

# Our California Constitutions: Retrospections In This Bicentennial Year

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## I. Early History

### A. Prologue

While the Bicentennial of our nation has focused attention on the great historic events which took place in 1776 on the eastern seaboard, one cannot ignore the western shores of our country. This year also marks the Bicentennial of the founding of San Francisco's mission and the establishment of its presidio garrison, around which the great city has developed. Through its port would come the major portion of the great mass migration begun in 1849.<sup>1</sup> Similarly, another vast influx would follow World War II, making California the most populous state of the Union.<sup>2</sup> As Bishop George Berkeley declared, "Westward the course of Empire takes its way," and in this Bicentennial, the circle has been completed. The course of world affairs has extended our national influence to the perimeters of the Orient, from whence, some assert, the surge of civilizations began.

The motives for the original settlement of California were geopolitical. The settlement was made, in part, because the Russians had crossed the Bering Strait and were trapping southward to San Francisco Bay. Now, of course, we find the Soviet fishing and whaling fleets off our shores and our own outposts are off the coasts of Asia, but in the late eighteenth century the Russians' proximity was genuinely threatening. A second major theme in the development of this new land was

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1. J. ROYCE, CALIFORNIA 17-18 (1970) [hereinafter cited as J. ROYCE]; J. CAUGHEY, CALIFORNIA 556 (3d ed. 1970).

2. The Census Bureau reports for 1970 abstracted in the WORLD ALMANAC AND BOOK OF FACTS (1976) tell the fantastic story. From 10.5 million in 1950, the population of California grew to 19.9 million. *Id.* at 203. There were twenty California cities with over 100,000 people. *Id.* at 210-11.

the growing disaffection of the original settlers, the *Californios*, with their distant governments, first in Spain and later in Mexico. The causes were much the same as those which generated the discontent of the American colonials: slow communication and great distance, which bred neglect by the central government, forced the colonials to govern themselves, and fostered in the settlers an independent spirit. The persistent interest of world powers in bringing California under their dominion combined with the *Californios'* weakness in numbers and lack of military support from the mother government made conquest probable by England, France, or the United States by 1846.

We shall review some of the territory's general history, for it later shaped the constitutional history of the American state of California. Federick Jackson Turner in his famous essay, *The Significance of the Frontier in American History*, turned the attention of eastern historians away from New England, suggesting that the ideas and institutions of the pioneers on the frontier had a great influence on our national development.<sup>3</sup> The courageous pioneers adapted to the necessities of their condition and were freed from fears of innovation.<sup>4</sup> The same self-reliance and independent spirit produced in California a government and a constitution in 1849. In 1879, social and political problems were again attacked directly through a new constitution. The great catastrophes of the earthquake and fire in San Francisco in 1906 and the resulting depression might have blighted a less resilient and dynamic people. Instead, in 1911 sweeping progressive innovations and reforms were adopted which other states are only now approaching. The constitutional revision and restatement recently adopted by the electorate demonstrate that Californians have continued to regard their fundamental law as a living guide rather than a static landmark.

Californians have come from diverse lands, and the potpourri of origins and aspirations has produced a turbulent society. Out of this ferment have come many California "firsts." Its savants stand on the front ranks of science<sup>5</sup> and are producing many of the current achievements in the study of interstellar space. This is the land of Robert Louis Stevenson, Bret Hart, John Steinbeck, Irving Stone, and Irving Berlin; of General Omar Bradley and General Jimmy Doolittle; of the

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3. Report of the American Historical Association (1893), *amplified in* F. TURNER, *FRONTIER IN AMERICAN HISTORY* (Am. Nation ed. 1921) and F. TURNER, *THE RISE OF THE NEW WEST* (Am. Nation ed. 1906).

4. R. NADEAU, *CALIFORNIA, THE NEW SOCIETY* 289-90 (1963).

5. California has more Nobel Prize winners than any other state. *Id.* at 288-89. For a list of the winners, see *WORLD ALMANAC AND BOOK OF FACTS* 542-43 (1976).

humanitarian Herbert Hoover; of Richard Nixon; and of Jerry Brown and Ronald Reagan. In short, California offers a heterogeneous gathering of remarkable people sharing perhaps only their geographic good fortune.

### B. California Discoveries and Colonization

In this Bicentennial year, many newcomers to the West, as well as those they left behind in the East, are astonished to learn that the first chapters of California history antedate the settlement at Jamestown and the landing on Plymouth Rock. In 1542, only fifty years after the discovery of America by Columbus, Cabrillo was exploring the western edge of this continent and had anchored his boats in San Diego Bay. He and his pilot, Ferrelo, share credit for first exploring the Pacific Coast north to what is now Oregon, extending Spanish claims and ambitions far beyond that country's initial conquests.<sup>6</sup> The Spanish were not the only Europeans in this part of the New World; Sir Francis Drake in the swift *Golden Hinde* saw the white cliffs north of the Golden Gate and called the land New Albion. Beaching his ship to scrape the hull, Drake built a fort and claimed the land for Queen Elizabeth I, erecting a cross on the shores of San Francisco Bay—or some say Drake's Bay—in 1579.<sup>7</sup> However, San Francisco was not named after him; to the Spanish, Drake was a pirate—the very personification of the Devil—and certainly not a saint.

In a land expedition to explore and occupy upper, or Alta, California, Don Gaspar de Portola discovered San Francisco Bay in 1769, and soon thereafter Moraga explored the opposite coast, the *contra costa*, along the eastern shore of the bay.<sup>8</sup> In the historic year of 1776, a presidio, or fortified garrison, was established overlooking the bay's entrance. To the southeast, Mission San Francisco Dolores de Asis was founded<sup>9</sup> and the jurisdictional line between them was the *divisadero*. In a little cove on the bay, named *yerba buena* for the wild mint found there, the settlers built a landing station through which people and provisions came for the new establishments.<sup>10</sup> The mission

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6. See R. ROSKE, *EVERYMAN'S EDEN, A HISTORY OF CALIFORNIA* 43-44 (1968) [hereinafter cited as R. ROSKE].

7. See J. Holliday, *The Francis Drake Controversy: His California Anchorage, June 17-July 23, 1597*, 53 CAL. HIST. Q. 197-200 (1974).

8. See THE DE ANZA EXPLORATION OF THE EAST BAY (D. Goodman ed. 1976).

9. Mathes, *The Vice-regal Order for the Founding of San Francisco*, 55 CAL. HIST. Q. 26 (1976).

10. 1 H. BANCROFT, *HISTORY OF CALIFORNIA* 279-85 (Hebbard reprint 1970) [hereinafter cited as H. BANCROFT].

was the nineteenth in a chain stretching from San Diego northward, each approximately a day's horseback ride from the last. The nearest of these was Santa Clara de Asis, then came Santa Cruz, San Juan Bautista, and San Carlos Borromeo on the Rio Carmelo, with the Presidio of Monterey on the bay nearby. This colonization of Alta California was Spain's move to block territorial claims to the neglected territory by other maritime nations. Colonists were induced to come to the territory by promises of land and the establishment of *pueblos*, or towns, when specified conditions were met. While established for the conversion of the generally friendly Indians, the missions also served a secular function and became important economic bases for colonization.

Subsequent events verified the apprehensions of the Spanish officials regarding territorial claims. In September, 1786, French ships entered Monterey Bay, bearing Jean Francois de Galoup, Comte de la Perouse, for an extended visit.<sup>11</sup> His parting gift, white potatoes from Chile, were to prove a boon to *Californios* and their agriculture. Despite this peaceful gesture, the Spanish remained apprehensive as French explorations continued and French warships sailed along the coast. A British explorer, Vancouver, already had established Britain's claim to the territory north of the Columbia River. In November of 1792, when Vancouver first sailed into San Francisco Bay and then into Monterey Bay, his fifty-day stay provoked the great displeasure of Spanish governor Jose Joaquin de Arillaga. Despite such official rebuff, Vancouver returned to Yerba Buena in 1793, proceeded to Monterey, and then visited Santa Barbara. He came back to these ports again in 1794.<sup>12</sup>

Besides the real or imagined threats of interference in California by European countries, the influence of another nation made itself felt. On October 9, 1796, the *Otter*, under Captain Ebenezer Dorr from the United States, landed at Monterey, circumventing the existing ban on all foreign shipping with his plea of distress.<sup>13</sup> Thereafter, the *Californios* built up a large and illicit trade with American vessels from New England. They exchanged hides and tallow for goods from the United States and China, the latter brought by the Yankees on the first stop of their triangular trade route from New England to China, from China to Alta California, and thence home.<sup>14</sup> Many American sailors

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11. Cf. J. CAUGHEY, CALIFORNIA 147-48 (2d ed. 1970) [hereinafter cited as J. CAUGHEY].

12. R. ROSKE, *supra* note 6, at 124-27.

13. *Id.* at 128.

14. *Id.* at 129-33.

jumped ship and settled in Alta California, especially in the south. The Spanish expressed little distress at the influx of Americans at this time; it was the Russian presence that had induced the Spanish to colonize Alta California, and the Americans were not perceived as a comparable threat.

The Russians had established a fur trading post at Sitka, in what is now the state of Alaska. For some time they had hired American and other shipmasters to bring in otter pelts taken from along the California coast,<sup>15</sup> and they were preparing to establish an outpost in Alta California. In 1794, Nicolai Petrovich Rezanov, royal chamberlain of the Tsarina, conceived the idea of a Russian-American fur company to operate in North America and found colonies there. Rezanov visited Sitka in 1805 and sailed from there down the Pacific coast to Yerba Buena, where his visit provoked little fear from the sixty inhabitants but great concern from Commandante Arguello and Governor Arrilaga.<sup>16</sup> Russian traders and trappers followed Rezanov to San Francisco Bay and began trapping in its upper reaches. One group occupied the Farallon Islands, and another established a colony on the coast to the north of Bodega Bay. In 1812, the strong and well-organized Fort Ross was built, mounting forty cannons and surrounded by a 1000-acre colony.<sup>17</sup> This incursion was countered by the Spanish, who built Mission San Rafael Archangel north of the Golden Gate in 1817. Six years later Mission San Francisco Solano of Sonoma was built by the new Mexican government.

Facing the Russians, Sonoma was the principal California garrison. A *Californio*, General Mariano Guadalupe Vallejo,<sup>18</sup> was posted there as Commandante and Director of Colonization for the Northern District.<sup>19</sup> Although islands had been held until that time as military reserves, the Mexican central government in 1838 directed the governor of Alta California to grant islands for colonization to prevent them from harboring smugglers or foreign invaders. Angel Island and "Goat," or Yerba Buena, Island in the San Francisco Bay were in-

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15. *Id.* at 137.

16. 4 H. BANCROFT, *supra* note 10, at 629-31; R. ROSKE, *supra* note 6, at 140. For a charming romantic sidelight, see S. DAKIN, ROSE OR ROSE THORN? 37-42 (1963) describing Rezanov's love affair with the Commandante's daughter.

17. 4 H. BANCROFT, *supra* note 10, at 158-70; R. ROSKE, *supra* note 6, at 143-44, 180-83.

18. See M. McKITTRICK, VALLEJO, SON OF CALIFORNIA (1944); 6 H. BANCROFT, *supra* note 10, at 294-95.

19. See 3 H. BANCROFT, *supra* note 10, at 294.

cluded.<sup>20</sup> In 1829 and 1830, California Governor Echandia ordered the Russians out of Fort Ross, which orders were ignored.<sup>21</sup> In 1842, the Russians abandoned their Farallon outpost.

The Russians were not the only fur traders of concern to the Spanish and Mexican governments. After 1821, trappers of the Hudson's Bay Company sought furs in the Sacramento and San Joaquin valleys, operating from Fort Vancouver on the Columbia river under management of Dr. John McLoughlin. He visited California in 1842 and established a store in Yerba Buena as headquarters for local operations. McLoughlin's operations were discontinued when the English withdrew from Oregon in 1845.<sup>22</sup> In 1839 the Tsar ordered the liquidation of the settlements in Bodega Bay and Fort Ross, for the operations had begun to lose money. Neither the Hudson's Bay Company nor the Mexican government would meet the price demanded,<sup>23</sup> and Captain John Sutter was the successful bidder for all of the Russian equipment and livestock. He paid only \$30,000 in installments.<sup>24</sup> The Russians departed, the first step in a withdrawal from the North American continent which would climax in the sale of Alaska to the United States in 1869.

Settlers from Texas and the United States had drifted into southern California for a considerable period of time. Naturalizations in the *pueblo* of Los Angeles in 1836 included Moses Carson, brother of Kit Carson, Dr. John Marsh, the pioneer of Contra Costa County, and William Wolfskill, who brought the orange into California horticulture.<sup>25</sup> In 1841, John Bidwell arrived and began the settlement of the upper Sacramento Valley,<sup>26</sup> while Yount (later the rescuer of the Donner party) settled in the Napa Valley.<sup>27</sup> By a decree of March 11, 1842, foreigners were allowed to secure land within the central department, but not on the frontiers without express permission of the

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20. See *United States v. Osio*, 1 Hoff. L. Cas. 100 (N.D. Cal. 1857); *United States v. Polack*, 1 Hoff. L. Cas. 284 (N.D. Cal. 1857).

21. See R. ROSKE, *supra* note 6, at 144.

22. *Id.* at 180.

23. *Id.* at 182-83.

