Private Rights and Public Purposes:

California's Second Constitution Reconsidered

By R. Jeffrey Lustig

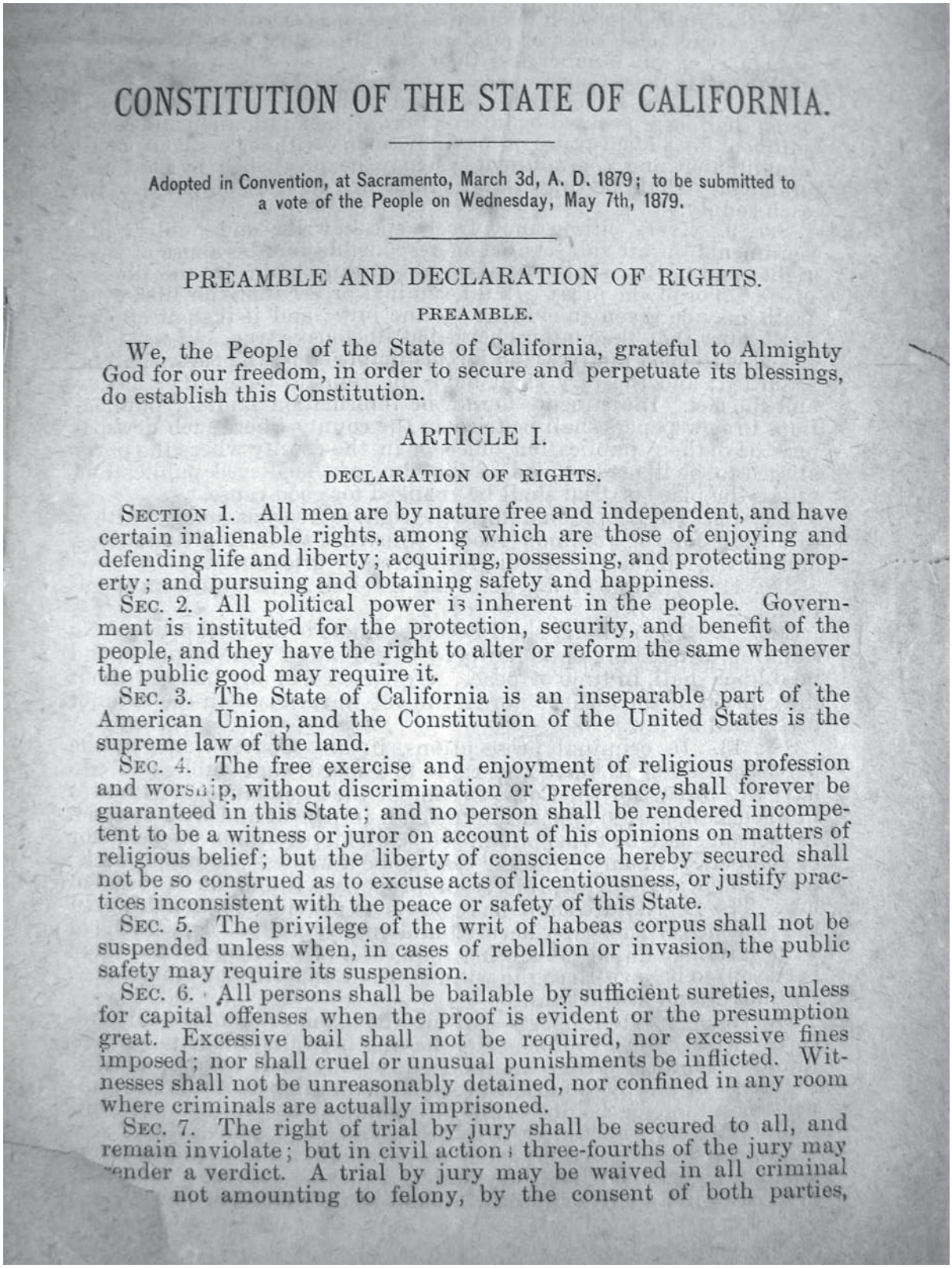
California is governed today by the constitution of 1879, yet few Californians know anything about that law or the convention that produced it. The convention's centennial passed unnoted. Historians have generally overlooked its proceedings. The constitution goes unstudied in public schools. And reformers recently called for a California 2.0 apparently without realizing the state has been operating under that system for over a century.[1]

The few things generally known about the constitution, furthermore, do not inspire further study. It is famed for its prolixity, now protecting fishing rights, arranging the financing of off-street parking, and weighing in at 70,000 words, the third longest constitution in the world. It has been ridiculed from the beginning for its "hybrid" legal character, reformer Henry George dubbing it at the time of passage a "sort of mixture of constitution, code, stump speech and mandamus."[2] The usual impression given by scholars is that it was drafted by rubes and amateurs who didn't know a *constitutio libertatus* from a shopping list. The State Assembly chief clerk's office currently publishes a book that calls it "the perfect example of what a constitution ought *not* to be."[3]

What praise the document has attracted over the years has been faint. The nineteenth-century constitutional scholar James Bryce, who first judged it a "horrible example" of democracy in the Far West, later decided that it had caused "No great harm. . . . [P]runed by the courts, and frequently amended . . . it came to work tolerably." A more recent study presents the constitution as a balked first step in the unfolding teleology of rational system and modernization—"an effort [by aggrieved workingmen and business interests "alike"] to make sense of a modernizing corporate order, . . . anticipating the regulatory state that would be established . . . a generation later."[4]

That the 1879 constitution remains California's fundamental law is puzzling. Already by 1949, Carey McWilliams observed that "California, the giant adolescent, has been outgrowing its governmental clothes" for a long time.[5] Other states have provisions for regularly revising their constitutions and use them. But California still operates under an organic law enacted when its population numbered 860,000, long before vast economic and demographic changes made it, with 38 million people, one of the most complex societies in the world today.

As California descends into a governing crisis marked by paralyzing budget battles and calls for a third constitutional convention, people



CONSTITUTION OF THE STATE OF CALIFORNIA.

Adopted in Convention, at Sacramento, March 3d, A. D. 1879; to be submitted to a vote of the People on Wednesday, May 7th, 1879.

PREAMBLE AND DECLARATION OF RIGHTS.

PREAMBLE.

We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution.

ARTICLE I.

DECLARATION OF RIGHTS.

SECTION 1. All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness.

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.

SEC. 4. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be guaranteed in this State; and no person shall be rendered incompetent to be a witness or juror on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.

SEC. 5. The privilege of the writ of habeas corpus shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require its suspension.

SEC. 6. All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor confined in any room where criminals are actually imprisoned.

SEC. 7. The right of trial by jury shall be secured to all, and remain inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases not amounting to felony, by the consent of both parties,

Intended to control land, water, and railroad monopolies, California's second constitution—drafted in 1879 for a state of 860,000 citizens—was an expression of efforts to preserve republican social conditions as well as republican political institutions. The document's original 21,000 words have grown to 70,000 due to frequent amendments. Despite reductions in the 1960s, it remains the third longest constitution in the world.

