

TIMOTHY SANDEFUR*

The Declaration of Independence in California:

A Tortured History

INTRODUCTION

Abraham Lincoln once said that the basic principle of the Declaration of Independence—equal liberty for all, regardless of their racial ancestry—is “a standard maxim” which should be “constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.”¹ But California’s experience with the Declaration’s principles has been strained. While early Californians prized its idea of self-government, they failed to acknowledge the underlying principle of equality, and in fact engaged in shocking degrees of official bigotry well into the twentieth century. The “spreading and deepening” of the Declaration’s influence in the Golden State has been slow, indeed. Not until the 1990s would Californians proclaim in their fundamental law that government discrimination based on race was intolerable—and even after that, the state has persisted in its discriminatory conduct. This article gives an overview of the Golden State’s long-delayed reckoning with the principle that “all men are created equal.”

* Timothy Sandefur is the Vice President for Legal Affairs at the Goldwater Institute’s Scharf-Norton Center for Constitutional Litigation and holds the Duncan Chair in Constitutional Government. He litigates to promote economic liberty, private property rights, free speech, and other crucial values in states across the country. Sandefur is the author of several books, including *The Conscience of the Constitution: The Declaration of Independence and the Right to Liberty* (2015), *Frederick Douglass: Self-Made Man* (2018), and *You Don’t Own Me: Individualism and the Culture of Liberty*, which was published in November 2025. Prior to joining Goldwater, Sandefur served for a dozen years as a litigator in Pacific Legal Foundation’s Sacramento office.

¹ Abraham Lincoln, Speech at Springfield, Ill., June 26, 1857, in 2 COLLECTED WORKS OF ABRAHAM LINCOLN 406 (Roy B. Basler ed., 1953).

I

THE DECLARATION IN PRE-STATEHOOD CALIFORNIA

A. *The Declaration and Its Mores*

When in 1776 the Second Continental Congress proclaimed that the American colonies were no longer part of Britain but were free and independent states, North America's West Coast was still a distant frontier to most Europeans. In what would become San Francisco, a Spanish missionary named José Joaquín Moraga had just built a modest structure that would eventually become Mission Dolores, and further north, Russian traders were staking out outposts for fur trading. Governed by Spain until 1821, and then by Mexico until its war with the United States in 1848, California would have no connection with the American Revolution's legacy until the middle of the nineteenth century. Certainly, the Spanish pioneers of early California had little concern with what was happening on the far side of the continent.

Nor did the Declaration make much impression on the Spanish-speaking world at the time. As Professor Joaquim Oltra notes, it was little known and rarely translated into Spanish until the middle of the nineteenth century, despite the fact that Spain contributed toward the colonial rebellion as part of the French-American alliance.² Part of this, Oltra argues, is due to the vast philosophical gulf between the politics of the Catholic empire and the Protestant classical liberalism of the American revolutionaries. As late as 1865, a translator in Madrid who sought to render the Declaration into Spanish was stymied by the term "self-government," and left it in English, while adding an explanatory footnote.³ By that time, California had already gone through the tremendous social and political upheavals of the Gold Rush and statehood.

That's not to say the Declaration's principles were unknown in Spanish America. On the contrary, the principles to which the Declaration refers, especially those regarding the equal rights of mankind, are timeless, and they made their appearance in Spain well over a century before American independence. In the 1533 bull *Sublimas Deus*, Pope Paul III pronounced that "Indians are truly men and . . . are by no means to be deprived of their liberty or the possession of their property, even though they are outside the faith of Jesus Christ."⁴ This declaration, unfortunately, did not resolve the question of whether the Spanish empire could enslave the native population of the

² Joaquim Oltra, *Jefferson's Declaration of Independence in the Spanish Political Tradition*, 85 J. AMER. HIST. 1370 (1999).

³ ANTONIO ANGULO HEREDIA, ESTUDIOS SOBRE LOS ESTADOS-UNIDOS DE AMÉRICA 20 (1865).

⁴ Quoted in LEWIS HANKE, *ALL MANKIND IS ONE: A STUDY OF THE DISPUTATION BETWEEN BARTOLOMÉ DE LAS CASAS AND JUAN GINÉS DE SEPÚLVEDA IN 1550 ON THE INTELLECTUAL AND RELIGIOUS CAPACITY OF THE AMERICAN INDIANS* 21 (1974).

New World. Thus, two decades later, the theologian Juan Ginés de Sepúlveda argued that indigenous Americans were not fully human—they were more like monkeys than men, he said—and therefore were naturally destined for slavery. To this, the monk Bartolomé de las Casas replied with an impassioned argument that they were “not . . . like brute animals,” but “clever and most capable of reasoning,” and therefore should be treated with decency.⁵ “This argument by Las Casas,” writes Professor Larry Arnhart, “can be seen today as one of the first statements of the modern conception of human rights—that all human beings have natural rights by virtue of their universal human nature.”⁶ But the debate appears to have ended without clear resolution, and it did little to prevent the Spanish from enslaving Native Americans.⁷

One scholar who would have had a difficult time imagining the Declaration’s principles spreading to California was Alexis de Tocqueville. In *Democracy in America*, he argued that South America—by which he meant political societies originating with Spanish settlement and reflecting Spanish colonial *mores*—“cannot maintain a democracy.”⁸ That was not because of Catholicism (he was himself Catholic), but because of political culture. “In order to profit by past experience,” he wrote, “a democracy must already have reached a certain degree of civilization and enlightenment”—which he believed Spanish America had not attained.⁹ For that reason, “the new nations of South America [are] convulsed by one revolution after another,” so that “society [there] is floundering at the bottom of an abyss from which its own efforts cannot drag it. . . . The people dwelling in this beautiful half continent seem obdurately determined to tear out each others’ guts. . . . I am tempted to believe that for them despotism would be a blessing.”¹⁰

That was an extreme statement, but consistent with Tocqueville’s broader belief that a society’s cultural and social attitudes are more important than its political institutions. Foremost among the *mores* that enabled democracy

⁵ HANKE, ALL MANKIND IS ONE 84, 102.

⁶ Larry Arnhart, *Strauss, Slavery, and Darwinian Natural Right*, Darwinian Conservatism, Feb. 4, 2015.

⁷ Las Casas on one occasion urged the King to replace Native slaves with African slaves, instead. This did not represent his belief that the enslavement of Africans was philosophically acceptable whereas the enslavement of Native Americans was not; Las Casas simply thought Africans were more resistant to the European diseases that killed off the Native Americans, and he later repudiated his endorsement of African slavery. LAWRENCE A. CLAYTON, BARTHOLOMÉ DE LAS CASAS: A BIOGRAPHY 136 (2012). American defenders of slavery, however, would later omit this latter point. In 1821, John Quincy Adams recorded in his diary a conversation with a pro-slavery intellectual who argued that “the Negro Slave-trade itself was the child of Humanity”—that is, of humane motives—and traced it back to Las Casas, who, the man said, “contriv[ed] [it] . . . to mitigate the condition of the American Indians.” 1 DAVID WALDSTREICHER, ED., JOHN QUINCY ADAMS: DIARIES 486 (2017).

⁸ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 306 (George Lawrence trans., J. P. Mayer ed., Harper Perennial 1969) (1835).

⁹ *Id.* at 225.

¹⁰ *Id.* at 226.

to thrive in the United States were the principle of “self-interest properly understood”—that is, a reflective sense of ethical egoism—and a profound sense of political taboo, largely attributable to religion.¹¹ “If the spirit of the Americans were free of all impediment, one would soon find them among the boldest innovators,” he wrote. “But American revolutionaries are obliged ostensibly to profess a certain respect for Christian morality and equity, and that does not allow them easily to break the laws when those are opposed to the execution of their designs. . . . Thus while the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare.”¹² In other words, social *mores* helped hold back the tyranny of the majority while at the same time channeling enormous energies into what is now called “civil society”: the many private clubs and organizations that the Americans were constantly creating to address social problems or promote new public projects. Tocqueville appears to have believed that these qualities had not sufficiently developed in the Spanish-American countries of the New World, and consequently doomed democratic reform there.

Only a decade after Tocqueville wrote these words, however, the unprecedented flood of immigrants into California after the discovery of gold would inaugurate an experiment in the creation of political society, one led by a people who—in at least some general sense—purported to subscribe to the Declaration of Independence’s doctrines, but who in practice were extremely slow to embrace its principles to the fullest.

B. Self-Government or Tyranny of the Majority?

To appreciate how the Declaration’s legacy played out in California, one must first recall the political philosophy it articulates. Rooted in the ideas of seventeenth-century English Whigs, especially John Locke, the Declaration starts with the proposition that “all men are created equal,” meaning that no mature adult is inherently entitled to govern another. Whatever the differences in their knowledge, skills, and capacities, all are inherently self-responsible beings, who cannot avoid choosing and refusing, and are ultimately the ones with the most to lose from making bad choices, and the most to gain from making wise ones. No matter how much they try, they cannot escape this self-responsibility. Consequently, they also must have the freedom to make the operative choices in their lives. People, after all, cannot be held responsible for actions unless they have the freedom to choose those actions. This is what it means to be endowed with the inalienable right to liberty. And because

¹¹ *Id.* at 525–28.

