

# Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution

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## I. Social Ills and Constitutional Cures: California in the 1870s

[The] corporations are not the great benefit to the people they are said to be. They have laid their blighting hands upon every avenue of labor, have prostrated industries, reduced wages to starvation prices, and, in pursuance of this policy, have introduced into our midst, to compete with our white labor, swarms of the most degraded race . . . .

—Delegate John Stedman<sup>1</sup>

The political campaign that led to the calling of a constitutional convention in California in 1878 was marked by strident, almost millennialist, rhetoric—a rhetoric noteworthy for its optimistic hopes, but also for the despair with which many citizens viewed the state's problems and

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1. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 521 (1880) [hereinafter DEBATES & PROCDGS.].

prospects.<sup>2</sup> As would so often be true in later periods of California history, many commentators perceived that the state's electorate carried a special responsibility. This was expressed by a writer for the *Sacramento Bee* who, in May 1878, asserted that California was

the natural leader of the other States in every reform that proposes to solve the problems of social, commercial and political life. . . . It is our business as citizens of the Golden State to set the world an example, and show other States how they can emerge from the difficulties which time, indifference and corruption have thrown around them.<sup>3</sup>

Far from seeing their state as "the great exception,"<sup>4</sup> many advocates of reform joined in this call for California to fulfill its special destiny as "a model for all other States."<sup>5</sup> Reformers calling for change in 1873-78 did so in a political milieu that was profoundly influenced by a protracted business depression—the worst the nation had experienced, and one that hit California's economy hard. Urgency, despair, and a fair degree of what was universally seen as radicalism were the responses manifested in the state's politics in the late 1870s. Widespread unemployment and homelessness, a spread of business failures, mortgage fore-

2. Any study of the 1879 constitution and the politics of the convention period must begin with C. SWISHER, *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION, 1878-79* (1930).

An important historical work that goes well beyond Swisher's on the political climate of the 1870s and on some of the major issues at the convention itself is S. Sharp, *Social Criticism in California During the Gilded Age* (University of California, San Diego, 1979) (unpublished dissertation). Her analysis draws heavily from the contemporary reform press and small periodicals as well as from the constitutional convention debates to illustrate its themes. See also the following specialized studies: Moorhead, *Sectionalism and the California Constitution of 1879*, 12 PAC. HIST. REV. 287 (1943); Cornford, *To Save the Republic: The California Workingmen's Party in Humboldt County*, 46 CAL. HIST. Q. 130 (1967); Shumsky, *San Francisco's Workingmen Respond to the Modern City*, 55 CAL. HIST. Q. 46 (1976); Sargent, *The California Constitutional Convention of 1878-79*, 6 CALIF. L. REV. 12 (1917). For an historical overview of state constitutional conventions and revisions, see Sturm, *The Development of State Constitutions*, 12 PUBLIUS: THE JOURNAL OF FEDERALISM 57 (1982).

3. *California Leadership*, Bee (Sacramento), May 17, 1878, at 2, col. 2; see Sharp, *supra* note 2, at 2.

4. See C. McWILLIAMS, *CALIFORNIA: THE GREAT EXCEPTION* (1949). Exceptionalism as a theme in California (and Pacific Slope) political culture and constitutional discourse had two faces: the idea of uniqueness and a special destiny could be invoked, as was done in the 1870s, to validate moves toward reform, even radical reform, or alternatively, it could be invoked to legitimize the perpetuation of differences in norms. This theme is discussed, *inter alia*, by E. Pomeroy, in his classic work *THE PACIFIC SLOPE: A HISTORY OF CALIFORNIA, OREGON, WASHINGTON, IDAHO, UTAH, AND NEVADA* (1965); and also in an important historical essay on the West and its regional consciousness by Gene Gressley, *West by East: The American West in the Gilded Age*, 1 CHARLES REDD MONOGRAPHS IN WESTERN HISTORY (1972).

5. *California Leadership*, *supra* note 3.

closures, and bank closings, a collapse of mining stock prices, and, withal, extensive personal suffering and social dislocation, contributed to radical political reactions and popular reformist attitudes.<sup>6</sup>

But even more deeply rooted discontents influenced the political atmosphere from which the campaign for constitutional reform would soon issue. These discontents reflected disillusionment, and often keen outrage, with how the political system was performing—a sense that something had gone terribly wrong with political process, rather than a concern solely with economic distress and its causes.<sup>7</sup> It was the probity of politics and the workings of the polity itself in light of American ideals—including the ideals embodied in the original 1849 California Constitution as a product of Jacksonian political culture—that came under the fire of reformers in this regard. Of course, such reform concerns were not confined to California in that era. In other states, the startlingly rapid rise of concentrated corporate power, especially in the railroad industry, and the problems associated with cynical partisanship and corruption in government, had inspired strong political reactions on similar lines. Reaction to the problems of the day had inspired many efforts throughout the nation to apply old Jacksonian-egalitarian standards in legislation and to undertake constitutional reform and revision.<sup>8</sup> This era was, after all, not only near the height of Gilded Age machine politics;<sup>9</sup> it was also the era of the Granger laws in the Midwestern states where voters had come to believe that strong constitutional medicine must be applied to cure the ills that “monopoly” and unbridled corporate

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6. C. SWISHER, *supra* note 2, at 5-9. On the national scene in the great depression of the 1870s, see Reznick, *Distress, Relief, and Discontent in the United States During the Depression of 1873-1878*, 58 J. POL. ECON. 494 (1950), reprinted in S. REZNECK, *BUSINESS DEPRESSIONS AND FINANCIAL PANICS: ESSAYS IN AMERICAN BUSINESS AND AMERICAN HISTORY* 127; H. SCHEIBER, H. VATTER & H. FAULKNER, *AMERICAN ECONOMIC HISTORY* (1976). On the California scene in that era, see Hardy, *Agricultural Changes in California, 1860-1900*, PROCEEDINGS OF THE PACIFIC COAST BRANCH OF THE AMERICAN HISTORICAL ASSOCIATION, 216-30 (1929); Taylor, *Foundations of American Rural Society*, 24 CAL. HIST. SOC. Q. 193 (1945); J. OPIE, *THE LAW OF THE LAND* 134-41 (1987).

7. C. SWISHER, *supra* note 2, at 114.

8. The embodiment of Jacksonian ideals of equality and open opportunity in the constitutional reform movements of the Midwest in the post-Civil War era is analyzed brilliantly in an article by Alan Jones, *Republicanism, Railroads, and Nineteenth Century Midwestern Constitutionalism*, in *LIBERTY, PROPERTY, AND GOVERNMENT: CONSTITUTIONAL INTERPRETATION BEFORE THE NEW DEAL* at 239 (E. Paul & H. Dickman eds. 1989). See Scheiber, *Public Policy, Constitutional Principle, and the Granger Laws: A Revised Historical Perspective* 23 *STAN. L. REV.* 1029 (1971); A. BEITZINGER, *EDWARD G. RYAN: LION OF THE LAW* (1960).

9. See M. TWAIN & C. WARNER, *THE GILDED AGE* (1873); M. KELLER, *AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA* 269 (1977) (corrupt alliance of entrepreneurship and politics); D. DONALD, *LIBERTY AND UNION* 248-55 (1978).

power had inflicted upon the political system.<sup>10</sup>

In California in the seventies, the main focus of such criticism was the evidence of pressure groups in Sacramento and the outright corruption of a state legislature that was then notoriously influenced by the Central Pacific Railroad directorate, the giant land and cattle companies, and a few other large-scale corporate interests.<sup>11</sup> Critics also levied charges that the judiciary had failed to function efficiently, or even to pursue a truly independent course or render impartial judgments.<sup>12</sup> Beyond their critique of formal constitutional structures and institutions, reformers in many quarters also condemned the political party organizations as having cynically sold out to special interests.<sup>13</sup> And so the litany went in California—all against the background of violent political rhetoric on several sides, personal assaults on speakers and hecklers at polit-

10. See G. MILLER, *RAILROADS AND THE GRANGER LAWS* (1971). On political parties in the Gilded Age, see C. YEARLEY, *THE MONEY MACHINES: THE BREAKDOWN AND REFORM OF GOVERNMENTAL AND PARTY FINANCE IN THE NORTH, 1860-1920* (1970); M. KELLER, *supra* note 9.

11. Thus an editorial writer in 1878 charged that the repeal of an earlier law creating a board of commissioners for railroad regulation had been engineered by Leland Stanford "and a corps of trained lieutenants" who "openly manipulated" the legislature on the issue. *San Francisco Chronicle*, April 19, 1878, *quoted in* C. SWISHER, *supra* note 2, at 53. Swisher also quotes the *Sacramento Bee* of April 18, 1878, to the effect that the railroad lobbyists had "become strong enough and sufficiently trained in the artifices of the profession to overwhelm an ordinary legislature." *Id.* See also W. BEAN, *CALIFORNIA: AN INTERPRETIVE HISTORY* 304-11 (2d ed. 1973).

Dissatisfaction with the legislature's performance would focus in the 1878-79 convention upon the narrower, well-defined issue of its enactment of special legislation and local legislation. This had been complained of as early as 1862 and it continued, in the 1870s, to be a major point in the indictment of the legislature's performance. See D. PISANI, *FROM THE FAMILY FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST, 1850-1931*, at 22 (1984). The 1879 constitution imposed new requirements on the legislative process, curbing the practices associated with enactment of special or local laws. See *id.* at 24; *infra* notes 164-171 and accompanying text.

12. See *The Judiciary: Some Suggestions for the New Constitution—A Remedy for the Law's Delay—An Increase in the Number of Justices of the Supreme Court—Alternate Judges—A Number of Other Good Suggestions*, *Daily Alta California*, Sept. 9, 1878, at 2, col. 2; *Jurisdiction of Justices' Courts*, *Daily Alta California*, Oct. 1, 1878, at 1, col. 1.

In one of the most widely noticed proposals for reform published prior to the convention, the efficiency issue was raised by former California Supreme Court Justice Solomon Heydenfeld. His study was initially "addressed to the bar of the State." *Novelties in Constitution-Making*, *Daily Evening Bulletin* (San Francisco), April 18, 1878, at 2, col. 2. See also E. STANIFORD, *THE PATTERN OF CALIFORNIA HISTORY* 264-65 (1975) (on the criticisms leveled at the judiciary's integrity and performance). In the convention, one of the Workingmen's delegates flatly declared that one could assume that "[t]he railroad and other corporations . . . own two thirds of the Courts of this State. Through their influence the Judges are elected to place, who favor their cause." *DEBATES & PROCDGS.*, *supra* note 1, at 610.

13. For surveys of reform opinion in the 1870s and the late nineteenth century in California, see W. BEAN, *supra* note 11, at 233-57; S. OLIN, *CALIFORNIA POLITICS, 1846-1920: THE EMERGING CORPORATE STATE* (1981).

ical meetings, and an intensifying campaign against the Chinese that approached mass hysteria.<sup>14</sup>

A felt loss of political innocence and a yearning to recapture an older golden age of republican politics constituted one major theme in the public discourse on constitutional reform.<sup>15</sup> A corollary reform theme of the time was the quest for a golden mean in politics: the Northern California editor who called for nonpartisanship declared that the kind of constitutional convention that was needed was one that "will avoid on the one hand the Scylla of monopoly and on the other the Charybdis of Communism. . . . We want earnest, patriotic, intelligent men there at Sacramento."<sup>16</sup> In June 1878, at the height of the movement for constitutional revision, the *San Francisco Daily Evening Bulletin* editorialized on similar lines in favor of a basic reformation of politics:

The Republican party, in the day of its power, failed to do its duty in this particular. The Democracy, which succeeded it, has betrayed its trust perhaps still more flagrantly. The movement which, under such circumstances, will recommend itself to the great mass of the people, must be one which, while opposing a firm front to agrarianism on the one hand, is not the creature of monopoly influence on the other. How much there is to be expected from either straight Democracy or straight Republicanism on the latter proposition, the history of the State during the last few years abundantly proves. *A just mean in politics is what is needed. The great middle class must assert itself* against the dangers by which it is threatened on both sides.<sup>17</sup>

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14. C. SWISHER, *supra* note 2, at 10-16. Dennis Kearney, leader of the Workingmen's party, *see infra* note 19 and text accompanying notes 34 and 42-43, was himself arrested and detained for rioting and assault during the course of the campaign period. C. SWISHER, *supra* note 2, at 12. Indicative of the rhetoric that filled the pages of the popular press were descriptions of Kearney as a "rattle-brained, foul-mouthed, blasphemous and ignorant arch-agitator" (*Kearney in the Toils*, Daily Alta California, April 30, 1878, at 1, col. 1); of his followers as "deluded people" and "side pocket babblers" (*The Alien Vice President of the Workingmen's Party on 'Aliens'*, Daily Alta California, Sept. 9, 1878, at 1 col. 1); or as "lazy non-producers who would get their living by compelling the prudent and the thrifty to 'divide'" (Marysville Daily Appeal, May 2, 1878, at 1, col. 1). The rhetoric of the radicals was equally inflammatory. *See* C. SWISHER, *supra* note 2, at 11 (quoting Workingmen's document).

15. For a fine analysis of this strain in political criticism of the day, particularly from the radical Workingmen but also from delegates affiliated with the two regular parties, that addressed the theme of a lost political world of republican innocence, a subtle and sometimes elusive issue, *see* Johnson, *Centennial Retrospect: Legacy of the Past*, in LAW AND CALIFORNIA SOCIETY: 100 YEARS OF THE STATE CONSTITUTION 5 (1980). *See also* S. OLIN, *supra* note 13 at 11.

16. *Facts Worthy of Consideration*, Marysville Daily Appeal, June 14, 1878, at 2, col. 1.

17. *An Analysis of Local Politics*, Daily Evening Bulletin (San Francisco), June 11, 1878, at 2, col. 1 (emphasis added).

The nostalgic—or alternatively, optimistic—evocation of a purer political order was often expressed in a harsh critical stance against the regular parties. Conservative commentators were alarmed by the specter of convention elections turned into “regular guerrilla contest[s],”<sup>18</sup> and they despaired that the major parties could not successfully outflank the radical movement led by Dennis Kearney in San Francisco.<sup>19</sup> In the face of the rising threat of “Socialism and Communism,” a Marysville newspaper declared, it was necessary “for self-protection” that “wise action and firm determination in behalf of law and order” be placed above considerations of party.<sup>20</sup> The best hope lay in emergence of “one harmonious phalanx,” transcending old party ties, that would overcome the influence of ignorant radicalism.<sup>21</sup> It was a new organic law, after all, a constitution that was at stake, wrote the editors of the *Oakland Democrat*:

There is to be neither Republicanism nor Democracy, as party tenets, embodied in the instrument to be framed [by the convention], but Americanism, if we may so speak, in contradiction to French Communism, German Red Republicanism, or the still wilder agrarian notions which have recently been so loudly proclaimed even in this country among the less intelligent classes.<sup>22</sup>

Similarly, the Los Angeles *Express* called on the voters to send men of high character to the convention, warning that delegates were needed “who will not thrust themselves into the filthy pool of politics . . . .”<sup>23</sup>

Economic issues were never far from the forefront, however, in the political debates of the late 1870s. Ever since the first days of Anglo-American occupation, throughout the long period of heady optimism about California’s future, and climaxing in the difficult years of the 1873-79 depression, the land question had been a burning issue in state politics. Complex claims dating from the days of Mexican grants were long in being resolved by the courts, making it difficult for common settlers to gain title to land,<sup>24</sup> and the adjudication of claims went forward in a climate rife with frauds.<sup>25</sup> Apart from demanding access to the lands of the state, settlers were also continuously agitated over the terms of Cali-

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18. *A Decidedly Mixed Election*, Marysville Daily Appeal, May 11, 1878, at 2, col. 1.

