California's Constitutional Conventions Create Our Courts

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California's constitutional conventions of 1849 and 1878-79 created a system of courts in a traditional American pattern of trial courts and an appellate court. The hierarchy of courts was less a problem for constitutional convention delegates than was the business of those courts. In fact, the delegates spent far more time, particularly in 1878-79, discussing constitutional law, criminal justice administration, and the costs of litigation than the structure of courts. In the process of debating the nature of our court system and the function of judges, the delegates said much about our state and our nation's legal system.

The delegates assembling in Monterey in 1849 had a variety of concerns in writing a constitution for the new state. They wanted to provide justice, industry, and economy in the constitution. The particulars of that task were in contention as the delegates wrote fundamental law. Some delegates wanted to destroy banking. Others wanted to prevent the migration of free blacks into the state. Lotteries and gambling were hot topics as were dueling, taxation, women's separate property, homestead provisions, the franchise and the cost of state government. When considering the judiciary, delegates were concerned with the need for a fair and speedy trial, the costs of litigation, and the role of judges in making law. In discussing these concerns, the delegates acknowledged both our national constitutional traditions and California's uniqueness in its Spanish and Mexican heritage. They also debated the nature of a constitution and the need to keep legislation out of fundamental law.[1]

The concepts of justice, industry, and economy were in contest in these debates. Justice was what courts dispensed, but the extent to which courts should have the authority to "legislate" for the state was at issue. Industry was what the delegates wanted to bring prosperity to the state and the issue was how the law-giving branches of government could facilitate that goal. Economy in government was what delegates thought taxpayers wanted. Good government at absolute minimum expense was a good Jacksonian goal that obviously found voice in 1849 in California.

But a broader political philosophy of popular sovereignty clearly resonated in the 1849 convention.[2] As Christian G. Fritz has so ably pointed out, the delegates knew that they had a charge as constitution makers to organize civil government and establish social institutions through fundamental law. Although the people were sovereign and the legislature was to do the will of the people in passing statutes, a constitution, when ratified by the people, was higher, fundamental law.[3] In the American mind, the judiciary was the institution that would have to interpret and apply that fundamental law.

The structure of the judiciary was not a serious question for the delegates, but the function of a system of justice was an issue. The structure of the California judiciary set out in the 1849 constitution was a traditional hierarchical one based on local trial courts run by the justice of the peace. The second level trial court was the county court. The district court was the next level of trial court. The district court had civil jurisdiction of controversies involving more than $200. Each county had one judge and sitting with two justices of the peace constituted a court of sessions. Finally, the California Supreme Court sat as the highest court of the state to hear appeals from the district courts. Other inferior trial courts quickly emerged to fit local circumstances. Justices of the peace for cities as well as counties, municipal courts, and police courts became part of the judicial landscape of California. During the 1849 debates, many delegates wanted certain provisions of law set in constitutional concrete so that neither the legislature nor the judiciary could tamper with their handiwork. L. W. Hastings, a Sutter attorney from Ohio, proposed that "as the true design of all punishment is to reform and not to exterminate mankind, death shall never be inflicted as a punishment for crime in this state." M. M. McCarver, a Sacramento farmer, retorted that "as California is situated at present, it is impracticable. The construction of penitentiaries would be enormously burdensome." He also resorted to history, noting that since "it has been a practice ever since the world was created, perhaps it would be as well to let it rest a while longer."[4] The convention voted the Hastings proposal down.[5]

In the California of 1849, the death penalty and the costs of incarceration in prison were related issues. The practice of the mining camps was to give the criminally accused a trial by jury and, if found guilty, to sentence the enemy deviant to whipping, banishment, or death. Sentence was carried out immediately.[6] This procedure and punishment

scheme was one learned from the American experience and driven by the fact that there were no jails in the diggings. With the creation of towns and jails, the question was whether local taxpayers and later state taxpayers wanted to build prisons or to save the costs of incarceration with the penalties of whipping or death. In 1851 the California legislature would decide that juries, the sovereign people, should decide the appropriate penalties for crimes against property. The statute gave the jury discretion in robbery cases of setting prison sentences of one to 10 years or death. Grand larceny had the same provisions and petit larceny, then defined as stealing property worth less than $50, had the penalty of "imprisonment in the County jail not more than six months, or . . . fine not exceeding five hundred dollars, or . . . any number of lashes not exceeding fifty upon the bare back, or . . . such fine or imprisonment and lashes in the discretion of the jury."[7] The first appellate case to test this statute found it constitutional. The defendant, George Tanner, had stolen $400 worth of food on April 3, 1852, went to trial before a court of sessions on April 14, 1852, lost an appeal in the district court on April 24, 1852, lost his petition before the Supreme Court on July 16, 1852, and his life on July 23, 1852. Justice was swift, sure, and did the will of the people expressed by a jury. For the delegates of 1849 or the jury of 1852, the incarceration of enemy deviants was an expense item for local taxpayers. It created the possibility of having the convict back on the streets in the future and did not present the same type of symbol to others in the society that would prey on law-abiding citizens.

Other delegates saw equally great evils on California's horizon. Henry Wager Halleck, a San Francisco attorney and later President Abraham Lincoln's general-in-chief, thought that a provision prohibiting lotteries had to be in the constitution because they were "immoral." The "evils of the lottery system" had to be crushed out regardless of arguments that such a prohibition was legislation, not fundamental law. Kimball Dimmick, a San Jose lawyer, agreed. "Whatever might have been usual in other Constitutions," he argued, "it was time for this Convention to present to the people of California a Constitution which would prohibit any injurious or immoral practice."[8] William Gwin, perhaps the best-informed and politically seasoned delegate, saw another monster, the banks. He moved an amendment to prohibit banking in California.[9] J. M. Jones, a San Joaquin attorney, announced that he was "prepared to go to any extent against banks in this country. The

inhabitants are against them; public opinion everywhere is against them."[10] Gwin went further, "Public opinion throughout the United States is against the banking system," he contended.[11] For California, it was a time to be tested. "Let us guard against infringing on the rights of the people, by legalizing the association of capital to war upon labor," Gwin remonstrated.[12] Charles T. Botts, a Monterey attorney, wanted "to crush this bank monster." He warned that "if you leave a loop-hole, this insinuating serpent, a circulating bank, will find its way through, because of the absolute necessity of the community for a paper currency."[13] In the Jacksonian rhetoric and mind of the time the evil was banking and the remedy was constitutional prohibition.