¹² *Id.* at 292.

every human being is subject to these same principles, they ultimately cannot escape responsibility for their own lives and are “equal” in the sense that none is entitled to control the choices of another.

This means that anyone purporting to govern must *ask* the governed for permission to govern—i.e., consent. It also means that political society exists not to enrich those in power or to achieve glory for the nation or the race, but to protect the rights of those who create the government—especially their right to property, which in classical liberal political philosophy is the “first among equals” of human rights. (All rights are effectively explicable as forms of property: a person’s right to free speech or freedom of religion arise from the individual’s “ownership” of his ideas and beliefs, for example.¹³)

Most significantly, all people have the right to “pursue happiness,” which means the right to take the steps necessary to flourish. Along with such rights as religious freedom or the freedom to marry and raise children—all central to the pursuit of happiness—this right also includes the right to exert one’s efforts to acquire wealth to provide for oneself and one’s family. The phrase “pursuit of happiness” appears in Locke’s writings but originated in the ideas of such ancient philosophers as Aristotle, Epicurus, and Cicero, who thought the purpose of life was the maximization of one’s natural gifts, and/or the avoidance of pain so as to achieve a sense of tranquility. Government at its best enforces the rule of law, and guarantees justice, not by redistributing wealth, but by remedying or punishing injuries, so that people can survive and thrive on their own.

The unprecedented influx of population into California in 1849 presented the newcomers with some unique social challenges and created a sort of natural experiment in political philosophy. The American West, in fact, was the closest humanity has ever come to a real-life state of nature situation hypothesized by Lockean political philosophy. And the results of that experiment were mixed, indeed.

Locke had predicted that in a state of nature, people would establish authoritative institutions to preserve their lives, liberties, and estates, and the miners did just that. As legal historian Andrea McDowell has recently shown,¹⁴ the Forty-Niners quickly established forms of social order out of anarchy—typically through the institution of the camp meeting, in which miners collectively addressed problems about ownership or the operation of settlements. They also met to resolve disputes in something resembling criminal

¹³ See, e.g., James Madison, *Property* (1792), reprinted in MADISON: WRITINGS 515–18 (Jack Rakove, ed., 1999).

¹⁴ ANDREA G. MCDOWELL, *WE THE MINERS: SELF-GOVERNMENT IN THE CALIFORNIA GOLD RUSH* (2022).

trials. They established mining codes, and if disputes arose, they would be sent to arbitration; and if that failed, to the camp meeting. This, writes McDowell, was a “quintessentially American” resolution of the problem of social order.¹⁵ In fact, leaders back in Washington largely chose to leave the Forty-Niners to their own devices in this respect. Missouri Senator Thomas Hart Benton, whose son-in-law John C. Frémont was a prominent California figure, told Californians in 1848 that they must establish their own institutions: “Having no lawful government, nor lawful officers, you can get none except by your own act; you can have none that can have authority over you except by your own consent. Its sanction must be in the will of the majority. I recommend you to meet in convention—to provide for a cheap and simple government—and take care of yourselves until congress can provide for you.”¹⁶

McDowell shows that Californians did proceed to create remarkably robust self-governing institutions. Yet these institutions lacked some elements vital to the Lockean conception—or, perhaps more accurately, vital to the American Revolutionary conception—of self-government. These *de facto* governments had few protections for minority rights; although there were crude forms of due process, there was no appellate process, no checks and balances, and no federalism. As a result, self-governing mining camps tended toward the tyranny of the majority, and that especially meant the tyranny of the white majority against Mexicans, Chinese, and other racial groups viewed as inferior. In some respects, the autonomy of California mining camps vindicated Tocqueville’s views—as McDowell writes, “the American tradition—almost a habit—of democratic self-government . . . meant that a random assembly of miners at a new diggings could draft and pass a mining code for themselves in a matter of hours. In this sense, cultural norms facilitated the creation of institutions and presented a manageable number of options for the rules themselves.”¹⁷ But on the other hand, where Lockean liberalism sees democracy as a merely *instrumental* good—as a means of securing individual rights—the lack of institutional protections for individual rights meant that unpopular minorities were unlikely to receive any protection from this system, or even any dignity.

The self-government of California’s mining camps in this respect more resembles that of ancient Greek city-states than the constitutional mechanisms we typically associate with the American regime. Chauvinistic, hostile toward the wealthy minority, and lacking any meaningful sense of privacy, camp

¹⁵ *Id.* at 84.

¹⁶ GRACE E. TOWER, SENTIMENT IN CALIFORNIA FOR AMERICAN GOVERNMENT AND ADMISSION INTO THE UNION 41–42 (1927).

¹⁷ *Id.* at 72.

government “took direct democracy to its extreme.”¹⁸ The result, as James Madison would have predicted, was that they had no cure for the mischiefs of faction.¹⁹ What’s more, just as the ancient Greek *polis* regarded outsiders as aliens without rights, so the mining camps disregarded the Lockean principle of equality for those not viewed as belonging to the community, particularly members of racial minorities. Race, as it would turn out, would remain one of the most contentious issues in California for most of its history—reflecting a massive failure of the Golden State’s population to embrace the full implications of the Declaration of Independence.

II

SLAVERY AND THE DECLARATION IN WESTERN REVOLUTIONS

It was already obvious when the Declaration was written that chattel slavery stood in direct conflict with its principles. Its authors were remarkably candid about the fact, and it is no surprise that the world’s first antislavery society was founded in Philadelphia in 1775. But while the American founders recognized that slavery was incompatible with the nation’s basic creed, they believed it was already fading away. In 1777, Vermont became the first state to ban slavery. In the years that followed other states adopted laws gradually eliminating it—Pennsylvania in 1780; Rhode Island and Connecticut in 1784; New York in 1799; New Jersey in 1804. Massachusetts’s Supreme Court declared slavery unconstitutional in 1783. Meanwhile, scholars such as Adam Smith were arguing that slavery was economically wasteful. An optimist could easily believe that slavery would be abolished entirely within a generation. Jefferson had good reason to say in 1826 that “all eyes are opened or are opening to the rights of man.”²⁰

What he and his colleagues did not anticipate was a reactionary movement that, beginning in the 1830s, characterized slavery as a “positive good,” instead of an evil, and demanded its expansion, rather than its eradication. This movement made such headway that by the middle of that decade, Southern leaders were willing to openly denounce the Declaration’s principle of equality and to claim that the Revolution had not actually been premised on classical liberal principles but was instead intended to vindicate the autonomy of the colonies as collective entities. “States’ rights” doctrine was well-named—it eschewed the rights of the individual, and emphasized the purported rights of state governments themselves, instead.

¹⁸ *Id.* at 101.

¹⁹ See THE FEDERALIST No. 10 at 57–65 (J. Cooke ed. 1961) (James Madison).

²⁰ Letter from Thomas Jefferson to Roger Weightman (June 24, 1826), in JEFFERSON: WRITINGS 1517 (Merrill Peterson ed., 1984).

Part of the pro-slavery program was to spread slavery westward, to ensure that it did not become cordoned off into a distinct segment of the country where it might eventually be outvoted in Congress by representatives of the states that would eventually be carved out of the Louisiana Purchase and other western lands. In the thirty years before the American Civil War, much attention would be devoted to efforts by antislavery leaders to restrict slavery to the American southeast—and efforts by proslavery leaders to break out of these limitations. And one of the most important fronts in this slavery cold war was Texas.

During the first decades of the century, Americans migrated into the area that was still governed by Mexico. That country had abolished slavery in Texas, but American slaveowners saw an opportunity to spread the “peculiar institution” westward into the poorly administered Mexican territory. That is not to say that the Texas Revolution of 1836 was principally centered on slavery. On the contrary, as historian Daniel Walker Howe explains, that revolution “broke out over economic and constitutional issues not very different from those that provoked the American Revolution sixty years earlier.”²¹ Freedom of religion was not recognized under Mexican law, or the right to trial by jury, and along with burdensome taxation, the government dictated to farmers what crops they could grow. When the American settler Stephen Austin submitted a petition for redress to the government, he was arrested and sent to prison for a year and a half. Meanwhile, Mexican president Antonio López de Santa Anna—who proudly imitated Napoleon Bonaparte—repudiated the national constitution and proclaimed himself dictator. He then proceeded to stamp out rebellions against his rule with striking cruelty. In Zacatecas, his troops killed thousands before he allowed them to pillage the capital city. For himself, he confiscated silver from the local mine, distributing the profits to his friends. In short, by the mid-1830s, Mexico was a failed state, with rebellions breaking out periodically throughout the realm. Some regions tried to break off from the country, including one abortive declaration of independence in Alta California in 1836.²² There can be no denying that Santa Anna was a tyrant. Thus, when in March 1836 a group of Mexican natives and American settlers proclaimed Texas an independent republic, they had plentiful historical and philosophical justification for doing so.