19. On Kearney and the Workingmen, see Kauer, *The Workingmen’s Party of California*, 13 PAC. HIST. REV. 278 (1944); I. CROSS, A HISTORY OF THE LABOR MOVEMENT IN CALIFORNIA (1935); see also *infra* notes 25, 34, 42-43 and accompanying text.

20. *A Decidedly Mixed Election*, Marysville Daily Appeal, May 11, 1878, at 2, col. 1.

21. *What is Needed is a General Representation of All the Honest Classes*, Daily Alta California, April 18, 1878, at 1, col. 2.

22. *Id.*

23. *Id.*

24. Gates, *California’s Embattled Settlers*, 41 CALIF. HIST. SOC. Q. 99, 99-103 (1962).

25. *Id.* at 116-21.

for California and national land laws under which they could gain title for pursuit of farming or other enterprises.<sup>26</sup> Because it was indisputable that the land system had produced serious and seemingly intractable problems for California society, political reformers hit a sensitive nerve with the electorate when they addressed the inequities of land distribution and demanded effective redress from the effects of the aggregation of some of America's largest landed holdings.<sup>27</sup> The land issue effectively merged with that of "monopoly" in the rhetoric and the larger concerns of political reformers and social critics.<sup>28</sup> The first party platform to be adopted by the radical California Workingmen's movement, which eventually carried the major burden of pushing for a constitutional convention, adverted to the twin problems of concentrated wealth and political corruption. This famous document declared that "equal rights of the people . . . [had been] violated until the administration of justice has

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26. Gates, *Pre-Henry George Land Warfare in California*, 46 CAL. HIST. SOC. Q. 121 (1967); McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 LAW & SOC'Y REV. 235 (1976); Hornbeck, *The Patenting of California's Private Land Claims, 1851-1885*, 59 GEOGRAPHICAL REV. 440 (1979).

27. See C. SWISHER, *supra* note 2, at chap. 1; Gates, *supra* note 24, at 99; Gates, *Public Land Disposal in California*, 49 AGRIC. HIST. 158 (1975); Miller, *Law and Entrepreneurship in California: Miller and Lux and California Water Law, 1879-1928* (University of California, San Diego, 1982) (unpublished dissertation); see also Taylor, *Foundations of California Rural Society*, 24 CALIF. HIST. SOC. Q. 193 (1945); Gates, *Carpenters Join the Rush for California Land*, 56 CALIF. HIST. SOC. Q. 98 (1977).

None of what is said in the text about popular grievances is meant to suggest that the "small settlers," as they are usually called, had no interest themselves in speculation on whatever scale they could afford. On the California frontier as on all others in American history, today's "small" claimant often aspired to become tomorrow's monopolist or large-scale speculator. Real estate bonanzas were not invented in the boom years after World War II. See P. GATES, *THE FARMER'S AGE: AGRICULTURE, 1815-60*, at 70-98, 387-97 (1960) (land speculation and California).

Hence the reference to small-scale operators as speculators (in addition to their role as potential farmers) recognizes one of the persistent realities of the nineteenth century West. See Gates, *supra* note 24, at 100-01. For an overview of land problems and agriculture in the state, see W. ROBINSON, *LAND IN CALIFORNIA* (1940).

28. As was true of the rhetoric of the Jacksonian era, the terms "monopoly" and "monopoly power" were used broadly to denote illegitimate exercises of influence, associated with aggregations of private wealth and especially corporate wealth. On the Jacksonians, see A. SCHLESINGER, *THE AGE OF JACKSON* (1945); B. HAMMOND, *BANKS AND POLITICS FROM THE REVOLUTION TO THE CIVIL WAR* (1957); E. PESSEN, *JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS* (1978). See also *supra* note 8. In the 1878-79 debates of reform, as Dr. Sharp has shown, the charge of "monopoly" was invoked not only on the most dramatic basic issues such as water use and land ownership, but also to take in such practices as the state authorities' favoring of publishers in the selection of school textbooks. Sharp, *supra* note 2, at 73-75. For the background in Colorado and the larger history of water law issues in western constitutional politics, see G. BAKKEN, *ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912* (1987).

become a mockery and a farce."<sup>29</sup> The new party promised "to wrest the government from the hands of the rich and place it in those of the people, where it properly belongs."<sup>30</sup>

The notion that greedy promoters and wealthy interests had grabbed power—not only at the expense of the laborers and artisans, but also to the peril of the republic's core integrity—was an idea often expressed in ensuing months, both in the political hustings and on the floor of the 1878-79 constitutional convention at Sacramento.<sup>31</sup> Not only the Workingmen, but also many elements of the two major parties expressed this concern to recapture the republic, somehow, for the people—to get rid of an "imported feudalism" that had validated monopoly landholdings and encouraged the appearance of great disparities in wealth.<sup>32</sup> It was necessary, declared the constitution of the Workingmen's Party, to halt the process by which "great money monopolies . . . purchase the state legislatures, rule the courts, influence all public officers, and . . . perverted the great republic of our fathers into a den of dishonest manipulators."<sup>33</sup>

Important as were political reform concerns, the most vividly remembered feature of the 1870s political movements is the notorious campaign directed against the Chinese. Although the anti-Chinese

29. W. DAVIS, *HISTORY OF POLITICAL CONVENTIONS IN CALIFORNIA, 1849-1892*, at 366, 384 (1893).

30. *Reprinted in* W. DAVIS, *supra* note 29, at 366-67. On the precedents and results of Workingmen's agitation, see generally R. Shaffer, *Radicalism in California, 1869-1929*, at 7-64 (University of California, Berkeley, 1962) (unpublished dissertation).

31. Professor David Johnson has argued as follows:

For those who wrote the new [1879] constitution, the increasing concentration of wealth alongside deepening poverty represented . . . a betrayal of the 'great republic of our fathers'; that is, the destruction of a society in which individual labor and enterprise was rewarded with autonomy, social mobility, and a share of the public powers.

Johnson, *supra* note 15, at 6. This theme is noted occasionally, though not emphasized, in Swisher's analysis of the debates. C. SWISHER, *supra* note 2.

32. *DEBATES & PROCDGS.*, *supra* note 1, at 1139-40 (comments of Delegate James O'Sullivan (Workingmen's Party)).

33. W. DAVIS, *supra* note 29, at 379. This sentiment was set forth in the convention itself by many speakers, but typical of the sentiments expressed by Workingmen delegates was the following passage from a speech by Patrick Dowling of San Francisco:

Corporations have bought up conventions and swayed Legislatures as if by a magic wand. They have even entered into the sacred presence of the United States Senate chamber. Why, sir, Senators are but machines and Representatives tools in their hands. In fact they run the ship of State. They have the control of the whole government, and certainly we cannot say but that the judiciary to-day in California, as well as in every other State in the Union, is dishonored with their contaminating influence.

*DEBATES AND PROCDGS.*, *supra* note 1, at 550.

For a perceptive discussion of corporate behavior and the possibilities of reining in corporate power through reform laws, see Sharp, *supra* note 2, at 114.



movement was pursued most relentlessly by the Workingmen's leadership, these radicals enjoyed abundant support from other quarters.<sup>34</sup> The "Chinese question" was, indeed, an issue with which the radicals could sweep in allies with very different views on other social or political issues but whose anti-Chinese prejudice was equally virulent.<sup>35</sup> The size of the Chinese population was growing significantly in California, though it still formed less than ten percent of the state's population of nearly a million in 1879. Against their presence, however, the European-American elements railed with a savagery that transcended all limits of ordinary political discourse even in an age of harsh rhetoric.<sup>36</sup>

The stridency of rhetoric directed against Chinese was in many ways more than matched by harsh and outright cruel treatment. This was true both of informal social relationships and of public policies.<sup>37</sup> Thus, on occasions when federal judges had taken a protective and expansive view of Chinese immigrants' procedural and substantive constitutional rights—as had been true during the long years of Judge Ogden Hoffman's tenure in the United States district court in San Francisco—the public reaction was often truly vicious.<sup>38</sup> Conversely, there was manifest public approval when the United States circuit court moved strongly in the other direction in 1878, when Judge Lorenzo Sawyer handed down a decision in San Francisco in the case of *In re Ah*,<sup>39</sup> which denied the

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34. See T. HITTELL, *HISTORY OF CALIFORNIA* 594-640 (1898); Sharp, *supra* note 2, at 153-56; Taylor, *supra* note 6, at 194-217.

35. See A. SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971); G. BARTH, *BITTER STRENGTH: A HISTORY OF THE CHINESE IN THE UNITED STATES 1850-1870* (1964); E. SANDMYER, *THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1939).

36. See A. SAXTON, *supra* note 35; S. CHAN, *THIS BITTERSWEET SOIL: THE CHINESE IN CALIFORNIA AGRICULTURE, 1860-1910* (1986); L. Salyer, *Guarding the 'White Man's Frontier': Courts, Politics, and the Regulation of Immigration, 1891-1924* (University of California, Berkeley, 1989) (unpublished dissertation).

37. A. SAXTON, *supra* note 35, *passim*. Recent scholarship has shown that to a surprising degree the federal trial and appeal courts extended procedural protections across a broad front to Chinese immigrants and residents long before the well known decision of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (applying the Fourteenth Amendment). On the Chinese in the courts in the pre-Convention era, see especially McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984).

38. C. Fritz, *San Francisco's First Federal Court: Ogden Hoffman and the Northern District of California, 1851-1891* (University of California, Berkeley, 1987) (unpublished dissertation). See also Fritz, *A Nineteenth Century 'Habeas Corpus Mill': The Chinese Before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347 (1988); and, for an analysis of the federal district court in San Francisco as concerned procedural issues affecting the status of Chinese immigrants in later years, see Salyer, *Captives of the Law: Judicial Enforcement of the Chinese Exclusion Laws, 1891-1905*, 76 J. AM. HIST. 91 (1989).

39. *In re Ah Yup*, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104). The decision, by Judge Sawyer, was reported fully under the title *Not "White Persons"* in the *Daily Alta California*,

right of Chinese-born immigrants to qualify for naturalization as citizens.<sup>40</sup> This important development in the law, closely watched in the midst of a powerful political debate, doubtless served to lend further legitimacy to anti-Chinese hysteria.

In the highly charged atmosphere of intensifying political strife and economic distress in the late 1870s, there proved to be strong support for the idea that enduring solutions should be sought through constitutional reform. To seek broad solutions instead through ordinary legislation, after all, would have required working through a process and institutions in which most California citizens had lost faith. With the leadership being taken at various times by independent and "fusion" political groups—by the Workingmen, by shifting partisan coalitions, and by the Democratic Party—various proposals for the summoning of a convention were put forward in the Assembly during the years 1873 to 1877.<sup>41</sup>

A unique role in crystallizing political discontent on the issue of constitutional reform was played by Dennis Kearney, the leader of the Workingmen's movement in San Francisco, where a quarter of the state's population resided. Kearney's style expressed an explosive compound of authentic social radicalism, a gift for charismatic leadership, and a penchant for evoking an ugly and potent racism.<sup>42</sup> Whether one deems him a demagogue or an organizing genius, he quickly fashioned a strong third-party movement in northern California, with some strength almost everywhere in the state. Kearney and his followers successfully pressed for the calling of a convention in the legislature, and their radical presence in the ensuing campaign for election of delegates dictated nearly all the key strategical moves by the Republican and Democratic state party leaders—even prompting an effort by the two major parties' state committees to develop a slate of fusion candidates for the statewide at-large delegate election that would head off the Kearneyite threat.<sup>43</sup>

In some districts, the Democrats and Republicans put partisan slates on the ballot for the local delegate elections. For the thirty-two at-large candidates, fusion and nonpartisan slates were developed, but then

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April 30, 1878, at 2, col. 2; see Przybyzszewski, *Judge Lorenzo Sawyer and the Chinese Civil Rights Decisions in the Ninth Circuit*, 1 W. LEGAL HIST. 23, 29 (1988) (Judge Sawyer, "confronted with 'the first application made by a native Chinaman for naturalization,' examined the congressional debates and ruled that the application could not be accepted, it being clear that the congressmen had used the word 'white' precisely in order to exclude the Chinese.").

40. *Id.* See McClain, *supra* note 37.

41. C. SWISHER, *supra* note 2, at 5-31.

42. *Id.* at 11.

43. *Id.* at 18-21. Contemporary newspaper accounts provided detailed reports of the maneuvers involving the two parties, fusion efforts, and realignments; see especially *Attempt at Coalition*, Daily Evening Bulletin (San Francisco), April 25, 1878, at 2, col. 3.

finally the Democrats ran their own ticket, and a significant number of independents—including one woman candidate in San Joaquin County who took advantage of the inapplicability of the male-only requirement that prevailed for office holding in the legislature—entered their names in contention.<sup>44</sup>

Of the 152 delegates elected, 50 were Kearneyites. Thus, while “the Goths and Vandals of Kearneyism”<sup>45</sup> were a force to be reckoned with, they did not have nearly enough votes to control.<sup>46</sup> Fusion and “nonpartisan” candidates, many of them long-time party regulars who distanced themselves from the party machines for reasons of convenience, together formed the convention majority on most issues.<sup>47</sup>

The delegates were convened in Sacramento in October, and the convention’s debates were closely followed and fully reported by the newspapers of the state. Some critics charged that it became a “runaway” convention, since the delegates did not confine themselves to the major issues (corporate powers, railway regulation, land monopoly, taxation, and the Chinese question) that had prompted the legislature to make the convention call. Indeed, a determined (but outgunned) conservative faction within the convention contended that the 1849 constitution should be retained nearly intact. “Under it,” as one of them pleaded,

there has been consummated more of general progress, more generally diffused happiness and prosperity, than has ever before been realized in the same period of time by any other people on the globe. For more than a quarter of a century it has held in equilibrium . . . the rivalries of sections, the antagonistic customs, the clashing prejudices and passions of all the alien races of the earth. . . . Let us amend it [only] in a few particulars . . .<sup>48</sup>

Apart from the “runaway” charge, the delegates were chastised more generally by editors and politicians for running up the costs and exceed-

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44. The alignments and realignments of the Democratic and fusion forces are discussed in the Marysville Daily Appeal, May 11, 1878 and June 14, 1878; and the San Francisco Daily Evening Bulletin, April 25, 1878 and April 30, 1878. The woman who placed her name in contention was Mrs. Laura DeForce Gordon. The degree of seriousness with which the press greeted her candidacy is indicated by the following editorial in the Marysville Daily Appeal: “That’s right. Laura belongs to the independent line, and we hope she will be elected just for the novelty of the thing.” *Facts Worthy of Consideration*, *supra* note 16.

45. *The Dangers of Kearneyism*, Daily Alta California, June 19, 1878, at 1, col. 1.