When the delegates debated the judicial article, they expressed the problems of their times in their rhetoric. Kimball Dimmick wanted a permanent judicial system, not subject to the legislative and popular winds of time. The system of courts "should not be established with any view to a change at some future period; that when practitioners in these courts bring in their cases they may know where they are to end." Dimmick wanted to "prevent endless litigation" stemming from rapid judicial personnel changes.[14] McCarver was concerned about swift and sure justice. He favored "a fair trial before a jury, and whenever they have decided the case, if they say hang him, then hang him in thirty days." He did not want to give the convict "an opportunity to escape." The Sacramento farmer did not want a convict "to get free . . . by any quibble of the law."[15] Winfield Sherwood, a Mormon Island lawyer, supported the right of appeal noting that "if he is guilty, he will be punished notwithstanding the appeal."[16] One delegate retorted that the problem was not appeal, but the lawyers representing men of money who could afford the process. To him, lawyers were "like vultures upon dead bodies . . . although the lawyers know they cannot succeed in their suits, they urge them to go on."[17] Thomas L. Vermeule, a Stockton lawyer, controverted the argument stating his belief "in abstract principles. I believe in their justice. If a principle be good in the abstract, it must be good in practice; and I believe the right of appeal is a righteous abstract principle."[18] Additionally, Vermeule castigated the antilawyer sentiment in the convention. "Lawyers are a very useful body of men, and when this Constitution goes forth to the world it will be greatly indebted to them for the part they took in its formation," he declared.[19]

The convention also considered the role of trial judges and juries. Pacificus Ord, a Monterey attorney, proposed that judges could not charge juries on fact, but could "state testimony and declare the law."[20] Botts thought that judges given too much latitude "could become a party to a suit . . . [and] great injustice may proceed from it."[21] Ord, swayed by the arguments, changed his position on stating testimony and favored limiting the judge to stating or expounding the law.[22] Winfield Sherwood regarded the judge as "an impartial umpire" needed to sort out the testimony and the law for the jury.[23] Hastings agreed with Botts based upon abuses from the bench in his experience.[24] As the debate wore down, Kimball Dimmick attacked the proposal as legislation. "I am opposed to introducing our Constitution sections which are more properly matters for legislative action," he maintained. Rather "our object is to establish in this article a fundamental judiciary system, and it is not necessary that we incorporate these trivial incidents which belong to the statute books of the State, or the books of the common law," Dimmick submitted.[25] With the trivial aside, the delegates passed a hierarchical system of courts. A California Supreme Court and our state trial courts were established.[26]

The discussion of law, lawyers, judges, and juries again highlights the popular sovereignty and Jacksonian democratic rhetoric of the times. Those who feared the caprice of the people, the democratic rabble, wanted juries harnessed and elite judges in control of trials and appeals. Lawyers were not to be trusted (regardless of the fact that Andrew Jackson was a lawyer) because they used procedure, technicalities, and the like to thwart the will of the people. Whigs saw this thinking as destructive of American society and antibank actions as economically naive at best. In the judiciary, at least, there was some protection for the future as elite lawyers on the bench could preserve the republican government Whigs thought necessary for the future of California.

In 1878 constitutional convention delegates would again assemble to reconstitute fundamental law for the state of California. This time the motive force behind the calling of a convention was domestic politics and depression. On the sand lots of San Francisco, Denis Kearney had rallied the working poor and the unemployed and formed the Workingman's Party. Kearney used the politics of racism, singling out the Chinese as the cause of economic distress.[27] San Francisco was ripe for such agitation.[28] It was in the midst of rapid change. The city would emerge

as a western financial center, but the influx of capital stimulated increased specialization and greater efficiency in finance. Brokers established stock exchanges enabling increased speculation in stocks. Dealers in commercial paper appeared, increasing the velocity of commercial transactions. Law firms reacted with increased specialization, servicing these clients. Investment bankers opened their doors to industry.[29] This climate of rapid change and uncertainty for urban labor enabled Denis Kearney to increase his following and call for a constitutional convention to expel the Chinese and to attack the evils of the economy, the monopoly capitalists.

In 1878 the legislature authorized a constitutional convention and the election of delegates. The press blistered with stories to enflame the public for the Workingman's Party or against them. The Democrats and Republicans had joined forces to put a nonpartisan slate forward to head off the attack from the left.[30] The Workingman's Party demanded regulation of the railroads and the monopolistic corporations, the abolition of Chinese labor and the expulsion of the Chinese from the state, equal taxation of all land of equal and productive nature, land reform in general, and the eight-hour day.[31] Nonpartisans opposed the radical nature of the proposals, branding them communistic. Albert Dibblee, a San Francisco merchant, writing to Charles Heidsieck of Rheims, France on February 26, 1878, saw "a sort of communistic movement among our laboring classes—mainly laborers of the very lowest grade."[32] Despite these dire warnings, the people elected 78 nonpartisans, 51 Workingmen, 11 Republicans, 10 Democrats, and 2 Independents to the convention. Kearney characterized the nonpartisan ticket as "composed of thieves, villainous and murderous bloodsuckers, a band of criminals and robbers.[33] His opposition thought Workingmen to be communists.[34]