Their declaration was consciously modeled on the 1776 Declaration—but it contained striking differences. It began with the premise that the

²¹ DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT?* 661 (2007).

²² J. M. GUINN, *HISTORY OF THE STATE OF CALIFORNIA* 102–03 (1906).

people have a right to rebel against a government that “cease[s] to protect the lives, liberty and property of the people, from whom its legitimate powers are derived, and for the advancement of whose happiness it was instituted, and so far from being a guarantee for the enjoyment of those inestimable and inalienable rights, becomes an instrument in the hands of evil rulers for their oppression.”²³ This language implicitly assumes and explicitly echoes, many of the American Declaration’s principles: that government exists to preserve individual rights, thereby to secure the people’s capacity to pursue happiness, and that when it systematically violates those rights, the people may justly overthrow it. The Texas Declaration went on to specify grievances, including Santa Anna’s overthrowing of the Mexican constitution, the jailing of Stephen Austin while trying to petition for redress, and the “anarchy” resulting from the malfeasance and disarray of Mexico’s government. Slavery played no role in the Texas Declaration—at least, not explicitly.

But while it is unfair to characterize the Texas Revolution as a proslavery rebellion, what is most striking about the Texas Declaration, as Akhil Amar notes, is “what it did *not* say.”²⁴ It was silent about slavery—even though the revolutionaries planned to reintroduce it if Texas were to become an independent republic—and it made no mention of the equality principle of the American Declaration. On the contrary, it identified “the first law of nature” as “the right of self-preservation.”²⁵

This was a subtle but revealing difference, because according to the Lockean theory of the American Declaration, the first law of nature is *equality*, not self-preservation. In his *Second Treatise*, Locke had explained by quoting the sixteenth-century Anglican priest Richard Hooker. “Those things which are equal, must needs all have one measure,” Hooker wrote. “If I cannot but wish to receive good, even as much at every man’s hands, as any man can wish unto his own soul, how should I look to have any part of my desire herein satisfied, unless myself be careful to satisfy the like desire, which is undoubtedly in other men, being of one and the same nature?”²⁶ The American Declaration views this basic equality—not mere self-preservation—as the political axiom. This was an important distinction to those who, like many proslavery intellectuals, thought the self-preservation of the white race required the enslavement of the black race.

²³ THE BOOK OF TEXAS 359 (Holland Thompson ed., 1929).

²⁴ AKHIL REED AMAR, BORN EQUAL: REMAKING AMERICA’S CONSTITUTION 1840–1920 at 218 (2025).

²⁵ BOOK OF TEXAS, *supra* note 23 at 359.

²⁶ John Locke, *Second Treatise of Civil Government* § 5 reprinted in TWO TREATISES OF CIVIL GOVERNMENT 310 (Peter Laslett, rev. ed., 1963).

More precisely, the emphasis on “self-preservation” reflected a shift away from classical liberalism and toward classical republicanism: a philosophy that downplayed the importance of individual rights and emphasized instead collective concerns about the stability of the state. The arch-prophet of this reactionary idea in the United States was South Carolina Senator John C. Calhoun, who expressly rejected the Lockean theory and argued instead that society as a whole possessed all rights and decided for itself which individuals to give these rights to. In Calhoun’s proto-Hegelian theory, sovereignty was not the function of a contractual relationship, but a vaguely understood function of the spirit of the race; what the Germans would later call the *volkgeist*. The ideological fracturing of the early nineteenth century, which would culminate in the U.S. Civil War, can be characterized as a division between the classical liberalism focused on individual rights and the classical republicanism focused on “state rights,” and which saw self-preservation of *the group* as government’s primary purpose.

This explains another notable omission in the Texas Declaration: rather than speaking of “all men,” as the 1776 Declaration did, the Texas Declaration spoke of “the Anglo-American population,” contrasting their sufferings with those of “the Mexican people” who (allegedly) had “acquiesced in the destruction of their liberty” and were therefore “incapable of self-government” and “unfit to be free.”²⁷ Once again, the contrast with the 1776 Declaration is striking. While the latter’s authors would not have denied that a people who surrender their freedoms are unsuited for liberty, they made no such imputations against their British or Canadian brethren, despite the fact that by 1776, these cousins had spurned over a decade’s worth of efforts at persuasion by leaders of the Thirteen Colonies.²⁸ On the contrary, the American Declaration acknowledged that “mankind” have different “opinions,” and that different peoples have the right (within limits) to establish whatever governments “shall seem most likely to effect their safety and happiness.”²⁹

Still another important distinction was the American Declaration’s emphasis on the “long train of abuses” that alone can justify revolution. This again echoed Locke, who insisted that revolutions are not justified based on “every little mismanagement in public affairs,” or even “great mistakes” by rulers.³⁰ By 1776, that train of abuses stretched back a dozen years to

²⁷ BOOK OF TEXAS, *supra* note 23 at 360.

²⁸ The Continental Congress had, for example, addressed multiple communications to the Quebecois, unsuccessfully trying to persuade them to join the rebellion against Britain. Yet the Americans never pronounced the French Canadians incapable of self-government or unworthy of liberty.

²⁹ 1 Stat. 1 (1776).

³⁰ Laslett, ed., *Two Treatises*, 460, 463.

the change in colonial policy inaugurated by the Sugar Act of 1764. The Texas Declaration, by contrast, was issued after nothing like so long an effort at peaceful resolution. Where the authors of the 1776 Declaration could justly claim to have demonstrated “patient sufferance”—the colonial conflict with Parliament dating back even to the seventeenth century—the Texan Revolutionaries could point to only about fifteen years’ worth of settlement on Mexican land, and Santa Anna had risen to power only four years before the Texan Declaration.

While the independent Texas Republic was not primarily created to preserve slavery, it was quickly seized on for that purpose by proslavery politicians who sought to expand the “southern way of life” to the West. In 1845, Texas was annexed to the United States as the 28th state, with a constitution allowing slavery. A year later, Iowa was admitted as a non-slave state, thus preserving the balance of free and slave states that prevailed for many years in the Senate—but setting a precedent that eventually would be seized upon by advocates of slavery’s spread.

It was in this context that California, too, declared itself independent of Mexico. The Texas revolt was just one of what became a series of mid-nineteenth century “filibustering” enterprises—clandestine efforts at territorial expansion whereby an infiltrating population would provoke a domestic (or seemingly domestic) revolt, followed by a request for annexation. The success in Texas led to a similar undertaking in California only a year later, when the federal government sent forces to California in hopes of finding a pretext for conflict with Mexico. Widely (and correctly) perceived as too weak, ineffectual, and corrupt to exert meaningful sovereignty over the region, Mexico was a prime target.

American desires for California were growing—again, not principally out of a desire to expand slavery, which was generally considered unsuitable to California’s climate, but due to its rich natural resources, access to the Pacific and, considering the weakness of Mexico’s government, its seeming availability. When the Mexican government did respond, it did so in a haphazard and extreme manner—which alienated the growing number of settlers in the West and lent credibility to the charge of oppressiveness.

Mexican leaders realized that American infiltration presented a serious risk, and some sought to constrain the immigrant population. But Americans spun this as further oppression. When rumors circulated in April 1846 that California governor José Castro had pronounced that all sales of land to foreigners in Alta California—what is now the U.S. state—would be “null and

void” unless the purchasers became Mexican citizens, and further that foreign citizens would be “expelled whenever the country might find it convenient,” they reacted violently.³¹ The source of these rumors is unknown; a few decades later historian Hubert Howe Bancroft said they were “forged” in order to manipulate the Americans into a rebellion they otherwise would have had no interest in.³² But however that may be, these rumors coincided with the Polk Administration’s decision to send soldiers across the Rio Grande into southern Texas, as part of a premeditated scheme to provoke a response from Mexico, which would offer a pretext for seizing territory. At that moment, a group of Americans in Sonoma County announced that California, too, was an independent republic.

Hoisting a flag featuring a star and the image of a grizzly bear, they issued a proclamation on June 14 that became the closest thing the Californians ever had to a declaration of independence. The purpose of this little rebellion, settler William Ide declared, was to “defend” those who had been

invited to this country by a promise of lands on which to settle themselves and families who were also promised a “republican government,” who, when having arrived in California were denied even the privilege of buying or renting lands of their friends, who instead of being allowed to participate in or being protected by a “republican government” were oppressed by a “military despotism,” who were even threatened, by “proclamation” from the chief officer of the aforesaid despotism, with extermination if they would not depart out of the country, leaving all of their property, their arms and beasts of burden, and thus deprived of the means of flight or defense.³³

Ide’s declaration crudely but concisely recapitulated some of the theory of the American Declaration. People had been invited to settle in California by a promise of equal laws, particularly respecting the right of property, whereby settlers would enjoy a freedom of opportunity denied them elsewhere. In other words, government was a kind of contract, and its violation by the government warranted rebellion. The Mexican government’s arbitrary threat to the immigrants—or what was believed to be such a threat—was thus a violation of the basic rights of the inhabitants. Such cruelty and arbitrariness justified the people in rising up and establishing new government.