46. For full analysis of the delegates and their background, and also of the organization of the convention and its modus operandi, see C. SWISHER, *supra* note 2, at 17-44.

47. Most prominent in this regard was Joseph P. Hoge, elected president of the convention, whose choice for that office was welcomed by, among others, the editors of the conservative Daily Alta California. *President of the Convention*, Daily Alta California, Oct. 1, 1878, at 1, col. 1.

48. DEBATES & PROCDGS., *supra* note 1, at 496.

ing legislative appropriations; and in fact, they never were paid their small daily expense allowances for the full time they spent in deliberations.<sup>49</sup>

In any event, the great majority of the convention's delegates clearly regarded their charge to be a reappraisal of the 1849 document in all its terms. The delegates met for more than five months, appointing drafting committees on all the major issues, and extending their concerns to a variety of other matters, some of which became prominent in subsequent convention debates. These included women's suffrage; separation of church and state and the status of sectarian schools; uniformity of textbooks, policy on vocational education, and other matters relating to the public schools; the autonomous powers to be given to the University of California board of regents; abolition of the grand-jury requirement in criminal indictments; tidelands leasing and alienability; and, across a broad spectrum, the powers of municipal government and the restructuring of the state judicial system.<sup>50</sup>

Near the end of their extended debates, the delegates accepted on the final draft revision a series of controversial compromises in language that watered down some of the most radical proposals that had won strong support, prompting one of the Workingmen's leaders to complain: "We have, in the last few days, trimmed [sic] it down until it is a mere wreck of its former grandeur."<sup>51</sup> However the radicals may have felt on that score, the convention finally approved the new document in March 1879. The instrument was submitted to the state's voters in May, and, after a bitterly fought campaign, was approved by the fairly close margin of 77,959 to 67,134.<sup>52</sup>

The contrast with 1849 bespoke the difference in political atmosphere between these two constitutional moments in California legal history: the original document had been adopted by the overwhelming vote

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49. The legislature had appropriated \$150,000 for the convention's expenses, but the entire sum was exhausted on the eighty-fifth day. The convention went on for 157 days in all, until March 3, 1879. Requests by the convention for additional funds were simply ignored. See Johnson, *California's Constitution of 1879: An Unpaid Debt*, 49 CALIF. HIST. SOC. Q. 135 (1970).

50. See, e.g., DEBATES & PROCDGS., *supra* note 1, at 1014-17, 1369-70 (suffrage); 1038-39 (tidelands); 97, 99, 138-39 (schools); 237, 118, 220-21, 228 (municipal powers); 435 (Regents of the University of California); 497 (prison administration); see also Goda, *The Historical Background of California's Constitutional Provisions Prohibiting Aid to Sectarian Schools*, 46 CALIF. HIST. SOC. Q. 149 (1967). The analysis of education law and policy in Sharp, *supra* note 2, contains a full discussion of issues such as vocational and agricultural education that were important in the 1870s but have been given little attention in other historical studies.

51. DEBATES & PROCDGS., *supra* note 1, at 1438.

52. C. SWISHER, *supra* note 2, at 109.

of 12,064 to 811 in the November 1849 ballot.<sup>53</sup> Once approved, in any event, the 1879 constitution went into effect in two prescribed phases: the powers of governmental officers and their terms came into conformity with the new constitution on July 4, 1879, and the remaining provisions became effective on January 1, 1880.<sup>54</sup>

Carl Brent Swisher, whose classic study of the convention still stands as the most complete scholarly work on the subject after nearly sixty years in print, was of the opinion that the convention movement reflected a disturbing tendency in the California electorate in the 1870s "to look for panaceas for their ills . . . ." <sup>55</sup> An element of irrationality prevailed, Swisher contended, for "there was little intelligent consideration given to the question of what might be legitimately expected to be achieved by revision of the fundamental law of the state."<sup>56</sup>

Swisher's gloomy assessment, that the whole convention movement was an essentially misguided enterprise, is probably unfair. Still, whatever the delegates expected of constitutional reform, we can profitably examine what it is they sought to accomplish. Contrary to the impression conveyed by Swisher's analysis, I would argue that one can find significant coherence in many basic social and political goals. In addition, despite important differences of ideology and political style among delegate factions, there emerged a fair degree of realism in their deliberations of mechanisms and direction of reforms; one does not sense that the delegates, or those who sent them to Sacramento, were completely at sea as to the purpose or potentialities of constitution writing.

Nevertheless, as countless observers from that day to Swisher's and on to our own have testified, the constitutional document produced by the convention had its faults. A variety of commentators of all political stripes have inveighed mightily against the 1879 document; the most memorable contemporary response was that of the celebrated reformer Henry George. On the eve of the popular vote on ratification, George condemned the product of the convention's long months of work as a "sort of mixture of constitution, code, stump speech, and mandamus!"<sup>57</sup>

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53. Crotty, *The California Constitutional Convention of 1849*, 31 HIST. SOC'Y OF S. CAL. Q. 155, 165 (1949).

54. CAL. CONST. art. XXII, §§ 1-4 (1879, repealed 1972); *id.*, §§ 10-12 (1879, repealed 1960); see also T. HITTELL, *supra* note 34, at 637-39.

55. C. SWISHER, *supra* note 2, at 18. The modern student needs to supplement a reading of Swisher's work, as mentioned earlier, by reference to the more embracing study of reform in contemporary California by Sharp, *supra* note 2.

56. C. SWISHER, *supra* note 2, at 18, 114-16.

57. George, *The Kearney Agitation in California*, 17 POPULAR SCI. MONTHLY, 433, 445 (1880). George's early views of political process are also set out in his article *Bribery in Elections*, 7 OVERLAND MONTHLY 497 (1871).

George undoubtedly evaluated the new constitution with such dismay not only because it bore the features (as he said) of a hopeless hybrid, but mostly because it failed to work a revolution in property rights—which, after all, was George's main concern. The constitution was "anything but agrarian or communistic," George wrote, for "it entrenches vested rights—especially in land—more thoroughly than before, and interposes barriers to future radicalism by a provision in regard to amendments which will require almost a revolution to break through."<sup>58</sup>

Other criticisms have come from many perspectives over the years, but the main rap against the 1879 document—both the original constitution and its many revised versions—has remained fairly constant. First, in the view of nearly all critics, the 1879 document was too much a collection of detailed and highly specified codes that would better have been left to ordinary legislation. And so it remains today, after 110 years, scores of amendments, and a thorough legislative revision during 1964-70—including efforts intended to improve it by separating out the authentically "constitutional" issues from lesser ones.<sup>59</sup> Ironically, any gains made in 1970 by purging the document of excessive detail and of provisions more properly "legislative" have been more than overbalanced since then by the profligate use and often devastating effects of the modern direct ballot for constitutional revision.<sup>60</sup>

Second, as Henry George complained, the "stump speech" feature was a prominent element of the document's mongrel ideological physiognomy. Soaring rhetoric is prominent in segments of the constitution, sometimes not clearly connected to any concrete purpose associated with rule-making. And yet one hesitates to condemn it all out of hand as empty phrase-making—what in the convention debates occasionally was denounced as "humbug" or as a banal effort to "engraft some political

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58. George, *The Kearney Agitation in California*, *supra* note 57, at 446, *quoted in* C. SWISHER, *supra* note 2, at 110. For analysis of Henry George as an economic theorist and social reformer, see 3 J. DOREMAN, *THE ECONOMIC MIND IN AMERICAN CIVILIZATION (1865-1918)* 142-49 (1949); S. FINE, *LAISSEZ FAIRE AND THE GENERAL WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT, 1865-1901* (1956); J. THOMAS, *ALTERNATIVE AMERICA: HENRY GEORGE, EDWARD BELLAMY, HENRY DEMAREST LLOYD AND THE ADVERSARY TRADITION* (1983); Caine, *The Origins of Progressivism*, in *THE PROGRESSIVE ERA* 11 (L. Gould ed. 1974).

59. See Spear, *The Politics of Constitutional Change*, in *LAW AND CALIFORNIA SOCIETY: 100 YEARS OF THE STATE CONSTITUTION* 23 (1980); see also the discussion of the revision process and its goals by the revision commission's chairman, Judge Sumner, in *THE CALIFORNIA CONSTITUTION REVISION COMMISSION, CALIFORNIA LEGISLATURE, CONSTITUTION OF THE UNITED STATES . . . [AND] CONSTITUTION OF THE STATE OF CALIFORNIA AS LAST AMENDED NOVEMBER 3, 1970*, at 109-20 (1972).

60. See *infra* note 68 and accompanying text.

pyrotechnics upon the fundamental law . . . .”<sup>61</sup> After all, some of the broad and glittering generalizations, admonitions, and exhortations that George condemned are the very phrases that one hears praised today as an expression of American ideals—the very kind of phrases, indeed, that Professor Fritz extolled in his reappraisal of the original California Constitution of 1849.<sup>62</sup>

Third, an indictment of the 1879 document rests solidly on a consequential argument that focuses upon one of the convention’s most ardently pursued goals: the legal disablement and, ultimately, the physical exclusion of the Chinese. In this regard, the instrument included a set of provisions not only vicious in intent but clearly at odds with the Fourteenth Amendment. These provisions were cast in constitutional terms, but any real force that they might have had was represented in appeals to Congress to do its “duty” and put a halt to Chinese immigration.<sup>63</sup> Here, more than anywhere else in the document, did anger and blatant grandstanding triumph over realism. Within a decade, the federal courts had dismantled the most important provisions aimed at depriving the Chinese of means of earning a fair living in California or sharing in the benefits of residence (let alone citizenship) under a regime of law.<sup>64</sup>

Also illuminated by the politics of constitutional reform in this episode of California’s history was an interpretive controversy that has recently absorbed the attention of American legal historians. Some, who have presented their work from a self-designatedly “radical” or “critical” posture, have been prone to condemn in a wholesale way the nineteenth-century American legal system and constitutional order as crudely exploitative. Specifically, they argue that the law systematically twists and

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61. DEBATES & PROCDGS., *supra* note 1, at 1182.

62. See Fritz, *More Than “Shreds and Patches”: California’s First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13 (1989).

63. DEBATES & PROCDGS., *supra* note 1, at 634, 703, 713-27, 1186 *passim*; see also analysis of the debate and specific proposals on the Chinese in C. SWISHER, *supra* note 2, at 86-99; Sharp, *supra* note 2.

64. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *In re Tiburcio Parrot*, 1 F. 481 (C.C.D. Cal. 1880); *In re Lee Sing*, 43 F. 359 (C.C.N.D. Cal. 1890). The fate of the anti-Chinese provisions, in a series of challenges before the federal lower courts and the United States Supreme Court, has been examined in several scholarly works, including Roche, *Entrepreneurial Liberty and the Fourteenth Amendment*, 4 LAB. HIST. 3 (1963); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975), reprinted in AMERICAN LAW & THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES 246 (L. Friedman & H. Scheiber eds. 1988); McClain, *supra* note 37 (on the Chinese). How immigrants were treated under federal law, including discrimination by the federal administrative authorities and the extension of significant protection by the United States District Court, Northern District of California, is a subject examined afresh for the period 1850-1880 in Fritz, *A Nineteenth Century ‘Habeas Corpus Mill’*, *supra* note 38; and Salyer, *supra* note 36 (post-1880 period).

shapes the rules of economic life to advance entrepreneurial interests, and to transfer wealth and power from the poor (and perhaps the middling elements) to those already rich and powerful. The implication of this view—which is a leading premise in much of the historically oriented writing of the school that calls itself “Critical Legal Studies”—is that, if popular democracy had only been given its way, such distortions of law would not have been permitted.<sup>65</sup> Yet in California at the height of radical Workingmen’s reformism in the 1870s, and amidst calls for redistribution of wealth and power that would favor labor and the poor, we have a laboratory case study in the operations of plebiscitary democracy in action. No intermediating issues or structures—no judges bound by their class assumptions and interests, no corrupt legislatures—stood in the way when white male voters went to the polls in a popular vote on the constitution. And, as it proved, no single issue mobilized popular forces so effectively, or produced so powerful a response, as the racism and prejudice of the anti-Chinese movement. The romanticism that inheres in the “critical” historians’ view of exploitation in the nineteenth century—its sources, how it was perpetuated, and with what results—can hardly survive exposure to the harsh facts of an episode such as this one in the history of the Golden State.<sup>66</sup>

Thus, if one is to take an historical view of exploitation, one had better give closer attention to some of these episodes of plebiscitary democracy in the nineteenth century; and one should do the same in appraising direct democracy today, given the actual effects on law and

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65. See *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984); cf. Scheiber, *Public Economic Policy and the American Legal System: Historical Perspectives*, 1980 WIS. L. REV. 1159, 1182-89; Friedman, *American Legal History: Past and Present*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER *supra* note 64, at 464, 467-68; Scheiber, *Doctrinal Legacies and Institutional Innovations: Law and the Economy in American History*, in *id.* at 451, 459-62; Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383. For the “exploitation” view, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1790-1860* at 63, 259-60 *passim* (1976). *Contra* Scheiber, *Law and American Agricultural Development*, 52 AGRIC. HIST. 439 (1978).

I have used the term “school” because these historians have so designated and grouped themselves, not because I am persuaded either (1) that historians who choose to stand outside that self-designated circle are by any means less “critical” in their attempts at realism in understanding the American legal system’s historic performance, flaws and all; or (2) that the Critical Legal Studies movement itself has enough coherence and agreement, regarding either method or substantive views, that it constitutes a “school” in the classic application of that concept. It is manifest that even the friendliest of in-group analysts often have problems identifying what is held in common, beyond a roughly defined ideological slant. See, e.g., Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

66. See Scheiber, *Xenophobia and Parochialism in the History of American Legal Process: From the Jacksonian Era to the Sagebrush Rebellion*, 23 WM. & MARY L. REV. 625, 648-59 (1982).



policy of the direct ballot—a reform for which such high hopes were held out in the Progressive era amendments to the state constitutions in California and elsewhere.<sup>67</sup>

Indeed, even the origins of the direct ballot in California political history bore some startling resemblances to the constitutional reform of forty years earlier that is our main concern here. The famous Progressive uprising in California revealed that the juxtaposition of social reform with racist attacks upon Asian immigrant minorities was a recurrent theme in the state's history. For when Governor Hiram Johnson presented the legislature with the Progressive program in the form of his "Ten Commandments" in 1910, he made one of the program's key proposals a measure that would restrict and forbid landowning by Japanese residents.<sup>68</sup> Again, as in 1879, measures to bring "the interests" to heel, or to advance the dreams of a yeoman Arcadia in an industrial age, came forth from political leaders who carried a reform banner in one hand and a "Whites Only" placard in the other.

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67. On the effects of the direct ballot, see the recent analysis by Lee, *Power to the People? Direct Democracy: A View from the States*, in *FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY* 131 (H. Scheiber ed. 1988). See also Lee, *California*, in *REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 87 (D. Butler & A. Ranney eds. 1978); Ranney, *The United States of America*, in *id.* at 80; D. MAGLEBY, *DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES* (1984); W. CROUCH, J. BOLLENS & S. SCOTT, *CALIFORNIA GOVERNMENT AND POLITICS* (1977).