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naturally look back to the second convention to understand what it accomplished, which of the current problems it caused, and what, if anything, it can teach us. Past historians and scholars have tended to limit their attention to its legal enactments or those that survived the pruning Bryce noted. But outside the courts and convention hall a larger political conflict was being played out in 1879, and what happened in the hall affected that conflict and its legacy for the next century, including a fundamental question that remains on the state's agenda today.

In light of this larger context, to propose that those who called the convention of 1878–79 were only trying to "make sense" of a corporate order that they had been contesting actively for twenty years entails a serious misjudgment of their politics. More accurately, they were doing what they said they were: attempting to defend themselves against what they considered criminal depredations of the republican world. That effort required that they invent new governmental mechanisms for new problems and take note, in effect, of unrecognized shortcomings in the old federal design.

The giant adolescent described by McWilliams in the 1940s has become an elephantine adult, now tripped up by its childhood garments. As Californians begin to think about new governmental clothing, it is instructive to see how the old was first stitched together.

ORIGINS OF THE SECOND CONVENTION

The 1878–79 convention may be distinguished from other constitutional events in the state's history by the vigor of its class-conscious invective. Even before the delegates arrived at the state capital, the *Stockton Independent* warned of "communist reformers" and the *Sacramento Record-Union* identified the choice before the state as one between "socialism and legitimate government." The *Oakland Democrat* inveighed against "French Communism, German Red Republicanism, or the still wilder agrarian notions which have recently been . . . proclaimed."[6] From the opposite bench at the convention, San Francisco's Workingmen's Party delegate Patrick Dowling charged: "Corporations have bought up conventions and swayed Legislatures; . . . they run the ship of State," and even "the judiciary . . . [has been] dishonored with their contaminating influence." Charges were exchanged about who wore the corporate collar. And Workingmen's delegate Charles Beerstecher announced he would never put his hand to a document "made and manufactured by the political tricksters and wirepullers who have seats in this convention." Admonished to respect parliamentary decorum, Beerstecher acknowledged that he was "sorry that the coat fits some persons here."[7]

The hard words and harder feelings were the products of the difficult times. California in the 1850s and 1860s was a rough-and-tumble place with a paucity of public services and a surfeit of violence. San Francisco fielded two vigilante movements in the 1850s to secure order in its streets. Supreme Court Justice David Terry killed ex-senator and Democratic Party organizer David Broderick in a famous duel in 1859. Speculators looted the public domain, making off in 1853, for example, with most of the federal land grant of 46,000 acres intended for state colleges.[8] Failed and broken young miners loitered on San Francisco's docks, striking the young Ulysses Grant as "strangers in a strange land," and in the hills impressing Mark Twain as old and grizzled before their times.[9]

A scattering of civic builders strove to create a more settled social order with schools, public hospitals, regular police forces, and teacher training programs. The Reverend Horatio Stebbins argued for a state university on the grounds that it was essential "to free Republican government": "The state is bound to furnish the citizens the means to discharging the duties imposed

on him. If the state imposes duties that require intelligence, it is the office of the state to furnish the means of intelligence. . . . [I]t is for the dignity of the commonwealth."[10] Higher education was necessary from this Jeffersonian view for political reasons and in response to people's duties more than their rights. In order to fulfill republican ideals and preserve a classless society in California—in contrast to the more class-bound East—the University of California was made tuition-free when it was created in 1868. It also opened its doors to women "on equal terms with young men," one of the first universities in the nation to do so.[11]

Among the many issues of the times, three stood out by their centrality and shaping influence on the others. First and foremost was the pattern of land ownership. Despite the richness and extent of what settlers expected and George described as an "enormous common," almost a third of the state's 100 million acres—including the 13 million most arable acres—had been claimed by 1869.[12] The Central (later Southern) Pacific alone acquired title to 11.6 million acres, or 12 percent of the state's land area, by federal land grant. In addition to almost 9 million acres tied up in former Mexican land grants, another 8 million acres of federal lands intended for schools, swampland reclamation, and public services had been disposed of by speculators, often on the basis of insider tips and dummy buyers and without official survey or payment of agreed-upon prices. As geographic historian Paul Wallace Gates noted, by 1878 "the largest and best portions of the state lands had already gone into private ownership."[13] And in an arid land, the water rights on these holdings provided the means for land barons such as Henry Miller, William Chapman, and James Ben Ali Haggin, with a million acres each, to leverage control over still more.

For settlers who had come of age in the Jacksonian era, this meant more than that some people held large tracts of an agrarian society's primary means of production. The idea of land for them held a rich web of meanings, including the moral and political preconditions for republican citizenship, the grounds for a workingman's hoped-for independence and autonomy. Taken altogether it comprised what a later generation would call "opportunity." That was clear from George's lyrical passage in *Progress and Poverty:* "Land is the habitation of man, the storehouse upon which he must draw for all his needs, the material to which his labor must be applied for the supply of all his desires. . . . On the land we are born, from it we live, to it we return again—children of the soil as truly as is the blade of grass or the flower of the field. Take away from man all that belongs to the land, and he is but a disembodied spirit." The settlers' complaint was not so much that the Millers and Chapmans possessed a great deal of land as that by their possessions they *dis*possessed others of their natural right and opportunity, stripping them of "everything that God Almighty provided for the comfort of men," as Patrick Dowling declared at the convention.[14]

Second in importance to Californians at the time were the problems of transportation and freight monopoly posed by the Central Pacific Railroad, symbol and advance agent of corporate capital. By 1877, the Octopus—as author Frank Norris characterized the giant railroad conglomeration in his 1901 novel of the same name—controlled 85 percent of the state's railroad tracks, the terminals and docks around the ports of San Francisco Bay, Sacramento, and Oakland, the major internal waterways, and was choking the routes of the Pacific Mail Steamship line. After Los Angeles succumbed to its demands for land, a terminal, and a $600,000 subsidy, the company's tentacles reached as far as New Orleans, too.[15] This gave it the power to raise and lower rates at will, to bleed off the profits of farmers and small businessmen who had no other way of getting their goods to market, and by giving rebates and special concessions or building "spite towns" a few miles away

from existing cities, to dictate which businesses and towns would boom and which would bust. The railroad giant's free dispersal of gifts, passes, and outright bribes also secured a large number of legislators to its, and the land and cattle barons', designs.

Taxation constituted the era's third major problem, and it struck the farmers hardest. Propertied debtors were saddled with the taxes on both their mortgaged property and their equity, while mortgage lenders paid nothing. And there were great inequalities in assessment. California's constitution of 1849[16] provided that "Taxation shall be equal and uniform" and "All property . . . shall be taxed in proportion to its value," but it did not specify what should count as taxable property. Nor did it provide for a statewide board to assess value equally. Given that bank credits in 1878 were not classified as taxable property, large land holdings held for speculation were taxed only lightly, and portions of railroad property were totally untaxed, small farmers objected bitterly to paying for the bulk of the state's operations and services through what, given the taxes on mortgaged property, they considered "double taxation."[17]

The common feature shared by these three problems in the eyes of contemporaries was that they were all products of monopoly power—and monopoly conceived as a political phenomenon. Monopoly was an old institution in the common law and Anglo-American political culture. It denoted the conferral by the state of "exclusive privilege" on a private entity. Minimally, it referred to the making of a formal grant, but the term was also used to describe a corporation that overstepped the limits of its founding charter or, at the extreme, to denote a branch of sovereignty in the hands of a subject (as with a toll road or the National Bank). A monopoly grant raised its recipient above fellow citizens, and subjected those citizens to disadvantage, dependence, and potential oppression.