The debates regarding the judiciary in 1878-79 were qualitatively more sophisticated than 1849 in that constitutional issues evoked pointed debate of a legally informed nature. The delegates discussed United States Supreme Court decisions including *Munn v. Illinois* (1877), *Dartmouth College v. Woodward* (1819), *The Passenger Cases* (1849), *The Slaughterhouse Cases* (1873), *State Tax on Foreign Held Bonds* (1873), *Barron v. Baltimore* (1833), and *Calder v. Bull* (1798). In addition, they offered opinions on jurisprudence, *stare decisis*, state constitution change, state case law from Wisconsin, Illinois, New York, and California, the national treaty power, eminent domain, state police power, federalism, the law of the land, the extent of the power of

Congress, due process, and the uniform law movement. Many of these issues flowed from the duty to write a constitution, but the extent of debate and the level of argument on point were significantly higher than 1849.[35]

For many of the delegates, *Munn v. Illinois* (1877) was an important case. The United States Supreme Court had held that state legislatures did have the authority to regulate businesses affected with a public interest. This put on the legislative agenda a vast array of opportunities to interpose the will of the people through legislation to regulate rates charged to consumers. The regulatory agenda confronted the vested rights of private property so dear to conservative Americans, making *Munn* even more of a debate issue for delegates and the nation. What were the implications of allowing states to regulate business?[36]

Constitutional argument of high order was offset by overtly racist attacks upon the Chinese. On a plane higher than racism, some delegates felt that the federal government did not have an effective immigration policy and that as a result, California was being swamped with cheap immigrant labor to the detriment of Workingmen. In the end, delegates would petition Congress for federal legislation excluding the Chinese.[37]

Other delegates felt that the state was not doing enough to stop crime and that the courts were partially to blame. An Alameda County delegate offered an amendment to the Bill of Rights providing that "nothing herein contained shall be construed to prohibit the infliction of corporal punishment for crimes."[38] The reason for the amendment was that "[o]ne of the District Judges of this State decided the law to be unconstitutional, and discharged the party . . . upon the ground that the Act conflicted with the provision in the Constitution which forbids the infliction of cruel or unusual punishment."[39] He argued further that the English experience with the whip had suppressed street crime and that California prisons held "no terror" for criminals. Rather they had turned into country clubs and it was time to do something about crime. "The duty of society is to use such punishments as will secure the safety of honest and respectable men; as will enable you to go home at night without the fear of being knocked down by a sand-club."[40]

The debate was on and its contours are not unfamiliar a century later. Patrick Reddy, one of California's most successful criminal defense attorneys, rose to the cause. Whipping was contrary to modern penology theory. What California needed was "reformatory and not vindictive."

Whipping had been declared cruel by "the highest court in the land" and it was a "black mark" upon civilization.[41] James Caples, a medical doctor and stock rancher from Sacramento, would hear none of it. "I demand," he began, "in the name of honesty, in the name of virtue, in the name of everything that is sacred, that the law-making power of the commonwealth of California be unshackled and left in a position to defend society against crime."[42] The legislature rather than the judiciary should decide the appropriate punishments for crime. Charles R. Kleine, a Prussian-born bootmaker and licensed Baptist minister, supporting the Workingman's Party position, averred that the way to stop crime was to remove the cause of crime: unemployment.[43]

Other delegates joined the fray with historical cases pro and con. Clitus Barbour, a Workingman's Party attorney educated at Knox College and the Northwestern Law School, ridiculed the proposal arguing that it put California into the seventeenth century with the "stocks and the pillory." Charles C. O'Donnell of San Francisco, a Workingman's Party delegate and former Union army field surgeon, noted more recent history. Two prisoners had recently died in San Quentin prison of flogging.[44] John C. Stedman, a San Francisco accountant, thought that the whip might have a place in the system for wife beaters. Wife beaters "should be tied to the whipping post and receive corporal punishment . . . and it would be considered by the people as a reform."[45] Another delegate thought that the issue was the ineffectiveness of existing punishments rather than their nature. The solution was education and jobs, not punishment enhancements.[46] District Judge Eugene Fawcett of Santa Barbara noted that proportional to population, California had more people in prison than did Ohio and that crime had increased rapidly. He saw the prison system was too good to prisoners. Inmates were "better fed, better clothed, better treated, half of them, than they were elsewhere in the whole natural course of their lives." The system of reformation had failed. Fawcett believed "in treating criminals to personal pain and chastisement, as a means of suppressing crime."[47]

Others agreed with the objective, not the methodology. John G. McCallum of Alameda, a graduate of Indiana University Law School, former El Dorado County attorney, state senator, and organizer of the Union Party of California in 1861, thought hanging was better than whipping, perhaps remembering that California provided for the death penalty for robbery in the period 1851-57.[48] One delegate did not object

to "lash[ing] every inch of their bodies off," if the rich would receive the sting equally with the poor.[49] With these parameters set, the convention adopted the amended motion, 69-63.[50] As the convention closed its business, this decision would be reversed and the provision deleted from the constitution.[51]

Although whipping generated heated debate, the issue of American immigration policy, the treaty power, and the Chinese occasioned the most racist, yet legally sophisticated rhetoric. Many delegates felt that the United States had an ineffective immigration policy and that the imagined flood of Chinese was costing Americans jobs.[52] The question for most delegates was not whether they should do something about Chinese immigration, but what was constitutionally permitted in a federal constitutional system of government.