³¹ BUD HASTINGS, *THE U.S.-MEXICAN WAR: A COMPLETE CHRONOLOGY* 91 (2014).

³² Hubert Howe Bancroft, *History of California 1846–1848* (1874), reprinted in 22 *THE WORKS OF HUBERT HOWE BANCROFT* 82 (San Francisco: The History Company, 1886). See also John Bidwell, *Reminiscences of the Conquest 16 OVERLAND MONTHLY* (2nd ser.) 561 (1890) (casting doubt on the rumor).

³³ HUNT JANIN & URSULA CARSON, *THE CALIFORNIA CAMPAIGNS OF THE U.S.-MEXICAN WAR 1846–1848* at 94–95 (2015).

The Bear Flag declaration went on to accuse the Mexican government of “seiz[ing] upon the property of the Missions for its individual aggrandizement”—a reference to the Decree for the Secularization of the Missions of the California (the Secularization Act) of 1833, by which Mexico’s Congress confiscated the Franciscan Order’s property. The Bear Flag declaration also condemned Mexico for its “enormous exactions on goods imported into this country”—that is, tariffs, which the Mexican government imposed with great extravagance, heavily taxing or entirely prohibiting the importation of tobacco, cotton, and wax. These taxes, wrote historian Bancroft, “[fell] lightly on the rich and heavily on the poor. Nearly two months’ wages every year had to go to pay for the cotton cloth worn by the Indian laborer and his family.”³⁴

In opposition to these outrages, the Bear Flag declaration pledged the rebels’ devotion to “the maintenance of good order and equal rights,” and to the “establish[ment] and perpetuat[ion of] a ‘Republican Government’ which shall secure to all: civil and religious liberty; which shall detect and punish crime; which shall encourage industry, virtue and literature; which shall leave unshackled by fetters, commerce, agriculture, and mechanism.” These passages echoed the American Declaration’s denunciation of British rule for its illegality and violation of rights such as property and trade. Most noticeably, the Bear Flag declaration asserted that “[for] a government to be prosperous and happyfying [*sic*] in its tendency [it] must originate with its people who are friendly to its existence.” This reference to prosperity and happiness echoed the American Declaration’s pledge of “safety and happiness.”

Although the purported Bear Flag Republic lasted only weeks before California fell under United States authority—and in the wake of the Mexican-American War, became an American state—it was clear that the Declaration’s principles had reached the Pacific Coast, albeit in an imperfect form. Notably lacking was the proposition of equality on which the American Declaration was based. The Bear Flag declaration’s assertion that a just government must be based on the “friendl[iness]” of the people to it—that is, the consent of the governed—was the closest that it came to the American Declaration’s assertion that all government is premised on the inherent equality of individuals in terms of their rights. Between the classical republicanism of the Texas Declaration and the classical liberalism of the American Declaration, the Bear Flag declaration seemed to attempt a middle course.

³⁴ Hubert Howe Bancroft, *History of Mexico* (1883), reprinted in 14 BANCROFT, *supra* note 32 at 546.

III

EQUALITY IN THE CALIFORNIA CONSTITUTION

A. *The First Constitution*

The doctrine of equal rights was finally pronounced in the state’s 1849 Constitution, which opened with the words—borrowed from the Virginia Declaration of Rights of 1776—“[a]ll 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.”³⁵ Yet by that time, the slavery issue was becoming ever more contentious, and the authors of California’s first constitution struggled to get a handle on the debates over equality and liberty then wracking the nation as a whole. Two related issues revealed the mixed sensibilities of the California framers with respect to equality: whether to ban slavery, and whether to ban free blacks from entering the state.

The latter had first been done in Missouri in 1820, provoking furious debate over whether such a prohibition violated the federal Constitution’s Privileges and Immunities Clause.³⁶ That debate was finally settled in a bizarre, even illusory compromise whereby Congress accepted the Missouri ban, but only on the condition that it not be interpreted in such a way as to violate the Clause—a sparkling example of *petitio principii* that was “close enough for government work.” While that oil-and-water mixture swirled, Western states followed Missouri’s lead, seeking to ban black immigrants in order to preserve what they saw as the purity of European culture. Oregon, for example, banned both slavery and black people in its 1857 Constitution, employing a euphemistic phrase that would become standard fare for the debates to follow: “the Legislative Assembly shall have power to restrain, and regulate the immigration to this State of persons not qualified to become citizens of the United States.”³⁷

The idea of banning nonwhites created a dilemma for some delegates at California’s 1849 Convention. On September 19, Sacramento Delegate Morton McCarver introduced a proposal to “prohibit free persons of color from immigrating to and settling in this state.”³⁸ They were “idle in their habits,” he declared; “difficult to be governed by the laws, thriftless, and

³⁵ CAL. CONST. of 1849 art. I § 1.

³⁶ U.S. CONST. art. IV § 2.

³⁷ OR. CONST. of 1857 art. I § 31.

³⁸ REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 137 (J. Ross Browne, ed., 1850).

uneducated.”³⁹ But McCarver also expressed fear that Southern slaveholders seeking to rid themselves of slavery—as many in Dixie claimed they wanted to do—would take advantage of the Western territories by bringing enslaved people into the area and liberating them there. “I believe large numbers will be brought here and thrown upon the community in a short time,” McCarver claimed, “unless we take urgent measures.”⁴⁰

McCarver also feared that white laborers would not stand for black emigrés “to compete with them in working the mines.”⁴¹ There had already been plentiful interethnic violence in the mining districts, and “[i]t is the duty of the Legislature to provide against these collisions.”⁴² Forbidding black immigration was therefore “as essential to the prosperity of this country as the prohibition of slavery.”⁴³ Delegate Robert Semple of Sonoma, too, feared the economic consequences of black immigration. Although California’s black population was then small enough to not present a danger, he asserted their numbers would grow “immensely” if “emancipated slaves—not free negroes—not freemen—but emancipated slaves, directly from the slave States, are permitted to be introduced.”⁴⁴ Semple, too, feared that slave masters would bring their charges to California, then promise to emancipate them if they worked at cut-rate wages for a certain time. This would result in “an immense and overwhelming population of negroes, who have never been freemen; who have never been accustomed to provide for themselves,” and who would therefore either become a burden on the community or a criminal underclass.⁴⁵

But San Jose delegate Kimball Dimmick spoke passionately against the proposal. The new bill of rights, he pointed out, declared the equal rights of all human beings, and yet “[n]ow it is proposed to do what . . .? [T]o say that a certain class of Americans born in the United States—their forefathers born there for many generations—shall be excluded from entering this Territory at all . . . ! What will be said of our Constitution if we assert one thing in our bill of rights . . . and then exclude a class speaking our own language, born and brought up in the United States, acquainted with our customs and calculated to make useful citizens[?]”⁴⁶ The convention had a rare opportunity, Dimmick observed: “[t]he spirit of freedom is inspiring mankind throughout the world

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 138.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 141.

to throw off the shackles of despotic systems of government. Let it not be said that we, the first great republican State on the borders of the Pacific . . . have attempted to arrest the progress of human freedom.”⁴⁷

Sacramento’s Lansford Hastings offered an unusual answer. “[I]t is a fundamental declaration made by us in our bill of rights, or whether made by us or not it is true, that all men are free and entitled to certain rights, privileges, and immunities. If this ever reaches the ears of the African race, it occurs to me that they will conceive this country to be a very favorable asylum for the oppressed; especially when they find that upon that broad principle we have added another, that neither slavery nor involuntary servitude shall ever be allowed in this State.” Yet if the Constitution were to include the prohibition McCarver proposed, these immigrants would be “met at our portals and told that they are coming to the wrong place. . . . It is true we [said all men are free and independent] but we did not mean it.”⁴⁸ Hastings was opposed to such hypocrisy. His solution, however, was striking; it would be better, he concluded, *to remove the statement of freedom and equality from the bill of rights entirely*. “I think they had better be introduced as slaves,” he concluded.⁴⁹

Another delegate, Henry Tefft of San Luis Obispo, also feared economic competition with black workers. “[N]egro labor, whether slave or free, when opposed to white labor, degrades it,” he claimed.