A monopoly acquired its power, then, by political favor rather than its own abilities, and a corporate monopoly was seen as a danger to, rather than a product of, the market world. Culturally, finally, the concept was laden with connotations of feudal status and dependence. Monopolies and corporations were suspect in a republic of small holders because they threatened the civic status of independent farmers and workers and of voluntarist citizens generally. Jacksonian republicanism was egalitarian republicanism (unlike the Federalist variety), and the newspapers, circulars, and oratory of the 1830s and 1840s were full of remonstrances against the resurgent hand of monopoly in the form of the Bank and large landholders. These threatened to squeeze the life out of formally democratic institutions by returning citizens de facto to the status of vassals and serfs. Our constitution, wrote one pamphleteer in 1831, "which, by its *letter,* declares that equality of rights shall be guaranteed to all," would become "the merest untenanted skeleton of liberty . . . [if] by its *operation* [it] creates aristocracy, privileges, extortion, monopoly and overgrown fortunes."[18]

"Never before in our history," declared the Greenback-Labor Party's founding statement fifty years later, "have the banks, the land-grant railroads, and other monopolies been more insolent in their demands for further privilege—still more class legislation. In this emergency the dominant parties are arrayed against the people and are the abject tools of the corporate monopolies."[19]

In the same vein San Francisco Workingmen's delegate Clitus Barbour stated on the second day of the convention that the main division among delegates was not determined by party loyalty but was "between monopoly on the one hand and anti-monopoly upon the other. . . . When I say 'monopoly,' I mean any and all of these means whereby one man, or one combination of men, protected and governed by laws, or by the constructions that are placed upon laws, appropriate to themselves and hold as against the balance of

Chinese immigrants exiting San Francisco's Ferry Building circa 1878 could find housing in the city's cramped Chinatown. Subject to continuing legal discrimination by local government, however, they sometimes sought less hostile accommodations across the bay.

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mankind that common stock given by their Creator for the preservation of their lives, their comfort, and the support of those that are dependent upon them. . . . [W]e mean special legislation."[20] When, in short, Californians of the 1870s decried monopoly, they were indicting betrayals of republican principles and denials of political rights. They were not complaining primarily about economic price-fixing or indulging in paranoid fantasies about industrialization, as some historians once claimed.[21]

FAILED REMEDIES

Californians tried repeatedly throughout the 1860s and 1870s to remedy these problems. Farmers in the Grange (the Patrons of Husbandry), reformers in political parties, and workingmen in their clubs and unions came up with proposals to suppress land monopoly by heavily taxing land held for speculation and by eliminating taxes on crops and buildings, though maintaining them on land. The Assembly Committee on Land Monopoly condemned the concentration of land holdings in the state in 1871, charging that the wealthy had converted a "great public benefit into an engine of oppression."[22] The legislature in its 1869–70 session passed a law banning double taxation. The People's Independent Party swept into the governorship and main state offices in 1873, protesting land, water, and railroad monopolies and the corruption of the legislature. By 1876, the party succeeded, with the support of the Chamber of Commerce, in creating a railroad commission.[23]

More shamefully, Californians passed numerous laws to harass and oppress the Chinese as scapegoats for their troubles. Special taxes, occupational bans, and restrictive ordinances fueled a racial animosity that at times led to mayhem, as when rioters lynched nineteen Chinese workers in Los Angeles in 1871. This malice was not an exception to the historical reality of republicanism, though it was to republican political thought. The "publics" at the heart of historical *res-publicas* have not, unfortunately, always embraced all people, many times attaining their political unity only in opposition to a maligned Other, a "public enemy" (as the foreigners who were publicly hung in San Francisco's city plaza in the mid-1850s were designated).[24]

Such was the bitter lot of the Chinese immigrants, whose religion and foreign ways distinguished them from other immigrants and who were utterly dependent on their Six Companies as well as on the monopolists. In this they symbolized for Anglo Californians the serflike fate that awaited them too if they failed to act. Threatening to "degrade labor and aggrandize capital," the Chinese fit a role in a historical drama that played in the minds of many (though not all)

early Californians. Were the Chinese permitted to become citizens, the Anglos feared, they would become "pliable tools for despots"—agents of Leland Stanford and Henry Huntington in the voting booth as well as the railroad yard.[25] The development of this politically inflected racism served to unify Grant's "strangers in a strange land," who lacked other traditional ties with one another. The process, carried on in party organizations, unions, and anticoolie clubs, served not only to racialize Orientals but also to produce, by reflex action, the sociopolitical body called the White Race on the Pacific.

The reformers' remedies in this period did not, however, prevail. The Assembly Committee on Land Monopoly report failed to produce legislation. The mortgage law was repealed. The Independent Party lost office after a term. The railroad commission was first hobbled, then abolished in 1878.[26] And the state supreme court systematically invalidated anti-Chinese laws as violations of federal treaty powers, the Fourteenth Amendment and the Civil Rights Act of 1866.

THE CALL FOR A CONVENTION

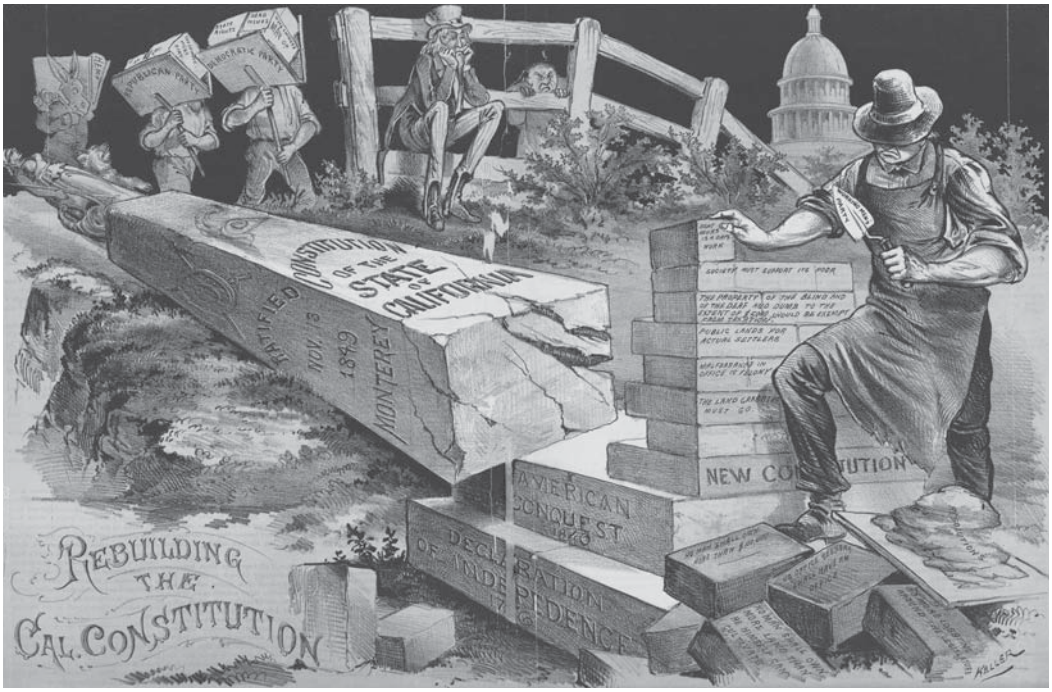
Faced with these defeats, Californians sought broader remedies for their troubles and a forum in which they could raise the more basic questions. They had tried unsuccessfully to call constitutional conventions in 1859, 1860, and 1873. But as conditions worsened—with drought, the economic Panic of 1873, the collapse of the Comstock silver lode, and further bankruptcies and layoffs that followed—the vote for a new convention finally carried in September 1877. Californians throughout the state sought to "recapture the republic, somehow, for the people [and] to get rid of an 'imported feudalism.'"[27]

