴ the United States Supreme Court invoked the establishment clause to invalidate a state law prohibiting the teaching of Darwin's theory of evolution in the schools. Professor Barnett argues that the sodomy statutes have a specifically Judeo-Christian biblical origin, whereas other ancient religious cultures, in Greece and Japan for example, held homosexuality in esteem. So long as it can be shown that the sodomy laws do not serve secular as well as religious purposes, they are open to challenge as being merely an expression of Christian dogma. The sodomy laws are pe-

4. 393 U.S. 97 (1968).

cular in penalising particular physical sexual acts, regardless of circumstances or mutual consent or absence of harm to anyone. This attribution of enormous significance to trivial details of bedroom behaviour is a species of magical thinking which stems from religious beliefs, but has no secular justification.

Some of the arguments cited by Professor Barnett are much more powerful than this and have already been applied with a measure of success in cases closely related to those of homosexual defendants. The eighth amendment forbids the infliction of "cruel and unusual punishment," and this has been held to include punishment that is excessive in proportion to the gravity of the offense. It thus becomes possible to argue that a punitive sentence for consensual sodomy in one state is "cruel and unusual" in view of the fact that other states of the Union and other legal systems impose no penalty whatsoever for the same behaviour. It can also be argued that punishment of a person for the consequences of a condition over which he has no control is unconstitutionally cruel. The argument was raised in *Robinson v California*⁵ in relation to narcotics addiction where it was held that a status or condition, as opposed to an overt antisocial act, cannot be made criminal.

Essential personal liberties are protected by the doctrine of independent rights, which requires justification for any governmental interference with personal liberty. In *Griswold v Connecticut*,⁶ which invalidated a state law prohibiting the use of contraceptives, a married couple's constitutional right of privacy was held to have been infringed. It could be argued, however, that all men and women, whether heterosexual or homosexual, have a constitutional right to private sexual expression. The only cases in which sodomy laws have been challenged as an unconstitutional attack upon personal freedom have so far related to sexual acts in public or with minors. The courts have had little difficulty in rejecting such pleas on the grounds that the laws curtailed individual liberty by reason of a compelling public interest.

For the average homosexual, the sodomy laws, because they are so largely unenforced or unenforceable, have relatively little direct impact on everyday life, although the potential threat of prosecution always causes anxiety in the background. Far more important is the discrimination against homosexuals in such spheres as government

5. 370 U.S. 660 (1962).

6. 381 U.S. 479 (1965).

employment, tenancy agreements, immigration and the formation of associations or clubs where they can meet others of their kind.

The fourteenth amendment provides for the equal protection of the laws for all persons within the jurisdiction of the state. It has been held by the Supreme Court that only compelling social objectives can justify discrimination against any class of citizens.⁷ Although Professor Barnett does not discuss relevant cases, the fact is that homosexual activists have won a number of battles against discrimination in situations in which there is no question of illegal sexual behaviour taking place.⁸ A homosexual convicted of sexual misconduct is in a very different position. The majority of prosecutions under sodomy laws involve aggravating circumstances, such as involvement of minors, prostitution, public misconduct, or overt annoyance to neighbors, all of which might be illegal if committed by heterosexuals. If a test case of pure, consensual adult behaviour in private could be brought up, it might be argued that the application of the sodomy laws to such a case would be an unwarranted discrimination against homosexuals as a class, since the laws seem to be refusing them the elementary rights of private sexual expression which are considered necessary and allowable for heterosexuals.

To a layman, the construction of all these elaborate arguments seems nothing more than the legal technician's way of securing a desired result, namely the abolition of criminal sanctions for behaviour which is no longer considered a threat to the community. The really interesting question is why value judgments are changing. Historically, when venereal diseases were incurable and infant mortality meant that abundant procreation was a necessity, sanctions against promiscuity, or non-procreative sexual pleasures, made more sense. Today, with over-population a problem and with the recognition that sexual expression is a need in itself, apart from reproduction, the old standards are less relevant. The crucial question is this: What harm does consensual homosexual conduct do to individuals or to the community at large? If the answer is none, or very little, then criminal sanctions are inappropriate and the law should be changed. Whether this will happen by pressure of enlightened public opinion upon the legislature, or by legal argument on constitutional grounds, remains to be seen.

7. See *Roe v. Wade*, 410 U.S. 113, *reh'g denied*, 410 U.S. 959 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); *Korematsu v. United States*, 323 U.S. 214 (1944).

8. See, e.g., *Scott v. Macy*, 349 F.2d 182 (1965).