24. *Id.* at 183-84.

25. Besides those named, petitions were presented for naturalization to the *ayuntamiento* of Los Angeles in 1836 for William Chard, pioneer in quicksilver mining (7 H. BANCROFT, *supra* note 10, at 656 n.20); Nathaniel Prior; James Johnson (member of the California legislature, 1859-60); and Samuel Carpenter. CITY CLERK, LOS ANGELES, 1 ARCHIVES 245, 281; 2 *id.* at 150.

26. See R. ROSKE, *supra* note 6, at 19, 197-99.

27. 6 H. BANCROFT, *supra* note 10, at 19.

Mexican government.<sup>28</sup> There were only 600 foreigners in California by 1845. Many settlers from Mexico had been lured to California by the prospect of obtaining grants of land. Land grants could be made by the governors and confirmed by the *diputacion* (the provincial council) to either naturalized citizens or those who had married Mexican women. This presupposed that they had embraced Catholicism. One of California's most famous early settlers, John Sutter, became a naturalized Mexican citizen, and received a grant of some 50,000 acres. He became a Mexican official, and built a fort, trading post, and saw-mill, near which gold was discovered in January, 1848.

This brief history of the settlement of California has set the stage for discussion of its legal framework under Spain and Mexico, and events in its constitutional history that followed the conquest and cession of California to the United States of America.

### C. Civil Organization of the Spanish Colony; Mexican Conquest

For the establishment and government of Spain's overseas empire, Philip II and the *Cortes* (or Parliament) established the *Leyes de los Reynos de las Indias*.<sup>29</sup> The general organization of the government was that which was common in contemporary European countries. Provision was made for a viceroy, or royal governor and an *audiencia* or governing council of state, typically including the *fiscal* (an auditor general with legal functions), the head of the military, and the head of the church. Administrative subdivisions were established under the viceroy in each of which might be a subordinate *audiencia*. At various periods under Spanish rule, the *audiencias* of Santa Fe and of Guadalajara had jurisdiction over the subordinate colonial government in Alta California.

The colonization of Alta California proceeded under the *Laws of the Indies* and subsequent decrees. These provided that settlement of a *pueblo* might be established under a contract in which ten married men with their families were to make a settlement within a time specified, fulfilling various requirements: a dwelling was to be constructed for each family, a church was to be established, and a pre-

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28. *Id.* at 25-40.

29. The colonial system was inaugurated by the publication of the LEYES DE LOS REYNOS DE LAS INDIAS, included in the early RECOPIACION DE LEYES DE LOS REYNOS DE LAS INDIAS. 4 ORDENANZAS DEL REY DON FELIPE II, *Titulo V, leyes VI, X*. See ESCRICHE, *DICCIONARIO, Ayuntamiento*, and the decree of Governor Don Felipe de Neve of Alta, California, approved on October 24, 1781, in J. DWINELLE, *THE COLONIAL HISTORY OF SAN FRANCISCO*, Addendum IV, at 4 (3d ed. 1866).

scribed list of livestock was to be maintained by each settler on the common lands set aside for the settlement. If all conditions were met within the specified time, the reward was the official establishment of the *pueblo*, and the grant to it of four square Spanish leagues of land laid out in a square if topography permitted and if it did not infringe upon any other *pueblo* or Indian town. The established *pueblo* thereby gained political status. It operated under the eye of the prefect, who represented the crown, but was governed locally by its *alcalde* (mayor and judge) and its *regidores* (councilmen), forming a local replica of the *audiencia* and called the *ayuntamiento* or *consejo municipal*.<sup>30</sup> This body had considerable powers of self-government, proportionately increasing by the distance from higher governmental authority. In practice, the crown authorities turned to the *alcaldes* and *ayuntamientos* for administration of large areas outside of *pueblo* boundaries, especially to protect minerals and forests, and to control smuggling, illegal settlements, and disorders.

The lands granted to the *pueblos* were of several classes: *ejidos* or common pastures; *solares* or single dwelling lots; *suertes*, the fields assigned to occupants by drawing lots; and *propios* or lands leased out for revenue. Important to our later legal and constitutional history was the fact that lands held under allotment by the *pueblo* were held only by possessory right. Such allotments were made upon petitions presented on special paper with the required stamp or seal, supported by a map and an official notation of the action of the *ayuntamiento* on the petition. The governors could make grants of land from the public domain upon petition, but these were only valid upon confirmation by the *diputacion* and occupation by the grantee. Few such grants were made in the Spanish period, but hundreds were made in the last years of Mexican rule.<sup>31</sup> Many of the grants were extensive; that to John Sutter was for eleven square leagues.

The *diputacion* was the provincial assembly or council, which had few members. Its speaker in the turbulent Mexican years frequently was the acting governor de facto if not de jure.<sup>32</sup>

The Spanish administrative system, established under the *Laws of the Indies* and operated under the Council of the Indies in Seville,

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30. See *The Alcalde System of California*, 1 Cal. 559 (1852). This lengthy report has been omitted in some later republications of the first volume of California Reports.

31. 1 H. BANCROFT, *supra* note 10, at 311-14, 336-38, 343-50, 388-89, 564-72, 600-06; 2 *id.* at 515-16.

32. See 1 Hoff. L. Cas. 453-58 for a list of the Spanish and Mexican governors of Alta California.



could pass muster under criteria for modern administrative procedure, and lasted in the Western hemisphere until 1898. It was the prototype of the commission form of city government, popular for many years in this century, and can be contrasted to representative government in the Anglo-American sense.

The Mexican cry for independence from Spanish rule had only faint echoes in Alta California. In 1820 the colonial population was perhaps 3,270 persons, in addition to the mission Indians, dispersed over 600 miles of coastal territory. It was a full year after the Mexican overthrow of the Spanish regime before the California *diputacion* was called upon to accept and acknowledge the new Mexican national government. For twenty-five years after Mexican independence (achieved in 1821) there was political turmoil in Alta California. Most of the Mexican governors sent up by the central government were as unpopular as those sent by the British crown to the American colonies. The soldiers and settlers sent north from Mexico too often were the outpouring of the jails; miscreants were sent north to Alta California to guard against other miscreants. Officials and soldiers were not supplied or paid for long periods of time. Officials supported the California government from their own funds, and some secured land as their only reimbursement.

Thomas O. Larkin, a merchant who settled in Monterey in 1832, was appointed American consul. In the forties he was under secret instructions to nurture sentiment among the *Californios* to cast their lot with the United States. However, it was also well-known that the Republic of Mexico had borrowed heavily in England, and some feared the British might seize California as collateral or in payment.<sup>33</sup> Then came the news that American settlers in Texas had seceded from Mexico and established a republic in 1836. *Californio* officials feared, correctly, it developed, that settlers coming into California might perpetrate a similar coup. Indeed, no one seemed greatly surprised when Commodore T. A. Catesby Jones, under false rumors that the United States was then at war with Mexico, landed at Monterey and accepted its surrender, raising the flag of the United States on October 19, 1842. Later news convinced him of his faux pas. With profuse apologies, he pulled down the flag and thus ended his tenure as Commander of the Pacific Squadron.<sup>34</sup>

John Charles Fremont was to be more fortunate. For three

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33. J. ROYCE, *supra* note 1, at 127-30.

34. *Id.* at 30-31.

successive years he entered California with an exploring party of U.S. Army personnel, asserting that his mission was to explore potential routes for a railroad to the Pacific. When ordered out of California he provoked hostilities, probably contrary to his instructions, and thereby nullified much of the pro-U.S. sentiment Larkin had carefully nurtured during his years as American consul. Instigated or encouraged by Fremont, an armed party of American settlers raided Sonoma, declared independence, and raised the Bear Flag on June 14, 1846.<sup>35</sup>

Fremont's aggression and the Bear Flag Republic were eclipsed by the war between the United States and Mexico. The flag of the United States was raised once again at Monterey by Commodore John Drake Sloat on July 7, 1846, and Captain John D. Montgomery followed suit on July 9 at Yerba Buena. Sloat was relieved by Commodore Robert F. Stockton, and he raised the flag in Santa Barbara and Los Angeles and sent Fremont to San Diego to do the same. The Mexican governor, Pio Pico, fled to Mexico. The prevailing opinion was that the American occupation had frustrated British plans to land and take possession of Alta California. After all, had not Drake been the first to claim it?

From previous experiences in Florida and Louisiana, leaders recognized that under international law the civil administration and laws of an occupied country continue in force unless superseded by necessary military regulations or laws of the conqueror.<sup>36</sup> Sloat's orders were to take firm possession of the territory and to establish civil government. In selecting persons to take over the civil offices he was to give due respect to the wishes of the people of California, as well as to the actual holders of authority in that province.<sup>37</sup> Sloat's successor, Commodore Stockton, divided the state into three regions, appointed men to fill the

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35. For two views of this episode, see Nevins & De Vito, *Fremont and the Bear Flag Rebellion: Heroes or Villains*, in CALIFORNIA CONTROVERSIES 47-69 (L. Pitt ed. 1968) [hereinafter cited as CALIFORNIA CONTROVERSIES].

36. No officers were trained for military government as they were in World War II. The United States had some experience with such rules in the takeover of Florida, Louisiana, and New Mexico. General Kearny had been active in the New Mexico takeover. Some of the proclamations made in California were similar to those used previously in the other takeovers. See T. GRIVAS, MILITARY GOVERNMENTS IN CALIFORNIA, 1846-1850, at 47 n.14, 79-81 [hereinafter cited as T. GRIVAS]; *Vilas v. Manila*, 220 U.S. 345, 357 (1910); *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 544 (1828).

37. Under the Mexican constitutions of 1824 and 1837, California, as a province, had one delegate in the national Congress. In Alta California under the 1837 legislation, there was to be a governor, seven members of a *diputacion*, or legislative council, prefects and subprefects, and *alcaldes*. See T. GRIVAS, *supra* note 36, at 154; *Mena v. Leroy*, 1 Cal. 216 (1850).

seven seats in the *diputacion* or assembly,<sup>38</sup> and designated *alcaldes* of his choosing. This action was followed by an election for those offices. Those voting confirmed his choices.

In August, 1846, Commodore Stockton transmitted to George Bancroft, Secretary of the Navy, a proposed constitution for the territory of California.<sup>39</sup> It died an administrative death. Thus the task of establishing and maintaining the civil government passed to Kearney. Kearney met insubordination from Fremont, military governor under Stockton's appointment,<sup>40</sup> that was exacerbated by Kearney's refusal to pay Fremont's unauthorized California battalion and by the large debt that Fremont had run up in the name of the United States as military governor. The Indians were in turmoil and Kearney commissioned Vallejo and Sutter as United States sub-agents to calm the unsettled state of affairs.<sup>41</sup>

In March, 1847, Kearney authorized Edwin Bryant, then *alcalde* in San Francisco, to sell beach and water lots from San Francisco's *pueblo* lands.<sup>42</sup> The Pandora's box of land ownership confusion was opened.<sup>43</sup> Succeeding *alcaldes* and councils made other conflicting grants. At one time there were three competing councils, and a mixup in land titles resulted that took fifty years for the courts to settle.<sup>44</sup>

When Kearney departed from California (accompanied by Fremont going east to his court-martial), he appointed Colonel Richard Mason to be the military governor of California. The military Secretary of State, Captain Henry Wager Halleck,<sup>45</sup> returned from Baja Califor-

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38. For the *diputacion*, Stockton appointed General Mariano G. Vallejo, David Spence, Juan Bautista Alvarado, Thomas O. Larkin, Eliab Grimes, Santiago Arguello, and Juan Bandini. Colton was appointed *alcalde* at Monterey; Washington A. Bartlett as *alcalde* at Yerba Buena. Not unexpectedly, all of those who were initially appointed were elected. For the operation of the *alcalde* system, see T. GRIVAS, *supra* note 36, at 88-90, 151-85 and 1 Cal. 559 (1852).

39. See U.S. Gov't Doc. Serial Set 499, Doc. nos. 13 & 19 at 106-07.

40. Fremont was court-martialed, found guilty of insubordination, and dismissed from the service. President Polk approved the findings, but remitted the sentence. Unwilling to accept this, Fremont resigned from the Army, returned to California, operated his Mariposa grant, and entered politics. He became one of the first two United States Senators from California and was a candidate for president in 1856. See R. ROSKE, *supra* note 6, at 235-36, 274-75.

41. T. GRIVAS, *supra* note 36, at 105-06.

42. J. ROYCE, *supra* note 1, at 169.

43. See 6 H. BANCROFT, *supra* note 10, at 568-70, 755-60; 7 *id.* at 229-33. See, e.g., *Hart v. Burnett*, 15 Cal. 530 (1860) (discussing *pueblo* lands).

44. 6 H. BANCROFT, *supra* note 10, at 271.