The main instigator of the call was the Workingmen's Association, formed by workers rallied to San Francisco's sandlots in July 1877 by the Workingmen's Party of the United States in support of the nation's first major railroad labor uprising in West Virginia and Pennsylvania.[28] This party, affiliated with Marx's First International in Europe, was soon shouldered aside by the homegrown Workingmen's Party of California, led by Denis Kearney, which leaped to a precocious class-consciousness but substituted race hatred for the former organization's message of solidarity among peoples. Kearney ended each of his sandlot orations demanding "the Chinese must go!" By the time of the convention, the party was a presence in forty counties of the state, with seven clubs in Los Angeles and others in Sacramento, Colusa, Watsonville, Santa Barbara, and the San Joaquin Valley.[29]

Throughout the spring of 1878, the Workingmen and other groups held public meetings to elect delegates to the convention, not only in San Francisco, which contained a quarter of the state's population some seasons of the year, but also in places like Vallejo, Benicia, Los Angeles, Merced, Sacramento, and Eureka. Farmers met in chapters of the Grange. New parties took the field, such as Stockton's New Constitution Party, chaired by the former chief justice and dueler Terry.[30] The banking and railroad interests opposed the call for a convention. But seeing the size of the convention vote of 1877, the pragmatic Democrats and Republicans closed ranks against the common enemy and formed a new Non-Partisan, or "Fusion," bloc. Later scholars have cause to be wary of the party labels, however. The Workingmen's Party, often called a third party, was actually the heir of an antiparty, independent tradition, while the Non-Partisan (Fusion) movement, as Carl Brent Swisher noted, "was itself partisan, and was a fusion to prevent reform."[31] All the groups, including the unalloyed Democrats and Republicans, elected delegates for the convention who they thought would best represent their views and most of whom were proven leaders or notables.

In the hard times of the 1870s, workingmen gathered in the sandlots in front of City Hall to air grievances and hear speeches. The sandlots were a genuine public space within which the movement for a new constitution emerged and flourished. This caricature of a meeting in the sandlots appeared in The Wasp, *San Francisco's weekly satire magazine, on July 24, 1880.*

Courtesy of The Bancroft Library, University of California, Berkeley



As the election of delegates to the convention drew to a close, a cartoon in the June 1, 1878, issue of The Wasp *imagined the rebuilding of California's constitution: members of the state's political parties topple the 1849 constitution and build a new one, while a weary Uncle Sam waits in the background. Among the tenets of the new constitution were censure of the monopolists, outlawing of forced sales of lands by homesteaders, and repression of the Chinese.*

Courtesy of The Bancroft Library, University of California, Berkeley

A state senate made up of party regulars passed the Enabling Act of March 1878 after adding thirty-two more at-large candidates to the original proposal for 120 delegates (the number of state legislators since 1862) at the behest of Non-Partisans. Backers of the amendment hoped that only people of wealth or established reputation could successfully field districtwide campaigns. And in this they were not disappointed. All thirty-two positions were won by Non-Partisan candidates. Their cohort included one quarter of the convention's lawyers, two merchants, and a corporation president.[32]

Of the 152 delegates elected in June 1878, fifty-one were Workingmen (including miners, millers, seamen, and a tailor), eleven were Republicans, ten Democrats, two Independents, and seventy-eight Non-Partisans. Unlike the 1849 constitutional convention in Monterey or Philadelphia's 1787 convention, Sacramento's delegates had not only different political positions but divergent worldviews, produced by their different parties' independent activities. There were no delegates from the state's Mexican, Spanish, Indian, or Chinese communities.

CONVENTION PROCEEDINGS

The delegates arrived in Sacramento on September 28, 1878, for a convention they regarded as called by "the sovereign will of the people."[33] The convention would last six months, compared to the six-week duration of its 1849 predecessor. Delegates would usually work six days a week to produce a final document that was twice the length of the 1849 text. The range of topics they addressed over those months in the thirty-one committees that periodically reported back to the main body was extensive. It included the issues noted above plus water rights, lobbying, the eight-hour day, the University of California, the press and the law of libel, eminent domain, Chinese immigration, women's suffrage, the accepted electoral system, and more.

But first the convention had to elect officers and establish procedures. After many ballots, Non-Partisan Joseph P. Hoge, former Democratic state committee chair and friend of Central Pacific President Stanford, won the presidency by a single vote. Once in office he assigned Non-Partisans to all committee chairs, padded his party's lead by appointing Non-Partisan (Fusion) replacements for two Workingmen's delegates who died, and ruled for the duration on which speakers and arguments were germane to the topic under discussion and which were not. Workingmen delegates asked him to split the committee chairmanships with the other parties, seeing as the latter represented the majority outlook in the state, but Hoge declined.[34] When the critical importance of that one vote for convention proceedings is considered along with the fact that Hoge himself was one of the at-large candidates, the crucial significance of the Old Guard's addition of those thirty-two extra delegates may be appreciated.

Particularly galling for Workingmen was that even with the extra votes, they would have won rather than lost by a single vote had two normally spurious votes not been counted. Those were the votes of David Terry and Judge Eugene Fawcett of Santa Barbara, the first barred from serving because he had fought a duel, the second because he was prohibited from holding another public office while serving as judge. The argument over the legality of their votes revealed a deeper dispute over the status of the convention itself; and the parties switched their usual positions for the occasion. The Workingmen, who usually insisted that the convention was a plenary expression of sovereignty and that each delegate represented the whole state "from San Diego to the Siskiyou,"[35] now urged that "obedience to [pre-existing] law" was necessary to express that sovereignty. The Non-Partisans, who usually belittled the convention's importance, now insisted that the people's right to select whomever they wanted to represent their views trumped preexisting legal

restrictions. Morris Estee explained why, boldly stating that "[t]he existing Constitution can have no application as to the rights of members on the floor or as to our powers when we are here. . . . We come here for the purpose of making a draft of a Constitution which, if adopted, will wipe from the records the hitherto organic law of the State and establish itself in its place."[36] Once the convention was convened, in short, it could do whatever it wished. The two votes were counted, and it was left for the future to determine whether constitutional conventions were also necessarily potential "runaway" conventions.[37]

Having been chosen, Hoge staffed the Committee on Rules and Order of Business with Non-Partisans, and those used to running state politics wound up running the reform convention as well. It was a blow to the reformers, though not fatal as it turned out. Many Non-Partisans, while committed to the rights of property, did not necessarily agree with the railroad/banking interests as to what those rights should be. And divisions existed within each bloc on crosscutting issues such as taxation, water rights, and corporate shareholders' limited liability.