That is the ground upon which I oppose the introduction of this class of persons. It is said that we have declared in our Constitution, and should adhere to that declaration, that all men are by nature free and independent, entitled to certain inalienable rights. Most assuredly I believe that to be so. . . . But does it follow that we are to allow certain objectionable classes of men to emigrate here and settle in California. . . . [T]he declaration means no more or less than this: they are free to remain at home; but they are not free to come here and degrade white labor—free to disturb the social and political harmony of the state.⁵⁰

Black immigrants, Tefft insisted, would lay the foundation for a “monopoly” of labor, because they would “set to work under the direction of capitalists.” Competition for jobs would drive down wages and ensure that “[t]he profits of the mines would go into the pockets of single individuals”—that is, the

⁴⁷ *Id.*

⁴⁸ *Id.* at 141–42.

⁴⁹ *Id.* at 142.

⁵⁰ *Id.* at 143–44.

managers whose profits would increase due to the lower cost of labor.⁵¹ The real inconsistency, according to Tefft, was to declare that all men are created equal “and then deny our own white citizens the privilege of laboring” by forcing them to compete against black immigrants.⁵² In any event, blacks were “ignorant, wretched, and depraved.” Astoundingly, Tefft insisted “I have no prejudice against the negro because of his color”—he just thought all black people were “too depraved to be governed by ordinary laws.”⁵³

To arguments like this, San Francisco’s Edward Gilbert had an apt reply. “If you insert in your Constitution such a provision or anything like it, you will be guilty of a great injustice—you will do a great wrong, sir—a wrong to the principles of liberal and enlightened freedom.”⁵⁴ After all, “[y]ou have said in the beginning of your bill of rights that all men are by nature free and independent and have certain inalienable rights,” yet after doing this, and banning slavery outright, “you say a free negro shall not enter its boundaries. Is it because he is a criminal? No, sir—it is simply because he is black. Well might it be said in the words of the revolutionary writer: ‘You would be free, yet you know not how to be just.’”⁵⁵

After lengthy debates, the Convention at last rejected the proposal to exclude all blacks from the state, by a remarkably lopsided vote.⁵⁶ Still, this rejection resulted more from the practical concern that Congress might reject a constitution with such provisions in it, than from a commitment to the principles of equal liberty. California entered the union in September 1850 with a constitution that did not ban free black Americans—or Asians or Hispanics—from entering the state. Instead, it proclaimed that “foreigners who are, or who may hereafter become *bone-fine* residents of this State, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native-born citizens.”⁵⁷ In a climate in which classical republicanism was beating out the classical liberalism of the American founding, California’s initial constitution was remarkable for its relative fairness. Yet the arguments revealed the degree to which the principles of the Declaration were contested in the run-up to the Civil War.

⁵¹ *Id.* at 144.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 149.

⁵⁵ *Id.* Gilbert was quoting the French Revolutionary Abbé Sièyes.

⁵⁶ See ROBERT F. HEIZER & ALLAN J. ALMQUIST, *THE OTHER CALIFORNIANS* 117–19 (1971).

⁵⁷ CAL. CONST. of 1850 art. I § 17. Voting rights, of course, were still limited based on race, although the constitution extended this right both to “white male citizen[s] of the United States” and to “white male citizen[s] of Mexico” who “elected to become” U.S. citizens. *Id.* art. II § 1.

B. The Second Constitution

Things went differently at the state's second constitutional convention, which began its work thirty years later. Called together in the midst of a severe economic depression, the Convention was the brainchild of the Workingmen's Party, a coalition of labor groups that believed the state's economic and cultural woes were the consequence of Chinese immigration. An outgrowth of the Workingmen's Party of the United States, which was itself a successor to the International Workingmen's Association founded in part by Karl Marx himself, the California Workingmen's Party would be best characterized as a Fascist, rather than Communist organization, given its nationalistic emphasis. However that may be, the Party managed to trigger a call for a new constitutional convention that opened in March 1878 with the express purpose of excluding the Chinese from the state by whatever means were necessary.

Chinese and other Asian immigrants had begun arriving in California in the 1840s to work in the gold fields, and had remained to construct the railroads, fish in the Pacific, and build communities for themselves and their families up and down the coast. Their work ethic astonished white Californians, and their capacity to survive even dire poverty, with a single-minded focus on productivity and the preservation of their way of life, drew the suspicion of many Europeans. Mark Twain, who lived in Nevada and California during this time, explained to his East Coast readers that the Chinese

are quiet, peaceable, tractable, free from drunkenness, and they are as industrious as the day is long. A disorderly Chinaman is rare, and a lazy one does not exist. So long as a Chinaman has strength to use his hands he needs no support from anybody; white men often complain of want of work, but a Chinaman offers no such complaint; he always manages to find something to do. . . . No California *gentleman* or *lady* ever abuses or oppresses a Chinaman, under any circumstances, an explanation that seems to be much needed in the east. Only the scum of the population do it—they and their children; they, and, naturally and consistently, the policemen and politicians, likewise, for these are the dust-licking pimps and slaves of the scum, there as well as elsewhere in America.⁵⁸

The Golden State's treatment of Asians is the closest California came to the institution of slavery. As historian Jean Pfaelzer detailed in her 2007 book *Driven Out*, race riots became a routine fact of life in the late nineteenth century. "The term *expulsion* doesn't fully represent the rage and violence of these purges," she notes. "What occurred along the Pacific coast, from the

⁵⁸ MARK TWAIN, *ROUGHING IT* 391–97 (1872).

gold rush through the turn of the century, was ethnic cleansing.”⁵⁹ But the war against Asians was not limited to lynching and rioting; the state’s courts also participated, ignoring the principles of the Declaration of Independence and both creating and affirming various forms of segregation.

Perhaps the most astounding of these came in 1854, when the state Supreme Court ruled in *People v. Hall*⁶⁰ that the Chinese qualified as “Indians” for purposes of a state law that forbade Indians from testifying against a white man in any criminal trial. Columbus, the court reasoned, had thought he was in China when he landed in the New World, and had used the word “Indian” to describe the land. Therefore, the word “Indian” encompassed “Asiatics” in general.⁶¹ A decade and a half later, after the federal Constitution was amended to prohibit states from depriving people of equal protection or abridging the privileges or immunities of citizenship, the court remained intransigent. The laws prohibiting the Chinese from testifying in court were a state matter, it declared, and none of the federal government’s business. Indeed, the justices added, if they thought the Fourteenth Amendment rendered such discriminatory laws unconstitutional, “we should regard [the Fourteenth Amendment] as we would a law apparently legalizing murder or robbery,” and would search for “some construction” of the Amendment that would allow the state to continue discriminating with impunity.⁶²

Of course, in practical terms, being barred from testifying in court rendered white violence against the Chinese legal, because any witnesses to an assault on a Chinese person were likely to be Chinese also, and thus unable to testify against the perpetrator. “Any white man can swear a Chinaman’s life away in the courts,” wrote Twain, “but no Chinaman can testify against a white man. . . . As I write, news comes that in broad daylight in San Francisco, some boys have stoned an inoffensive Chinaman to death, and that although a large crowd witnessed the shameful deed, no one interfered.”⁶³

Where the 1849 Constitutional Convention completed its work in two months, the 1878–79 convention lasted for nearly a year, and its debates reflected a far more disunited state. Besides the Workingmen, the delegates ranged from Communists to ex-Confederates to classical liberals in the Jeffersonian mold. The delegates were also far more likely to be attorneys—their debates are studded with references to court decisions, especially the

⁵⁹ JEAN PFAELZER, *DRIVEN OUT: THE FORGOTTEN WAR AGAINST CHINESE AMERICANS* at xxix (2007).

⁶⁰ 4 Cal. 399 (1854).

⁶¹ *See id.* at 400.

⁶² *People v. Brady*, 40 Cal. 198, 220–21 (1870).

⁶³ TWAIN, *supra* note 58 at 391.

then-recent *Munn v. Illinois*,⁶⁴ which greatly expanded the states' authority to regulate private businesses. On the issue of Chinese immigration, however, the members were almost unanimous. They imposed a wide variety of restrictions on the employment of Chinese laborers, and for the same reasons that the 1849 delegates had sought to restrict the immigration of black Americans from the East: to prevent legitimate economic competition. The Chinese immigrant, said one delegate,

is a sinewy, shriveled human creature, whose muscles are as iron, whose sinews are like thongs, whose nerves are like steel wires, with a stomach case lined with brass; a creature who can toil sixteen hours of the twenty-four; who can live and grow fat on the refuse of any American laborer's table. . . . To compete with the Chinese our people must give up their homes, abandon the family altar, tear down their schoolhouses, blot out their civilization, and adopt the Chinese mode of life. If the white man is to compete with the Chinaman he must adopt a cheaper style of dress, he must inure himself to the cold, he must labor in the night; sleep shall not come to his pillow until the midnight bell tolls the solemn hour. He must arise at the first gray streaks of dawn and at his work. Then what shall be his food? No longer the savory meats, the pure, white bread made by willing hands. No! He must live as the Chinaman lives; work as the beast works; there can be no recreation, no rest, nothing but toil.⁶⁵

Only one delegate at the Convention, Sonoma County's Charles V. Stuart, had the courage to speak in defense of the Chinese. In two impassioned speeches, he insisted that Chinese immigrants were hardworking and upstanding members of the community, who had "buil[t] our railroads, clear[ed] our farms . . . [and] plant[ed] our vineyards."⁶⁶ The persecution of the Chinese, cried Stuart, was "an act that would shock all humane men throughout the world, both Christian and Pagan"—indeed, an act so brutal that "[y]ou can trace down the stream of time and through all savage life, with all its cruelties, and its slavery, and fail to find its equal or parallel for injustice, treachery, and ingratitude."⁶⁷ Stuart's heroic effort to defend Chinese rights fell on deaf ears, however.⁶⁸ The Convention approved the anti-Chinese provisions, most of which were eventually declared unconstitutional by federal courts.