The convention's committee on Chinese immigration proceeded on three theories in discussing remedies. "The committee . . . was not able to agree upon any definite plan . . . for the extirpation of this evil, but . . . all agreed that Chinese immigration was an evil."[53] The first plan of action was based upon the constitutional theory that the state did not have the power to prohibit immigration, but it did have the police power "to protect itself against foreign and well-known dangerous classes." The committee noted that prior state legislative actions had been declared unconstitutional, but they were proceeding with "a different plan" modeled on *The Passenger Cases*.[54] A second approach was to prohibit Chinese immigration by means of the constitution and state statute. The third plan was to prohibit Chinese employment and thereby to cause "starvation by constitutional provision." This third plan went "to the very verge of constitutional power, and the state cannot go any further." The committee also thought that Chinese criminals should not be jailed but deported to lift a burden from the taxpayers. Chinese inmates of insane asylums posed a similar threat to California's budget.[55]

Supporters of Chinese exclusion and deportation found strength in constitutional law. James J. Ayers, the editor of the San Francisco *Morning Call*, presented an extensive case law analysis supporting the power of the state to exclude foreigners and those that would "corrupt the morals or endanger the health or lives of their citizens."[56] Charles C. O'Donnell of San Francisco thought in more basic terms. Chinese immigrants posed a "sanitary question." They had leprosy, he claimed, and would infect the whole of the white race.[57] Those opposing these

committee sections raised the conflict with the federal treaty power.[58] They were met by a flurry of legal arguments to the contrary. Charles J. Beerstecher of San Francisco, a German-born graduate of the University of Michigan Law School and leading legal mind of the Workingman's Party, contended that the "reserve power inherent in the State" was sufficient. He cited Joseph Story on the U.S. Constitution and several U.S. Supreme Court decisions for authority. The Burlingame Treaty had been "given too much sanctity" by the delegates, according to Beerstecher.[59]

For Clitus Barbour and James J. Ayers, the constitutional convention was the place to push the limits of constitutional precedent. Barbour wanted practical solutions to emerge from "the chaos of ideas" to end the "curse." He declared that "the American idea . . . is a white man's government; a government of Caucasians, established by white men, and for white men." The Chinese were taking over whole neighborhoods and driving white labor out. To save California for white Americans, the state should exclude all vagrants and criminals, deny business licenses to Chinese, forbid Chinese employment on private and public works, and do it now. Even if the Supreme Court should "set it aside . . . we are not worse off." Rather action by the convention might awaken Congress and arouse the American people. Barbour wanted to use constitutional provisions to shock "their sensibilities."[60] Ayers agreed "that nothing could shock the sensibilities of the East on this subject more than to adopt a section in the Constitution declaring the power of exclusion to exist in the State." But he would go further, denying the Chinese standing to sue, revoking the license to practice of any attorney representing a Chinese client, denying Chinese business licenses, the right to fish, to purchase, own, or lease real estate, refusing employment on public works, and withdrawing the franchise from anyone employing the Chinese.[61] These were the voices of the radical right seeking to drive the Chinese from the state.[62]

The most telling rebuttal based on constitutional law analysis was advanced by James McMillan Shafter of San Francisco. He was a graduate of Wesleyan University of Connecticut, the Connecticut secretary of state from 1842-49, the speaker of the Wisconsin Assembly in 1851, a U.S. congressman, in the California Senate, 1862-63, and a Republican elected to the convention on the Non-Partisan ticket. He charged that "truth and error are recklessly or even ignorantly intermin-

gled." Delegates had "violate[d] propriety" and "by senseless virulence darken[ed] counsel by words without knowledge." The forces of fear were trying to push "these crude, unreasonable, and absurd claims" into the constitution. Shafter warned that "when constitutional law has no longer any force in the State and country, when ignorance and violence shall . . . rule us," then chaos shall reign. On another level, Shafter commended the Chinese work ethic and reminded the delegates that "the same objections which are now made to them, fifty years ago were urged against at least some European immigrants." Shafter insisted that the federal jurisdiction over immigration was exclusive, that the treaty power and specifically the Burlingame Treaty forbade the convention's proposed actions to restrict Chinese property ownership, that state police power extended "only to those who are personally objectionable, and must then only be exercised upon at least quasi-judicial examination," and that the convention's only avenue for action was a memorial to Congress.[63] Despite these apt observations, the convention rushed to pass anti-Chinese provisions, only to have them overturned in the courts.[64]

The convention was not in as much of a rush, nor were the speeches as colorful, when the structure of the judiciary came before the delegates. The report of the committee on the judiciary generated a discussion of whether the Supreme Court should hold sessions in places other than Sacramento, the election of judges, the term of office, and the costs of justice. Regarding the length of terms for Supreme Court justices, Samuel M. Wilson of San Francisco, the law partner of Joseph P. Hoge, the president of the constitutional convention, and founder with Hoge of the San Francisco Bar Association, wanted long terms for judges. A long term was necessary to attract the best legal talent, he argued, and "the continual changing of Judges is certainly one of the worst things in our system."[65] Horace C. Rolfe, representing San Bernardino and San Diego counties, warned the convention of judicial elections and politics. "This idea of a Justice of a Supreme Court being re-elected in consequence of having been a good and efficient judge, is all a delusion," he asserted.[66] George V. Smith agreed, cautioning that politics could "make the office of Supreme Judge merely a political office."[67] Others saw the judiciary article as a means of keeping the courts out of politics. Thomas B. McFarland of Sacramento thought that "the judiciary [was] by far the most important department to the people." A Supreme Court justice's salary must be sufficient and the term long enough "that he may expect

[to be judge] . . . the balance of his life."[68] Another delegate saw long terms as a barrier to political caprice. "The excellence of the judicial system . . . is predicated not on change, but on certainty, on permanence and precedent," he offered. Further, judges were a special breed having "quite a different order of talent . . . to hand down the laws unimpaired, to adhere to precedent, and to refine without over-refinement."[69] Long terms put some distance between judges and the political environment of frequent elections.