MAIN GOALS OF REFORM

Regarding the three basic problems noted above, the farmers and workingmen were able after lengthy argument to establish a board of equalization to equalize the valuation of taxable properties and make assessments, transfer mortgage tax obligations from borrowers to lenders, subject the intangible assets (profits, franchises, etc.) of corporations and railroads to taxation, and raise the rates on railroad property.[38]

They were less successful with land and water monopolies. The railroads, grain merchants, timber men, and speculators now held title to the arable land of the state. In *Progress and Poverty*, published in San Francisco the same year as the convention, Henry George argued that permitting vast holdings to some denied natural rights and "the opportunities offered by nature" to others. And because labor alone in the agrarian ethos conferred rights of possession, the conclusion directly followed that "the recognition of private property in land is a great wrong." The delegates were not prepared, however, to go that far. The new constitution simply affirmed that lands suitable for cultivation "shall be granted to actual settlers and in quantities not exceeding 320 acres to each settler" and that the holding of large, unimproved tracts was "against the public interest and should be discouraged."[39]

In response to the growing water monopolies and the intrigues of private water companies, many delegates fought to extend the public's power over state water resources to water monopolists' holdings, irrigation projects, the flow of mining debris, and forests damaged by hydraulicking. Responding to Tulare Democrat Joseph Brown's claim that water was "property pure and simple," they replied: "The waters of the streams in this State are not the property of individuals, but belong to the State." The reformers succeeded in inserting provisions in Article XIV of the constitution declaring that the use of water was a "public use and subject to regulation and control of the state" and the right to charge water rates was a franchise from the state. Those provisions were construed narrowly by the courts, however, and subsequently ignored in practice.[40]

Against their main antagonist, corporate monopoly, the reform delegates advanced both by flanking actions and direct assault. The attacks emerged from the recommendations of the Committee on Corporations Other than Municipal and arguments took up more than three weeks in a convention initially intended to last only 100 days. In terms of flanking efforts, the delegates passed the tax provisions noted above, limited the eminent domain powers the legislature could delegate to corporations, and affirmed that the legislature could take corporate property like any other "for public use."[41]

Addressing the corporation not only as property holder but as employer, the delegates also passed a number of provisions to protect the substantive liberty of republican workingmen. In defending the rights of labor, they were engaged in the same effort as delegates at other western constitutional convention, as Amy Bridges has shown. And the presence of workers at the convention was crucial to the success of those efforts. The new constitution established a mechanics lien law that gave workers a right to first payment in case of employer bankruptcy, abolished imprisonment for debt, limited convict labor, and gave constitutional status to an 1868 law providing for an eight-hour day on public works. The latter was a significant achievement, given the seventy-two-hour week still standard in many eastern industries and the often violent strikes for the eight-hour day that would punctuate the next decade nationally.[42]

Attempting to "cinch" corporate power more directly, the reform delegates made two structural proposals. These followed from the widespread view, as Democrat Volney Howard of Los Angeles put it, that a corporation was essentially a form of institutionalized irresponsibility: "[E]veryone knows there is no responsibility, and can be none, in corporations. There is no fund to look to as it is, and no responsibility of the corporator. It was well said . . . that individual enterprise was destroyed by the godless corporation." Dr. Charles O'Donnell of San Francisco cast the same idea more pungently: a corporation was "a corrupt combination of individuals formed together for the purpose of escaping individual responsibility for their acts."[43]

The first idea, then, was to restore a degree of personal responsibility by denying limited liability to California corporations. The delegates fought to make stockholders "individually and personally liable . . . for debts and liabilities" proportional to their investment, and directors and trustees "jointly and severally liable" for any moneys embezzled or misappropriated. David Terry led the effort for the latter, and after lengthy argument these provisions became part of the new law.[44]

The second and more well-known reform was the creation of a popularly elected, three-member commission to regulate railroads, establish rates, and fine or imprison corporate officers for violations of its rules. Morris Estee, chair of the committee, actually led the floor fight for this proposal, Non-Partisan and at-large delegate though he was. Estee declared in reporting out his committee's recommendations that although the traditional view held that monopolies ought not to exist in a free country, "monopolies do exist, monopolies will exist" and "where combination is possible, competition is impossible." Market competition having failed, regulation by commission was therefore necessary.[45]

Many people in other states had come to the same conclusion and were creating regulatory commissions to reestablish controls the corporations had escaped when they shed their special charters. But the railroad interests expressed outrage at the idea, charged "communism," and warned that capital would flee the state if this measure were adopted. Their ideas of property and property rights had been formed on the unsettled frontier and in goldfields rarely acknowledged to be part of the public domain. They regarded any public action that reduced their profits as "confiscatory." But property rights had long been regulated in the public interest in America, whether under the state's police powers, eminent domain practices, obligations tied to property serving a "public use," or the terms of corporate charters. This traditional approach, which regarded property as the foundation for "maintaining the proper social order [and] the private basis for the public good," legal historian Gregory Alexander calls the "proprietarian" view of property.[46] And in 1878 it was the law of the land.

Workers of the Central Pacific Railroad Machine Shop No. 2 in Sacramento, the railroad center of the state during the 1850s, pose for a group portrait circa 1876. After the late 1860s, railroad employees formed a major segment of Sacramento's population and electorate. Convention delegates established provisions in the new constitution not only to regulate the railroads but also to begin to protect the working conditions of railroad and other workers.

Courtesy, California State Railroad Museum

In his opinion in the Granger cases, *Munn v. Illinois* in 1876, U.S. Chief Justice Morrison Waite had noted that "It has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bankers, millers, wharfingers, innkeepers &c., and, in so doing, to fix a maximum of charge to be made for services rendered." These enterprises all "pursue[d] a public employment" and in that, exercised "a sort of public office." All "stand in the very gateway of commerce and take toll from all who pass," and are therefore automatically affected with the public interest. The state had the power to "regulate . . . the manner in which each shall use his own property, when such regulation becomes necessary for the public good. . . . When . . . one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good."[47]

Estee quoted these passages in a learned argument for corporate regulation and against monopoly. And he added supplementary arguments to Waite's that may be of interest to those living in an era of privatization. First, he offered a political allusion drawn from the history of controversy over the corporate form. "The political and financial power of the railroads in the United States are immense," he explained, "and have become a grand *imperium in imperio*, a government within a government, a power within a power," which could not survive unchecked without endangering the political system itself. Second, he expanded on his economic argument about combinations and the need for their government regulation, citing arguments from Charles Francis Adams' well-known work, the experiences of European countries and those of the fourteen states that had railroad commissions.[48]

Third, Estee impugned any implicit claim on the part of railroad owners to a *natural* right to whatever profits they could wrest from the market. "There is no such thing as the existence of a railroad anywhere, in any country," he explained, "except by and through the sovereign will of the state." In addition to the public's subsidy of the roads through federal land grants and municipal subsidies, he pointed out that all railroads acquired their rights-of-way by delegated powers of eminent domain.