Outstanding in the literature of scholarly criticism directed at the initiative and referendum are Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 *HASTINGS CONST. L.Q.* 43 (1983); Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 *AM. POL. SCI. REV.* 753 (1968) (on the advantages of legislative over direct-ballot process); and Note, *Initiative and Referendum—Do They Encourage or Impair Better State Government?*, 5 *FLA. ST. U.L. REV.* 925 (1977). See also Bone & Benedict, *Perspectives on Direct Legislation: Washington State's Experience, 1914-1973*, 28 *W. POL. Q.* 330 (1975). For an up-to-date discussion of the issues of exploitation, racism, consensus, and democracy in the nineteenth century, see the synthesis in K. HALL, *THE MAGIC MIRROR: LAW IN AMERICAN HISTORY* (1989). Compare the analysis in L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1985).

68. On the immediate background and larger political context of anti-Japanese prejudice in relation to California progressivism, in addition to discussion of Hiram Johnson as reformer, see R. DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 46-64* (1962). See also Y. ICHIHASHI, *JAPANESE IN THE UNITED STATES: A CRITICAL STUDY OF THE PROBLEMS OF THE JAPANESE IMMIGRANTS AND THEIR CHILDREN* 228-42 (1932); S. OLIN, *CALIFORNIA'S PRODIGAL SONS: HIRAM JOHNSON AND THE PROGRESSIVES, 1911-1917* (1968); W. BEAN, *supra* note 11, at 332-35.

## II. Historical Memory and the 1879 Constitution: From Amnesia to Consciousness to Celebration

A growing tendency is observed to neglect the study of the history of the law and its traditions, without the knowledge of which the student can never become imbued with the true spirit of Jurisprudence.

—Serranus Clinton Hastings (1878)<sup>69</sup>

In the past quarter century of California politics, but especially in very recent years, the 1879 California Constitution has been prominent in the state's political discourse mainly because of its Declaration of Rights.<sup>70</sup> The declaration's provisions, carried over in many particulars from the 1849 document, have taken a remarkable place in recent national constitutional politics and jurisprudence, as the California Supreme Court has played a leading role in developing the doctrine of "adequate and independent state grounds."<sup>71</sup>

The California court has premised a long line of major decisions upon provisions of the state declaration of rights, thereby expanding rights which otherwise would have been restricted by dint of federal constitutional decisions.<sup>72</sup> As a consequence, a dramatic line of constitu-

69. Serranus Clinton Hastings, C.J., quoted as title-page inscription to R. POWELL, *COMPROMISES OF CONFLICTING CLAIMS: A CENTURY OF CALIFORNIA LAW, 1760 TO 1860* (1977).

70. CAL. CONST. art. I (1879).

71. On independent state grounds generally, see *Symposium on State Courts and Federalism in the 1980s*, 22 WM. & MARY L. REV. 599 (1981); *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1347 (1985); Howard, *Federalism at the Bicentennial*, in FEDERALISM, *supra* note 67, at 3; Howard, *The Renaissance of State Constitutional Law*, 1988 EMERGING ISSUES IN ST. CONST. L. 1 (1988); Mosk, *The State Courts*, in AMERICAN LAW: THE THIRD CENTURY: THE LAW BICENTENNIAL VOLUME 213-28 (B. Schwartz ed. 1976). On California's leading role in particular, see Falk, *The State Constitution: A More than 'Adequate' Nonfederal Ground*, 61 CALIF. L. REV. 273 (1973); Bice, *Anderson and the Adequate State Ground*, 45 SO. CAL. L. REV. 750 (1972); Goldberg, *Stanley Mosk: A Federalist for the 1980s*, 12 HASTINGS CONST. L.Q. 395 (1985).

72. See Falk, *supra* note 71, at 277-78 (compilation of early cases); *In re Anderson*, 69 Cal. 2d 613, 447 P.2d 117, 73 Cal. Rptr. 21 (1968) (counsel for convicts under death sentence at post-automatic appeal level); *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955) (exclusionary rule and unlawful search and seizure); *In re Berry*, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal. Rptr. 273 (1968) (contempt of court).

In one of the most important California cases, Justice Mosk declared:

[In] the area of fundamental civil liberties—which includes . . . all protections of the California Declaration of Rights—we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful

tional initiatives and referenda promoted by political leaders and law enforcement officers hostile to the court's direction—including a bitterly contested popular vote in 1987 on approval of state supreme court justices, resulting in a change of the court's basic ideological orientation—has placed the state constitution and its terms before the voters at levels of intensity not matched since the Progressive days.<sup>73</sup> Indeed, state constitutional law has been at the vortex of recent political storms.

It was surprising, therefore, to find that in 1979, the centennial year of the California Constitution, neither the legal profession, scholars, nor the public at large gave much attention to this landmark anniversary of the California document. This was, of course, in very great contrast to the observances, both cerebral and celebratory, that marked the bicentennials of the Declaration of Independence in 1976 and the national Constitution in 1987. To my knowledge, the only meeting or conference of any scope to recognize the California centennial in 1979 was one held at La Jolla that happened to be organized by the present author.<sup>74</sup> A large number of secondary school teachers attended, but it was not because they were well informed on the state constitution, as we learned, but rather because they had long been required to teach the subject of California legal history in their classes, and only about ten percent of those attending could say that they knew the slightest thing about the subject or gave it even nominal attention in the classroom.<sup>75</sup> Even more surprising was the fact that in 1979, in the state's leading schools of law, the

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consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.

*People v. Longwill*, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975).

73. P. JOHNSON, S. BARNETT, G. UELMAN & S. SHIFFRIN, *THE BILTMORE DEBATE: SHOULD THE JUSTICES BE RETAINED?* (1986) (Rose Bird campaign); B. BABCOCK, *THE COURT ON TRIAL* (1986); Scheiber, *High Courts are a Too-Easy Target*, L. A. Times, Oct. 6, 1986, at 5, col. 1. On progressive constitutional politics of the first fifteen years of the century, see the classic work by G. Mowty, *THE CALIFORNIA PROGRESSIVES* (1951).

74. See LAW AND CALIFORNIA SOCIETY, *supra* note 15. In association with those who delivered papers and with the present author as academic advisor, the television station KPBS, San Diego, produced *California Rights* (1981) (independent state grounds and constitutionalism), which aired on public television stations and was subsequently shown in many public schools.

75. The author directed a questionnaire survey of high school teachers in the San Diego area and represents these results from memory. In several summer and weekend institutes on law conducted for California teachers since 1979, I have regularly asked those attending to indicate whether they have read the California Constitution, and whether they know anything of its history and teach the subject. Each time the response has run to ten percent or fewer who can say yes to this three-part question; ironically, nearly all instructors are eager to teach the subject, and they have welcomed materials and guidelines for introducing the subject matter in their classes. See Scheiber, *The Constitution in the School Curriculum: A Proposal For the 1987 Bicentennial*, in *HISTORY IN THE SCHOOLS* 162 (B. Gifford ed. 1988).

subject of California constitutional law, even with respect to the prominent issues associated with independent state grounds such as women's rights in the workplace, the separation of church and state, the death penalty, racial discrimination, and search and seizure, was receiving virtually no attention in constitutional law classes.<sup>76</sup>

This deficiency was all the more astonishing when one considers that scholars and jurists by 1979 were already writing or ruling from the bench on the California Constitution's Declaration of Rights and on independent state grounds. Among them were, most prominently, Justice Stanley Mosk of the California Supreme Court, Jerome Falk of the San Francisco bar, and Dean (now Justice) Hans Linde of Oregon. Indeed, well before the 1879 California constitutional centennial, Justice William Brennan, Jr. had also written searchingly on the emerging doctrine of independent state grounds, and he had bestowed high praise on the strategies marked out by Justice Mosk and others.<sup>77</sup> It was thus bewildering, not merely dismaying, for those of us who were pursuing studies of state law and federalism to see so important a dimension of state constitutional development woefully neglected in scholarly circles as well as in the public arena.

That day of neglect is now over.<sup>78</sup> In the decade since the California centennial, the importance of state law in the jurisprudence of federalism has been thrust before us both by the course of relevant United States Supreme Court rulings and by political events.<sup>79</sup> It is thus no longer

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76. See Friedman, *State Constitutions in Historical Perspective*, in 496 ANNALS AM. ACAD. POL. & SOC. SCI. 33 (1988).

77. See Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); R. POST, *Justice Brennan and Federalism*, in FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY 37 (H. Scheiber ed. 1988); Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 LAW & SOC'Y REV. 664, 686 (1980); Mosk, *The State Courts*, in AMERICAN LAW: THE THIRD CENTURY: THE LAW BICENTENNIAL VOLUME 213 (B. Schwartz ed. 1976).

The relationships of California and national constitutional law specifically are considered in McCurdy, *California Law and the Federal Courts*, in LAW AND CALIFORNIA SOCIETY, *supra* note 15, at 16; and Alarcon, *State and U.S. Courts' Second Half Century*, in *id.* at 19.

78. The writings of Professor A. E. Dick Howard eventually helped to dispel the fog. See Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976). Professor Howard's sensitivity to the importance of state law was doubtless the product of his experience as a leader in constitutional revision in Virginia.

79. With respect to the United States Supreme Court, see especially *National League of Cities v. Usery*, 426 U.S. 833 (1987) and *Garcia v. San Antonio Metropolitan Transit Authority*, 496 U.S. 528 (1985). See also *State Courts and Federalism in the 1980s*, 22 WM. & MARY L. REV. 599 (1981); Choper, *Law Before and After Garcia*, in PERSPECTIVES ON FEDERALISM 13 (H. Scheiber ed. 1987). With respect to closely related issues of policy and politics, see Foote, *Administrative Preemption: An Experiment in Regulatory Federalism*, 70 VA. L. REV. 1429 (1984); Scheiber, *Some Realism About Federalism: Historical Complexities and Current Challenges*, in EMERGING ISSUES IN AMERICAN FEDERALISM 41 (1985); and Jorde, *Antitrust*

conceivable—at least, one earnestly hopes not—for a constitutional law curriculum to relegate issues associated with the application of state constitutions to the obscurity formerly reserved for what used to be seen as hopelessly “parochial” fare.<sup>80</sup> Especially welcome are the efforts by the organizers of the 1989 Hastings symposium to present historical as well as contemporary research perspectives on the developments that have rekindled interest in state law in our own day.

It would be a fitting highlight of the present inquiry if, given all the foregoing, one could say that the 1879 California Constitution was a well-crafted and revered document. Alas, one is not dealing with the history of what speakers at political ceremonial celebrations would call a “venerated charter.” The 1879 constitution was in fact a disappointment to many of those who had championed the convention call;<sup>81</sup> it was reviled and savagely denounced by its critics;<sup>82</sup> and, as noted already, it was ultimately nearly eviscerated by the federal courts, on the very matters which had been the most important to many of the delegates—the anti-Chinese question and the issue of corporate or “monopoly” powers.<sup>83</sup>

It would also be fitting, in the light of the fascination today with the doctrine of independent state grounds, if we could say that the convention in 1879 provided us with a full and satisfying record of “original intent” on that issue. In fact, as section V of this Article will attempt to demonstrate, the question of state autonomy in the context of federal structure and constitutional uniformity did absorb the delegates’ attention in 1878-79. Very little of any penetrating philosophical or jurisprudential material can be found in the debates, however, as to how California might extend individual rights beyond what the national gov-

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*and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227 (1987).

80. There is now a case book published by the U.S. Advisory Commission on Intergovernmental Relations. See R. WILLIAMS, *STATE CONSTITUTIONAL LAW: CASES AND MATERIALS* (1988).

81. See, e.g., the statement by Henry George, in text accompanying note 58, *supra*; Johnson, *supra* note 49, at 137-38; DEBATES & PROCDGS., *supra* note 1, at 1521-24.

82. One leading historian of the era has written: “One sector of the press, under railroad and corporation influence, as bitterly denounced the convention and all its works as Kearney had denounced the State’s capitalists.” R. CLELAND, *A HISTORY OF CALIFORNIA: THE AMERICAN PERIOD* 42 (1926).

83. McCurdy, *supra* note 77, at 16-18; McAfee, *Constitutional History of Railroad Rate Regulation in California, 1879-1911*, 37 PAC. HIST. REV. 51 (1968).

On the “Ninth Circuit jurisprudence” that in the 1880s successfully expanded the reach of the Fourteenth Amendment regarding the rights of the Chinese, the property rights of corporations, corporate taxation, and railroad regulation, see H. GRAHAM, *EVERYMAN’S CONSTITUTION* (1968).

ernment and its judiciary might mandate. Political and legal theorists in the mold of James Madison, James Wilson, or John Randolph simply were not in evidence in the 1878-79 convention. In fact, insofar as the delegates debated the proper reach of state authority to define individual liberties, they did so mainly in their quest to find ways of extending the reach of illiberal policies to disfranchise and remove a minority racial population.<sup>84</sup>

As a final observation about how the 1879 document is remembered historically—when it is recalled at all as a document with a past and a heritage—one must concede that this constitution, as an artifact of the nation's past, is much like George Washington's axe: The handle has been replaced four times and the blade at least twice. The California instrument survives as an entity whose disembodied spirit speaks to its origins—but one whose present composition is evidence of many transforming events in the interim. The document has been amended so thoroughly and so often, especially in the modern era of the initiative and referendum, that we are under a special burden to keep clearly in mind to what degree such concepts as "original intent" have to do with the deliberations of 1878-79 and to what degree they bear only on subsequent events, popular debates, and referenda.<sup>85</sup>

Elements of the original 1879 document—for example, some central provisions of the Declaration of Rights, the church-state and education sections, and the University of California provisions—are still largely intact and of controlling influence in the state's constitutional jurisprudence. And yet on many other key issues of great current importance—privacy, for example; or the basic terms of criminal procedure and punishment policies, which were restructured at a single stroke in an initiative ballot in 1982; or environmental and resource regulations; or even the vexed question of independent state grounds—the voice of this constitution is largely a contemporary one, and also, significantly, the prod-

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84. See *infra* notes 141-45, 188-93, and accompanying text.

85. One is reminded of the obverse peril of seeking original intent for the United States Constitution by looking only to the Framers in 1787 and forgetting that "intent" also involves the terms of the Fourteenth Amendment and subsequently adopted transforming amendments. Mr. Meese, the former U.S. Attorney General, made a specialty of this oversight, something for which Mr. Justice Brennan criticized him eloquently in *THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION* 11-27 (The Federalist Society/Harvard Society for Law and Public Policy, Occasional Paper No. 2, 1986). See Scheiber, *The Structures of Liberty*, in *CONSTITUTIONAL ROOTS, RIGHTS, AND RESPONSIBILITIES* (A. Howard ed. 1988), also appearing in *POWER DIVIDED: ESSAYS ON FEDERALISM IN THEORY AND PRACTICE* (H. Scheiber & M. Feeley, eds. 1989). On Meese's version of "originalism," see also the discussion in Pollack, "*Original Intention*" and the *Crucible of Litigation*, 57 U. CIN. L. REV. 867, 868-70 (1989).

uct of the direct ballot.<sup>86</sup> In many of the provisions that most keenly affect the daily life of citizens of California today, the amended constitution simply cannot be adduced as a source of evidence of nineteenth century realities or ideals—except as they may have influenced the twentieth century political consciousness.