45. Henry Wager Halleck resigned from the Army in 1854. With his mastery of Spanish and his acquired familiarity with Mexican law and land law, he brought great

nia where he had served with distinction in the naval expedition that seized it.<sup>46</sup> There were extensive civil organizations and laws of Mexico that the conquerors were required to respect. Halleck took possession of the Spanish-Mexican archives. No doubt aided by William Hartnell, he translated and prepared a digest of the Mexican laws thought to be in force. Later he also digested the mining laws. It was Halleck as well who devised and implemented the procedure for calling a constitutional convention in 1849 and for electing state officers. All of this was preparation for his later brilliant legal career.<sup>47</sup>

Mason was beset with difficulties and disorders from the start of his military governorship. Before Halleck's work was completed it was difficult to determine what Mexican laws were in force. *Alcaldes* had operated largely upon the customs of the locality, as was the practice in early England and Spain, and persons appointed as *alcaldes* were often ignorant of their powers and duties. Meanwhile, the flow of American emigrants to California slowly increased in 1846 and 1847. Mason's task of governing, already difficult, became almost impossible after gold was discovered at Sutter's sawmill, and news of the find travelled quickly around the world. In 1849, some 80,000 persons reached California, of whom 60,000 were from the United States.

Even if the *alcalde* system had been effective and respected in the northern California *pueblos* (as it was in the south), it was not present in the new "diggings" that sprang up along the great rivers and their tributary creeks. The diggings were independent communities which, for the protection of their miners and their claims, devised

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success to his firm of Halleck, Peachy & Billings in San Francisco. In 1859 he published *The Mining Laws of Spain and Mexico* and in 1861 his *International Law*, a standard work long after its second edition in 1908, was first published. His *Military Art and Science*, published in 1846, became a training manual for volunteer officers during the Civil War. Returned to the Army as a Major General, he was picked by General Winfield Scott to succeed him as Chief of Staff of the Armies. His administrative skill brought order out of initial chaos in training and command; his contemporaries called him "Old Brains." He remained in the Army at the close of the war, and returned to California as Commander of the Department of the Pacific. His military achievements were eclipsed by the popular acclaim given the other, more active field commanders.

46. See J. Yates, *Insurgents on the Baja Peninsula: Henry Halleck's Journal of the War in Lower California 1847-1848*, 54 CAL. HIST. Q. 221 (1975). In the peace which followed, Lower California was not ceded to the United States. From this expedition, Halleck came back a brevet captain, to become the architect of the 1849 constitutional proceedings and secretary of state under the military government.

47. Halleck built the famous "Montgomery Block" in San Francisco which resembled a fort. See R. O'BRIEN, *THIS IS SAN FRANCISCO* 33-37, 57 (1948). Halleck, Peachy, & Billings appeared in 80 cases before the Land Commission. See R. ROSKE, *supra* note 6, at 321-22. See also 6 H. BANCROFT, *supra* note 10, at 542 n.12.

primitive codès and administered swift, although often not infallible, rough-and-ready justice.<sup>48</sup>

The pleas made to General Kearny to organize a territorial assembly, which he rejected, were pressed upon Colonel Mason, particularly by groups of the recently arrived Americans in San Francisco and Stockton. Mason had no orders to set up a territorial United States administration and urged patience to permit Congress to act. He sent emergency messages to Washington urging immediate congressional action. The only action taken was to make San Francisco a port of entry to which the revenue laws of the United States were made applicable. The rates were disastrous to the Californians, whose livelihood depended upon imports, especially because labor had rushed off to the mines. The port revenues, which under the Mexican system had been devoted to the maintenance of the California government, were now cut off, and there was no provision for support of the interim government.<sup>49</sup>

When news came of the end of the war with Mexico and the cession of Alta California to the United States, opponents of the interim regime asserted that with the treaty of peace<sup>50</sup> the military lost all power to govern.<sup>51</sup> Under the treaty, Mexican citizens were free to remove themselves and their property to Mexico, and their rights in property they left behind were to be protected. Those who remained more than one year after ratification of the treaty automatically became United States citizens although their rights as citizens were to be declared by Congress "according to the principles of the Constitution."<sup>52</sup> The year passed; Congress did not make such a declaration.

The Mexican *Californios* were then nominally citizens, but with undetermined rights. The treaty did provide that the former Mexican

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48. See J. ROYCE, *supra* note 1, at 247-71.

49. The problem of arranging financing for the delegates' pay and other expenses of the 1849 constitutional convention worried the delegates. General Riley agreed to pay the expenses out of the port collections, including sixteen dollars a day and mileage to each delegate. Ten thousand dollars was appropriated for the publication of the proceedings in both English and Spanish editions.

50. Treaty of Guadalupe Hidalgo, Feb. 2, 1848, 9 Stat. 922 (1848), T.S. No. 207. Ratifications were exchanged at Queretaro, May 30, 1848, and proclaimed July 4, 1848.

51. See J. ROYCE, *supra* note 1, at 198-200, quoting the president's message to Congress of December, 1848, in which such a view was expressed. It was an effort to get congressional action. After the treaty of peace was signed, citizen groups in California took the same position. See Hunt, *Legal Status of California, 1846-1849*, 12 ANNALS 387 (1898).

52. Treaty of Guadalupe Hidalgo Art. IX, 9 Stat. 922, 930 (1848).

nationals were to "be maintained and protected in the free enjoyment of liberty and property, and secured in the free exercise of their religion without restriction."<sup>53</sup> Property of every kind belonging to Mexicans not remaining in California was to be inviolably respected. These owners, their heirs and successors, were to enjoy their rights in property "equally ample as if the same belonged to citizens of the United States."<sup>54</sup> However, the incoming hordes from the United States were prone to regard everything they saw as their property by right of conquest. With property rights so unsettled, there was great distress among the *Californios*. Mason was besieged with demands from the Mexican citizens to know their personal status, and was overwhelmed by their justifiable requests that the treaty provisions be enforced against the squatters now occupying their lands, ruining their crops, and stealing their livestock.<sup>55</sup> Mason was powerless to police the state with the troops at hand, whose ranks continually shrank with the desertion of soldiers to the mines. Near the end of 1848, public gatherings in San Francisco, San Jose, and Sacramento produced demands that the citizens themselves should form a territorial government in the absence of congressional action. A convention for that purpose was postponed upon Colonel Mason's admonishment that Congress, then in session, could yet take the necessary action.<sup>56</sup>

#### D. General Riley and the Call of a Constitutional Convention

The climax was approaching. Brigadier General Bennett Riley arrived with specific instructions to be the chief executive of the civil government to be organized to supersede the weakened and discredited

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53. *Id.*

54. Art. VII, 9 Stat. 922, 929-30 (1848).

55. California United States Senator William M. Gwin, over the protests of Senator Fremont, sponsored an act for the settlement of land claims in California which placed the burden of proving title upon the holders of Spanish-Mexican land grants, rather than upon the swarms of settlers who had dispossessed them. Even when the grants had been defended successfully through the Land Commission and the federal courts, the delay, legal fees, and continuing depredations ruined many *Californio* landowners. See Act of March 3, 1851, ch. 41, 9 Stat. 631. For the contrasting views of historians John S. Hittell and Paul W. Gates, see J. ROYCE, *supra* note 1, at 378-87 and CALIFORNIA CONTROVERSIES, *supra* note 35, at 87-104.

Under the treaty, the treatment of the *Californios* parallels that of the Indians whose land treaties were ignored and violated. These violations were later rationalized in favor of those who wanted the lands and took them.

56. T. GRIVAS, *supra* note 36, at 132-33, 200-01. Among those who addressed the meetings were William M. Gwin, ex-Congressman from Mississippi, who started for California originally with the express purpose of becoming its United States Senator; Peter H. Burnett, who had had experience in setting up the territorial government in Oregon; and M.M. McCarver, another veteran of the Oregon experience.

military government. The executive branch was thereby filling the void left by a Congress torn apart over controversies concerning slavery in the territories; Congress had adjourned again without making provision for a civil government in California.<sup>57</sup> General Riley took the initiative. He reasserted that the existing Mexican laws were valid until constitutionally repealed, that the Mexican administrative framework would continue, but that offices would be elective. He decreed that on August 1, 1849, there would be an election for officers, including delegates to an assembly or legislature.<sup>58</sup> Riley's boldest move, however, was to call for the election of delegates to meet at the former Mexican capital, Monterey, on September 1, 1849, to prepare a constitution for the new territory.<sup>59</sup> This constitution was to function as an extra-legal or de facto framework of government, and as a proposal to be presented to Congress. Ten districts were established. Elections were to be conducted by the *alcaldes* of the *pueblos* or districts. Thirty-seven delegates were to be elected: five each in Monterey, San Jose, and San Francisco; four each in Los Angeles, Sonoma, Sacramento, and San Joaquin (Stockton); and two each in San Diego, Santa Barbara, and San Luis Obispo. When the convention convened, other areas claimed a right of representation. The convention seated all delegates who had received 100 votes or more.<sup>60</sup>

There had been scant time for the election preliminaries, and it is doubtful that many *Californios* were fully informed of what was proposed, or of their status as potential voters, since their citizenship rights had never been defined under the treaty provisions. From Monterey itself, the former capital and provisional capital, there was a formidable delegation that indicated the uneven representation: Halleck and Ord were army officers; Colton was a navy chaplain; and Larkin was the former United States consul. Of the total delegates only seven were native *Californios*; fifteen had come to California from the southern slave-holding states, and twenty-two had come from the northern states. The average age of the delegates was 36½ years.<sup>61</sup>

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57. T. GRIVAS, *supra* note 36, at 141.

58. *Id.* at 145; Proclamation by Governor Riley, Monterey, June 3, 1849, Serial No. 573, 31st Cong., 1st Sess. 776-80 (1849). Riley's right to call such an election was disputed bitterly. T. GRIVAS, *supra* note 36, at 207-09.

59. J. ROYCE, *supra* note 1, at 203-04. No doubt the celerity with which he acted tended to overcome the objections raised.

60. 6 H. BANCROFT, *supra* note 10, at 287 n.69. These were supernumeraries provided for in the call.

61. *Id.* at 284-88; R. ROSKE, *supra* note 6, at 268-69.

Despite the fact that most of the delegates were newcomers to California, the convention was given some stability by the presence of an influential group who had come to the territory before the gold rush.<sup>62</sup> One of the ablest of this group, Dr. Robert Semple of Benicia, was selected as presiding officer; Captain Henry W. Halleck was secretary of the convention and active in its deliberations. Some delegates already had been seasoned in the political arena, and others would obtain prominence in later years, making the convention a remarkable congregation of important historical figures.<sup>63</sup>

One of the San Francisco delegates, William M. Gwin, on arriving at the convention "happened" to have a copy of the recently adopted constitution from Iowa. A former congressman from Mississippi, he came west with the avowed intention of becoming a United States Senator from California and had been involved with the San Francisco citizens who previously had urged the organization of a territorial government upon Kearny and Mason. He was made chairman of the drafting committee.<sup>64</sup> The new constitution of New York (1847) was also available to the committee. Debates in English were simultaneously translated for benefit of the Spanish-speaking delegates, and it was ordered that the proceedings be published in both English and Spanish.<sup>65</sup>

## II. Constitution of 1849 and the Years Following

### A. The Constitutional Convention and the Constitution Adopted

The Constitutional Convention of 1849 and the document produced by its labors derive historical importance partially from the delegates' audacity. The fact that the convention was held at all demonstrated an irrepressible urge for self-government and a legal order to maintain it.<sup>66</sup> The 1849 constitution was largely conventional, based

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62. Thirty-five had been in California more than one year; thirteen had been in the state less than one year. J. ROYCE, *supra* note 1, at 206.

63. R. ROSKE, *supra* note 6, at 269; 6 H. BANCROFT, *supra* note 10, at 284-87. Rodney M. Price, a Monterey delegate, was later governor of New Jersey and a Congressman from that state.

64. J. ROYCE, *supra* note 1, at 207-08 ("No man approaches him in impressiveness or skill in the debates."). Dr. Semple might have equalled him, but he was maneuvered into the chairmanship of the convention.

65. R. ROSKE, *supra* note 6, at 268. See generally J. BROWNE, DEBATES OF THE CONVENTION OF CALIFORNIA (1850) [hereinafter cited as J. BROWN].

66. The San Francisco Vigilance Committees of 1851 and 1856 showed the same spirit. The 1856 committee rid the city of the criminal element for the time being, important when that element had control of the de jure offices. The committee bought back stolen city records, indispensable in the land title litigation. It paid \$10,000 for



upon the models of Iowa and New York. The legislative parameters were broad; so much so that the provisions of the constitution of 1879 were designed to curb legislative excesses and political abuses that developed in the intervening years. In 1849 the citizenry was absorbed by the national stress presaging the Civil War as well as by California's own internal developments in mining and agriculture. Subsequent fiscal delinquencies by state and local governments, a result of later public inattention, were not foreseen by the high-minded framers of the 1849 constitution.

In the 1849 convention the reports of the committees were considered by the entire body. Although slavery was a paramount issue, the constitution's Declaration of Rights contained no reference to it when reported out of committee. Some delegates pondered what might happen if slaves were brought in to work in the mines. Delegate William E. Shannon of Sacramento offered an amendment to provide that involuntary servitude and slavery, except as a punishment for crime, would be forever barred. To the surprise of many, the amendment was adopted and added to the Declaration of Rights despite the large contingent of former southerners.<sup>67</sup> Gwin and his southern pro-slavery followers were biding their time. After all, California, as ceded by Mexico, embraced a vast area extending to the Rockies. There was enough territory for several states, and it was not seen as politically probable that Congress would approve a constitution making all of that territory free of slavery. Aware of that, the anti-slavery men, who did not want to have the recognition of the California Constitution delayed by a congressional controversy such as that attending Kansas-Nebraska, were willing to limit the boundary of the proposed state to the eastern slope of the Sierra Nevada mountains. This was the action taken,<sup>68</sup> leaving a vast region over which Congress still

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the design of an unstuffable ballot box, fostered the consolidation of city and county governments, and reduced overall expenses by 90%. In all its operations, the committee rigorously demanded nonpartisan efforts to put honest and qualified men in office. 6 H. BANCROFT, *supra* note 10, at 742-54; J. CAUGHEY, *supra* note 11, at 228-35; Cutler, Scott & Coblenz, *The San Francisco Vigilantes of 1856: Government by Laws or Men?*, in CALIFORNIA CONTROVERSIES, *supra* note 35, at 72-82.