⁶⁴ 94 U.S. (4 Otto) 113 (1876).

⁶⁵ 1 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 633 (1880).

⁶⁶ 3 *id.* at 1238.

⁶⁷ *Id.*

⁶⁸ See Timothy Sandefur, *Charles v. Stuart: A Solitary Voice at California's Constitutional Convention* (Jan. 29, 2008), abstract available at SSRN: <https://ssrn.com/abstract=1088544>.

But a revealing exchange took place on October 29, 1878, when the convention was discussing the bill of rights to be included in the new Constitution. Beginning with the now-standard phraseology “all men are by nature free and independent, and have certain inalienable rights, among which are enjoying and defending life and liberty . . .” etc., one delegate proposed to change the word “men” to “persons.” Admitting that everyone knew “men” meant “persons” in the original, he thought it worthwhile to “say precisely what we mean.”⁶⁹ After a brief exchange, this proposal was rejected—but was immediately followed by an interjection by delegate Charles Carroll O’Donnell, a proud Workingman who boasted of being “the inaugurator of the Anti-Coolie [i.e., anti-Chinese] crusade.”⁷⁰ O’Donnell moved that the phrase be amended “by inserting after the word ‘men’ in the first lines, the words, ‘who are capable of becoming citizens of the United States.’”⁷¹

“Ineligible for citizenship” was a code-phrase for Chinese, who were held ineligible for American citizenship in *In re Ah Yup*, decided in April 1878.⁷² Federal law had offered limited naturalization to “free white persons” beginning in 1802, and reiterated that point in 1875—long before the Chinese Exclusion Act of 1882—and the phrase “not qualified to become citizens” had been successfully adopted by the Oregon Constitution in 1857.⁷³ Thus, when O’Donnell proposed his amendment to the Lockean principle of equality, he was literally recommending that the state Constitution proclaim that all people *except the Chinese* are created free and equal. When his motion was seconded, the chairman ordered the proposed amendment read aloud: “The Secretary read: ‘All men who are capable of becoming citizens of the United States, are by nature free and independent’ [Laughter].”⁷⁴ The motion failed, but the message was clear.

The story of California’s dismal treatment of Asians hardly ends there. While many of the racist elements of the 1879 Constitution were declared invalid by federal courts,⁷⁵ the state continued to discriminate against Chinese and Japanese immigrants, most notably under the Alien Land Law, which forbade Asians from owning land in the state.⁷⁶ That act remained on the books

⁶⁹ 1 DEBATES AND PROCEEDINGS, *supra* note 65 at 232.

⁷⁰ BIOGRAPHICAL SKETCHES: DELEGATES TO THE CONVENTION TO FRAME A NEW CONSTITUTION 50 (1878).

⁷¹ 1 DEBATES AND PROCEEDINGS, *supra* note 65 at 232.

⁷² *In re Ah Yup*, 1 F. Cas. 223, 223 (C.C.D. Cal. 1878).

⁷³ 22 Stat. 58 (1882).

⁷⁴ 1 DEBATES AND PROCEEDINGS, *supra* note 65 at 232.

⁷⁵ *See, e.g., In re Tiburcio Parrott*, 1 F. 481 (C.C.D. Cal. 1880).

⁷⁶ The Alien Land Law, also known as the Webb-Haney Act, was adopted in 1913. *See* 1913 Cal. Stat. 206 (Ch. 113). It was superseded by a ballot initiative at the 1920 election. *See* 1921 Cal. Stats. lxxxiii.

until 1952, when it was finally declared unconstitutional.⁷⁷ Yet even then, the California Supreme Court spent no time discussing the equality principle in detail. It was not until 2000, in the case of *Hi-Voltage Wire Works v. San Jose* that that court offered its most detailed commentary on the Declaration and its relationship to federal and state constitutional law.⁷⁸

C. Constitutional Equality at Last

While California was never a slave state, it was in some ways a reluctant member of the Union when the Civil War came. Indeed, sympathies for the South ran so high that the state legislature adopted a law allowing the southern counties to form their own state if they so chose.⁷⁹ U.S. Army Captain Winfield Scott Hancock, stationed in Los Angeles, was so alarmed at the ubiquity of pro-Confederate attitudes that he stationed guards around government property to prevent sabotage and instructed his wife to go about armed.⁸⁰ A few months later, the Placerville *Mountain Democrat* published an editorial denouncing Republicans for “appeal[ing] to the declaration of American Independence” and “triumphantly assert[ing] ‘that all men are created equal,’” because “‘the equality of mankind’ as Republicans understand it” was “a fallacy” that had been “long since exploded.”⁸¹

As we have seen, the equality principle was largely ignored in California even in the years following the Civil War, although the targets of white hostility were principally Asians and Hispanics. Forms of discrimination, including school segregation, remained a fact of life in California until the latter half of the twentieth century.⁸² Even after a federal court declared that “[t]he equal protection of the laws’ pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities,” it still persisted.⁸³ Almost a decade after *Brown v. Board of Education*,⁸⁴ the state Supreme Court ruled in *Jackson v. Pasadena City School District* that a black child

⁷⁷ *See* *Sei Fujii v. State*, 38 Cal. 2d 718 (1952).

⁷⁸ 24 Cal. 4th 537 (2000).

⁷⁹ An Act Granting Consent of the Legislature to the Formation of a Different Government for the Southern Counties of This State, Apr. 18, 1859. 1859 Cal. Stat. 310.

⁸⁰ GLENN MATTHEWS: THE GOLDEN STATE IN THE CIVIL WAR 86 (2012).

⁸¹ *They Falsify the Record*, MOUNTAIN DEMOCRAT, Sept. 12, 1860 at 2.

⁸² In *Wysinger v. Crookshank*, 82 Cal. 588 (1890), the state Supreme Court held that school segregation was constitutional, but that state statute had not provided for it except in the cases of Asians and Native Americans. *See also* *Piper v. Big Pine Sch. Dist. of Inyo Cnty.*, 193 Cal. 664, 671 (1924) (“it is now finally settled that it is not in violation of the organic law of the state or nation, under the authority of a statute so providing, to require Indian children or others in whom racial differences exist, to attend separate schools, provided such schools are equal in every substantial respect with those furnished for children of the white race.”).

⁸³ *Mendez v. Westminster Sch. Dist. of Orange Cnty.*, 64 F. Supp. 544, 549 (S.D. Cal. 1946), *aff’d sub nom.* *Westminster Sch. Dist. of Orange Cnty. v. Mendez*, 161 F.2d 774 (9th Cir. 1947).

⁸⁴ 347 U.S. 483 (1954).

who wanted to transfer to Eliot Junior High School in Altadena could not be barred on the basis of his race.⁸⁵ Yet even here, the court declined to rest its decision on the principle of equality articulated in the Declaration and in the state's bill of rights.

In fact, even the *Brown* decision itself declined to focus on this basic principle. Rather than endorsing the axiom of equality derived from the Declaration, and so well expressed in Justice Harlan's celebrated *Plessy v. Ferguson* dissent ("Our constitution is color-blind, and neither knows nor tolerates classes among citizens"⁸⁶) the *Brown* decision based its rejection of *Plessy*'s separate-but-equal doctrine on the theory that racial segregation had come over time to "generate[] a feeling of inferiority as to their status in the community that may affect [the] hearts and minds" of black Americans.⁸⁷ Going out of its way *not* to endorse the equality principle,⁸⁸ the *Brown* decision was anchored exclusively in the social and economic circumstances of "public education in . . . its full development and its present place in American life."⁸⁹ The consequence, naturally, that if racial discrimination could be shown at some future point *not* to generate a feeling of inferiority, or to affect a realm of life *less* important in "its present place in American life," it could survive constitutional scrutiny under *Brown*.