And fourth, he recurred to the tradition affirmed in *Munn* upholding the public's long-standing right to regulate property devoted to a "public use"—common carriers, public accommodations, ferries in internal waterways, and the like. All of these, historian Harry Scheiber explains, were "*publici juris*—under special obligations, or a 'servitude' to the public."[49] Though they might lack explicit chartered obligations, Estee noted that railroads did "stand in the very gateway of commerce" and "take toll from all who pass"—the substantive tests of power Waite used in *Munn* to determine the presence of a "practical" or "virtual monopoly." By so doing, they had "become a thing of public interest and use." For all these reasons, many people in California and the nation regarded the roads as public highways. Concluding with a nod to the Fourteenth Amendment, Estee declared: "The whole people gave these companies the right to build their roads; the whole people are entitled to equal protection."[50]

The precedent for regulating property in the public interest was thus well established in American states. If there was any novelty to the California plan, it was that whereas New England and Mississippi Valley states created legislatively appointed regulatory commissions and the federal government opted for an executive-based Interstate Commerce Commission in 1887 (to isolate it from popular influence), California created an independent body with popularly elected members "to take from the halls of legislation the corrupting influence of corporate power." The impulse, in effect, was to create an independent fourth branch of government "where a lobbyist-ridden legislature could not get at it" and which was directly responsible to the people. (The convention's other effort at an independent body, separate from even the direct influence of the people, was the University of California Board of Regents, initially made subordinate to the legislature but transformed into an autonomous body by a last-minute maneuver introduced after many delegates had departed for home.)[51]

The effort to create a railroad commission was an attempt to deal with a newly emergent form of private power in America, and one for which the federal constitutional design offered little help. That system had been devised, as James Madison explained in *The Federalist Papers*, to curb factions, interests with aims "adverse to the right of other citizens, or to the permanent and aggregate interests of the community."[52] The federalists' main concern was majority factions, and to thwart them they created the government's well-known array of checks and balances. To private power or minority faction they devoted only a single sentence, observing the availability of the "republican remedy," or majority vote. California's situation revealed dramatically the inadequacy of that remedy. Those interests with aims that were adverse to the rights of other citizens or to the aggregate interests of the community could not be voted out of office because they had not been voted in. The Octopus had shown itself perfectly capable, moreover, of shaping the options on any ballot it cared to control. The independent railroad commission of 1878 was a tacit acknowledgment of this inadequacy and an effort to find a new remedy for minority faction.

The convention finally voted for the commission by an overwhelming vote of 92 to 28, most farmers and many Non-Partisans joining the workingmen in voting for it. Though the bulk of

the convention delegates belonged to the parties of property, less than a fifth of the convention supported the Central Pacific's absolutist view of property rights. After this, the railroad and newspapers that backed it turned overtly hostile to the convention, calling its efforts by turns amateurish and tyrannical, and branding even former chief justice and Hoge supporter David Terry "an agrarian and communist" for supporting the commission and limits on the powers of corporate directors.[53]

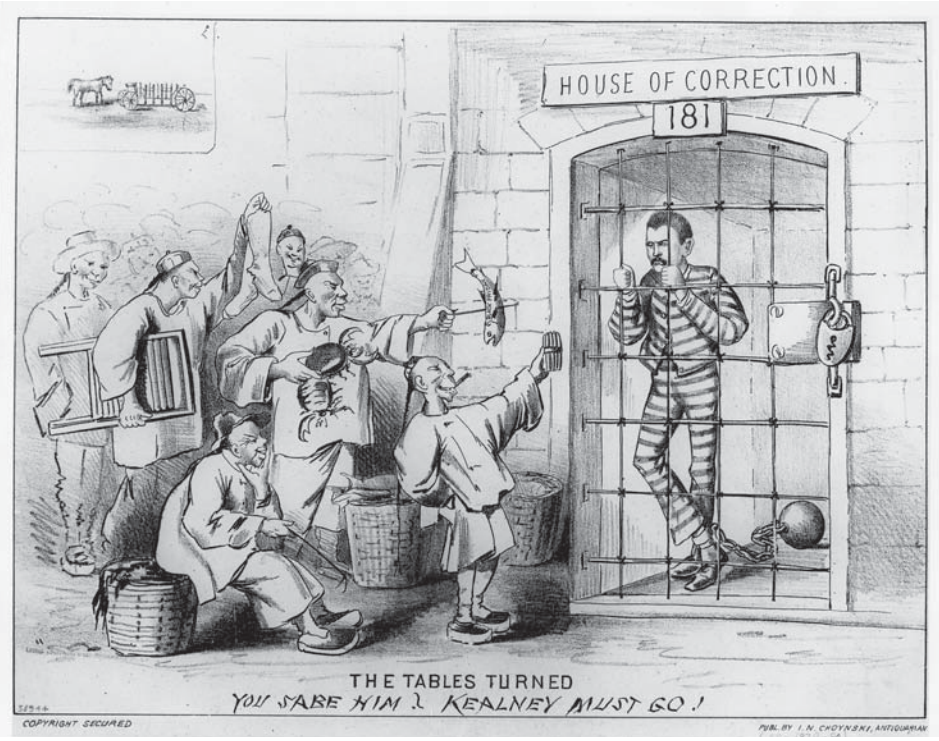
The language of this debate reveals a great deal about the political outlook of the reformers. It shows that for all the class-conscious invective, the Workingmen and radical farmers were not socialists or protosocialists. They were latter-day Jacksonians asserting the authority of the public good against corporate monopoly. These labor republicans were engaged, indeed, in a protest against their degradation to proletarian status and a struggle to preserve the material preconditions for equal citizenship and upward mobility. Kearney caught this distinctive mix of ideas when he declared, "The Republic must and shall be preserved, and only workingmen will do it." And Beerstecher explained: "We are not agrarians, we are not barnburners . . . , and we are not levelers. . . . We are willing to give [the corporations] rights, but we also desire to have the rights of the people recognized. . . . We do not come here for the purpose of confiscating the property . . . , but . . . for stopping the legalized system of confiscation . . . today."[54] This outlook was not the reflex expression of an economic position, but the product of years of political action and debate on behalf of a work ethic and a republican view of citizenship.

REFORMING THE POLITICAL PROCESS

Beyond their concerns for land ownership, monopoly, and taxation, the populist delegates also wanted to reform state politics and reestablish democratic governance processes. They sought to do this in two ways: by eradicating "corruption" and by redrawing the boundaries of the public sphere. They employed the classical republican term, *corruption*, to denote not only cases of outright bribe and payoff but also representatives' betrayal of the public good and systematic malfunctions in the political process.