67. CAL. CONST. art. I, § 18 (1849), *as amended*, CAL. CONST. art. I, § 6.

68. Thomas Butler King, an agent secretly making reports to the national administration, reported that he thought a state, once established, would divide. See H.R. EXEC. DOC. NO. 31, 31st Cong., 1st Sess. 1 (1850); H.R. EXEC. DOC. NO. 59, 31st Cong., 1st Sess. 1-6 (1850).

Proposals to bar slaves and former slaves from the new state died in committee. The California Supreme Court applied the Fugitive Slave Act in *In re Perkins*, 2 Cal. 424 (1851), which might have become the national *cause celebre* rather than the *Dred Scott* case, had the distance from Washington not been so great.

might quarrel. The southerners in the 1849 convention assented to the boundary adopted, believing that another part of the territory could still be established as a slave state if economic conditions justified it.<sup>69</sup> The legislature and the voters in 1859 did approve the division of California into three states and petitioned for ratification by Congress, which shelved the matter because it was still embroiled in the Kansas-Nebraska controversy and threats of disunion were being made.<sup>70</sup>

Provisions unique to California were included in the constitution. Reflecting the sentiment in a land of gold against the issuance of bank notes or negotiable paper, the 1849 constitution prohibited the grant of charters for banking purposes, while at the same time providing that associations might be formed under general laws for the deposit of gold and silver.<sup>71</sup> Incorporation was branded by some as a device for bilking creditors despite its utility for amassing capital, and each stockholder of a corporation or joint stock association was made personally responsible for his portion of the debts and liabilities.<sup>72</sup> The *rancheros* holding vast acreages feared, with good reason, that real property taxation, to which they had not been subjected under the Mexican law, would weigh heavily upon their lands. Article XI, section fourteen did indeed provide that taxation would embrace all property and be equal and uniform throughout the state, but landowners were assured that the provision for local election of assessors would ameliorate their tax burdens. Theoretically, the rule of equality could be vitiated by local inequality of assessment.

There was controversy at the convention over whether to recognize the existing Spanish-Mexican community property system or to adopt the English common law under which the husband controlled the wife's property, subject only to dower. All of the delegates realized that marriage to a citizen was one way under the Mexican system for a foreigner to acquire land in his own right while his wife retained rights to her own holdings. Many were anxious to become landholders and were loathe to close off this avenue by disavowing the community property system. Article XI, section fourteen of the draft constitution provided for a community property system. Debates over a wife's interest in property enlivened the convention proceedings. Responding to flowery phrases concerning the chivalrous care of the wife's property

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69. J. ROYCE, *supra* note 1, at 209-10; 6 H. BANCROFT, *supra* note 10, at 291-96.

70. 7 H. BANCROFT, *supra* note 10, at 254-57; J. CAUGHEY, *supra* note 11, at 219-20. Concerning further agitation in 1878-79, see 7 H. BANCROFT, *supra* note 10, at 369.

71. CAL. CONST. art. IV, § 34 (1849).

72. CAL. CONST. art. IV, § 36 (1849).

by the husband under the dower system, the bachelors noted that unless the proprietary right of married women in property was recognized, they might not be able to obtain wives in California.<sup>73</sup> The latter view prevailed, and the present California constitution perpetuates the 1849 decision.<sup>74</sup>

Foreshadowing the fact that education was to become California's greatest public enterprise, the 1849 constitution directed the legislature to encourage by all appropriate means the promotion of intellectual, scientific, and agricultural improvement. A state superintendent of public instruction was to be elected to implement this policy. Every established school district was to hold school for at least three months in each year. A state school fund was established out of monies received from the sale or rental of any school lands granted the state by Congress and from escheated estates.<sup>75</sup> Any district not maintaining school for the required three months would be deprived of its proportionate share of the school funds.<sup>76</sup> Similarly, the legislature was directed to establish a university from such granted lands, with branches "as the public convenience may demand," for promotion of literature, arts, and sciences authorized by the terms of such grant.<sup>77</sup>

Until otherwise provided by the Legislature, the 1849 Constitution established San Jose as the state capital.<sup>78</sup> San Jose was one of the three original Spanish *pueblos* established on November 29, 1777. In 1849 San Jose had some 700 inhabitants.<sup>79</sup> Because of its port of Alviso, it was more convenient than Monterey for the majority of

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73. Halleck's statement deserves notice: "I am not wedded either to the common law or the civil law, nor as yet, to a woman; but having some hopes that sometime or other I may be wedded, and wishing to avoid the fate of my friend from San Francisco, Mr. Lippett, I shall advocate this section in the Constitution, and I would call upon all the bachelors in this Convention to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce into the Constitution." J. BROWN, *supra* note 65, at 259.

Mr. Botts objected. "In my opinion, there is no provision so beautiful in the common law, so admirable and beneficial, as that which regulates this sacred contract between man and wife. Sir, the God of nature made her frail, lovely and dependent; and such the common law pronounces her. Nature did what the common law has done—put her under the protection of man. . . . When she trusts him with her happiness, she may well trust him with her gold. . . ." The convention did not agree.

74. CAL. CONST. art. XI, § 14 (1849), *as amended*, CAL. CONST. art. I, § 21. See McGinty, *Common Law and Community Property: Origins of the California System*, 51 CAL. STATE BAR J. 370 (1976).

75. CAL. CONST. art. IX, § 2 (1849).

76. CAL. CONST. art. IX, § 3 (1849).

77. CAL. CONST. art. IX, § 4 (1849), *as amended*, CAL. CONST. art. IX, § 9.

78. CAL. CONST. art. XI, § 1 (1849). See 6 H. BANCROFT, *supra* note 10, at 321-25; HISTORY OF CONTRA COSTA COUNTY 214-18 (1882).

travelers and merchants who used the rivers and San Francisco Bay. Thereafter, the change of the state capital from San Jose to Vallejo, then to Benicia,<sup>79</sup> and ultimately to Sacramento left a trail of disappointments, political intrigue, and, some said, bribery. The move to Sacramento is understandable when one considers that it was closer to the mines and all the attendant multifarious activities in the early 1850's.

After the constitution was ratified by a vote of the people, a state government was set in operation and the first legislature did a prodigious job. Gwin and Fremont were elected as senators. They carried the constitution to Congress and worked for its approval and for admission of California to the Union. In the Compromise of 1850, California was admitted as a free state on September 9, 1850.<sup>80</sup>

The 1849 convention made one other moral commitment besides the rejection of slavery. Article XI, section two proclaimed:

Any citizen of the State who shall, after the adoption of this Constitution, fight a duel with deadly weapons, or send or accept a challenge to fight a duel with deadly weapons, either within this State or out of it, or who shall act as second, or knowingly aid or assist in any manner thus offending, shall not be allowed to hold any office or profit, or enjoy the right of suffrage under this Constitution.<sup>81</sup>

Until repealed on November 3, 1970, this section was carried forward by the 1879 constitution. This was not enough, however, to stop the most famous duel in California history, in which Chief Justice David S. Terry of the California Supreme Court mortally wounded United States Senator David C. Broderick on September 12, 1859, on the shores of Lake Merced, south of San Francisco. But that duel itself probably gave impetus to social rejection of the *code duello*, which until then was still in the gentleman's lexicon and was frequently employed by torrid political foes.<sup>82</sup>

### **B. Railroad Control, Legislative Excesses, Labor Trouble, and Agrarian Unrest: Move Toward a New Constitution**

The constitution of 1849 has been praised as a textually concise instrument of government that declared broad principles for action—

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79. J. ROYCE, *supra* note 1, at 13; 1 H. BANCROFT, *supra* note 10, at 312-14; *id.* at 4.

80. Act of Sept. 9, 1850, ch. 50, 9 Stats. 452.

81. CAL. CONST. art. XI, § 2 (1849), *as amended*, CAL. CONST. art. XX, § 2 (1879).

82. See A. BUCHANAN, DAVID S. TERRY OF CALIFORNIA—DUELING JUDGE 6, 111-12, 173 (1956).

legislative, executive, and judicial. Although the United States Constitution was in many ways a grant of power, that of the state was a limitation on legislative action. Nonetheless, the generalities of the 1849 constitution allowed abuses in the form of special legislation to flourish.<sup>83</sup> In response to those abuses, the detailed provisions of article IV, section twenty-five of the 1879 constitution prohibited some thirty categories of special legislation that had been found invidious.<sup>84</sup>

Under the 1849 constitution, large landholdings devoted to ranges were taxed.<sup>85</sup> As mentioned above,<sup>86</sup> the ranchers feared that this would unfairly cast the burden of the bulk of the state taxation upon them. For example, in 1852 it was asserted that the six southern counties with a population of only 6,000 paid \$42,000 in property taxes, plus \$4,000 in school poll taxes;<sup>87</sup> while the northern counties with a population of 120,000 paid only \$21,000 in property taxes, and \$3,500 in poll taxes. Reform was demanded. Ranchers had been assured that by exercising their voting rights they could influence rates set by locally elected assessors. In practice, assessors in populated counties lowered valuations as easily as the ranch-dominated county assessors did, so the ranchers gained no relative advantage. As a result of tax burdens, and partially due to persistent droughts, floods, and tight credit, the stock-raising feudalism of early California was ending by 1879.<sup>88</sup>

Continual agitation centered around land-holding. Although ranching was moribund, agriculture was on the rise. The railroads owned vast areas conveyed to them in alternate sections along their rights of way. Sale of this land was expected to underwrite the cost of their enterprises,<sup>89</sup> but it had an additional, perhaps unexpected effect:

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83. See generally C. SWISHER, *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-1879* (1930); *THE RUMBLE OF CALIFORNIA POLITICS 1848-1970* (R. Delmatier ed. 1970).

84. Nearly all of these prohibitions had an historical basis. For instance, in reference to pardons, governors had pardoned, between 1860 and 1879, 536 felons from state prison, 81 from county prisons, and had commuted sentences for 42. 7 H. BANCROFT, *supra* note 10, at 218. But consider also absconder Meiggs, who bilked San Francisco of \$1 million in forged warrants. The governor vetoed his legislative pardon.

Such restrictions gave rise to classification techniques whereby the legislation passed the constitutional test and was held valid, although restricted to the point of almost being special by reason of the limitations of the definition. Cf. *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal. 2d 276, 384 P.2d 158, 32 Cal. Rptr. 830 (1963).

85. See CAL. CONST. art. XI, § 13 (1849).

86. See text accompanying note 72 *supra*.

87. J. CAUGHEY, *supra* note 11, at 219.

88. 7 H. BANCROFT, *supra* note 10, at 14-15 n.37, 16 nn.38 & 39; R. ROSKE, *supra* note 6, at 391.

89. 7 H. BANCROFT, *supra* note 10, at 549-51.

by controlling land, the railroads also controlled settlement and development along the lines. Another problem stemmed from the fact that thousands had come to California expecting to find free, or almost free, land. Both those who had "squatted" and those who had made legitimate purchases were frequently frustrated by litigation over land titles. Some of the disputes continued into the next century.

By 1879, agricultural production was beginning to outstrip the returns from the mines.<sup>90</sup> The gold output had begun to decline in 1865, and fifteen years later the individual placer miner along the rivers had largely disappeared from the played-out mines.<sup>91</sup> Men were tunneling deep in the mountain sides to find gold-bearing quartz. Whole mountains were torn apart and their gravels sluiced for the recovery of gold. Old river beds were dredged, producing an ecological crisis as the silt raised the water levels in the rivers and induced flooding.<sup>92</sup> The new developments in mining forced some men into other pursuits such as agriculture and commerce. Some moved to Nevada to mine until the silver was made inaccessible by accumulated water in the most famous mines; but many middle-aged miners drifted instead into the ranks of the unemployed in Sacramento and San Francisco.

### C. Destroy the Octopus; Fetter the Legislature

There was considerable enmity against the railroads, resulting from their autocratic control of land transportation.<sup>93</sup> A commission set up by the 1849 constitution and later statutes ineffectively attempted to secure and maintain reasonable rates and services. While the railroads nominally adhered to the rate limits of ten cents per passenger-mile, and thirteen cents per ton of freight, these were undercut by rebates, geographic differentials, routing, and free passes. The railroads fixed arbitrary terminal charges in handling commodities for transfer to and from waiting vessels. The statutory railroad commission was said to be in the vest-pocket of the railroads. Local governments had been compelled by the legislature to subscribe for railroad stock and to give other subsidies.<sup>94</sup> The railroads would not yet openly lobby

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90. See generally 7 H. BANCROFT, *supra* note 10, at 5, 6, 41, 42, 119 n.26, 651-55.

91. *Id.* at 645.

92. *Id.* at 646-48.