Superior court judgeships provoked plenty of palaver over pork. The judiciary committee had tried to replace the district judges with superior court judges by the numbers to avoid an increase in the number of judgeships. Delegate McCallum reporting for the committee warned that "once you depart from [the principle] . . . there will be no end to it." How true! Delegates rushed to amend to give two judges to various counties, reasoning, for example, that "if the Counties of Sacramento and Sonoma are entitled to two Judges, the County of San Joaquin ought to be."[70] One delegate objected to the plundering of the state treasury; another retorted that Santa Cruz had "at least ten lawyers who want to get upon the bench, and we want more places."[71] Patrick Reddy wanted the issue of expense buried. The "question of cost cuts no figure," he exhorted. "It is a question of providing a system whereby justice can be had promptly."[72] This issue of numbers of judges was complicated on the cost side by the question of salary.

What the convention did to reform the court system under the 1849 constitution was to specify the jurisdiction of the Superior Courts as they related to inferior courts and subject matter. The Article VI list turned into a long but necessary one to avoid the conflicts sometimes witnessed under the 1849 instrument.[73]

Like Reddy, the issue of justice could not be restrained by cost. Taxpayers wanted justice, and they would pay for it. Isaac Belcher, former two-term district attorney of Yuba County, district judge, and justice of the Supreme Court, speaking for the practicing bar, favored "giving the lawyers who go upon the bench fair pay, and then they will work for it."[74] James M. Dudley of Solano County saw the state "drifting into bankruptcy" and wanted salaries lowered. Reddy asked him if he wanted "to drive our Judges into a hash house to live?"[75] Reddy, Wilson, and others saw high salaries as a means of getting the best legal talent on the bench. Others like Eugene Casserly saw lawyers who could not make

a living wanting a place at the public treasury ATM.[76] Attempts to reduce judicial salaries beaten back, the delegates still pondered specifics in molding a judiciary.

In the process of discussing the role of the superior court judge in trials, the agents of the press pushed an amendment to bar a judge from instructing a jury regarding what constituted libel. Thomas B. McFarland of Sacramento had observed that "the greatest evil of law making, either in constitutional conventions or legislative bodies, is the desire which every man has to put in something to remedy some little matter . . . [of] his . . . personal experience."[77] But amend to remedy they did. Samuel M. Wilson scolded that "the press, in its pride and independence, ought not to ask privileges and immunities not possessed by and accorded to others."[78] Editor James J. Ayers retorted that the amendment was "to protect fearless newspaper publishers."[79] Delegate Rolfe was "sick and tired of having matters of so little importance as this thrust upon this Convention."[80] Such matters should be left to the legislature.

With a good deal of other minor tinkering, including a 90-day limit on the issuance of opinions, the convention concluded its work on a constitutional scheme for California's courts. The plan was traditional in its structure, calling for a hierarchy of courts headed by a Supreme Court. The chief justice had authority to administer the business of the court in a variety of ways. Thomas H. Laine, a Santa Clara attorney, graduate of the University of Pennsylvania, and California state senator, observed "that [the] Supreme Court is complex, cumbersome, and costly, and I believe it is a Court of fragments lightly bound together by the Chief Justice."[81] The role of the chief justice was not lost upon those that opposed the ratification of the constitution by the people. The San Francisco *Daily Alta California* in its May 5, 1879, supplement contained "an exact copy from the official document of the proposed new constitution—with our headings and comments in brackets, calling attention in very brief terms to the main defects of the instrument." In Article VI before section 2 the editors inserted: "[Judicial Despotism]."

The Chief Justice's role under section 2 was a target of criticism. On April 25, 1879, the *Daily Alta California* had favorably printed Governor Irwin's speech against the constitution. Irwin proclaimed that "the system propounded for the judiciary, so far as concerns the Supreme Court, is one of the most monstrous ever yet suggested to the world." Irwin bellowed that corrupt courts attacked the liberty of the people and that

"no man's life, liberty, or property would be safe." Why? Because "a combination of the Chief Justice and three others would be the inauguration of a reign of terror and corruption." This attack upon the chief justice was a small part of a much larger indictment. The *Placer Argus* ran a similar story on April 5, 1879, accusing the delegates of a willingness "to subvert popular institutions . . . [by creating] an all-powerful Chief Justice." On April 25, 1879, the *Los Angeles Daily Star* printed "Some Reasons Why I Do Not Like the Proposed Constitution," from a "worker." Included among the long list of grievances against the document was: "It removes the judiciary in the interest of lawyers and their wealthy clients," and "it renders the Supreme Bench a 'caste Prerogative,' confined to a select legal grade. . . ." This latter complaint was against the requirement that Superior Court and Supreme Court judges be admitted to the bar. The *Placer Argus* had, on May 3, 1879, objected to the requirement as "some men claim this is inferior to the old system." The *Los Angeles Daily Star* ran an April 27, 1879 supplement to print the Stockton speeches of Thomas H. Laine of Santa Clara and Creed Haymond, general counsel of the Southern Pacific Railroad, against the constitution. Laine iterated and the *Star* put in bold, "A Chief Justice with More Power than a King." The complaint was that after being heard in one department, you would not know whether you would be heard in bank. The *Contra Costa Gazette* offered in an April 5, 1879, editorial that several of the constitution's provisions were "a clear departure from the principles of responsible Republican government, and a substitution of Autocratic Absolutism." One of those provisions was in Article VI, concentrating power in the hands of the chief justice. The Jacksonian mind lost focus in the period.