That became clear in *Jackson*, when the California Supreme Court elaborated on *Brown*'s rationale. School segregation is unconstitutional, it said, "[b]ecause of intangible considerations relating to the ability to learn and exchange views with other students. . . . The separation of children from others of similar age and qualifications solely because of race may produce a feeling of inferiority which can never be removed and which has a tendency to retard their motivation to learn and their mental development."⁹⁰ Logically enough, this rationale led the court to remark that government *should* engage in racial balancing in order to engineer proportionate representation in school populations:

⁸⁵ 59 Cal. 2d 876 (1963). Eliot is this author's own *alma mater*.

⁸⁶ 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

⁸⁷ *Brown*, 347 U.S. at 494.

⁸⁸ Most striking was the bizarre rationale by which the *Brown* Court rejected the idea that the Fourteenth Amendment was intended to eradicate segregation. The Court considered "the views of proponents *and* opponents of the Amendment," and decided that the historical record was "inconclusive" because while the amendment's "proponents . . . undoubtedly intended [it] to remove all legal distinctions among [the races] . . . [the amendment's] opponents, just as certainly, were antagonistic" to this principle and "wished [the amendment] to have the most limited effect." *Id.* at 489 (emphasis added). The Court never explained why the views of the amendment's *opponents*—who *lost* the debate—should count for anything, let alone should be treated as equivalent to the views of the amendment's authors and supporters.

⁸⁹ *Id.* at 492.

⁹⁰ *Jackson*, 59 Cal. 2d at 880.

So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists *it is not enough for a school board to refrain* from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation *require that school boards take steps*, insofar as reasonably feasible, *to alleviate racial imbalance in schools regardless of its cause.*⁹¹

This was, naturally, a recipe for government race-balancing programs that would go on indefinitely. Along with decisions such as *Price v. Civil Service Commission*⁹² and *DeRonde v. Regents*,⁹³ it meant a repudiation of the colorblindness principle, and the endorsement of the idea that government may select employees, contractors, or students—and perhaps take even more coercive measures—based on race as long as “it believes” that this “will best achieve fairness and balance,”⁹⁴ or will “break down old patterns of racial segregation and hierarchy.”⁹⁵

This development was paralleled by an unedifying series of federal rulings that carved out room for the government to discriminate in favor of some people—and consequently against others—based on race. In *Regents of Univ. of California v. Bakke*,⁹⁶ the Supreme Court was divided over the constitutionality of a decision by the state’s preeminent university to discriminate against white applicants in admissions. The resulting opinion was fractured, leading court-watchers to conclude that the Court had upheld the constitutionality of such discrimination so long as the race of applicants was treated (in Justice Lewis Powell’s words) as “simply one element—to be weighed fairly against other elements—in the selection process.”⁹⁷ Some argued that the illegitimacy of this “one element” would inevitably taint the entire admissions process, but Powell tried to assure readers that the government would act in “good faith,” and would refrain from “professing to employ a facially nondiscriminatory

⁹¹ *Id.* at 881–82 (emphasis added).

⁹² 26 Cal. 3d 1 (1980).

⁹³ 28 Cal. 3d 875 (1981).

⁹⁴ *DeRonde*, 28 Cal. 3d at 891.

⁹⁵ *Price*, 26 Cal. 3d at 274.

⁹⁶ 438 U.S. 265 (1978).

⁹⁷ *Id.* at 318 (Op. of Powell, J.).

admissions policy” while in fact operating “the functional equivalent of a quota system.”⁹⁸ But in reality, that was precisely what they did.

The race-balancing theory of *Jackson* and similar cases ran into two inescapable problems. First, such “patterns” of “hierarchy”⁹⁹ can never be eradicated once and for all, given the dynamic nature of human life, meaning that the Procrustean task of “remedial” race-balancing can never end. Even *ex hypothesi*, discriminating against group A today in order to help group B can only be justified up to the *exact* moment when their advantages are *precisely* balanced (whatever that might mean)—yet the likelihood that race preferences will cease at that instant, without tipping over into “excessive” discrimination against group A (which will have to be “remediated” in the future by discrimination in the opposite direction) is infinitesimally small, even ignoring for the moment the fact that these groups are not hermetically sealed or even reasonably discernible, and that there are far more than just two racial groups who would have to be balanced in this theory.¹⁰⁰ Second, it is positively unjust to discriminate against innocent individuals on the grounds that their ancestors or other members of the same ethnic group received unjust favoritism in the past. Inflicting injustices on the children for the sins of their fathers is a recipe for perpetual injustices.

The primary victims of California’s institutional race preferences were, of course, Asians.¹⁰¹ Viewed as “overrepresented” in the state’s educational institutions—due to the large number of Asians who outscored all competitors in academic tests¹⁰²—California universities engaged in racial balancing in order to “diversify” the student body by penalizing highly qualified Asian applicants. Even President Bill Clinton expressed the fear that if universities looked only at the qualifications of applicants, they would “fill their entire freshman classes with nothing but Asian Americans.”¹⁰³

Amidst this ongoing, rationalized discrimination, Californians in 1996 voted overwhelmingly to amend their constitution by adopting the California Civil Rights Initiative, which declared simply that “[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group

⁹⁸ *Id.* at 318–19 (Op. of Powell, J.).

⁹⁹ *Price*, 26 Cal. 3d at 274.

¹⁰⁰ See DAVID E. BERNSTEIN, *CLASSIFIED: THE UNTOLD STORY OF RACIAL CLASSIFICATION IN AMERICA* (2022) (detailing how government’s racial categories are so poorly defined as to be effectively arbitrary).

¹⁰¹ This common knowledge would be spectacularly vindicated in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

¹⁰² See, e.g., Joshua Grossman et al., *The Disparate Impacts of College Admissions Policies on Asian American Applicants*, 14 *NATURE SCIENTIFIC REPORTS* 4449 (2024) (“Asian American applicants had 28% lower odds of ultimately attending an Ivy 11 school than white applicants with similar academic and extracurricular qualifications.”).

¹⁰³ Leo Rennert, *Clinton Hones Stand on Affirmative Action*, *SAN FRANCISCO EXAMINER*, Apr. 7, 1995, at 1.

on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”¹⁰⁴ Advocates of the initiative were quite clear that they were drawing on the Declaration’s equality principle. “By enacting Proposition 209,” wrote Professor Lucas Morel, “Californians teach the nation that racial identity has no part to play in the protection they receive from their common government. . . . [I]t is a lesson . . . as the Declaration of Independence.”¹⁰⁵ “[F]rom the Declaration of Independence, to the ratification of the Fourteenth Amendment,” wrote Robert Alt of the Center for Individual Rights, “the proper goal of civil rights policy was clear: equal protection of the laws. In contrast, classifying individuals and distributing benefits on the basis of race and gender deviates from this goal and violates equal protection.”¹⁰⁶ For advocates of affirmative action, wrote Professor Michael Lynch, “[e]quality no longer means, in the ringing words of the Declaration of Independence, that ‘all men are created equal. . . .’ [I]t now means that racial and ethnic groups have an entitlement to proportional representation in America’s most sought after institutions.”¹⁰⁷

Amazingly, champions of race preferences sought to persuade federal courts that Proposition 209’s ban on racial discrimination was itself unconstitutional. In *Coalition for Economic Equity v. Wilson*,¹⁰⁸ they claimed that prohibiting the government from granting preferences in contracting or admissions based on race was unconstitutional under the so-called *Hunter/Seattle* doctrine, a legal principle which holds that an attempt to alter the “political process” in order to prevent a disfavored group from obtaining benefits can itself be a form of discrimination.¹⁰⁹ Whatever the merits of this theory, the Ninth Circuit found that it did not apply in a manner that would have resulted in the self-contradictory rule that the Equal Protection Clause somehow forbids the government from forswearing racial discrimination. “The Fourteenth Amendment,” wrote the court, “does not require what it barely permits.”¹¹⁰ Thus Proposition 209 took effect—in words, at least.

What actually followed was a form of “massive resistance” in which local governments simply defied the state Constitution or sought clever ways to

¹⁰⁴ CAL. CONST. art. I § 31.

¹⁰⁵ Lucas Morel, *Prop. 209: Relearning the Lesson of Equality*, Ashbrook.org, Sept. 1, 1997.

¹⁰⁶ Robert D. Alt, *Toward Equal Protection: A Review of Affirmative Action*, 36 WASHBURN L.J. 179, 182–83 (1997).

¹⁰⁷ Michael W. Lynch, *Affirmative Action at the University of California*, 11 NOTRE DAME J.L. ETHICS & PUB. POL’Y 139, 155 (1997).

¹⁰⁸ 946 F. Supp. 1480 (N.D. CA. 1996), *vacated*, 122 F.3d 692 (9th Cir. 1997).

¹⁰⁹ The principle, named for the cases of *Hunter v. Erickson*, 393 U.S. 385 (1969), and *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), was reviewed in detail in *Schuettle v. Coal. to Defend Affirmative Action, Integration & Immigrant Rts. & Fight for Equal. by Any Means Necessary (BAMN)*, 572 U.S. 291 (2014), in which a majority of the Court sharply criticized the doctrine, but failed to muster a majority to actually overturn *Hunter* or *Seattle*.