### III. Economic Individualism and Public Rights

We find that about fifteen thousand persons own the land of England. Yet, sir, here in this fair young State, we find that sixty land-owners and corporations own more land than there is in all England. They form a landed aristocracy which threatens as much danger to this State as it ever did to England. If we permit this thing to go on a few years we will see the great nobilities of Kern—Haggin, Tevis, and Carr—forming themselves into an aristocracy which will be worse than was ever seen in England.

—Delegate William P. Grace<sup>87</sup>

Let me say to these men who are so afraid of the [proposed] Railroad Commissioners, that railroad and other transportation companies need not fear the people; but they must come and rest their heads where you and I rest our heads—upon the bosom of public justice.

—Delegate C. W. Cross<sup>88</sup>

Paradoxes that confound any effort at clear-cut historical judgment leap out from any close study of the 1879 constitution. There is no route to a simplified characterization of what the convention achieved, for a cluttered document does not yield an uncluttered interpretive view. In some ways, however, this was an authentically reformist constitution, and in that respect it had a coherence that critics too readily deny.<sup>89</sup>

The changes in the taxation system were designed to open up economic opportunity and remove blatant inequities associated with speculation. Disproportionate burdens had long been carried by the small owners and actual farmers, but now the reforms redistributed those burdens largely at the expense of absentees and large-scale speculators. Apart from introducing a classic equalization measure of an administrative type, designed to tax landed property at uniform values, the new constitution also sought to introduce an important tax break for long-term mortgage borrowers by freeing them from taxation on the mort-

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86. See Lee, *Power to the People?*, *supra* note 67; Lee, *California*, *supra* note 67.

87. DEBATES & PROCDGS., *supra* note 1, at 1141.

88. *Id.* at 62.

89. See C. SWISHER, *supra* note 2 (writing off the constitution as without a vision).

gaged portion of the estate and shifting that tax to the lender.<sup>90</sup> As critics of the mortgage tax had predicted, the bankers and other lenders reacted at first by holding back on credit; but within a short time, they adjusted rates so as to offset what one attorney termed the “revolution in the revenue system of the state.”<sup>91</sup> During the 1880s, in a series of cases before the California Supreme Court, mortgage lenders sought to gain immunity from the effects of the new mortgage taxation provision; but after some wavering, the court came down against their claims, upholding the changes that the new constitution had clearly mandated.<sup>92</sup>

As happens so often in the process of tax reform, however, an accidental beneficiary emerged to profit from what was either poor drafting or lack of foresight. The shift in the mortgage tax proved to be a windfall for the state’s railroad companies, which typically were mortgaged heavily to out-of-state creditors who could not be touched by the tax.<sup>93</sup> The railroad corporations also resisted tax equalization assessments by means of a prolonged campaign of litigation in state and federal courts. Their success in these suits was so impressive as to virtually confirm what reformers had said in the 1878-79 debates of the railroad interests—that these corporations represented a power almost unconquerable in the judicial arena.<sup>94</sup>

Whatever the flaws in the new constitutional design for taxation, taken as a whole it compared favorably with, say, the California tax system as shaped in our own day by Proposition 13 and its two-tier system of rates.<sup>95</sup> As to the impact of the 1879 tax reforms on the state’s econ-

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90. See G. BAKKEN, *THE DEVELOPMENT OF LAW IN FRONTIER CALIFORNIA: CIVIL LAW AND SOCIETY, 1850-1890* at 41-72 (1985) (discussion of the history of California mortgage statutes and jurisprudence).

91. Edward J. Pringle, counsel in *McCoppin v. McCartney*, 60 Cal. 367, 368 (1882), quoted in G. BAKKEN, *supra* note 90, at 58.

92. G. BAKKEN, *supra* note 90, at 57-59.

93. *Id.* The University of California, as a mortgage holder, also escaped the net of taxation, much to the discomfiture of the San Francisco tax authorities; see *People v. Board of Supervisors*, 77 Cal. 136, 19 P. 257 (1888) (discussed in G. BAKKEN, *supra* note 90, at 59-60).

94. W. FUNKHAUSER, *A FINANCIAL HISTORY OF CALIFORNIA* 299-310 (1913); C. SWISHER, *supra* note 2, at 112.

95. No one contending that permitting pre-1978 property purchasers to pay taxes at a third or even a fifth the level that is imposed upon post-1978 purchasers is in a very strong moral posture to criticize the taxation decisions made in 1879! In 1989, in response to the United States Supreme Court’s unanimous decision in *Allegheny Pittsburgh Coal Co. v. County Comm’rs of Webster County, W. Va.*, 109 S. Ct. 633 (1989) (ruling that informal county method of assessing new property owners on full market value, while not re-assessing long-time owners, violated Equal Protection Clause), three lawsuits were filed in California courts challenging the constitutionality of Proposition 13. See Jacobs, *Three Lawsuits Seek to Dump Prop. 13*, *San Francisco Examiner*, Feb. 13, 1990, at A-1, col. 1; Jacobs, *Macy’s Suing to Overturn Proposition 13*, *San Francisco Examiner*, Feb. 13, 1990, at A-6, col. 1. These suits



omy, regardless of the ameliorating effects of judicial rulings, the buoyant economic revival of the early 1880s would probably have offset any negative impact the new taxation law might have had on mortgage investment flows.<sup>96</sup>

The major reform proposals directed at the railroad corporations resulted in new constitutional provisions that were criticized in the convention as radical—a view shared by scholars such as Professor Swisher—and were denounced by conservative critics in 1879 as a ruinous policy that would destroy the security of all investments.<sup>97</sup> The convention halls and newspaper editorial columns in 1878 rang with protestations that the delegates were waging open war on property. The proposal for a railroad commission with rate-setting authority, charged one opponent in the convention, violated “every principle of law, . . . ever[y] principle of public faith . . . of caution, and of common sense.”<sup>98</sup> Even some of the state Democratic Party’s top leadership, the San Francisco *Argonaut* asserted, were “developing themselves into agrarians and communists of a type quite as pronounced, more dangerous, and less respectable than that of the sand lot [i.e., Workingmen’s] leaders whom they are anxiously endeavoring to supplant.”<sup>99</sup> This school of critics declared that the railroad regulations under consideration (and finally adopted) would serve to confiscate the honest investments of private sector interests that the community ought instead to protect, and even subsidize and nurture, for the common good.<sup>100</sup> A view from the perspective of our day, even after the deregulation frenzy of the 1980s, would argue

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raise equitability issues that were brushed off cavalierly by the California Supreme Court a decade ago. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978); see also *Los Angeles County Transp. Comm’n v. Richmond*, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

96. G. BAKKEN, *supra* note 90, at 56-59.

97. DEBATES & PROCDGS., *supra* note 1, at 377, 547, 550.

98. *Id.* at 489. Like others in the convention, Shafter derided the idea that elected or even appointive railroad commissioners could rationally set rates:

I have been railroading more or less for twenty years. Even with that experience I doubt my ability to satisfy myself up on the simple question of freights and fares from here to San Francisco. How much less would be men selected at random, without experience or knowledge, to administer upon such a great interest as this—men utterly ignorant of the essential low down details of the business?

*Id.* See also Swisher’s discussion of the railroad regulation debate, C. SWISHER, *supra* note 2, at 50-65; and Morton Keller’s appraisal of the California revised constitution as unique and radical in M. KELLER, *supra* note 10, at 113.

99. C. SWISHER, *supra* note 2, at 63.

100. DEBATES & PROCDGS., *supra* note 1, at 494 (citing the Wisconsin experience under stringent “Granger” regulation (the Potter Law), which produced a situation in which “all railroad construction was suspended, foreign credit was withdrawn from the State, the railway service was greatly deteriorated, and a deep and widespread disturbance of business ensued,” leading to the Law’s repeal).

to the contrary that the new railroad regulations were well within the ambit of the emerging legislative and constitutional tendencies of the Granger laws era.<sup>101</sup> Moreover, the 1879 railroad reform provisions certainly do not appear wildly "radical" in the light of post-New Deal (or even post-Theodore Roosevelt) regulatory innovations and modern administrative agency powers.<sup>102</sup>

One is forcibly reminded that the California constitutional changes were well within the four corners of the constitutional discourse and reforms of the 1870s reflected by the United States Supreme Court's decision in 1877 of *Munn v. Illinois*<sup>103</sup> and the companion Granger Cases upholding state regulation of railroad rates,<sup>104</sup> though these decisions were themselves under attack in 1878 as having legitimated a grievous destruction of vested property rights.<sup>105</sup>

Some of the convention's most cogent debates centered on the impact of the emerging regulatory regimes in the states, and particularly on the performance of the United States Supreme Court in the Granger Cases; on the legitimacy of blurring separation of powers by blending the judicial, executive, and legislative functions in a commission; and, in a broader way, on what one outraged delegate denounced as the "monstrous" doctrine that the police power could be invoked even to mandate "what Holbrook & Company shall charge for a sack of onions."<sup>106</sup>

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101. See G. MILLER, *supra* note 10; E. KIRKLAND, *INDUSTRY COMES OF AGE: BUSINESS, LABOR, AND PUBLIC POLICY, 1860-1897* (1961); Scheiber, *Public Policy, Constitutional Principle, and the Granger Laws: A Revised Historical Perspective*, 23 STAN. L. REV. 1029-37 (1971).

102. An exception, with respect to "tameness," was the provision that imposed upon corporate directors in general the liability for losses to creditors and stockholders owing to misappropriation or embezzlement by officers. DEBATES & PROCDGS., *supra* note 1, at 418, 1199-1207. On the railroad question, see generally C. SWISHER, *supra* note 2; Sharp, *supra* note 2; and, for the history of later developments, McAfee, *supra* note 83, and Nash, *The California Railroad Commission, 1876-1911*, 44 SO. CAL. Q. 287 (1962).

103. 94 U.S. 113 (1876).

104. See *id.*; *Chicago, Burlington and Quincy R.R. v. Iowa*, 94 U.S. 155 (1877); *Peik v. Chicago and Northwestern Ry. Co.*, 94 U.S. 164 (1877); *Chicago, Milwaukee, and St. Paul R.R. Co. v. Ackley*, 94 U.S. 179 (1877); *Winona and St. Peter R.R. v. Blake*, 94 U.S. 180 (1877); *Stone v. Wisconsin*, 94 U.S. 181 (1877); Scheiber, *Granger Cases*, *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 862 (L. Levy & K. Karst eds. 1986).

105. The most notable attack, but scarcely the only one, was Judge Cooley's article, *Limits to State Control of Private Business*, 1 PRINCETON REV. 233 (1878). See A. PAUL, *THE CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895* (1960); C. JACOBS, *LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW* (1954); Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSPECTIVES AM. HIST. 327, 392-402 (1972), reprinted in *LAW IN AMERICAN HISTORY* 327 (D. Fleming & B. Bailyn eds. 1972).

106. DEBATES & PROCDGS., *supra* note 1, at 379, 494-95, 501, 573-75.

In fact, the panoply of powers vested in the new regulatory commission that the constitution created was no more expansive than powers that had already been exercised by similar commissions in the Granger states.<sup>107</sup> And indeed, the long-established and honored tradition of "public purpose" in American law, especially as expressed in eminent domain doctrines, provided a well-rooted doctrinal basis for the new reform moves.<sup>108</sup>

Neither in the tax reforms nor in the regulatory regime created to bring the railroads under public control did the convention, for all the concern expressed by the majority of delegates over "monopoly power" and social inequities, create a legal environment that can possibly be termed fatal to the entrepreneurial ambitions and expectations of a diverse, hustling population of expectant capitalists such as California harbored. The business of the aforementioned Holbrook & Co., and of scores of other California mercantile companies like it, surely was not seriously jeopardized by the new constitution. Indeed, one suspects that even these very onion merchants may well have welcomed the stringent rules against discriminatory rates and also some of the other major provisions of the new basic law!<sup>109</sup>

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107. *See, inter alia*, G. MILLER, *supra* note 10 (Granger states); Jones, *supra* note 8. An implied concession on this point was made by one delegate, Henry Edgerton, who had been a member of the Massachusetts railroad commission. He declared that his mind had changed in the six years since he had served there, for after his education in "the healthy though disheartening school of experience," he had concluded that to regulate railroad companies coercively by administrative edicts was improper and ineffective, and that

the business of a railway is based upon, and must be conducted in accordance with those universal and immutable principles which lie at the base of every other business; that an arbitrary interference with it by government in any form always has been, and from the nature of the case must inevitably be, in proportion to the extent to which it is exerted, destructive.

DEBATES & PROCDGS., *supra* note 1, at 495.

108. The basic work on this topic is the classic study by Leonard Levy, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957).

There was also an historic basis for pro-active state intervention in rate setting by dint of the record in the antebellum canal era, when the state governments in eastern and older mid-western states entirely controlled some of the basic lines of internal transport. They manipulated rates blatantly, despite the strictures of John Marshall's Court on the matter of interstate commerce, in a system that amounted to the systematic, quasimercantilistic allocation of markets. *See* H. SCHEIBER, *OHIO CANAL ERA: A CASE STUDY OF GOVERNMENT AND THE ECONOMY, 1820-61*, at 247-68 (1970). A cogent and impressive argument on the subject of public purpose in American law was offered by Delegate Beerstecher in the debate on corporate privileges and railroad regulation. DEBATES & PROCDGS., *supra* note 1, at 508-09.

109. *See* CAL. CONST. art. XII, § 21 (1879, repealed 1974). For a discussion of how merchants were often adversely affected by the rate-setting practices of unregulated railroads, and later became heavily involved in the railroad regulation movement, see L. BENSON, *FARMERS, MERCHANTS, AND RAILROADS: RAILROAD REGULATION AND NEW YORK POLITICS, 1850-1887* (1955); G. MILLER, *supra* note 10, at 107-13.

That the delegates had scarcely embraced the “agrarianism” or “communism” that their political enemies associated with the Workingmen’s cause was dramatically signalled also in the very first article of the declaration of rights, declaring that the “acquiring, possessing, and protecting [of] property” were among the inalienable rights of a free people.<sup>110</sup> This phrase, carried over from the 1849 constitution, expressed an individualistic ethic in the starkest terms. The concept was in fact as American as apple pie, insider stock trading, and the Fourth of July; the phrase had appeared as part of the definition of the “pursuit of happiness,” which had been spelled out in some of the earliest state constitutions, as well as in the Revolutionary and Founding era, and it had been retained in successive constitutional revisions in many states.<sup>111</sup> It was an expression of economic liberty—an ideal which, as I have argued elsewhere, has at different times been embraced for diverse purposes by liberal reformers and conservative property-minded elements of our society, and which was rooted deeply in several key provisions of the national Constitution.<sup>112</sup>

In this regard, the 1879 California Constitution (and also its application in the following century of the state’s development) illustrated the continuing viability of two powerful competing traditions in American law. For alongside the faith in privatism and individualism that was associated with private property ownership, the 1879 document also expressed the equally venerable tradition of the common interest pursued through law—pursued, often, at the expense of the private and individualistic values which otherwise were honored as validating canons for legitimate state and private action. This tradition of asserting *public* rights attended to needs, wants, and aspirations that were community-based and community-defined; it established priorities among conflicting private claims based upon communal goals, and it represented in a positive and formal way the “rights of the public” which can legitimately override private claims.<sup>113</sup> In the 1879 California Constitution, this strain in

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110. CAL. CONST. art. I, § 1 (1879).