Another attack upon Article VI was over the independence of the judiciary. The *San Luis Obispo Tribune* ran an April 19, 1879, feature on "The New Constitution" drawn from a speech by Judge R. F. Peckham in San Jose. The judge asserted that the "liberty of the people" was safeguarded by an independent judiciary. The new constitution's Article VI, section 10 provided for the legislative removal of judges. Judge Peckham offered that "no judge on the bench dare set up his legal learning in favor of the constitutional rights of a citizen against the will of an ignorant legislature." The reason was simple: two-thirds of that ignorant legislature. Further, the legislators did not have any standards to guide them, just the caprice of the times.[82] The Eureka *Democratic*

Standard saw it differently in an April 26, 1879, story entitled "Fifty Solid Reasons Why the New Instrument Should Be Adopted." Regarding the judiciary, the constitution increased "the efficiency of the Courts by simplifying proceedings and distributing business in such a way that it can be more promptly attended to, thus lessening the evils of . . . delay." Every county had a "Court of general jurisdiction . . . thereby bringing justice home to every man's door." Justice would be speedier because judges would have their salary withheld if they did not "decide cases for ninety days." The justice system was simplified "by providing for only two kinds of Courts of general jurisdiction." The new structure for the Supreme Court in two departments doubled "its working capacity and [gave] the Judge more time for the study of cases." The constitution also prevented "the slighting of cases on appeal by requiring all decisions to be in writing, stating the reasons upon which they are based."[83] In many ways, what the press saw in the constitution was conditioned by the politics of the times, and most of the editors found the mark of Denis Kearney on the document.

The Workingman's Party role in the convention was to save the state from monopolists according to some. The Fort Jones *Scott Valley News* saw on March 20, 1879, that "our present [1849] constitution has been doctored by legislative enactments, so construed by the judicial tribunals, so captured by the moneyed interests . . . that it has become a protection to the rich and a barrier to the poor." The ratification fight was "the people's battle for freedom from oppression." An April 12, 1879, editorial in the *San Francisco Chronicle* put the issue of ratification in terms of economic prosperity. The 1849 document had led to depression: the 1879 constitution would lead to a "new and golden age." The ideological support for the constitution in the press was small compared with the papers that opposed the 1879 constitution.[84]

The language of opposition, like that characterizing the authority of the chief justice as a king, was filled with extremes. The *San Luis Obispo Tribune* in a March 29, 1879, editorial took a stand against "Nihilism . . . Socialism . . . Communism . . . Agrarianism . . . Sandlotism . . . [and] every species of mob rule." The *Los Angeles Daily Star*, on May 18, 1879, ran a story from a Columbia College Law School graduation speech of Professor Dwight announcing that "the new Code of California has been checkmated by a codified Constitution, a sort of Noah's Ark, with all sorts of creeping things and slimy creatures, and

without any Noah to take charge." As we know with historical hindsight, the people did ratify the 1879 constitution, and it was the judiciary at the tiller of the ark that saved the state.[85]

NOTES

[1]J. Ross Browne, *Report of the Debates in the Convention of California of the Formation of the State Constitution in September and October, 1849* (Washington, D.C., 1850).

[2]Christian G. Fritz, "Popular Sovereignty, Vigilantism, and the Constitutional Right of Revolution," *Pacific Historical Review*, 58:39-66 (1994).

[3]*Ibid.*, 50-51.

[4]*Ibid.*, 45-6.

[5]*Ibid.*, 46.

[6]Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln, 1991), 101.

[7]Gordon Morris Bakken, "Death for Grand Larceny," in *Historic U.S. Court Cases, 1690-1990: An Encyclopedia*, ed. John W. Johnson (New York, 1992), 34-35.

[8]*Ibid.*, 92-93.

[9]*Ibid.*, 108.

[10]*Ibid.*, 115.

[11]*Ibid.*, 115.

[12]*Ibid.*, 117.

[13]*Ibid.*, 125.

[14]*Ibid.*, 215.

[15]*Ibid.*, 226.

[16]*Ibid.*, 227.

[17]*Ibid.*, 228 (Noriego).

[18]*Ibid.*, 229.

[19]*Ibid.*, 231.

[20]*Ibid.*, 234.

[21]*Ibid.*, 234.

[22]*Ibid.*, 235.

[23]*Ibid.*, 235.

[24]*Ibid.*, 237.

[25]*Ibid.*, 239.

[26]Also see: Cardinal Goodwin, *The Establishment of State Government in California, 1846-1850* (New York, 1914); Lately Thomas, *Between Two Empires: The Life Story of California's First Senator, William McKendree Gwin* (Boston, 1969); Walter Colton, *Three Years in California* (New York, 1850), 410-11; Rockwell Dennis Hunt, *The Genesis of California's First Constitution* (Baltimore, 1895). For a comparative analysis with the best work on the politics of the 1849 convention see David Alan Johnson, *Founding the Far West:*

California, Oregon, and Nevada, 1840-1890 (Berkeley, 1992), 15-40, 101-38, 233-68.

[27]Hubert Howe Bancroft, *History of California, 1860-1890,* Vol. 7 (San Francisco, 1890), 371-75; William J. Courney, *San Francisco's Anti-Chinese Ordinances, 1850-1890* (San Francisco, 1956), 66-69; Doyce B. Nunis, Jr., ed., "The Demagogue and the Demographer: The Correspondence of Denis Kearney and Lord Bryce," *Pacific Historical Review,* 35:269-88 (1967); David B. Griffiths, "Anti-Monopoly Movement in California, 1873-1898," *Southern California Quarterly,* 52:93-121 (1970); Ralph Kauer, "The Workingman's Party of California," *Pacific Historical Review,* 13:278-91 (1944); Delmatier M. Waters, *The Rumble of California Politics* (New York, 1970), 70-98; Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention of 1879* (Claremont, Calif., 1930); David Alan Johnson, *Founding the Far West,* (Berkeley, 1992), 255. Johnson sees the Kearney proposals as "more starkly phrased versions of Democratic and Republican measures" and the 1879 constitution as "an effort to make sense of a modernizing corporate order by preserving freedom for the individual proprietor while at the same time accepting the presence . . . of supraindividual combinations." *Ibid.*

[28]Between 1869 and 1880 widespread occupational mobility ceased and San Francisco experienced periods of depression and high unemployment. San Francisco's workingmen saw themselves not as a part of the working class but as part of the future upper class. As with mobility, what mattered was not reality but perception. See Neil Larry Shumsky, "Dissatisfaction, Mobility and Expectation: San Francisco Workingmen in the 1870s," *Pacific Historian,* 30:21-28 (1986).