93. *Id.* at 628. Some passenger rates were eight cents per mile on through tickets, but freight was forty-eight dollars a ton from San Francisco to Elko, Nevada, and seventy dollars a ton to Salt Lake City, Utah. See Estee & McFarland, *The Constitutional Convention of 1879-1880 and the Southern Pacific Railroad*, in CALIFORNIA CONTROVERSIES, *supra* note 35, at 108-18.

94. In *The Octopus*, written in 1901, Frank Norris depicted the struggle of the

the legislature, but the railroads controlled the legislators by financial pressure. The powerful Sacramento merchants, Stanford, Crocker, Huntington, and Hopkins,<sup>95</sup> had made their dream of the transcontinental railroad come true by their efforts and talents. In 1878 their proud mansions adorned Nob Hill in San Francisco, favorite targets of the epithets of the unemployed, many of whom had labored on the railroads and had been without work since their completion.

Municipal finances in Sacramento and San Francisco continued to be in deplorable shape. Reforms initiated by the Committee of Vigilance of 1856 had included consolidation of city and county governments, reduction in expenses, and correction of many venal abuses.<sup>96</sup> But, as usual, the people had relaxed after the housecleaning. Additionally, a backlog of debt remained from the repeated destruction of municipal property by fire in San Francisco.<sup>97</sup> Municipal debts mounted with over-optimism, general speculation, and corruption. Diverted by the mining booms and national politics, the people allowed the old evils to reassert themselves. Often when claims against either of these cities for condemnation of land were deemed invalid by the local authorities, creditors rushed to ask the legislature's intervention to allow the claims. On principle, local authorities resisted such legislative action, and the resistance intensified when the legislature created Commissioners of the Funded Debt and Sinking Fund to hold all of the assets of San Francisco City and County, to pass upon all claims,<sup>98</sup>

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farmers against the railroads. This and the remaining volumes of the "wheat trilogy" were as stinging a social commentary in its day as Steinbeck's *The Grapes of Wrath* was in a later era.

To facilitate the building of the transcontinental railroad, the state legislature made a grant of state lands to the railroad, gave it a right of way through Sacramento, and promised to pay \$10,000 for every mile completed. Additionally, the legislature authorized San Francisco to subscribe large sums to the railroads' stock. 7 H. BANCROFT, *supra* note 10, at 555-59, 594 n.1, 598. In reaction, such stock subscriptions were forbidden under the 1879 constitution in article IV, section 31 (now CAL. CONST. art. XVI, §§ 16, 17). Gifts also are forbidden.

See also Orsi, *The Octopus Reconsidered: The Southern Pacific and Agricultural Modernization in California*, 54 CAL. HIST. Q. 197 (1975).

95. See 7 H. BANCROFT, *supra* note 10, at 532 n.46, 545-47 for brief biographies.

96. See 6 H. BANCROFT, *supra* note 10, at 321-25.

97. In December, 1849, San Francisco had its first disastrous fire, with a loss estimated at \$1 million. Principally affected were cloth structures, largely occupied by gamblers. On May 4, 1850, there was an even more serious blaze, affecting warehouses, with losses of \$30 million. On June 14, 1850, there was yet another fire, which stimulated some preventive measures: fire limits were established, tents, rags, and other easily flammable materials were banned, and redwood was brought in from San Mateo County for rebuilding. These and subsequent fires brought brick buildings and iron window and door shutters into use. J. ROYCE, *supra* note 1, at 303-06.

98. 1851 Cal. Stats., ch. 88, at 387; 1855 Cal. Stats., ch. 219, at 285.

and to fund the indebtedness. Surprisingly, there was wholesale rejection of claims, and the wrath of creditors was then felt.<sup>99</sup> Both in San Francisco and Sacramento there was insistent demand from all quarters that the power of cities and counties to incur indebtedness be curbed to avoid such situations.<sup>100</sup>

#### D. "The Chinese Must Go"

In the turbulent days of 1878, with the public mood aggravated by an economic depression, a self-schooled charismatic drayman, Denis Kearney, raised a battle-cry on the San Francisco sandlots: "The Chinese must go!" In the race to complete the transcontinental railroad, Irish laborers had dominated the crews building west from Council Bluffs. The labor demands of mines and agriculture had made manpower scarce in California during railroad building years, so thousands of Chinese laborers were imported to build eastward across the mountains.<sup>101</sup> Once the railroad was completed, some Chinese turned to agriculture and small business. By 1876 there were 70,000 Chinese in California, over one-fourth of them in San Francisco.<sup>102</sup> The Burlingame Treaty of 1868 between the United States and the Empire of China permitted increased immigration.<sup>103</sup>

From the very beginning, both Chinese and Mexicans—including *Californios* who were citizens—were outcast competitors in the "diggings." In 1850 a Foreign Miners' License Law was passed, imposing a fee of twenty dollars a month upon noncitizens working in the mines.<sup>104</sup> Far from exceptional, the discrimination found in the diggings was symptomatic of the attitudes in much of the new state.

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99. The commissioners knocked \$2,059,000 of claims down to \$322,000, for which bonds were issued at 6% per annum, due in 1875. J. ROYCE, *supra* note 1, at 340.

100. Deficit spending was curbed by the constitution of 1879, article XI, section 18 (now CAL. CONST. art. XVI, § 18).

101. See A HISTORY OF THE CHINESE IN CALIFORNIA: A SYLLABUS (T. Chinn ed. 1969) [hereinafter cited as CHINESE IN CALIFORNIA].

102. *Id.* at 21.

103. See *id.* at 26. In 1880, the Burlingame Treaty, July 28, 1868, 16 Stat. 739 (1868), T.S. No. 48, was amended to give the United States the right "to regulate, limit, or suspend such coming or residence, but may not absolutely prohibit it." The Act of May 6, 1882, ch. 126, 22 Stats. 58, suspended immigration of Chinese laborers for ten years, and the suspension was renewed, over protests. This was the situation at the time of the overthrow of the Chinese empire.

104. This was repealed, but restored in 1855. The fee was reduced, then graduated upward for each subsequent year. This was declared unconstitutional in 1870, but this income provided a substantial part of the state's revenues during the intervening years. J. ROSKE, *supra* note 6, at 246; 7 H. BANCROFT, *supra* note 10, at 336-37 & n.3.



In 1855, a passenger tax of fifty dollars a head was imposed upon steamship companies landing immigrants not eligible for citizenship.<sup>105</sup> There was also local official harassment. For example, the Chinese were singled out for enforcement of an otherwise valid ordinance respecting laundries, which was invalidated in the famous case of *Yick Wo v. Hopkins*.<sup>106</sup>

A Workingmans' Party was organized by Kearney in San Francisco on October 5, 1877.<sup>107</sup> It gained membership in Oakland, Los Angeles, and other cities, but there it did not have the same extremist overtones. He spoke with revolutionary fervor and invective to cheering crowds of workingmen and the unemployed, making such suggestions as: (1) fifty thousand workmen should arm themselves with muskets and drive the Chinese into the bay; (2) property in California be redistributed to those who did not get their rightful share; (3) the monopolies be destroyed; and (4) the rich be taxed so much that it would make the accumulation of wealth impossible.<sup>108</sup>

This caldron of economic, social, and political turmoil included the Grangers, members of the Patrons of Husbandry who were organizing nationally. With farmers throughout California joining,<sup>109</sup> their immediate targets were the railroads' abuses. In Contra Costa County the Grangers built their own terminal at which to load grain directly on ships, thus avoiding the railroad charges entirely. The Grangers in California favored government control of railroads, steamship lines, and of public utilities generally.<sup>110</sup> They urged that monopolies be curbed, and that official corruption, extravagance, and waste be eliminated.

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105. 1855 Cal. Stats., ch. 153, at 194; 7 H. BANCROFT, *supra* note 10, at 337.

106. 118 U.S. 356 (1885). The federal and state courts eventually struck down such passenger cases. *Henderson v. Mayor of New York*, 92 U.S. 259 (1875); *State v. S.S. Constitution*, 42 Cal. 578 (1872).

107. 7 H. BANCROFT, *supra* note 10, at 354-55. Regarding the party platform, see *id.* at 356 n.29. See also R. ROSKE, *supra* note 6, at 383; J. CAUGHEY, *supra* note 11, at 330.

108. See Shumsky, *San Francisco's Workingmen Respond to the Modern City*, 55 CAL. HIST. Q. 46 (1976).

109. 7 H. BANCROFT, *supra* note 10, at 65 n.16. At the first annual meeting in San Jose in 1873, 104 Granges from twenty-four counties were represented. The Grangers opened their own bank in San Francisco.

110. The power of a state legislature to control grain elevators in the public interest was ratified by the Supreme Court in *Munn v. Illinois*, 94 U.S. 113 (1876).

To break the monopoly the railroads had on grain shipments, the Granges erected their own cooperative deep water terminal at Port Costa, on Carquinez Straits, and in 1880 they loaded ninety ships. HISTORY OF CONTRA COSTA COUNTY 231, 415 (1882). A Grange had been organized at Antioch as early as 1864. *Id.* at 491.

They organized a cooperative Grangers' bank in San Francisco. They favored a primary election law to curb the control of political parties. They supported some programs proposed by the Workingman's Party, such as an eight-hour day on public works, direct election of United States senators, the vice-president, and the president, and curtailment of the pardoning power of the governor. Women were active in the Grangers, and there was some sentiment for women's suffrage. Although such proposals were in advance of their time, some came to fruition in the 1879 constitutional convention, while others blossomed in the progressive constitutional and statutory reforms of 1911-1913.

### III. The New Constitution of 1879 and Subsequent Retailoring

#### A. The Convention

Under intense pressures for change and reform, the legislature of 1876 set an election to decide whether to call a constitutional convention. The popular vote was favorable, and a bill signed March 31, 1878 mandated the election of delegates to the convention.<sup>111</sup> To a greater extent than the California Constitution of 1849, at the 1879 convention numerous committees, some working at cross-purposes, produced a patchwork of compromises providing something for everyone.<sup>112</sup> The constitution of 1879 was adopted by the electorate by a narrow margin.<sup>113</sup>

The history of the 1879 constitution is one of repeated amendment over the last seventy-seven years. In the June 8, 1976 election the voters substantially completed the piecemeal adoption of a constitution based upon the work of the Constitutional Revision Commission. This revision is so complete that to refer to the present text as the 1879 constitution is incongruous. Since the new text was adopted in segments, it is impossible to assign any single year to the current edition. This article adopts the designation of 1976 for this new constitution, honoring the Bicentennial.

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111. For thumbnail biographies of the delegates, see 7 H. BANCROFT, *supra* note 10, at 402-06.

112. See DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION (J. Young ed. 1880). The constitution and attending documents are found in the California State Archives, 1020 "O" Street, Sacramento.

113. The 1879 constitution was adopted by a margin of slightly over 10,000 votes statewide. The Workingmans' Party took credit for its passage, but in San Francisco and Alameda counties, strongholds of the Party, the vote favored rejection.

## B. Basic Reform by the 1879 Constitution: End of Special Legislation

Article IV, section twenty-five of the 1879 constitution expressly prohibited thirty-two kinds of special legislation. A thirty-third direction provided that the legislature should act by general laws whenever they could be made applicable. This relieved the legislature of the burden of considering a host of special bills and cut off the opportunities for corruption that were attendant. The 1976 constitution states simply, in article IV, section sixteen: "(a) All laws of a general nature have uniform operation; (b) A local or special statute is invalid in any case if a general statute can be made applicable." These subsections speak in terms of consequences rather than in prohibition of legislative action. Such generalities again open the door to abuse. In practice, however, there have been few recent instances in which the legislature has not been able to find sufficiently plausible distinctions to support classifications that in effect limit the application of a statute to given circumstances which are in themselves special.

## C. Immigration

Article XIX of the 1879 constitution gave the legislature broad power to control aliens present in the state, to prevent any corporation from employing any Chinese or Mongolians, to discourage the immigration of aliens ineligible for citizenship, and to empower cities and counties to remove Chinese from their boundaries. It made void all contracts for the employment of Chinese labor, providing penalties for the importation of such laborers. Of course, the federal government has the paramount right to govern such international matters, and it did intervene through a treaty temporarily curtailing Chinese immigration.<sup>114</sup> Although superseded in the main, article XIX was not repealed until 1953.

Under the auspices of the constitution of 1879, aliens were prohibited from holding agricultural land in California by the Alien

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114. See note 103 *supra*. By treaty in 1901 the exclusion was made permanent. This was followed by California legislation to the same effect. At the time of the repeal of the Chinese Exclusion Act in 1943, there were 78,000 Chinese in the United States, of which 80% were foreign born. CHINESE IN CALIFORNIA, *supra* note 101, at 28. The problem exemplified by the treatment of the immigrant Chinese is a recurring one in American history, which has seen wave after wave of immigrant unskilled laborers. Each has been disdained by the last, no matter how recent was his own assimilation. See generally J. MICHENER, CENTENNIAL (1974).

Property Act of 1920.<sup>115</sup> Although aimed primarily at the Japanese, who were industriously increasing their agricultural holdings, it was held not to violate treaty rights in the absence of a reciprocal right in Americans to hold such lands in Japan. However, a Japanese child born in California was a citizen of the United States, so the act was circumvented when Japanese holdings were transferred to or created in the children and the alien parent became guardian. Provisions of the act prohibiting such guardianships were held invalid.<sup>116</sup> The 1976 constitution, article I, section twenty, now provides that "[n]on-citizens shall have the same property rights as citizens."