111. See 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 263 (Pennsylvania Declaration of Rights of 1776) & 375 (New Hampshire Bill of Rights of 1783) (1971).

112. Scheiber, *Economic Liberty and the Constitution*, in *ESSAYS IN THE HISTORY OF LIBERTY* 75 (Henry E. Huntington Library ed. 1989); Scheiber, *Original Intent, History, and Doctrine: The Constitution and Economic Liberty*, 78 AM. ECON. A., PAPERS AND PROC. 140 (1988).

113. See *supra* note 108; Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217 (1984). My own approach reflects the pioneering scholarly contributions of Willard Hurst. See especially Hurst’s penetrating discussion of these themes in the highly specific context of a midwestern state’s resource industry in J. HURST, *LAW AND ECONOMIC GROWTH: LEGAL HISTORY OF THE WISCONSIN LUMBER INDUSTRY, 1836-1910*

American jurisprudence opposed to unfettered capitalism was expressed in the simple phrase: "Government is instituted for the protection, security, and benefit of the people. . . ." <sup>114</sup> The language, cast in the context of fundamental justification for the reserved right of the people to alter the government "when ever the public good may require it," <sup>115</sup> and embodying the old common-law maxim *salus populi*, in later years would often be cited in support of extensions of governmental regulation of private property. <sup>116</sup> In any event, the phrase served to frame the provisions such as those on taxation and railway corporation law that gave concrete meaning to public rights.

Perhaps the convention's most conspicuous doctrinal jousting ground for the confrontation of vested property with the claims of the public good was, however, in the arena of eminent domain law. <sup>117</sup> This question became a matter of heated debate in the convention, centering on four specific proposals. First, adopting language that had been incorporated recently in the constitutions of Missouri and Illinois, the California delegates adopted a provision that property "taken or damaged" by eminent domain proceedings must be compensated. <sup>118</sup> By this move, directed mainly against the railroad interests, the delegates were countering the impact of a series of California Supreme Court decisions that had found "consequential" or "indirect" damages in eminent domain takings to be not compensable—a doctrine that served to reduce costs not only for government itself but also for the railroad companies. <sup>119</sup> The railroads, of course, were the chief private sector benefactors of such

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(1964). See also the landmark study by Leonard Levy, *supra* note 108, and discussion in note 108, *supra*.

114. CAL. CONST. art. I, § 2 (1879, repealed 1974; see art. II, § 1).

115. *Id.*

116. See, e.g., *Miller v. Board of Pub. Works*, 195 Cal. 477, 234 P. 381 (1925) (landmark zoning decision); cf. *Associated Home Builders v. Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (review of California police power doctrine).

117. It had traditionally been so in American courts and constitutional conventions. Expropriation, and its corollary constitutional doctrine of inverse condemnation as a negative check on the police power, had framed a dramatic contention between the claims of public power and those of vested rights since the earliest days of the Republic. See Grant, *The 'Higher Law' Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67 (1930); Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553 (1972). For a regional study offering an important reappraisal of eminent domain law, see Freyer, *Reassessing the Impact of Eminent Domain in Early American Economic Development*, 1981 WIS. L. REV. 1263 (1981).

In the case of the 1878-79 debates, the expropriation issues, together with the inverse-condemnation implications (as some delegates argued) of declaring water a "public use," tended to merge eminent domain with water law questions. See *infra* notes 128-134 and accompanying text.

118. CAL. CONST. art. I, § 14 (1879, repealed 1974; see art. I, § 19) (emphasis added).

119. *Green v. Swift*, 47 Cal. 536 (1874).

a doctrine because of the legislature's routine devolution of the eminent domain power upon railroads.

Second, again following the lead of sister states, the convention also adopted a provision that went to the heart of procedure in eminent domain takings, providing that "no right of way shall be appropriated to the use of any corporation, except a municipal corporation of a county or the state until full compensation therefor be first made in money, . . . irrespective of any benefits from any improvement proposed by such corporation . . . ." <sup>120</sup> By this last prohibition on calculating the presumed benefits in compensation proceedings, the convention sought to address one of the foremost popular complaints about how eminent domain had affected private property owners. For in California, as in many other states, by allowing "offsets" based on alleged benefits of improvements, the courts had afforded both government authorities and private interests—most notably the railroads—yet another lever by which to extract significant involuntary subsidies from farmers and other property owners. <sup>121</sup>

Third, the delegates adopted as part of the new provisions on corporations a section designed to bring what was commonly termed "monopoly power" unambiguously within the ambit of state authority in the realms of both takings and regulation:

The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals, and the exercise of the police power of the state shall never be so abridged or construed as to permit corporations to conduct their business in such manner as to infringe the rights of individuals or the general well-being of the State. <sup>122</sup>

Finally, the eminent domain fight was extended into the realm of water law, as the convention struggled with the question whether the legislature should be authorized explicitly to devolve the takings power on private corporate and individual interests. <sup>123</sup> Such devolution had

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120. CAL. CONST. art. I, § 14 (1879, repealed 1974; see art. I, § 19); see DEBATES AND PROCDGS., *supra* note 1, at 1189-90.

121. See *Railroad v. Caldwell*, 31 Cal. 368 (1866); *Railroad v. Mahoney*, 29 Cal. 112 (1865). On the problem of offsets more generally, see Scheiber, *Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789-1910*, 33 J. ECON. HIST. 232 (1973). On offsets as an issue in constitutional reform efforts generally in the late nineteenth-century United States, see Scheiber, *Economic Liberty*, *supra* note 112, and Scheiber, *Original Intent*, *supra* note 112.

122. CAL. CONST. art. XII, § 8 (1879, repealed 1972).

123. On the tendency to expand eminent domain devolution in the West in this era, see Scheiber, *Economic History*, *supra* note 111.

long been approved in all states of the Union with regard to railroad companies and other transport enterprises such as bridge, turnpike, and canal proprietorships. The California convention now considered whether to extend the reach of the takings power, however, by effectively defining "public use" so broadly as to include privately owned milling, manufacturing, sanitary, drainage, and irrigation projects.<sup>124</sup> Several delegates attacked the proposal on grounds it patently violated constitutional rights protected under the Fifth Amendment (and presumably the Fourteenth), while defenders of the proposal responded that drains, flumes, and mills were no less important to the public—that is, were enterprises of no less a "public purpose," even if private in ownership—than were railroads or bridges.<sup>125</sup>

In the end, the convention sidestepped the issue, leaving it to the political process and the courts to establish the exact constitutional boundaries of eminent domain devolution. Instead, the delegates voted for a procedural innovation that they believed would protect private holdings adequately from any kind of takings: a provision that compensation must be paid to injured parties, in takings, prior to any actual expropriation.<sup>126</sup>

Given the extraordinary importance of California's natural resources in the state's hectic economic development and population growth since the Gold Rush, it was ironic that the 1879 constitution gave relatively little explicit attention to resource management by government. The conception of a positive state role in a pro-active mode, in resource management, awaited twentieth-century reform and innovation.<sup>127</sup> The convention did, however, give explicit attention to the matter of water

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124. DEBATES & PROCDGS., *supra* note 1, at 1024.

125. *Id.* at 1025-26. This debate—both as to the Fifth Amendment and its applicability in the broad sense of fundamental law protecting vested rights, and as to the division over how far the concept of "public use" or "public purpose" could be stretched by a state constitution or its authoritative interpreters—reflected classical elements of the historic tradition in the United States of eminent domain and regulatory law. See Scheiber, *Economic Liberty*, *supra* note 112.

126. CAL. CONST. art. I, § 14 (1879, repealed 1974; see art. I, § 19).

127. See J. HURST, LAW AND SOCIAL CHANGE (1977); McCraw, *Regulatory Agencies*, in 2 ENCYCLOPEDIA OF AMERICAN ECONOMIC HISTORY 788 (Porter ed. 1980). An overview of California's experience in development of government research, rule making, and positive management of natural resources is available in G. NASH, STATE GOVERNMENT AND ECONOMIC DEVELOPMENT: A HISTORY OF ADMINISTRATIVE POLICIES IN CALIFORNIA, 1849-1933 (1964); see also A. MCEVOY, THE FISHERMAN'S PROBLEM: ECOLOGY AND LAW IN THE CALIFORNIA FISHERIES, 1890-1980 (1986); and, for state coastal and ocean resource policies in the late 1940s to 1970, see Scheiber, *Pacific Ocean Resources, Science, and Law of the Sea: Wilbert M. Chapman and the Pacific Fisheries, 1945-70*, 13 ECOLOGY L.Q. 381, 395-426, 486-98 (1986).

rights and ownership, and to the obverse side of this matter: the basis of the state's authority to regulate water use.<sup>128</sup> Article XIV declared "all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, . . . hereby declared to be a public use, and subject to the regulation and control of the State in the manner to be prescribed by law."<sup>129</sup>

Here again, a matter of urgent public policy evoked a sharp encounter between the demands of economic individualism and the doctrines of public rights. Delegate Brown of Tulare County represented one extreme, insisting that water was property, pure and simple, so that "a man has a right to waste or destroy it, just the same as he has a right to kill his own horse if he chooses."<sup>130</sup> Others, including some of the delegates from San Francisco, where public opinion had been outraged by the "water monopoly" as it had been exercised by the Spring Valley Water Company,<sup>131</sup> voiced the opposing view. Thus one delegate from the city warned that the "public use" water provision that was finally adopted was inadequate because it left the existing private rights in water entirely intact. He argued, "The waters of the streams in this State are not the property of individuals, but belong to the State."<sup>132</sup> With prophetic accuracy, he warned that this question "will agitate the people of this State at no distant day, more than any other, railroad corporations not excepted."<sup>133</sup> In the end, the convention's provisions regarding control of water explicitly declared water to be "public," hence subject to regulation, only when sold or rented; and the reform, apparently designedly so,

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128. D. PISANI, *supra* note 11, at 160-61; Sharp, *supra* note 2, at 276-87. Pisani quotes the *Sacramento Daily Union* to the effect that "the new constitution was 'silent as the grave' on such important questions as mining debris, water monopolies, and the wanton destruction of forests that protected the state's watersheds. There was some substance to the charge." D. PISANI, *supra* note 11, at 161.

129. CAL. CONST. art. XIV, § 1 (1879, repealed 1976; *see* art. 10, § 5).

130. DEBATES & PROCDGS., *supra* note 1, at 1021 (Delegate Brown, adverting to the decision in *The People ex rel. Heyneman v. Blake*, 19 Cal. 579 (1862) (holding that water separated from its original source is personal property)).

131. A brief summary of the Spring Valley Water Works charter fight and litigation bearing on its corporate powers appears in A. Roth, *The California Supreme Court, 1860-79: A Legal History 182-87* (University of Southern California, 1973) (unpublished dissertation).

132. DEBATES & PROCDGS., *supra* note 1, at 1021.

133. *Id.* On the subsequent agitation of politics and the prolonged battles over water law, *see* especially the standard work on policy history by Donald Pisani, *supra* note 11. *See also* Miller, *Riparian Rights and the Control of Water in California, 1879-1928: The Relationship Between an Agricultural Enterprise and Legal Change*, 59 AGRIC. HIST. 1 (1985); Scheiber, *supra* note 113 (jurisprudential questions). Professor Brian Gray goes over some of the same ground and looks at more modern materials in Gray, "In Search of Bigfoot": *The Common Law Origins of Article X, Section 2 of the California Constitution*, 17 HASTINGS CONST. L.Q. 225 (1989).



fell far short of bringing the giant water companies and rancher-appropriators under a regime of thoroughgoing regulation by state authorities.<sup>134</sup>

Viewed in the large, however, the 1879 constitution clearly did strengthen the doctrinal and institutional foundations of the state government's regulatory power, even in the water rights field.<sup>135</sup> In the same manner as the California Supreme Court had been seeking since the earliest days of statehood to balance the needs of development against the need for securing property rights, the 1879 convention attempted—and not so irresponsibly, incoherently or even radically as many commentators have asserted—to bring that balance into line with some of the new economic and social realities of the West in the era of industrialization.<sup>136</sup>

In contrast to the campaign against the Chinese, culminating in adoption of the 1879 constitution's provisions aimed at their disfranchisement and economic destruction, the convention's provisions on basic issues of property rights cannot be dismissed as an irrational or irresponsible response to difficult social and economic problems of the day.

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134. See D. PISANI, *supra* note 11, at 160-61; G. Miller, *supra* note 133, at 1, 4-6.

135. This turned out to be so even in the water rights field, because in 1913 the California Supreme Court interpreted very broadly the terms of the constitutional provision. See D. PISANI, *supra* note 11, at 161.

The convention also acted specifically on the matter of tidelands waters and harbors. In the California Constitution, Article XV, section 1 (repealed in 1976) extended the power of the state's eminent domain to "all frontages on the navigable waters." In Article XV, section 2, rights of way for public purposes were reserved for the public against the claims of any private owners of "frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state." This section further provided that the legislature should enact laws to give "the most liberal construction to this provision, so that access to the navigable waters of this state shall be always attainable for the people thereof." Article XV, section 3 (repealed 1976) further provided: "All tide lands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships, or corporations."

These provisions of the constitution, interpreted in light of the Spanish and Mexican civil law heritage, proved highly important in later years with respect to maintenance of harbor frontage for public uses in some of the major ports and with respect to such resource issues as offshore oil. Article XV also provided an anchor for much of modern California public trust jurisprudence. See Selvin, *The Public Trust Doctrine in American Law and Economic Policy, 1789-1920*, 1980 WIS. L. REV. 1403; *The Public Trust Doctrine in Natural Resources Law and Management: A Symposium*, 14 U.C. DAVIS L. REV. 181 (1980); Comment, *The Tideland Trust: Economic Currents in a Traditional Legal Doctrine*, 21 UCLA L. REV. 826 (1974).

136. On the California court's balancing act, see McCurdy, *supra* note 26; Scheiber & McCurdy, *Eminent Domain Law and Western Agriculture*, 49 AGRIC. HIST. 112 (1975). For the subsequent history, see Gray, *supra* note 133; Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217 (1984).

#### IV. The Grab-Bag of Constitutional Politics: Race Hatred, Reforms, and “Hybrid Eclecticism”

I have observed that some gentlemen on this floor . . . have contracted the fatal habit of browsing through the organic laws of other States, borrowing enough to show a want of invention and inventing just enough to show a total want of judgment; wrenching from its context a phrase here and a sentence there . . . and then bringing the result of their labors in here in form of superficial, charlatanic patchwork, of clumsy hybrid eclecticism, and attempting to pass it off upon the credulity and judgment of this house under the authority of great names abroad.