[29]William Issel and Robert W. Cherny, *San Francisco, 1865-1932* (Berkeley, 1986), 6-23.

[30]Swisher, *Motivation,* 17-31.

[31]Warren Beck and David A. Williams, *California* (Garden City, N.Y., 1972), 260-3.

[32]Dibblee to Heidsieck, Feb. 26, 1878, in Albert Dibblee Collection MSS, Bancroft Library, Carton 14, v. 221, Letterbook #24. Dibblee wrote to W. W. Hollister, a Santa Barbara rancher, on March 16, 1878, that "the Savings Banks have all been a little anxious on account of the howl raised against them by that Vagabond Kearney and his imps. Several of them have been steadily calling in loans for some time and all feel it imperative to keep a larger supply than usual of idle money on hand to meet possible contingencies." *Ibid.*

[33]*Ibid.*; Swisher, *Motivation,* 20.

[34]See Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly,* 17:35-80 (1989).

[35]*Ibid.*, 57-67, 71-80; Gordon M. Bakken, "Constitutional Convention Debates in the West: Racism, Religion, and Gender," *Western Legal History*, 3:213, 239-44 (1990).

[36]See generally Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (Cambridge, Mass., 1990); Herbert Hovencamp, *Enterprise and American Law, 1836-1937* (Cambridge, Mass., 1991); Harry N. Scheiber, "The Road to *Munn:* Eminent Domain and the Concept of Public Purpose in the State Courts," *Perspectives in American History*, 5:329-402 (1971).

[37]David Alan Johnson, *Founding the Far West*, 257.

[38]E. B. Willis and P. K. Stockton, *Debates and Proceedings of the Constitutional Convention of the State of California . . . 1879* (Sacramento, 1880), 3 Vols., 243. In other parts of the debates, it is clear that some delegates were worried about tramps or "the dangerous class." See: Eric H. Monkkonen, *The Dangerous Class* (Cambridge, Mass., 1975); Roger Lane, *Violent Death in the City: Suicide, Accident and Murder in Nineteenth Century Philadelphia* (Cambridge, Mass., 1979); David R. Johnson, *Policing the Urban Underworld: The Impact of Crime on the Development of American Police* (Philadelphia, 1979); Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County, California, 1870-1910* (Chapel Hill, N.C., 1981).

[39]Willis and Stockton, *Debates*, 243.

[40]*Ibid.*, 244. Later in the debates, delegate Howard of Los Angeles moved reconsideration of the whipping section with a proviso that whipping be limited to "garroters, hoodlums and Chinese." He supported his proposal with the observation that he did "not see any other mode of repressing hoodlums and garroters and punishing Chinese misdemeanors, because [when] a Chinaman gets in jail he is in as good a place as a hotel." *Ibid.*, 1192.

[41]*Ibid.* Reddy established a perfect record defending the criminally accused in Bodie. Bakken, *Practicing Law*, 44; Roger D. McGrath, *Gunfighters, Highwaymen, and Vigilantes* (Berkeley, 1984), 256. For biographical information on the delegates I have relied upon T. J. Vivian and D. G. Waldron, eds., *Biographical Sketches of the Delegates to the Convention to Frame a New Constitution of the State of California, 1878* (San Francisco, 1878).

[42]Willis and Stockton, *Debates*, 244.

[43]*Ibid.*

[44]*Ibid.* Also see Shelley Bookspan, *A Germ of Goodness: The California State Prison System, 1851-1944* (Lincoln, 1991); Lyle A. Dale, "The Police and Crime in Late-Nineteenth- and Early-Twentieth-Century San Luis Obispo, California," *Western Legal History*, 4:203-23 (1991); John J. Stanley, "Bearers of the Burden: Justices of the Peace, Their Courts and the Law, in Orange

County, California, 1870-1907," *Western Legal History*, 5:37-67 (1992). On colonial criminal justice administration see Bradley Chapin, *Criminal Justice in Colonial America, 1606-1660* (Athens, Ga., 1983); Edgar J. McManus, *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620-1692* (Amherst, Mass., 1993). For early 19th-century see Allen Steinberg, *The Transformation of Criminal Justice: Philadelphia, 1800-1880* (Chapel Hill, N.C., 1989).

[45]Stedman's concern about domestic violence had already moved the California's legislature to include cruelty as a grounds for divorce. California Civil Code, Section 89 *et seq.* (1872). Also see Robert Griswold, *Family and Divorce in California, 1850-1890* (Albany, 1980). Norma Basch, "The Emerging Legal History of Women in the United States: Property, Divorce, and Constitution," *Signs*, 12:106-9 (1986); Elizabeth Pleck, "Wife-Beating in Nineteenth-Century America," *Victimology*, 4:60-2 (1979); Elizabeth Pleck, *Domestic Tyranny: The Making of Social Policy Against Family Violence from Colonial Times to the Present* (New York, 1987); Susan Gonda, "Not a Matter of Choice," *Journal of San Diego History*, 37:195-6 (1991). Also see: Bonnie L. Ford, "Women, Marriage, and Divorce in California, 1849-1872," Ph.D. dissertation, University of California, Davis, 1985; Willis and Stockton, *Debates*, 245.