#### D. The Railroad Commission

The statutory Railroad Commission established under the 1849 constitution was entirely ineffective. The constitution of 1879 provided that there should be three commissioners elected by districts. The commission had power to establish binding rates, to impose uniform accounting, and to hear and determine complaints against railroad and transportation companies. Such companies were forbidden to give free or discounted passes to any public official, and receipt of passes by any officer, except by a railroad commissioner, was declared to work a forfeiture of his office. All railroad, canal, and other transportation companies were declared common carriers subject to regulation. Their officers and employees were forbidden to be interested, directly or indirectly, in furnishing other companies with materials or supplies, or to be in the business of transporting freight by common carriers, except to own stock in such shippers.<sup>117</sup> While these provisions were designed to permit the commission to bring the railroads under control, the railroads' political power continued. In the meantime, new utilities demanded attention; those which supplied water, gas, electricity, and communications became more important with higher standards of living and new technology. In response, article XII, section twenty-two of the 1879 constitution was revised in 1911. The composition of the commission was changed, the terms of the commissioners were fixed at six years, and the prohibitions against conflicts of interest were strengthened. No longer limited to transportation, the commission's jurisdiction

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115. 1913 Cal. Stats., ch. 113, at 206. It was superseded by an initiative measure passed Nov. 2, 1921. 1921 Cal. Stats., at lxxxvii. This statute was upheld in *Mott v. Cline*, 200 Cal. 434, 253 P. 718 (1927) but later repealed. Alien Land Law Repeal (Proposition 13), 1955 Cal. Stats., ch. 316, at 767, *as amended*, 1955 Cal. Stats., ch. 1550, at 2831.

116. *Estate of Yano*, 188 Cal. 645, 206 P. 781 (1922).

117. CAL. CONST. art. XII, § 22 (1879).

was extended by section twenty-three to public utilities generally, and the legislature was permitted to confer other powers on it. Legislative, executive, and judicial functions were united under the constitutional provision. The commission establishes rates, sets conditions for services, enforces its determinations, and even fixes the compensation to be paid in eminent domain proceedings condemning any public utility.<sup>118</sup> Provisions were made for the commission's regulation of utilities operated in any county or incorporated city or town.<sup>119</sup> Consistent with the enlargement of jurisdiction conferred, the name of the commission eventually was changed to the Public Utilities Commission in 1946. The commission establishes its own procedures.<sup>120</sup> The members of the commission now are appointed by the governor, subject to confirmation by a majority of the entire membership of the senate. They are subject to removal for dereliction of duty, incompetency, or corruption by a vote of two-thirds of the entire membership of both the state assembly and the senate.<sup>121</sup>

In the 1879 constitution, article XI, section nineteen<sup>122</sup> loosened the grip of private utilities upon municipalities by permitting the cities to provide their own utilities. Many have done so, and some have condemned the properties of private utilities. The huge water and power system of Los Angeles, San Francisco's Hetch Hetchy water system and municipal railway, bus lines such as in Santa Monica, and a host of other facilities have been provided by cities throughout the state.<sup>123</sup>

### E. The Judiciary

Since 1879, article VI has been extensively revised, and because the legal profession generally knows the article's permutations, not all details are described here. Article VI, section nineteen provides that no judge shall draw his monthly salary if any cause in his court has been

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118. CAL. CONST. art. XII, § 5.

119. CAL. CONST. art. XII, § 23 (1914). *But see* CAL. CONST. art. XII, § 8.

120. CAL. CONST. art. XII, § 2.

121. CAL. CONST. art. XII, § 1.

122. CAL. CONST. art. XI, § 9.

123. *See* STATE CONTROLLER, ANNUAL REPORT OF FINANCIAL TRANSACTIONS CONCERNING CITIES OF CALIFORNIA (1974-75). Water utilities were operated by 242 cities; airports by 52; transportation systems by 38; electric systems by 22; harbors by 12; gas systems by 3. Other enterprises included hospitals by 7; cemeteries by 23; parking districts by 57; and sewer districts by 57. The provision of water to the city of San Francisco through the Hetch Hetchy system and the water and power system of Los Angeles were the most ambitious and extensive. *See* Kahrl, *The Politics of California Water, 1900-1927*, 55 CAL. HIST. Q. 2 (1976).

submitted for the period of ninety days and has remained undecided. All decisions of the supreme court and the courts of appeal must be in writing and the grounds of decision must be stated.<sup>124</sup>

Article VI, section nine of the 1879 constitution provided that the legislature should have no power to grant a leave of absence to any judicial officer, and that any such officer who absented himself from the state for more than sixty consecutive days should be deemed to have forfeited his office.<sup>125</sup> Here we find one of many instances where a constitutional provision was generated by a specific abuse. A justice of the California Supreme Court secured a leave of absence and went to another state where he ran unsuccessfully for the United States Senate. Before his return, an interim justice was appointed. The other two members of the court were evenly divided regarding the legality of this appointment. Upon the return of the *de jure* justice, he broke the tie in a related case by voting the enabling legislation unconstitutional.

Under the 1879 constitution, as originally written, the legislature might remove any justice or judge of a court of record by a concurrent resolution of both houses of the legislature. This would have permitted arbitrary political removals, so the section was amended to provide a hearing.<sup>126</sup> Judges nonetheless were subject to impeachment, as they still are under the 1976 constitution.<sup>127</sup> Impeachment proceedings have been rare. Instead, the discipline of judges has been effectively provided by the Commission on Judicial Performance, which receives complaints, conducts hearings, and recommends to the supreme court the action to be taken, if any.<sup>128</sup> The public has direct access to this commission, and the ability to secure action on justified complaints should enhance public trust in the judiciary. Except in some unusual or extreme case, this makes impeachment proceedings unlikely.

## F. Jury Trial

The 1879 constitution provided that a verdict could be reached in a civil case with the concurrence of nine members of the twelve-

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124. CAL. CONST. art. VI, §§ 14, 19.

125. 7 H. BANCROFT, *supra* note 10, at 221. The section was repealed by the electorate on Nov. 8, 1966.

126. CAL. CONST. art. VI, § 10 (1879).

127. CAL. CONST. art. IV, § 18(b). Judge James H. Hardy was impeached in 1862, on the charge that he openly supported the Confederacy. Found guilty, he was suspended for six months by the senate. Con. Res. 48, 1862 Cal. Stats., at 613. Forty years ago the impeachment of Judge Carlos W. Hardy was sought unsuccessfully.

128. CAL. CONST. art. VI, § 8.

person jury.<sup>129</sup> This provision was bitterly denounced as an abrogation of fundamental rights. Today there is continuing agitation for curtailing or abolishing the jury in civil cases. Presently in California, a jury trial may be waived by consent of both the parties and counsel in open court in a criminal case and by mere consent of the parties in a civil case. In misdemeanor and civil cases, the jury may consist of less than twelve persons by consent of the parties in open court under the 1976 constitution.<sup>130</sup>

### G. Women's Suffrage

There was much debate over women's suffrage in the 1879 constitutional convention. Some argued that participation of women was necessary if politics were to be purged of corruption; others argued that putting women into politics would sully their nobility.<sup>131</sup> In 1878, the "Susan B. Anthony Amendment" for women's suffrage failed in Congress. The fight was renewed by Alice Paul in 1896, and by that time liberal midwesterners had flocked into California, particularly southern California. A California historian wrote:

In southern California, these midwesterners made the region Protestant in morality and outlook and gave the area a distinct populist tinge. Southern Californians were more likely to favor prohibition or even women's suffrage. In 1896, southern California approved giving women the ballot, only to see foreign-born, Catholic San Francisco voters defeat it.<sup>132</sup>

In 1911 the voters deleted the restriction of suffrage to males contained in the 1879 constitution, article II, section one, thereby giving California women the right to vote. In 1920, the Nineteenth Amendment to the United States Constitution was ratified, providing that the right to vote should not be abridged by the United States or any state on account of sex. It should be noted that long before the growing awareness of women's rights nationally, the delegates to the 1879 constitutional convention provided in reference to the University of California: "No person shall be debarred admission to any of the collegiate departments of the University on account of sex."<sup>133</sup> Likewise, the 1879 constitution also declared: "No person shall, on account of sex, be disqualified

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129. CAL. CONST. art. I, § 7 (1879). In 1928 the section was amended. CAL. CONST. art. I, § 16.

130. CAL. CONST. art. I, § 16.

131. See Cheyney, *It All Began in Wyoming*, 24 AM. HERITAGE 62 (April, 1973).

132. R. ROSKE, *supra* note 6, at 419.

133. CAL. CONST. art. IX, § 9.

from entering any lawful business, vocation or profession."<sup>134</sup> The constitution of 1976 adds a prohibition against discrimination in employment because of sex, race, creed, color, or national or ethnic origin.<sup>135</sup>

## H. Land Reform

Attempting to break the hold of corporations—particularly the railroads—upon land, the 1879 constitution provided that no corporation could hold real estate unnecessary for the conduct of its business for more than five years.<sup>136</sup> As to lands within its power of disposal, the legislature was to grant lands suitable for cultivation only to actual settlers, and then not in excess of 320 acres.<sup>137</sup> A general declaration of policy was made that conformed to the platforms of the parties that had brought about the 1879 constitutional convention: "The holding of large tracts of land, uncultivated and unimproved, by individuals or corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property."<sup>138</sup>

Examples of the objects of such a prohibition were range land, uncultivated and unimproved, but necessary for cattle and sheep raising, and vast areas which for want of water and the presence of alkali were unsuitable for cultivation. As discussed *infra*, taxation was one primary means of discouragement consistent with private property rights.

The constitution of 1879 recognized the necessity of water frontages and beaches, and the state was authorized to acquire them by eminent domain. Owners of the tidal lands fronting on any navigable bar, harbor, or inlet were required to afford public access. All tidelands within two miles of any incorporated city fronting on the waters of any navigable harbor, estuary, or bay used for navigation were required to be withheld from grant or sale to private parties.<sup>139</sup> These provisions, retained in the 1976 constitution, have permitted extensive grants to cities for waterfront development, subject to their use in trust for commerce, navigation, fisheries, and now recreation.

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134. CAL. CONST. art. XX, § 18 (1879).

135. CAL. CONST. art. I, § 8.

136. CAL. CONST. art. XII, § 9 (1879).

137. CAL. CONST. art. XVII, § 3 (1879).

138. CAL. CONST. art. XVII, § 2 (1879).

139. CAL. CONST. art. XV.



## I. Taxation: Concessions to Agriculture

In 1879 only ten percent of some fifty million arable acres were under cultivation and only eight million acres were enclosed. The bulk of property taxes were collected from the cultivated portion. As a concession to farmers, the constitution of 1879 exempted growing crops from taxation.<sup>140</sup> Then, striking a blow against the railroads and other large landowners, article XIII, section two, provided that land, cultivated or uncultivated, should be assessed at the same value when it was similarly situated and of the same quality. Excluding San Francisco from the computation, it was contended that small farmers paid taxes of at least \$125 million, while large landowners holding idle land or subleasing it paid only \$38 million on four times as many acres.<sup>141</sup> These new provisions were designed to reduce the inherent inequities, but the outcome was not quite what was intended. With local assessment, there were wide variations in the percentage of actual value of property that was taxed in the various counties. Inequities were quite evident in the assessment of railroad property from county to county, and the railroads litigated their tax liabilities for years. A state board of equalization was created by the 1879 constitution to deal with this situation.<sup>142</sup> The reforms of 1910 placed the entire assessment of statewide or intercounty utilities in the board,<sup>143</sup> and its powers were expanded by statute to make it effective in establishing uniform levels of assessment throughout the state.

The great majority of amendments since the 1879 constitution have been tax measures. Numerous tax exemptions have been established; special provisions have been made for taxing various species of property, banks, and corporations. Authority was lately conferred upon local governments to assess or reassess property damaged or destroyed by calamity after the lien date to which the former assessment or reassessment related.<sup>144</sup> Analysis of the detailed provisions is far beyond the scope of a general constitutional survey. The fundamental

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140. CAL. CONST. art. XIII, § 1 (1879); immature trees were included by amendment in 1894 (CAL. CONST. art. XIII, § 12¾ (1879), *as amended*, CAL. CONST. art. XIII, § 3(h)-(j).) The constitutional exemption was narrowly construed in *Miller v. County of Kern*, 137 Cal. 516, 70 P. 549 (1902), in which the court held that perennial alfalfa was not to be included under "growing crops."

141. 7 H. BANCROFT, *supra* note 10, at 383 n.14.

142. CAL. CONST. art. XIII, § 9.

143. CAL. CONST. art. XIII, § 14 (1910), *as amended*, CAL. CONST. art. XIII, § 19. County boards of supervisors also act as boards of equalization. In the larger counties, they are assisted by assessment appeals boards. CAL. CONST. art. XIII, § 16.