—Delegate H. Edgerton<sup>137</sup>

The new constitution’s complexity, scope, and prolixity were the target of much negative comment by delegates and contemporary critics, but were defended stoutly by its champions. One delegate responded to expressions of concern on this score, declaring:

I care not if this constitution swells into the magnitude of a code. Let it be a code if it is right. Principles, if correct, should be eternal . . . . As we all know, laws are evanescent . . . Legislatures meet and pass laws; and other Legislatures meet and repeal them . . . . Not so with Constitutions.<sup>138</sup>

The central question of Chinese exclusion cut across several other prominent issues, especially the regulation of corporate privileges and the legitimate extent of the state’s police powers. Only a few delegates were willing to stand and defend the rights of Asian residents. One of them was an otherwise politically obscure figure, Charles V. Stuart, a Sonoma County farmer of some substance.<sup>139</sup> Denouncing the anti-Chinese hysteria, Stuart reminded his colleagues of the extensive role played by Chinese workers in the state’s economy over the previous two decades. Stuart denounced the personal assaults, exclusion from public schools, and “murder, arson, and outrage” to which the Chinese population had been subjected in San Francisco—a city that was guilty, he said, of “cowardice in not protecting them in the exercise of their rights of ‘life, liberty, and the pursuit of happiness,’ which all men are guaranteed under our flag.”<sup>140</sup>

Stuart stood nearly alone, however, and the anti-Chinese provisions adopted by the convention all passed by large majorities. Despite the

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137. DEBATES & PROCDGS., *supra* note 1, at 489.

138. *Id.* at 486.

139. Stuart’s unique courage in standing up to the anti-Chinese movement is discussed in T. HITTELL, *supra* note 34, at 622-24.

140. DEBATES & PROCDGS., *supra* note 1, at 1239.

manifest problem of dubious constitutionality, an extravagantly broad power of regulation was asserted over aliens "dangerous or detrimental to the well-being or peace of the State."<sup>141</sup> Corporations formed under California law were forbidden to "employ, directly or indirectly, in any capacity, any Chinese or Mongolian," who were similarly barred from public employment.<sup>142</sup> "Asiatic coolieism" was declared to be "a form of human slavery," and it was prohibited, with all "coolie labor" contracts declared void.<sup>143</sup>

Numerous lawyers among the delegates were aware that the treaty obligations of the United States and the constitutional supremacy of the national government in matters of immigration, citizenship, and guarantee of equal protection all militated against broad state discretion in regulating the Chinese.<sup>144</sup> Nonetheless, a brazen declaration of authority was incorporated in Article XIX for the legislature to delegate to towns and cities "all necessary power . . . for the removal of Chinese without [their] limits . . . and it shall also provide the necessary legislation to prohibit the introduction into this State of Chinese after the adoption of this Constitution."<sup>145</sup> Recent scholarship has documented well the subsequent history of these anti-Chinese provisions. They became the grist for the mill of "Ninth Circuit jurisprudence," as Justice Field and his colleagues systematically struck down one ordinance after another and nullified all the 1879 document's key provisions regarding the Chinese.<sup>146</sup> Ironically, at the very time that the United States Supreme Court was eviscerating the equal protection content of the Fourteenth Amendment as it applied to African-Americans—despite the freed Blacks having been, without question, the chief object of the amendment's original concerns—Chinese residents in California, with the aid of a few skilled and dedicated attorneys, managed to push judicial doctrine squarely in the opposite direction so far as their rights were concerned.<sup>147</sup>

If there was any inspiration or model for the anti-Chinese provisions, it would have been the Black Codes of the antebellum slave South and the Reconstruction era.<sup>148</sup> For a host of other proposals, and many of the specific provisions finally included in the 1879 document, it was

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141. CAL. CONST. art. XIX, § 1 (1879, repealed 1952).

142. CAL. CONST. art. XIX, §§ 2, 3 (1879, repealed 1952).

143. CAL. CONST. art. XIX, § 4 (1879, repealed 1952).

144. See summary of the debate in C. SWISHER, *supra* note 2, at 86-92.

145. CAL. CONST. art. XIX, § 4 (1879, repealed 1952).

146. The phrase "Ninth Circuit jurisprudence" was coined by Howard Jay Graham. See H. GRAHAM, *supra* note 83; see also McClain, *supra* note 37.

147. McClain, *supra* note 37; Roche, *supra* note 64; Salyer, *supra* note 38.

148. See E. FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877 (1988); J. FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR (1961).

either the language of the 1849 constitution or the terms of other states' constitutions and statutes that guided the drafting of substantive terms and specific language.<sup>149</sup> Among the provisions adopted that gave the California Constitution its distinctive reformist character were those providing for the eight-hour day in public employment, establishing a strict separation of church and state in matters of public education, and defining the autonomous powers of the University of California (and also insulating the University from religious sectarian influence in its administration—no small matter, even so late in the nineteenth century).<sup>150</sup> Mechanics' liens were also made a matter of constitutional right—an important labor issue of the day—and imprisonment for debt was prohibited.<sup>151</sup>

One is rather startled to discover a serious concern, at least on the surface, for women's rights, with the new constitution forbidding sex discrimination in admission to any department of the University of California;<sup>152</sup> and the provision—remarkable for its day—that “[n]o person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession.”<sup>153</sup> Although this last provision took nearly a century's time to be applied fully in regulation of the California labor market, the 1879 constitution's perpetuation of community property in marriage, from the first California Constitution, was of

149. For a complete overview of the major issues, see Sharp, *supra* note 2.

150. CAL. CONST. art. IX, § 8 (1879) (church-state separation), § 9 (incorporating the terms of the founding act of March 23, 1888 and amendments); CAL. CONST. art. XX, § 17 (1879, repealed 1976 (current version at art. 14, § 2)) (eight-hours rule). In a related church-state area, the constitution declared that no marriage might be declared invalid “for want of conformity to the requirements of any religious sect.” CAL. CONST. art. XX, § 7 (1879, repealed 1970; see CAL. CIV. CODE § 4206.5); see Goda, *supra* note 50; D. Stewart, “Development of Constitutional Provisions Pertaining to Education in California” (University of California at Berkeley, 1958) (unpublished dissertation).

151. CAL. CONST. art. XX, § 15 (1879, repealed 1976; see art. IV, § 3); art. I, § 15 (1879, repealed 1974; see art. I, § 10).

152. CAL. CONST. art. IX, § 9 (1879). In support of the provision for the University's autonomy, one speaker declared that

in all these great institutions [of learning] it is a cardinal principle that they must be stable. They must be beyond all power of assault and subversion, or they will be a failure. . . . [S]o long as it is made subject to legislative caprice; so long as it can be made subject to the beck of politicians; so long as it can be made to subserve sectarian or political designs, it will never flourish.

DEBATES & PROCDGS., *supra* note 1, at 1476.

153. CAL. CONST. art. XX, § 18 (1879, renumbered as art. I, § 8). Of course, not until *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971), did the clear meaning of this provision gain recognition in California constitutional law. See Furay, *Women's Rights and the California Constitution*, in LAW AND CALIFORNIA SOCIETY, *supra* note 15, at 13.

profound importance to women in that day and subsequently.<sup>154</sup>

Another important cluster of issues pertained to suffrage and to political and judicial processes. The convention provided for universal male suffrage for those over twenty-one years of age and resident in California for one year,<sup>155</sup> except that natives of China were excluded from the ballot.<sup>156</sup> Suffragists mounted an effort to extend the vote to women, and a cluster of about ten delegates led a floor fight to amend the article on suffrage on their behalf. The usual litany of antisuffrage arguments was then heard at length: Woman's "sphere" was in the home, and it would "degrade" women to involve them in the sordid world of politics;<sup>157</sup> women were not really interested in political questions, and if they were to become interested, domestic disharmony would surely result in many otherwise happy marriages, or, alternatively, women would merely vote as their husbands did;<sup>158</sup> and the free ballot had been won by men fighting great wars and revolutions, hence "the ballot belongs to the men."<sup>159</sup> On the other side, the suffragists contended that the time was long past when women should be taxed without representation or suffer from discrimination in a matter so basic as the ballot; it was unacceptable to have this avenue of expression and power closed to them since they had already "proved themselves" by their success when they obtained access to "all the public and profitable vocations of life."<sup>160</sup> Ironically, some of the most radical Workingmen's delegates were wholly against women's suffrage, fearing that it would freight the reform constitution

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154. CAL. CONST. art. XX, § 8 (1879, renumbered as art. I, § 21); see Furay, *supra* note 153, at 13.

155. CAL. CONST. art. II, § 1 (1879, repealed 1972; see art. II, § 2).

156. *Id.* Also disfranchised was anyone found to be an "idiot, insane person, or . . . convicted of any infamous crime." *Id.*

157. DEBATES & PROCDGS., *supra* note 1, at 1004 (summarizing opposing arguments).

158. *Id.* at 1006, 1010 (summarizing opposing views). Delegate Steele took offense particularly to the argument that "[t]he best women will not vote," and only "[b]ad women will vote." *Id.* One delegate cited the experience of Wyoming, which had been the first territory or state to adopt women's suffrage, quoting a third-hand report to the effect that "the better class [of women] became disgusted with the operation of the law, and quit voting." *Id.* at 1012. Wyoming anecdotes were then brought forth also from the other side. Delegate Steele, an advocate of women's suffrage, quoted a federal judge in the territorial supreme court of Wyoming to the effect that "[t]he general influence of woman suffrage has been to elevate the tone of society, and to secure the election of better men to office," and he "thought their experience [in Wyoming] refuted the objection that women unsex themselves." DEBATES & PROCDGS., *supra* note 1, at 1015.

159. *Id.* (summarizing opposing arguments).

160. *Id.*

with an issue that would cause its defeat in the ratification ballot.<sup>161</sup>

A moderate element among the delegates was willing to settle for a provision that would simply leave the legislature with authority to grant suffrage to women at any time, or at least explicitly permit legislation allowing women as a class to vote on the issue of suffrage extension.<sup>162</sup> These compromise efforts failed, however, and a last-ditch effort at gaining reversal was thwarted when the convention refused to even hear the petitions of a group of women who attended a session in the closing days.<sup>163</sup> Women's suffrage was not to be triumphant in California for another thirty-two years.<sup>164</sup>

A more popular set of concerns was what we may term "process-oriented" reforms, a set of new provisions aimed at liberating the legislature from what was widely seen as its vassalage to special interests.<sup>165</sup> Among the more important innovations was a strongly worded prohibition against "local or special laws" (as opposed to laws of general application), which had in the past been a vehicle for obscuring the devolution of special privileges.<sup>166</sup> Indeed, the delegates embroidered the prohibition by setting forth a detailed enumeration of thirty-two categories of legislation in which only general laws might be passed. Also included was an open-ended category: "all other cases where a general law can be made applicable."<sup>167</sup> Limits were placed on the legislature's discretion with respect to charters for municipal government,<sup>168</sup> a blow in favor of home rule, which was a favorite cause of the more conservative and moderate elements, enraged because San Francisco had been subject to "pillage" by dishonest and irresponsible state legislators.<sup>169</sup>

Despite the efforts of opponents to kill the reform effort with an overdose of sardonic humor—after all, one of them pleaded, so many others would be hurt by the new provisions, why not spare the poor lawyers<sup>170</sup>—a provision was adopted that declared it "lobbying" and as such

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161. *Id.* at 1014 (Delegate Estee: "I hope that these amendments will not be adopted, because it will have a tendency to load down the Constitution. . . . There have [been] some great reforms gone into this Constitution that we hope will be adopted.").

162. *Id.* at 1364, 1366-67. \*

163. *Id.* at 1494.

164. Furay, *supra* note 153, at 15. The suffragist movement in California launched a strongly organized campaign in 1896 to introduce the vote for women, but despite active participation by Susan B. Anthony and other national figures in the women's campaign, the measure was defeated. S. Scheiber, untitled manuscript loaned by author, treats this campaign.

165. *See supra* note 9 and accompanying text.

166. CAL. CONST. art. IV, § 25 (1879, repealed 1966; *see* art. 4, § 16).

167. *Id.* (list of 33 enumerated cases).

168. CAL. CONST. art. XI, §§ 6-8 (1879, repealed 1970).

169. San Francisco Daily Bulletin, April 30, 1878.

170. DEBATES & PROCDGS., *supra* note 1, at 1283.

a felony to influence the legislative process through "bribery, promise of reward, intimidation, or any other dishonest means."<sup>171</sup> A more sweeping effort to make lobbying per se a crime failed to gain adoption.<sup>172</sup>

Another subject area of important revision was the system of criminal justice. The old requirement that a felony case must be given to a grand jury and "prosecuted by indictment" was now dropped, and a simpler procedure for filing, in the superior court, an "information, after examination and commitment by a magistrate" was substituted as an alternative option.<sup>173</sup> This reform was upheld by the United States Supreme Court in the case of *Hurtado v. California*,<sup>174</sup> and, as a practical matter, "the role of the grand jury in criminal process shriveled away [in California] after 1880."<sup>175</sup>

Also of considerable interest, especially in light of current day legal battles concerning libel and first amendment protection of speech, were the terms of the 1879 constitution in the area of speech and press.<sup>176</sup> This is a fascinating realm of state law, largely neglected by historians, on which the delegates at Sacramento staged a lively debate, subjecting the common law and constitutional questions to searching discussion.<sup>177</sup>

Proposals that were aired but defeated should not be overlooked in this overview of the varieties of innovation, because (like the proposal for women's suffrage) they indicate the range of reform ideas that gave impetus to the movement for constitutional revision. Among the losing causes were proposals to make voting in elections compulsory, to institute a sliding scale of compensation for legislators that would penalize

171. CAL. CONST. art. IV, § 35 (1879, repealed 1966; see art. IV, § 15).

172. DEBATES & PROCDGS., *supra* note 1, at 143, 165, 1283-84.

173. CAL. CONST. art. I, § 8 (1879, repealed 1974; see art. I, §§ 14, 23).

174. 110 U.S. 516 (1884). The *Hurtado* decision rejected arguments based on the Fourteenth Amendment that a deprivation of due process was involved in the 1879 reform, in this instance elimination of grand jury indictment in criminal cases. In this respect, the review in federal adjudication came to a different result than either suits testing provisions of the constitution relating to the Chinese, see *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and discussion *supra* note 64, or other provisions relating to taxation and the powers of the railroad commission, see H. GRAHAM, *supra* note 83. See also McCurdy, *California Law and the Federal Courts*, in LAW AND CALIFORNIA SOCIETY, *supra* note 15, at 16.

175. Friedman, *One Hundred Years of Criminal Justice*, in LAW AND CALIFORNIA SOCIETY, *supra* note 15, at 7. For a full analysis of the criminal justice system in operation under terms of the 1879 constitution, see L. FRIEDMAN & R. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910* (1981).

176. CAL. CONST. art. I, § 9 (1879, repealed 1974; see art. I, § 2).

177. DEBATES & PROCDGS., *supra* note 1, at 324-38. On libel and constitutional development in the United States, see N. ROSENBERG, *PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL* (1986); and Post, *Defaming Public Officials: On Doctrine and Legal History*, 1987 AM. B. FOUND. RES. J. 539 (1987) (review of N. ROSENBERG, *supra*).

them for prolonging their sessions, to prohibit divorce for any reason except adultery, to abolish grand juries altogether, and to move toward appointive (instead of elective) judicial offices.<sup>178</sup>

In sum, if "clumsy, hybrid eclecticism" was evident, so too was a fairly strong sense of coherence in many of the 1879 document's provisions. There was, to be sure, diffraction and diffusion of reform objectives in the process of compromise; but there was also a clear intent at reformation and a vision that sought to create a more efficient state apparatus, with new protections against corruption or subversion by special interests. That an essential element of the resulting compound was a vulgar and unyielding racism was no less indicative of the times, however, than was the vision of reform.