To correct these, and consistent with "second generation" convention efforts nationally, the delegates limited the powers of a legislature that had been given relatively free rein by the first-generation convention. Article IV, Section 25 of the new constitution listed thirty-two subjects on which the legislature was barred from passing local or special laws, plus a thirty-third extending to "all other cases where a general law can be made applicable" (or as Modesto delegate George Schell laconically proposed, "all other cases which the Committee on Legislative Department may have forgotten").[55] Angered by the brazen methods of the railroads, banks, and land barons in the legislature, they also tried to make lobbying per se a felony. They failed in the attempt, but the convention did succeed in making the use of bribery, promise of reward, or intimidation to influence a vote illegal.[56]

Morris Estee also subjected another institution to rare scrutiny, the state's winner-take-all electoral system. He delivered an early and insightful plea to replace it with a system of "equal and proportionate representation." "The majority should receive all the representation to which it is entitled," he explained; but that was not 100 percent of it. "The minority should have its just share." "Suffrage is not representation . . . . It is the means of representation," he added with keen insight. The only way to make sure that the whole people, including the political minority, had representation was to create multimember legislative districts. Estee proposed three representatives per district for both assembly and senate and a threshold requirement of a third of the votes for a party to get a seat. Taken together with the



Denis Kearney was particularly vocal in presenting the Workingmen's Party platform and demanding that "the Chinese must go!" A cartoonist envisioned "the tables turned"—with Kearney behind bars and a group of Chinese men, sporting the impedimenta of their different trades, exhorting "Kearney must go!" The unflattering caricatures and inapt exclamation reveal that despite his playful reversal of roles, the cartoonist shared in the racism of the period.

California Historical Society, FN-6308

Workingmen's and the Independents' diatribes against the party system, his proposal revealed the breadth of public disaffection from the state's system of representation at the time. Estee's plan attracted no support, but he had spotted a real problem and one that would attract public attention periodically over the next century.[57]

The delegates also sought to redraw the boundaries of the public sphere. Article XIX of the new constitution excluded the Chinese from it politically and threw obstacles in their path economically. It empowered the legislature to protect the state from "aliens, who are, or *may become* . . . dangerous . . . to the peace or well-being of the State" (emphasis added), and declared the "presence of foreigners ineligible to become citizens . . . dangerous to the well-being of the State." It discouraged the immigration of those persons. It legalized occupational and residential segregation, barred employment of Chinese by corporations and on public works, and gave local towns and cities the unprecedented "power . . . for the removal of Chinese . . . or their location within prescribed" areas.[58] Though most of these provisions were invalidated by the courts, Article XIX was not repealed until 1952, and racist sentiments continued on as part of the state's political culture. California also provided the impetus—and its five electoral votes, the bait—for the federal government to enact the Chinese Exclusion Act of 1882.

A group of delegates fought to introduce women into full citizenship of the public sphere. The new constitution preserved their communal property, granted in 1849, and barred their exclusion from the university, businesses, and professions. It did not finally extend the suffrage to them, however, despite strong arguments for an amendment by Eli Blackmer of San Diego. George Steele, a rancher from San Luis Obispo, argued that to deny women the rights, privileges, and immunities of citizens when their families paid taxes was to impose "taxation without representation" and the rudiments of tyranny. William Grace of San Francisco reported that women's suffrage worked well in Wyoming, the first state in the union to grant it, and spoke of his admiration for any woman who fought for the vote: "It takes courage to come out for woman's suffrage. Her friends and relatives . . . try to make her believe it is humiliating, and that she ought to be ashamed to vote." The suffrage effort was defeated, however, by the familiar arguments that held that a woman's place was in the home,

political activity would degrade her virtue, her voting would destroy the family, and—a novel non sequitur—the ballot had been fought for by men and belonged to them.[59]

The convention concluded its efforts on March 3, 1879, its 127th day. The final document contained twenty-two articles compared to the earlier thirteen. Railroad interests set up a $3 million fund to defeat ratification and were joined by the banks, mining companies, water and gas companies, and the state's newspapers by a margin of over three to one. Some Bay Area Workingmen voted with them, feeling that the new constitution did not go far enough. Constitution clubs and anticonstitution groups sprang up around the state and held public meetings to discuss the clauses of the new document.[60] Solid farmer support helped carry ratification on May 7 by 77,959 votes to 67,134, the gap of 10,825 votes out of 145,093 revealing the divisiveness of the issues that had arisen in the state since the nearly unanimous vote of 1849.

DENOUEMENT

Before the new constitution could pass into California history and memory, however, it had to undergo that radical pruning and amending Bryce mentioned. How the Southern Pacific was able to undermine the new commission by suborning the members of the railroad commission is an oft-told story.[61] How lenders soon raised interest rates to cover the new tax burdens on their loans and effectively restored double taxation is less known but also important. How a U.S. Supreme Court obiter dictum in 1886 in *Santa Clara County v. Southern Pacific Railroad* established the corporation as an individual in the constitutional sense of the term and subsequent substantive due process cases in the 1890s overturned the *Munn* precedent are also familiar. The rationale for these watershed rulings was devised by Justice Stephen Field, former California justice, Central Pacific lawyer, and close friend of Stanford and Hoge. It replaced the proprietarian view of property, which saw property as justifiably regulated by public rights and the "anchor of public citizenship," with a new doctrine appropriate to the capitalist corporation's new strategies of accumulation.[62]

The new doctrine construed property to be a commodity to the use and expected profits of which its owners enjoyed near-absolute rights. Under this doctrine the high court would strike down state efforts to regulate property and protect labor and the public interest 401 times over the next thirty years.[63] By creating new corporate rights and declaring large areas of decision making off-limits to state legislatures, the court made itself into a supralegislature and worked a constitutional revolution nationally. It made the Central Pacific's view of property—the view of less than a fifth of the California convention's delegates—the law of the land.

Though counted out by the courts, the popular forces continued to struggle on, supporting Progressive efforts and beyond. After 1910, the Progressives finally gained regulatory control over the Southern Pacific by resuscitating the moribund railroad commission and transforming it into a Public Utilities Commission. California corporations still continued, however, to contest its authority. (As late as 1996, they succeeded in getting a legislature ignorant of the agency's constitutional pedigree to vote unanimously to strip the commission of much of its power to regulate energy.)

The Progressives built on the 1879 constitution's provision of public authority over water resources. They extended its racial restrictions and prohibitions, unfortunately, from the Chinese to the Japanese. They initiated an assault on party machines and bosses and introduced nonpartisan elections and cross-filing, but to achieve a purpose the opposite of Estee's. Where he hoped with multiple parties to enliven conflict and expand voters' choice, cross-filing (and the later open primaries) would dispose of partisan conflict and narrow electoral choice.