[46]*Ibid.*, 245 (Blackmer).

[47]*Ibid.*

[48]*Ibid.*, 246 (McCallum). See Gordon Morris Bakken, "The Influence of the West on the Development of Law," *Journal of the West*, 24:66-72 (1985).

[49]Willis and Stockton, *Debates*, 247 (Joyce).

[50]*Ibid.*

[51]*Ibid.*, 1172. Whipping as a punishment in California harkened back to the gold rush period. It has colonial roots, but the absence of jails and the seeming effectiveness of the punishment made it culturally acceptable at that time. See Bakken, *Practicing Law*, 101. The attack upon whipping was part of "the new penology" that argued that prison could reform the offender's behavior if properly designed, professionally staffed, and offering generous rewards for good behavior. Bookspan, *Germ of Goodness*, 30.

[52]See Scheiber, "Race, Radicalism, and Reform," 50-1; Bakken, "Constitution Convention Debates," 242-4.

[53]Willis and Stockton, *Debates*, 628.

[54]On *The Passenger Cases* (7 How. 283) see Carl B. Swisher, *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: The Taney Period, 1836-64* (New York, 1974), 383-92.

[55]Willis and Stockton, *Debates*, 628-30.

[56]*Ibid.*, 634-6.

[57]*Ibid.*, 638-41.

[58]*Ibid.*, 242 (Stuart).

[59]*Ibid.*, 246-7.

[60]*Ibid.*, 649-51.

[61]*Ibid.*, 651-3.

[62]On the anti-Chinese movement in California see Sucheng Chan, *This Bitter-Sweet Soil* (Berkeley, 1986), 38-40; Gary B. Nash and Richard Weiss, eds., *The Great Fear: Race in the American Mind* (New York, 1970), 107-17, 124, 149; Alexander Saxon, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley, 1971).

[63]*Ibid.*, 673-7.

[64]See Bakken, "Constitutional Convention Debates," 242-4; Scheiber, "Race, Radicalism, and Reform," 68-70.

[65]On Hoge and Wilson see Bakken, *Practicing Law*, 39. Also see Christian Fritz, "Popular Sovereignty, Vigilantism, and the Constitutional Right of Revolution," *Pacific Historical Review*, 58:64-66 (1994); Willis and Stockton, *Debates*, 959.

[66]*Debates*, 959.

[67]*Ibid.*, 960.

[68]*Ibid.*, 961.

[69]*Ibid.*, 962 (Johnson).

[70]*Ibid.*, 968 (McCallum committee report; Hall).

[71]*Ibid.*, 969 (Cross and White).

[72]*Ibid.*, 970.

[73]This is an issue of interest only to lawyers and the section was forged in committee. Swisher, *Motivation*, 96-98, contains a discussion of the place for sessions of the Supreme Court as the only issue of controversy on the article.

[74]Willis and Stockton, *Debates*, 974.

[75]*Ibid.*, 987.

[76]*Ibid.*, 989. Reddy puts it well at 992: "There is no economy in having inexperienced and incompetent Judges. It delays business, piles up work on the Supreme Court, and harasses and annoys litigants, besides putting them to a great deal of unnecessary expense."

[77]*Ibid.*, 996.

[78]*Ibid.*, 998.

[79]*Ibid.*, 999.

[80]*Ibid.*, 999-1000.

[81]*Ibid.*, 1357.

[82]The press was consistent on wanting "justice," but not on how to obtain it. The *Placer Argus* ran a Nov. 3, 1877, story prior to the convention election. The *Argus* wanted "a change in the judiciary system of our State. We have

altogether too many Judges. Just think of a District Court, a County Court, and a Probate Court in every one of the fifty-two counties of the State! Let us have a less[er] number of Courts and more justice." The press in the nineteenth century frequently made fun of lawyers and judges, yet they knew that the rule of law was necessary for a stable society. The *Fresno Weekly Expositor*, Oct. 18, 1878, thought that California had "too many Courts." The problem was expense in an unfair taxing system. Bakken, *Practicing Law*, 114-37.

[83]This last reason, written opinions with reasons, was a long-term complaint of the practicing bar. Early cases could be very terse and decisions handed down with absolutely no case citations. Bakken, *Practicing Law*, 29. Also see Gordon Morris Bakken, *The Development of Law in Frontier California: Civil Law and Society, 1850-1890* (Westport, Conn., 1985), 7-83.

[84]Dudley T. Moorhead, "Sectionalism and the California Constitution of 1879," *Pacific Historical Review*, 12:287-8 (1943); Gordon Morris Bakken, "California Constitutionalism: Politics, the Press and the Death of Fundamental Law," *Pacific Historian*, 30:5-17 (1986).

[85]The ark was Professor Dwight's term and as Noah did, so did the 1878-79 delegates in gathering the life blood of the state into one vessel, the constitution. The constitution was defective in many ways, and it was for the courts to judicially remove the most vile sections. See Scheiber, "Race, Radicalism, and Reform," 67. The federal courts did much to cut away the constitutionally objectionable sections in violation of the treaty power, but the California Supreme Court also played an important role. See Ex parte Ah Cue, 101 Cal. 197 (1894); Estate of Tetsubmi Yano, 188 Cal. 645 (1922); Roger Daniels, *The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion* (Berkeley, 1962); Robert Higgs, "Landless by Law," *Journal of Economic History*, 38:216-20 (1978); Charles J. McClain, Jr., "The Chinese Struggle for Civil Rights in Nineteenth-Century America: The First Phase, 1850-1870," *California Law Review*, 72:529 (1984). Regardless of the cases favoring equality and the rights of Asians, the struggle for access to land and citizenship continued well past World War II.