### V. State and Nation: The Question of Federalism and the 1879 View of "Independent State Grounds"

One of the most dramatic debates of the convention concerned the classic question of federalism: how much autonomy legitimately remained with the state government, given the terms of the national Constitution; and to what degree were the citizen's rights and the state's powers to be seen as derived from the California Constitution, rather than as a residual implicit in the federal design?<sup>179</sup> In modern day constitutional law, both in the state courts and in national constitutional jurisprudence, intense attention has been focused recently on the issue of independent state grounds—the definition of citizens' rights under terms of the state constitutions, beyond those guaranteed under the national Constitution and its authoritative interpretation by the federal courts.<sup>180</sup>

The California convention witnessed some debate of state autonomy and the principles of federalism in this context—but mainly to acknowledge or celebrate in a general way the importance of careful definition and enumeration of rights.<sup>181</sup> The most extended debates on this issue, however, centered in the convention on two other matters. One was the state's power to control Chinese immigration and status. The other was the appropriate form and rhetoric for acknowledging (if it were to be done at all) the formal supremacy of the national Constitution and fed-

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178. For a summary of the major defeated measures, see T. HITTELL, *supra* note 34, at 625-26.

179. For the classic issues of federalism, see Choper, *The Scope of National Power vis-a-vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977); for these issues discussed in an historical context, see Scheiber, *Federalism (History)*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 697 (1986).

180. See *supra* notes 71-73 and accompanying text.

181. See, e.g., DEBATES & PROCDGS., *supra* note 1, at 234, 238.



eral authority—a vexed question laden with the political baggage of the Civil War divisions and partisan bitterness.

As to the debate on the Chinese issue, the delegates voiced strong and often ideologically based views on the matter of how far state authority could properly reach. On the one extreme was the know-nothing anti-Chinese element that demanded measures for the immediate physical expulsion of all Chinese, with draconian curbs, even beyond those finally adopted in the 1879 document, upon the freedom of Chinese residents until they could be expelled.<sup>182</sup> Leaving aside the lonely few voices who spoke up for extension of equal protection to the Asian,<sup>183</sup> some moderate and conservative delegates voiced the obvious caveat that under the national Constitution certain powers could be exercised by Congress alone. There was less reference to the Fourteenth Amendment than one might expect, given the prominence of the issue of ratifying this charter of equal protection at that time in the politics of the nation.<sup>184</sup> Instead the emphasis of delegates' speeches was upon the treaty obligations to China, the negotiation of new treaty terms as the best immediate recourse for banning of immigration, and the need to work within the framework of supremacy of federal law.<sup>185</sup> Especially interesting, as Professor Bakken has observed,<sup>186</sup> was the learning exhibited in the debates involving points on constitutional law, particularly the extended analyses of decisions of the federal courts dealing with supremacy and treaty obligations.<sup>187</sup> Equally intriguing was the extent to which these debates reflected in vivid ways the overlay of issues derived from the era of secession politics, the Civil War, and the Reconstruction period movement for equality in civil rights for Blacks.<sup>188</sup>

The second line of debate on the federalism question concerned basic jurisprudential concepts of state versus national authority. As already indicated, one strand of this concern was closely tied to the question of how much power the state could wield in persecuting the

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182. *Id.* at 92, 105, 638, 739.

183. *See supra* notes 139-40 and accompanying text.

184. *See* J. TEN BROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951); Bickel, *The Original Understanding and the Segregation Decision*, 69 *HARV. L. REV.* 1 (1955).

185. *DEBATES & PROCDGS.*, *supra* note 1, at 702-21 (speeches on Chinese, treaty terms).

186. Comments of Gordon Bakken, Professor of History, California State University, Fullerton, at symposium on the California Constitution, University of California, Hastings College of the Law, March 2, 1989.

187. *See, e.g.*, *DEBATES & PROCDGS.*, *supra* note 1, at 649-67.

188. *See, e.g., id.* at 659-61. The overtones of nullification in relation to assertions of autonomous state authority to regulate the Chinese (even to expel them) were particularly evident in speeches by delegates Barbour and Cross. *Id.* at 233; *see supra* notes 182-84 and accompanying text.

Chinese. The initial foray into this area of constitutional language and law occurred when the convention first considered the Declaration of Rights. Delegates raised fundamental issues of federalism when presented by the drafting committees with the following language for what became, in the completed 1879 revision, Article I, sections 2 and 3 of the declaration:

[Sec. 2.] All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it.

[Sec. 3.] The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land.

Henry Larkin of El Dorado, one of the radical anti-Chinese delegates, immediately moved an amendment that would have substituted in section 2 much more assertive (if imprecise) language as to the reach of the state's police power. The people of California, Larkin's proposal declared, had "the inherent, sole, and exclusive right to regulate their internal government, and the police thereof . . . [and] to determine what is detrimental to the well-being of the State, and to exhaust the power of the State to prohibit and prevent it."<sup>189</sup>

The issue behind the rhetoric was, of course, the Chinese. The facade fell quickly when one of Larkin's supporters endorsed his proposal on grounds that "*we have an overshadowing curse everywhere present, in this State, and we want an emphatic declaration in the Constitution, declaring that this State has the right to regulate her own internal government.*"<sup>190</sup> Another champion of the Larkin amendment argued that because the United States Government had "declared the relation of the several States [to itself]" in the federal compact, the state should do the same. "And, while perhaps it comes very nearly to the old principle of States rights," he rather abashedly admitted, so long as it stood alongside the proposed section 3 (reasserting federal supremacy, as quoted above), it could not be interpreted as an expression of old style nullification doctrine, nor in any way as being "revolutionary against the government of the United States."<sup>191</sup>

The Larkin view, having raised the specter of well-worn nullification doctrines, states' rights claims, and anti-Unionism in an arena in which Civil War issues were not yet crowded out and charges of "bloody shirt" tactics were still common, could not carry a majority for language so

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189. DEBATES & PROCDGS., *supra* note 1, at 233.

190. *Id.* (emphasis added).

191. *Id.*

sweeping or laden with secessionist overtones.<sup>192</sup> Some of the ideas, however, were the guiding spirit of provisions incorporated into the sections on the Chinese.<sup>193</sup>

When the delegates turned to the assertion of federal supremacy, in the proposed Article I, section 3, the debate quickly turned on ideas, phrases, issues, and political accusations that would have been equally appropriate, in such a dialogue on the constitution, in 1859-60 as in 1878-79.<sup>194</sup> The Democratic regulars were at pains to deny that the Reconstruction amendments had effected significant change in the sphere of federal versus state authority. The decision of *Texas v. White*<sup>195</sup> was cited, for example, as evidence that the United States Supreme Court “repudiates altogether the doctrine that the character or nature of our government was changed by the rebellion, or that the victory at Appomattox had anything to do with the fundamental principles of government.”<sup>196</sup> The supremacy of the states’ authority “within their respective spheres”<sup>197</sup> was an idea very congenial not only to the anti-Chinese delegates but also to doctrinaire opponents of centralization and an expansive view of the Fourteenth Amendment, that is, to those who denied that the supremacy issue had been settled by “the case of Grant vs. Lee, decided at Appomattox,” a decision from which there was no appeal.<sup>198</sup> Among the anti-Chinese and the states’ rights idealogues, in fact, were a few who were fanatical enough (or politically naive enough) to advert directly to secession—a recourse that was warranted, they averred, “if our Government doesn’t protect us, and if our Government is [determined] to make

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192. For the “bloody shirt” charge (that the Republicans were relying on implications of disloyalty and treason against those who had opposed Lincoln and the war policy in 1861), see, e.g., *id.* at 1182, 1187. On bloody shirt politics in the post-Civil War era, see P. BUCK, *THE ROAD TO REUNION: 1865-1900*, at 74-84, 91-98, 107-13 (1937).

193. Some sympathetic delegates, not willing to raise issues of Unionism and states’ rights, thus urged they should be. *Id.* at 234. See CAL. CONST. art. XIX, §§ 1-4 (1879, repealed 1952).

194. The debate also introduced, from the side of those who had been sympathetic to the Confederacy and opposed the statement of federal supremacy, language and ideas that were again made a familiar part of American rhetoric in the 1980s by President Ronald Reagan and especially his Attorney General, Edwin Meese. This fact speaks eloquently to the pedigree and vintage of the Reagan-Meese ideas on the constitutional limits of federal supremacy. See also Scheiber, *supra* note 113, at 48-50, and the widely noticed speech by Justice Thurgood Marshall drawing the obvious connections between considerations of race relations, and of interventionism versus antigovernmentalism, on the one side, and Meese’s notions of the proper limits of federal authority, on the other, Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

195. 74 U.S. (7 Wall.) 700 (1869).

196. *DEBATES & PROCDGS.*, *supra* note 1, at 1183.

197. *Id.* at 238.

198. *Id.* at 1185.

this State a China Empire.”<sup>199</sup>

Ironically, the proximate origin of the proposed language on federal supremacy was not a determined drive by “bloody shirt” Republicans or constitutional ideologues, nor even the concern of the anti-radicals to assert state power against centralization generally or in the anti-Chinese cause specifically. Instead, the origin lay in responses to a recent public declaration by the Workingmen’s convention by which the radical leadership sought to defend the movement against charges of “communism” and hostility to basic American political principles.<sup>200</sup> “[W]e recognize the Constitution of the United States,” the Workingmen had stated, “as the great charter of our liberties and the paramount law of the land . . . .”<sup>201</sup> When the language the Workingmen had adopted was submitted to the convention as a formal provision for the new constitution, however, the many faces of the federalism question became manifest: the diverse motivations and hidden (and not-so-hidden) agendas of racism, conservatism, states’ rights, and zealous Republican nationalism did not take long to surface.

All this is not to say that the core idea, correctly cherished and nurtured today by proponents of independent state grounds—the idea that the rights of the citizen against the power of his or her state government need not stop with the federal Constitution and its judicial interpretation—was absent in 1878-79. There was explicit consideration given to the idea of independence of the states in regard to definition of rights. To rely solely upon the national Constitution as the sole “charter of our liberties,” one of the conservative delegates thus declared, “is a mistake historically, a mistake in law, and it is a blunder all around.”<sup>202</sup> The state constitution, Delegate Howard argued, “is as much or more the charter of our liberties than the Constitution of the United States.”<sup>203</sup>

Whatever the immediate motives and ideological preferences of the various factions of delegates who considered these questions in the convention, the subsequent history of California jurisprudence, and of independent state grounds doctrine more generally, is indicative that the idea of rights based and rooted in the state’s own constitution was a robust one. It was strong enough, at any rate, to transcend the immediate purposes for which some delegates in 1879 pursued the issue; and it would take new roots in a later era when concern with the redefinition of

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199. *Id.* at 1186.

200. *Id.* at 241.

201. *Id.*

202. *Id.* at 238.

203. *Id.* at 1182.

individual and group rights would become a prominent item in the agenda of political discourse.<sup>204</sup>

At first blush, recognition of the ugly tone of the 1878-79 debates of federalism questions, and especially acknowledging the racist or anti-egalitarian impulses that moved many of the delegates, might lead one to challenge the enthusiasm with which some jurists have pointed to the "original intent" of the California framers as the champions of independent state grounds.<sup>205</sup> We do so, however, at the risk of overlooking that the convention itself eschewed the most assertive general declarations of doctrine that seemed to echo the principles of Calhoun and nullification. More importantly, almost a century after the 1879 revision, the people of California would speak directly to the issue by adopting an unambiguous declaration of the independent function of the state constitution and jurisprudence in the definition of rights.<sup>206</sup>

It is well to recall the obverse side of plebiscitory action in the field of defining rights based in the state constitution's provisions: that the people of California have also pioneered in taking away from themselves, or at least from affected minorities, what their state supreme court had given, in the way of rights above and beyond those guaranteed by the national government.<sup>207</sup> Both the plebiscitory style and the often con-

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204. See Falk, *supra* note 71; *People v. Longwill*, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n.4, 123 Cal. Rptr. 297, 302 n.4 (1975); see also *supra* note 72.

205. Generally the California justices who have championed independent state grounds have portrayed the framing of the declaration of rights in terms of the 1849 convention's work on the first constitution, rather than in the context of the 1878-79 revision. Only thus can be explained, for example, Justice Mosk's rather roseate view of the declaration as the product of a convention "that was a reflection of the youth, heterogeneity and independence of the state." *Diamond v. Bland*, 11 Cal. 3d. 331, 338, 113 Cal. Rptr. 468, 473, 521 P.2d 460, 465 (1974) (Mosk, J., dissenting). See also other opinions authored by Justice Mosk: *People v. Brisendine*, 13 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 328-29 (1975); *People v. Longwill*, 14 Cal. 3d 943, 951 n.4, 538 P.2d 753, 758 n. 4, 123 Cal. Rptr. 297, 302 n.4 (1975); *People v. Disbrow*, 16 Cal. 3d 101, 114-15, 545 P.2d 272, 280-81, 127 Cal. Rptr. 360, 368-69 (1976); *DeRonde v. Regents of Univ. of Cal.*, 28 Cal. 3d 875, 893-94, 624 P.2d 220, 230-31, 172 Cal. Rptr. 677, 687-88 (1981) (Mosk, J., dissenting); *People v. May*, 43 Cal. 3d. 436, 729 P.2d 778, 233 Cal. Rptr. 344 (1987).

206. CAL. CONST. art I, § 24 (1974): "Rights not guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution" (adopted November 5, 1974, Resolution Chpt. 90, ACA 60).

207. See, e.g., *Reitman v. Mulkey*, 387 U.S. 369 (1967); Wolfinger & Greenstein, *supra* note 67 (popular votes against the extension of rights). On low-income housing, see *James v. Valtierra*, 402 U.S. 137 (1971) (local voters must approve plan), discussed in Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971). On Prop. 1 in 1979 and its reversal of California Supreme Court decisions instituting a higher standard than that imposed by the federal courts as to school desegregation, see Hart-Nibbrig, *School Integration: Constitutional Law*, in LAW AND CALIFORNIA SOCIETY, *supra* note 15, at 21; and Newman, *The Constitution and Ethnic Pluralism*, in *id.* at 25.

flicting (and sometimes confounding) outcomes of these populist revisions of the state's constitution through the direct ballot have an authentic historic resonance in light of the 1878-79 convention and its context in California politics. In its unpredictable pattern of populist currents, not without evidences of illiberal or even outright racist direction,<sup>208</sup> and also in its tendency to mobilize resourcefully the full range of powers in the state government's authority and jurisdiction, modern California constitutional politics derive from a long and continuous tradition.

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208. This is a tradition that, as noted earlier, does not exclude the Progressive era of reform. *See supra* notes 67-68 and accompanying text. Prop. 1 in 1979 took away from the California Supreme Court the authority to develop its own higher standard of school desegregation requirements, beyond what the United States Supreme Court and federal civil rights laws were requiring:

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to pupil school assignment or pupil transportation . . . .  
CAL. CONST. art I, § 7(a) (1879, amended 1979).