This political cartoon, published in The Wasp *on April 29, 1879, more than a month after the convention, reiterated the problems that the gathering sought to resolve—labor, land, corruption, and the monopolies—and proposed that they could persist despite the delegates' best efforts. The new constitution was ratified on May 7, 1879, and was passed into law at the twenty-third session of the state legislature in Sacramento, January–April 1880. The problems it was called to address did remain.*

Courtesy of The Bancroft Library, University of California, Berkeley

The Progressives, finally, tried to overcome legislative corruption and the difficulties of constitutional amendment by introducing an initiative process unique in the nation for its exclusion of preballot legislative and judicial consultation. Over time, this measure, intended to quash the play of special interests, became a tool regularly wielded by those interests to secure constitutional changes with only 50 percent-plus-one of the popular vote.

PRIVATE RIGHTS AND PUBLIC PURPOSES

Sacramento Non-Partisan Henry Edgerton ridiculed his colleagues' "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 . . . and then bringing the result . . . here in [the] form of superficial, charlatanic patchwork, of clumsy hybrid eclecticism."[64] Superficial. Hybrid. Patched together. And by implication, prolix. Edgerton had anticipated the verdicts of posterity. We are now in a position to evaluate those verdicts.

Take the matter of length and detail. The final constitution did contain many matters usually left to legislation and spelled out multiple limits on legislative action. Constitutional scholars have judged that inelegant and a foretaste of accretions to come. But it was only a foretaste. At an original 21,000 words the constitution was nowhere near the mammoth proportions it later attained. The avalanche of amendments eventually added—519 as this is written—can be credited more to the Progressives and the initiative they designed. It might be argued, in fact, that the trouble with the new constitution was not its looseness, but its strictness. Requiring the support of two-thirds of the members of both Assembly and Senate to pass amendments, it

raised near insurmountable barriers in a rapidly changing society to political innovation. The initiative provided relief from such constraint.

There were also practical reasons for the document's hybridity and inelegance. The resort to constitutional legislation was not due to naïveté or poor judgment. It was a route adopted by delegates in all the western state conventions of the time, Amy Bridges and Arthur Rolston have shown, because of the reformers' recent experiences with precisely the kind of blockages California's new constitution prohibited in Article IV. Having attempted and failed to enact a series of legislative reforms, western delegates turned to constitutional constraints to try to preserve democratic political institutions. The resulting constitutions were very much "defensive documents," as Bridges has noted.[65] As of 1879, by Rolston's count, "some 22 state constitutions contained separate articles dealing with corporations, banks, and/or railroads; 19 had homestead provisions, and 22 had blanket provisions barring special legislation—many of which were included verbatim by the delegates to California's 1878–79 convention."[66] Those were the borrowings of which Edgerton complained.

Intriguingly, as Swisher observed in 1931, the delegates gave "no consideration . . . to the ways and means of choosing a better legislature."[67] To do that, however, would have required that they conceive of different ways of educating citizens, training leaders, conducting public life, and undertaking representation as a whole than those which the federal framers had originally prescribed.

The defects of California's second constitution, while troublesome, do not fully explain the obloquy to which it has been subjected. Cementing current policy preferences into a fundamental law is not an attractive habit, creating barriers to change and shifting majorities as it does. But the Sacramento convention was a public assembly in a time of conflict, not a consensual gathering, as met in Monterey in 1849, or a closed meeting of the elites, as assembled in Philadelphia in 1787. What the Sacramento delegates did by way of insulating their preferences, at any rate, was child's play compared to what Justice Field accomplished in the Santa Clara case a few years later.

There was also a rough consistency to what the delegates achieved, in substance if not in form. Even taking into consideration the compromises that had to be made between contending parties, the new constitution strengthened "the old common-law maxim of *salus populi*," and "long-established and honored traditions of 'public purpose,'" as Scheiber has argued. It strengthened the status of public rights and the regulatory power of the state by creating the railroad commission, asserting public authority over water, trying to remedy the inequality of the tax system (e.g., between cultivated land and speculative holdings), taking legal cognizance of working conditions, and in Article I, Section 2, reserving to the people "the right to alter or reform the same whenever the public good may require it." It seemed to provide "a victory for the people over the interests."[68]

Scheiber writes that the convention and its constitution exhibited "the continuing viability of two powerful competing traditions in American law." The first he described as a "faith in privatism and individualism," associated with private property ownership; the second, the "equally venerable tradition of the common interest pursued through law." The latter had traditionally put limits on private property and individualistic pursuits, and set "priorities among competing private claims" in order to fulfill the common good.[69] These traditions did indeed clash at the convention. The first of them was not, however, strictly speaking, individualistic. Private though the new claims were, the privacy attached not to lone individuals but to large organizations—railroads, mining corporations, land empires, and foreign investors.

And what they sought was not the protection of preexisting private rights but new claims forged out of what had previously been secured to others by the public authority. When these facts are considered and the inability of real individuals to compete with the new *imperios* endowed with these new powers is acknowledged, the new industrial and financial giants can be seen to have sought not individual rights but special privilege, corporate privilege, as the farmers and workingmen said.[70]

The real charge against the latters' efforts, one begins to feel, has not been stated. It is a complaint about something that Californians, like other Americans, have a hard time forgiving. This is that the people, ultimately, did *not* gain "a victory . . . over the interests." They were defeated. Normally believing that success is linked by a providential hand to virtue, Americans are also frequently tempted to assume the obverse: that what failed deserved to. It was somehow wrong or misguided from the start. But this moral naïveté easily produces factual errors. The convention reformers were not irrational or utopian, nor did they oppose economic development.[71] They did what they could against entrenched powers and wrung partial victories after an initial defeat—victories that proved to be of great importance for the democratic struggles that followed. That is a feat worth acknowledging.

The constitution wound up an eclectic, motley affair not because its authors were bunglers but because it was the product of an ongoing social conflict and was drafted, in part, by people who had learned the hard way that they needed extralegislative protections in their struggle for democracy. It was a work in progress—as democracy in California remains today. And the constitution did prophesy accurately the terms of the state's primary political conflict in the coming era.

The convention delegates also accomplished a few positive things that have become clearer over time. For one, they created a genuinely public event to address the public crisis of their time. The convention established a public space in which the focal issues of the day could be aired and debated openly—despite delegates' animosities toward each other—over a period of months and then reported by newspapers to communities across the state. In the open and public manner in which the delegates were chosen, the way their parties expressed independent points of view, the range of issues they debated, and the civic education they provided for the state, the delegates not only pursued a republican program, they exemplified a republican politics. Theirs was not a backroom caucus or a magnified focus group. It was a contentious and productive public assembly.

Second, the delegates raised the question explicitly of California's character as a democratic republic. Among all the practical questions they debated—on taxes, railroads, limited liability, harbor frontage, suffrage, and more—they retained a central focus on what California should be politically. In the process they posed a question about the conflict between corporate interests and the public good that has yet to be answered. And they understood this to be a fundamentally political question. They did not believe California could grow itself economically or rewire itself technologically out of that question.[72] Despite the hard times, and expressive of this outlook, delegates of all parties retained their faith in the people's competence to be citizens. It was a confidence current constitutional reformers might find well worth emulating.

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