144. CAL. CONST. art. XIII, § 15.

principle, departed from as often as not in the constitutional tax provisions, still is: "Unless otherwise provided by this Constitution or the laws of the United States: (a) All property is taxable and shall be assessed at the same percentage of fair market value."<sup>145</sup>

#### **J. Education: The Common Schools and the University**

The constitution of 1879 increased the minimum school year from three to six months per annum, but the state school fund was assigned to support only free primary and grammar schools.<sup>146</sup> To workingmen and agrarians of the time, higher education was a luxury. The University of California was made a public trust, and funds derived from the sale of lands ceded by the United States for university purposes were available to it making post-high school education more attainable.<sup>147</sup> Aid to sectarian educational institutions was forbidden, however.<sup>148</sup> Elementary and high school education was funded by a state poll tax of not less than two dollars per annum, collected from every male inhabitant over the age of twenty-one and under sixty years of age, excepting paupers, idiots, insane persons, and Indians. The poll tax was eliminated by a 1914 amendment. In 1920 and 1924, the poll tax was again directed to be levied, but fell into disuse. The poll tax provision was repealed in 1946, long after the federal constitutional provision against poll taxes became effective with the ratification of the Twenty-fourth Amendment.

#### **K. Local Government and Development of Home Rule**

Under the 1849 constitution, a general act had been passed for the incorporation of cities. However, by 1879 nearly all California cities and towns operated under charters granted by special acts of the legislature.<sup>149</sup> Such special acts prevailed over the general laws. The individual charters followed three or four basic patterns and recited their granted powers in great detail. In the absence of such specification, a power did not exist unless otherwise conferred by general law, and a vacuum was left when there was no general law upon the sub-

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145. CAL. CONST. art. XIII, § 1(a).

146. CAL. CONST. art. IX, § 5.

147. CAL. CONST. art. IX, § 9 (1879). Regarding trusts for other educational institutions, see CAL. CONST. art. XX, § 6.

148. CAL. CONST. art. IX, § 8.

149. The 1849 constitution excepted municipal corporations from the prohibition against chartering corporations by special act. CAL. CONST. art. IV, § 31 (1849).

ject.<sup>150</sup> The 1879 constitution thereafter made such charters subject to general laws.<sup>151</sup>

As a generic collective for such powers, without individual specification, article XI, section eleven of the 1879 constitution made this general grant: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."<sup>152</sup> This provision, pro tanto, established a wide scope of municipal home rule. For the larger cities the option of a charter was reinstated by the 1879 constitution in article XI, section eight, which allowed any city having a population of 100,000 or over to adopt a charter, drafted by a board of freeholders. This section was amended thirteen times thereafter. Now a city or county of any size may adopt a charter, drafted by a charter commission, by initiative, or by the governing body.<sup>153</sup> Under this constitutional authority, any city charter may provide that the city "may make and enforce all regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters, shall be subject to general laws. . . ."

What constitutes a "municipal affair" at any given time or in any given circumstance is a judicial question.<sup>154</sup> As the state has become urban, the problems of the cities have become a state concern. On the other hand, the larger a city becomes, the greater is its representation in the state assembly and senate, thereby making it better able to advance and protect its interests when general legislation is involved.

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150. See *Low v. City of Marysville*, 5 Cal. 214 (1855).

151. CAL. CONST. art. XI, § 7 (1879).

152. The genesis of this provision is quite well established, contrary to statements in Peppin, *Municipal Home Rule in California*, 32 CALIF. L. REV. 341, 343-49 (1942). Prior to 1879, each special charter enumerated legislative powers *in extenso*. Successive charters copied the list from one or two prototypes, one of which was An Act to Provide for the Incorporation of Cities, 1850 Cal. Stats., ch. 30, at 87.

CAL. CONST. art. XI, § 11 (1879) was a general summary of such powers and others of like nature which were customarily exercised. The 1976 restatement is article XI, section 7.

153. CAL. CONST. art. XI, § 3. Under the 1879 Constitution (art. XI, §§ 6, 8) a freeholder's charter (or any amendment thereto) was first adopted locally and then presented to the legislature, which had to approve or reject it in toto. The requirement of legislative approval was thought to give a charter added status as a law of the state. In practice, such assent was given as a matter of course, and only in a few instances was any question raised. The requirement is now eliminated, and the charter, after approval by the electors, is filed with the secretary of state and thereupon becomes effective.

154. What was at one time judged to be a municipal affair may at a later time become a matter of state concern controlled by general law. *Pacific Tel. & Tel. Co. v. City & County of San Francisco*, 51 Cal. 2d 766, 336 P.2d 514 (1959).

The encouragement of municipal home rule permitted new civic undertakings such as planning and zoning, municipal housing, and municipal facilities and enterprises generally. The 1914 amendment to article XI, sections six and eight, providing that any charter city could elect to amend its charter to legislate for itself on municipal affairs, worked to expand municipal powers. But it is significant that at the same time the California Supreme Court held in *Ex Parte Daniels*<sup>155</sup> that traffic regulation was beyond local control. This began the piecemeal limitation of such home-rule powers by the courts through the use of the doctrine of state preemption of local ordinances when the legislature addressed "a matter of state-wide concern."<sup>156</sup> This article need not analyze the continual tension between state accumulation of power to deal with social problems and the tendency of local governments to jealously guard their residual powers, and the reshifting it has occasioned. It is sufficient to note that in *Bishop v. City of San Jose*<sup>157</sup> the supreme court has revamped the applicable doctrines affecting state and local jurisdictions by instituting a test of balancing interests and relaxing the preempting effect of the state's general legislation. The court held that local governments, whether chartered or not, do not lack power to legislate on matters not of a local nature, nor are they forbidden by the constitution to do so. But at the same time, the legislature is not forbidden to legislate concerning the municipal affairs of a chartered city. In the event of conflict between state and local regulations, or if the state legislature evidences the intention to preempt the field, the question becomes one of predominance or superiority as between the general law and the local ordinances and regulations. Thus, it seems that the earlier cases permitting local governments to enact ordinances or regulations that supplement general laws again are applicable.<sup>158</sup>

The shifting definitions of municipal affairs by the courts have not been the only limitations to home rule. Later constitutional provisions and statewide initiatives have withdrawn various concerns from the municipal affairs category. The reform of the judicial system eliminated police and recorder's courts, which had operated at the municipal level. Except for conducting elections for school boards, the super-

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155. *Ex parte Daniels*, 183 Cal. 636, 192 P. 442 (1920).

156. *See In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962); *Lambert v. Municipal Court*, 53 Cal. 2d 690, 349 P.2d 984, 3 Cal. Rptr. 168 (1960); *In re Porterfield*, 28 Cal. 2d 97, 168 P.2d 706 (1946); 167 A.L.R. 675 (1946).

157. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969).

158. *See, e.g., In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964).

visory power over the educational system was withdrawn from municipalities. Liquor control authority was placed in the state by constitutional amendment.<sup>159</sup>

Counties were and are regarded as administrative arms of the state government although they perform local government functions in unincorporated areas. Under the 1849 constitution, consolidated city and county governments were established by statute for San Francisco<sup>160</sup> and Sacramento.<sup>161</sup> At one time abandoned by Sacramento, city-county consolidation again has been authorized by the recent constitutional amendment allowing exclusion of some cities in that county from such a consolidation.<sup>162</sup> By constitutional amendment in 1911, counties were authorized to adopt freeholders' charters. Some items were required to be included in such charters, but in other areas, relating principally to county administration, the adopted charter provisions supersede general law.<sup>163</sup> It was impractical to require each of the fifty-eight widely diverse counties to have uniform governments.

As cities have become organized, the territorial jurisdiction of counties correspondingly has decreased, except in their state functions such as maintenance of the courts. Fighting to maintain the integrity of its administrative and public work forces, Los Angeles County undertook to develop a joint-power plan, by which the county contracts to perform municipal services (the "Lakewood Plan"). Many small cities were organized within Los Angeles County to control local land development and provide local police protection. The county now performs one or more services for every city within its boundaries, and many retain only planning and legislative functions. This "government by cooperation" has attained constitutional status. The present constitution, article XI, section eight, states: "The Legislature may provide that counties perform municipal functions at the request of cities within them. If provided by their respective charters, a county may agree with a city within it to assume and discharge specified municipal functions."

Under the constitution, any municipal corporation is authorized to establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service, or other

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159. CAL. CONST. art. XX, § 22.

160. 1856 Cal. Stats., ch. 125, at 145.

161. 1858 Cal. Stats., ch. 301, at 267.

162. CAL. CONST. art. XX, § 1.

163. CAL. CONST. art. XI, §§ 3, 4.

means of communication.<sup>164</sup> Such works may be acquired by original construction, by the purchase of existing works, or both. Originally, private companies were allowed to provide water and light within cities where there were no such public works, subject to the municipal power to control them under terms and conditions imposed by the city's organic law. The 1976 constitutional provision, article XI, section nine, does not condition the private supply of utility services upon there being no such works within the municipal corporation.<sup>165</sup> As restated in the present constitution, a municipal corporation may also furnish utility services outside its boundaries, except within the territory of another municipal corporation that furnishes the same service and does not consent to the competition.<sup>166</sup>

The influence of the platforms of parties advocating public ownership of utilities was clear in these provisions, and these goals were to be realized further in the statutory development of public utility districts of varying sorts. The powers given to the cities to provide their own services broke the existing stranglehold of private utilities on politics. Competition or the threat of it helped to keep private utility rates and services under control. Nearly all cities have utilized the conferred power, most commonly to construct and operate water systems. San Francisco developed its water, municipal railway, and airport; Oakland, its harbor and airport; Los Angeles purchased Owens Valley to acquire water rights,<sup>167</sup> built its water and power system, and its harbor and airports. City or county charters authorize their government to contract with other entities in many instances,<sup>168</sup> and by reason of its water and power operations, the City of Los Angeles is organized as a corporation in Nevada.<sup>169</sup>

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164. CAL. CONST. art. XI, § 9 (1879), *as amended*, CAL. CONST. art. XI, § 9 (1976).

165. CAL. CONST. art. XI, § 19 (1879).

166. CAL. CONST. art. XI, § 9.

167. See Los Angeles Department of Water and Power, Mayo, & Nadeau, *Los Angeles in the Owens River Valley: Was it "Rape"*, in CALIFORNIA CONTROVERSIES, *supra* note 35, at 144-68 for conflicting views concerning this stormy acquisition process, during which the city of Los Angeles bought the better part of Mono and Inyo Counties for the water rights. Such possessions made necessary California Constitution article XIII, section eleven, regarding taxation of extraterritorial properties.

168. By charter or, alternatively, by legislative authorization, counties may contract to perform municipal functions. CAL. CONST. art. XI, § 8.

169. Under NEV. REV. STATS. §§ 273.010, -.050, -.060 (1973). In effect, two or more governmental agencies may create an organization to exercise their joint powers for certain purposes or projects, or one may undertake the function for the others. Joint Powers Act, CAL. GOV'T CODE §§ 6500-14 (West 1966). As to sewage disposal, another series of sections applies: CAL. GOV'T CODE §§ 55080-93 (West 1966).

## L. Fiscal Control of Local Government

Mention has already been made of the sad state of municipal finances in the years 1849-1879, which were strained by disasters of fire and flood, and by debts built up from over-expansion, extravagance, and corruption.<sup>170</sup> Government finance was not on a pay-as-you-go basis; rather, tax anticipation warrants were issued, and San Francisco in particular sank deeper and deeper into debt.<sup>171</sup> Yet the intervention of the legislature by putting the city assets and liabilities in the hands of the sinking fund commissioners had been resented, as were other legislative intrusions into local affairs.<sup>172</sup> These problems and their attempted solutions were responsible for a number of provisions inserted in the 1879 constitution: Article XI, section twelve prohibited the legislature from levying any tax for municipal purposes, and gave this power to the cities instead;<sup>173</sup> Article XI, section thirteen prohibited the legislature from delegating authority to any special commission or private corporation to make, control, supervise, or in any way interfere with any county, city, town, or municipal improvement, money, property, or effects, or to levy taxes or perform any municipal function whatever. This provision was enacted to prevent future state agencies or functionaries like the sinking fund commissioners from taking over. During the rise of state administrative agencies this section has required considerable construction by the supreme court, and it has been effectively neutralized.<sup>174</sup> In the 1976 revision of this pro-

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170. See notes 66, 97-100 and accompanying text *supra*.

171. In the period 1851-55, San Francisco was issuing tax anticipation warrants which sold at fifty cents on the dollar. The taxes received did not keep up with liabilities, and in addition to liabilities of \$1,959,000 in 1855, there was a deficit of \$840,000. J. ROYCE, *supra* note 1, at 336, 340.

172. See 1851 Cal. Stats., ch. 88, at 387; 1855 Cal. Stats., ch. 219, at 285. Other legislative intrusions into administration which were resented included the establishment of a state inspector of flour (1852 Cal. Stats., ch. 57, at 129; 1853 Cal. Stats., ch. 174, at 272), an inspector of beef and pork (1856 Cal. Stats., ch. 151, at 232; 1860 Cal. Stats., ch. 146, at 116), and the harbor commissioners (1874 Cal. Stats., ch. 659, at 910).

173. CAL. CONST. art. XI, § 12 (1879), *as amended*, CAL. CONST. art. XIII, § 24. The legislature is forbidden to impose taxes for local purposes, but may authorize local governments to do so. Some invalidations under this restriction: *Fatjo v. Pfister*, 117 Cal. 83, 48 P. 1012 (1897) (nullifying probate fee imposed for county purposes); *McCabe v. Carpenter*, 102 Cal. 469, 36 P. 836 (1894) (voiding tax rate fixed by county superintendent of schools); *San Francisco v. Liverpool, L & C, Ins. Co.*, 74 Cal. 113, 15 P. 380 (1887) (nullifying tax on insurance premiums for benefit of the county).