¹¹⁰ *Wilson*, 122 F.3d at 709.

continue discriminating notwithstanding the ban.¹¹¹ In *Hi-Voltage*, the case itself concerned a San Jose ordinance giving favorable treatment to public contractors based on race and sex. Specifically, it required contractors to prove that they had attempted to hire subcontracting firms that were owned by members of racial minority groups (or by women) in order for the contractor to be eligible for a public works contract.¹¹² When Hi-Voltage sought to bid on a contract in which it would use its own employees rather than subcontractors, its bid was deemed nonresponsive, and it sued to challenge the program under the Civil Rights Initiative. Shockingly, the state’s attorney general appeared as an amicus curiae in *opposition* to Hi-Voltage.¹¹³ And to this day, the state government has never attempted to enforce the Initiative, leaving that task entirely to private litigants.¹¹⁴

Written by Justice Janice Rogers Brown, herself the daughter of an Alabama sharecropper who grew up during the civil rights era, the *Hi-Voltage* decision began—as no California Supreme Court decision ever had¹¹⁵—by quoting the Declaration’s basic premise: “The United States was founded on the principle that ‘all men are created equal.’”¹¹⁶ Acknowledging the judiciary’s role in violating this principle, the court embraced the “‘color-blind’ jurisprudence” that Justice Harlan had presaged in his *Plessy* dissent, and that embodied the Declaration’s principle most clearly.¹¹⁷ As for legal precedents allowing for race preferences as a form of “balancing,” they had represented a wrong-way turn that had led the state far from the original constitutional principle of equality: “Having once validated consideration of race, the United States Supreme Court struggled to articulate a principled, consistent standard,” Brown wrote.¹¹⁸ As a result, what had begun as an effort to protect the “individual right of equal opportunity” had “fundamental[ly] shift[ed]” into a nonstop program of discriminating in order to achieve “proportional

¹¹¹ This included such cases as *Cravford v. Huntington Beach Union High Sch. Dist.*, 121 Cal. Rptr. 2d 96 (Cal. App. 2002); *Connerly v. State Pers. Bd.*, 112 Cal. Rptr. 2d 5 (Cal. App. 2001); and *Coral Constr., Inc. v. City & Cnty. of San Francisco*, 50 Cal. 4th 315 (2010), among others.

¹¹² See *Hi-Voltage*, 24 Cal. 4th at 543.

¹¹³ See Brief Amicus Curiae of California, *Hi-Voltage Wire Works v. City of San Jose*, 2000 WL 34019273 (Jan. 13, 2000).

¹¹⁴ Foremost among which is my former employer, the Pacific Legal Foundation, which represented the plaintiff in *Hi-Voltage*.

¹¹⁵ In *Perez v. Lippold*, 32 Cal. 2d 711 (1948), the court declared the state’s anti-miscegenation law unconstitutional under the Due Process of Law Clause of the Fourteenth Amendment. In a concurring opinion, Justice Jesse Carter wrote that the opinion was “in harmony with the declarations contained in the Declaration of Independence which are guaranteed by the Bill of Rights and the Fourteenth Amendment.” *Id.* at 732 (Carter, J., concurring).

¹¹⁶ *Hi-Voltage*, 24 Cal. 4th at 545.

¹¹⁷ *Id.* at 544.

¹¹⁸ *Id.* at 554.

group representation.”¹¹⁹ The 1996 Civil Rights Act represented a decision to return to “the philosophy that ‘[h]owever it is rationalized, a preference to any group constitutes inherent inequality.’”¹²⁰

Yet while the court embraced the equality principle in *Hi-Voltage*, state and local officials continued to resist it—and still do—leading to a seemingly endless series of lawsuits challenging race preferences.¹²¹ Indeed, in 2020, champions of race preferences attempted to repeal the Initiative, through Proposition 16. That effort failed by a lopsided 57% to 42% vote. Undeterred, however, pro-preference forces tried again, proposing Assembly Constitutional Amendment 7 in 2024, which would have amended the Civil Rights Initiative to only ban “harmful” discrimination—as if all discrimination were not harmful. Among other things, this amendment would have changed the Initiative from saying “the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race” to read “the state shall not *harmfully* discriminate against, or grant preferential treatment to, any individual or group on the basis of race.”¹²² It was a fitting echo of Charles Carroll O’Donnell’s attempt at the 1879 convention to change “all men are created equal” to read “all men who are capable of becoming citizens of the United States are created equal.”¹²³ This proposed amendment, however, died in committee.

Yet the effort to continue racially discriminating still continues in some circles. Indeed, in what may be called by now a perverse California tradition, when the U.S. Supreme Court took up the legality of such preferences in *Students for Fair Admissions v. Harvard* in 2023,¹²⁴ both the state and its university system filed briefs supporting such preferences and traducing the state constitution’s ban on them. And even after the Court found such preferences unlawful, prominent California figures such as Erwin Chemerinsky, Dean of the Law School at U.C. Berkeley, insisted that they would continue to follow these illegal discriminatory admissions practices regardless (“If ever I’m deposed, I’m going to deny I said this to you,” he added.¹²⁵) The state’s longstanding

¹¹⁹ *Id.* at 555, 558.

¹²⁰ *Id.* at 561 (quoting *Price v. Civ. Serv. Comm’n of Sacramento Cnty.*, 26 Cal. 3d 257, 299 (1980) (Mosk, J., dissenting)). Justice Stanley Mosk, whose writings the court quoted here and throughout the *Hi-Voltage* decision, stands out as an exemplary spokesman for the principle of color-blindness. Mosk—who served on the California Supreme Court from 1964 to 2001—a quarter of the state’s entire history—was a New Deal Democrat but split with other liberal justices who endorsed affirmative action and remained a lifelong believer in the colorblind constitution.

¹²¹ *See, e.g.*, *Californians for Equal Rights Foundation v. City of Alameda* (Ct. App. 1st Div. A167472, Mar. 20, 2024) (challenging Alameda County race preferences for public contracting).

¹²² [ACA 7](#) (2024).

¹²³ *See supra* text accompanying notes 75–76.

¹²⁴ 600 U.S. 181 (2024).

¹²⁵ Alexander Hall, *Dean Caught Saying Berkeley Law Uses “Unstated Affirmative Action”: “I’m Going to Deny I Said This,”* Fox News, June 30, 2023.

hostility toward the Declaration’s principle of equality remains as alive as ever.

CONCLUSION

In his fragmentary poem “A Promise to California,” Walt Whitman—democracy’s greatest poet—pledged to the state: “soon I travel toward you, to remain, / to teach robust American love, / For I know very well that I and robust love belong among you, / inland, and along the Western sea. . . .”¹²⁶ The “robust American love” of which he spoke was the principle of equality announced in the Declaration of Independence:¹²⁷ the universality of liberty and opportunity of which he spoke when he said that America’s greatness lay not in the “grandeurs of the past,” but in the spread of freedom to all mankind.¹²⁸ There were some, he acknowledged, who regarded this idea as nothing more than a dream—a foolish notion to which no realistic person would subscribe. But his answer was simple:

Is it a dream?
 Nay, but the lack of it the dream.
 And, failing it, life’s lore and wealth a dream,
 And all the world a dream.¹²⁹

The principles of the Declaration—the idea that all people have basic rights that government must respect, regardless of the color of their skin—have struggled for acceptance in California’s constitutional history. Even the outstanding achievement of the California Civil Rights Initiative has not entirely laid to rest efforts by the government to benefit some and burden others based on their ancestry.¹³⁰ Yet that principle does “belong among you,” and although the journey will never fully end, it will be realized.



¹²⁶ Walt Whitman, *A Promise to California* (1867), reprinted in *THE COMPLETE POEMS OF WALT WHITMAN* 121 (David Rogers, ed. 1995).

¹²⁷ See, e.g., George Saintsbury, *Leaves of Grass* (1874), reprinted in *WALT WHITMAN AND THE WORLD* 32 (Gay Wilson Allen & Ed Folsom, eds., 1995) (“It would be a great mistake to suppose that sexual passion occupies the chief place in Whitman’s estimation. There is according to him something above it, something which in any ecstasies he fails not to realize, something which seems more intimately connected in his mind with the welfare of mankind, and the promotion of his ideal republic. This is what he calls ‘robust American love.’”).

¹²⁸ Walt Whitman, *Song of the Universal* (1881), reprinted in *COMPLETE POEMS*, *supra* note 126 at 210.

¹²⁹ *Id.* at 211.

¹³⁰ Indeed, two separate ballot initiative campaigns to weaken the California Civil Rights Initiative were defeated in recent years: Proposition 16 in 2020 and Assembly Constitutional Amendment 7 in 2024. See Mikhail Zinshteyn, *The Effort to Bring Back Affirmative Action in Limited Form Is Dead*, CalMatters, June 25, 2024.