174. See, e.g., *In re Bonds of Madera Irrigation Dist.*, 92 Cal. 296, 28 P. 272 (1891) (classic statement of legislative power to create functional districts and important in the development of California administration).

vision a considerable substantive change has been made: no such delegations of authority are to be made to any *private* person.<sup>175</sup> Thus, the state administrative agencies can now constitutionally be empowered to intervene.

Addressing other abuses, the 1879 constitution, article IV, sections thirty-one and thirty-two, provided that the legislature should have no power to authorize public officers to make gifts of public funds, *i.e.*, to pay claims for which there was no valid consideration or express authority in law, or to subscribe to the stock of railroad or other companies. These sections also prohibited the allowance of extra compensation to any public officer or contractor after his services had been rendered or the contract performed.<sup>176</sup> The initial impact of the prohibition against gifts was lessened gradually by judicial construction, to the extent that there was no unlawful "gift" if a public purpose was discerned, and the consideration required did not necessarily have to be legal. The consistency of this interpretation was disturbed in one important area. The legislature had granted tidelands to cities for over seventy years, to be held in trust for public purposes. The issue of whether such grants were limited by the prohibition of sections thirty-one and thirty-two never arose until the City of Long Beach derived oil revenues from the granted lands which the state was eager to tap. There was consternation when the California Supreme Court strictly applied the prohibition against gifts to municipal corporations, notwithstanding the public purposes served by such cities, and the long established practice of the Legislature in making such grants.<sup>177</sup>

Over the years, numerous amendments were made to these two constitutional sections to permit various exceptions. Article XXVI of the 1976 constitution, providing for subvention of motor vehicle revenues to cities and counties, is one such constitutional exception.<sup>178</sup>

City insolvencies of the type which crippled San Francisco in 1876 and threatened New York City in 1976 arose because current expenses and debt services exceeded the income in each year; deficit spending compounded the difficulties. Tax anticipation warrants were

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175. CAL. CONST. art. XI, § 11.

176. CAL. CONST. art. XI, § 10 (1976). As to the legislature, see CAL. CONST. art. XVI, § 6.

177. *Mallon v. City of Long Beach*, 44 Cal. 2d 199, 282 P.2d 481 (1955).

178. See *City of Los Angeles v. Riley*, 6 Cal. 2d 621, 59 P.2d 137 (1936); *County of Los Angeles v. Riley*, 6 Cal. 2d 625, 59 P.2d 139 (1936). The provisions discussed have been retained in CAL. CONST. art. XI, § 10 and art. XVI, § 6.



issued, but the taxes when collected were insufficient to redeem them. Municipal insolvency was a burning issue in the 1879 constitutional convention and resulted in the adoption of the pay-as-you-go principle, expressed in the 1879 constitution in article XI, section eighteen, now article XVI, section 18. This principle is applicable to counties, cities, towns, townships, boards of education, and school districts; none of which shall incur any indebtedness in any manner for any purpose exceeding in any year the income and revenue received for such year. The extent of that treatment is, of course, determined by the tax limit imposed by charter or general law and the extent of other revenues such as those derived from licenses and proprietary enterprises. One important exception is that such indebtedness or liability may be incurred by assent of two-thirds of the qualified electors at an election called for this purpose. Other requirements are that the maturity of bonds evidencing such indebtedness shall not exceed forty years, and that a provision be made for a tax to be levied sufficient to pay the interest and to constitute a sinking fund for payment at maturity. If the indebtedness is incurred to repair, replace, or reconstruct public school buildings legally determined to be structurally unsafe for school use, such indebtedness may be authorized by a simple majority of the electors voting at the election.

The literal application of these provisions to all expenditures, contractual or otherwise, was relaxed by a judicial interpretation to the effect that to "incur a liability" implied a conscious choice. Hence, liabilities "imposed by law" are not limited by the provision.<sup>179</sup> Impressed by the needs of the schools that were consistently failing to secure the required two-thirds majority in bond elections, the California Supreme Court held that such a requirement violated the Fourteenth Amendment by denying equal protection of the laws and violating the privileges and immunities clauses.<sup>180</sup> The United States Supreme Court rejected this interpretation in *Gordon v. Lance*,<sup>181</sup> in which it upheld an identical two-thirds requirement in the West Virginia constitution.

In the state constitution itself, there are other two-thirds vote requirements. Appropriations from the general fund of the state, except when appropriated for the public schools, are void unless passed in each house by a two-thirds roll call vote entered in the journal, as now

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179. *County of Los Angeles v. Byram*, 36 Cal. 2d 694, 227 P.2d 4 (1951); *American Co. v. City of Lakeport*, 220 Cal. 548, 32 P.2d 622 (1934); *Federal Constr. Co. v. Wold*, 30 Cal. App. 360, 158 P. 340 (1916).

180. *Westbrook v. Mihaly*, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839, *vacated and remanded*, 403 U.S. 915, *cert. denied*, 403 U.S. 922 (1970).

181. *Gordon v. Lance*, 403 U.S. 1 (1970).

provided in article IV, section twelve. As is clear, financing of the school system continues to have its perplexities and preferential constitutional treatment. This was further evidenced in the judicial nudge given toward complete state financing in *Serrano v. Priest*.<sup>182</sup>

By a new section of the 1976 constitution, article XIII, section twenty, "[t]he Legislature may provide maximum property tax rates and bonding limits for local governments." In this era of inflation, taxpayers' groups are urging such limitations upon property taxation, and initiative measures for that purpose are being circulated.

#### M. Nonpartisan Local Government Offices and Judiciary

The municipal reforms made in San Francisco following the activities of the Committees of Vigilance were accomplished by nonpartisan organization. To combat the Kearneyites in electing delegates to the 1879 constitutional convention, there was a nonpartisan union of elements of the major parties as well as a group of independents. In the thirty years that followed, the frequent intervention of independents in local elections had a beneficial effect on the caliber of candidates for local office when nominated by local party conventions. After 1896, when freeholders' charter provisions became organic law in municipal affairs, charter provisions boldly made municipal offices nonpartisan in various cities. Furthering the same trend, the progressive reforms of 1911 purposefully broke the still tight control of party organizations by the Direct Primary Law,<sup>183</sup> which made city, county, and school district offices nonpartisan. Judicial independence was secured when judicial offices were made nonpartisan by the constitutional amendment of 1926.<sup>184</sup>

The practice of "cross-filing," whereby a candidate could be voted on for state office by more than one party, was used until relatively recently in California. But as California gained increasing national importance and the traditional parties jockeyed for power, this practice was abandoned. Another factor encouraging nonpartisanship is that for many years California's educational system, civic organizations, school support groups, patriotic societies, and service clubs, have given the citizenry alternative sources of information and influence on state and

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182. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); 41 A.L.R.3d 1187 (1971).

183. 1911 Cal. Stats., ch. 398, §§ 4, 6, 7.

184. Direct Primary Law, 1913 Cal. Stats., ch. 690, at 1379. At the general election of Nov. 2, 1926, a constitutional amendment was passed making judicial offices nonpartisan. CAL. CONST. art. II, § 2¾ (1926).

local government. There is no question that, by and large, California cities and counties have been able to develop a high quality of professional public service, freed from partisan politics and notable for its extensive civil service systems.<sup>185</sup> The California judiciary has been freed for the most part from the political influences that take up the time, money, and attention of judges in many other jurisdictions. Initial appointments to vacancies may be attended by political considerations, but once on the bench, the California state jurist has achieved independence. The political nonpartisanship of local government and the judiciary must be one of the most important constitutional developments in California since 1879.

#### IV. Present Operation of the California Constitution: Some Major Topics

##### A. Administrative Boards and Commissions

The growth in population, the proliferation of demands upon government, and the highly organized, technological nature of our age combine to make administration of the manifold affairs of government something that is beyond the capabilities of executive and legislative bodies.<sup>186</sup> A parallel administrative government, only indirectly responsible to the public, has expanded and slipped out of the firm control of the executive or legislative branch that called it into being. Legal literature has scrutinized, and court decisions have alternately praised and condemned the typical administrative agency's mixture of rulemaking, enforcement, and adjudicatory powers.<sup>187</sup> The doctrine of separation of powers was stated in the 1879 constitution and restated in that of 1976 as follows: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."<sup>188</sup> However, the 1879 version of this declaration stated that only the powers of the state were so divided. Thus, the separation of powers doctrine was held inapplicable to local govern-

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185. The key to politics in California is the notable emphasis upon the man rather than the party; this is a conclusion based on fifty years of observation. *See also* McHenry, *The Pattern of California Politics*, 1 W. POL. SCI. Q. 44-53 (1948).

186. *See* Mr. Justice Jackson's dissenting opinion in *F.T.C. v. Rubberoid Co.*, 343 U.S. 470, 487-88 (1951); 1 K. DAVIS, *ADMINISTRATIVE LAW TEXT* §§ 1.02, -.04, -.05, -.08 (1972).

187. For an excellent concise essay, *see* MASON, *CONSTITUTION OF THE STATE OF CALIFORNIA* 404-08 (1946).

188. CAL. CONST. art. III, § 3.

ments.<sup>189</sup> Presumably, the 1976 restatement was not intended to alter this rule. Beginning with the 1879 constitution, administrative bodies without the limitation were expressly provided for in the constitution itself; for example, the State Board of Equalization<sup>190</sup> and the Railroad Commission.<sup>191</sup> The 1976 constitution explicitly permits the establishment of many state administrative agencies,<sup>192</sup> based primarily upon definitive statutes. The Public Utilities Commission is given power to establish its own procedures, subject to statutory and due process considerations<sup>193</sup> and the legislature has "plenary power, unlimited by the other provisions of this constitution, . . . to confer additional authority and jurisdiction upon the commission. . . ."<sup>194</sup> Similarly, the legislature is vested with plenary power, unlimited by any other provision of the constitution, to create and enforce a complete system of workmen's compensation, conforming to the constitutional specifications of purpose.<sup>195</sup> The Department of Alcoholic Beverage Control has broad powers in licensing purveyors and in policing them,<sup>196</sup> but there is a detailed constitutional procedure established for its operations.

There are some one hundred state administrative agencies not named in the constitution. There seems to be a practical compromise, in that adjudications made in the course of their operation are regarded as if they were those of inferior courts, subject to appellate review by the regular judiciary. Such an adjudicatory function and the rulemaking process require due process, and all of these operations are governed by the state Administrative Procedure Act.<sup>197</sup> Local administrative processes are subject to similar review under the California Code of Civil Procedure, section 1094.5.<sup>198</sup> In the general election of 1942,

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189. *Cf.* *People v. Provines*, 34 Cal. 520 (1868); *Mariposa County v. Merced Irrigation Dist.*, 32 Cal. 2d 467, 196 P.2d 920 (1848).

190. CAL. CONST. art. XIII, § 9 (1879).

191. CAL. CONST. art. XII, § 22 (1879).

192. These include the Fish and Game Commission; the Regents of the University of California; the Commission on Judicial Appointments; the Commission on Judicial Performance; the State Bar of California; Hastings College of the Law, the first law school west of the Mississippi, established in 1878; the state and local boards of education; the Public Utilities Commission; the state and county boards of equalization; the Industrial Accident Commission; the Department of Alcoholic Beverage Control; the governing body of the state college system; the State Personnel Board; the Department of Social Welfare; and the Department of Mental Hygiene. The State Athletic Commission, established in the 1879 constitution, has been relegated to statutory status.

193. CAL. CONST. art. XII, § 2.

194. CAL. CONST. art. XII, § 5.

195. CAL. CONST. art. XX, § 21.

196. CAL. CONST. art. XX, § 22.

197. *See generally* CAL. GOV'T CODE §§ 11370-74.

198. *Strumsky v. San Diego County Employment Retirement Ass'n*, 11 Cal. 3d 28,

senate constitutional amendment number eight, Proposition Sixteen, which would have accorded finality to administrative determinations, was defeated.

### B. State Control of Unappropriated Waters

The lifeblood of California is water. The most salutary constitutional development since 1879 was the 1928 amendment of the provisions now found in article XIV, section three, in which the state of California announced its dominion and control over all unappropriated waters. The rights of water users were to be fixed and apportioned on the basis of beneficial use, rather than by common law concepts of the rights of riparian owners.<sup>199</sup> The constitutional provision was sustained, despite strong opposition.<sup>200</sup>

In the development of the West, the entrepreneurs who controlled the water controlled the land. In California, the change from stock raising to agriculture depended upon irrigation and therefore on the maintenance of subterranean water levels to permit necessary pumping. The urban state and its industrial backbone require ever-increasing water supplies. The building of huge dams, such as Hoover Dam, have assured constant water supplies, and also provided the electricity essential to develop the state.<sup>201</sup> The right to use water from the Colorado River, in which other riparian states and the Republic of Mexico are also interested, has engendered much litigation in which

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520 P.2d 29, 112 Cal. Rptr. 805 (1974) (with undefined scope). Basic cases are: *Laisne v. State Bd. of Optometry*, 19 Cal. 2d 831, 123 P.2d 457 (1942); *Drummev v. State Bd. of Funeral Directors*, 13 Cal. 2d 75, 87 P.2d 848 (1939) (from which developed "certiorarified mandamus"); *Standard Oil Co. v. State Bd. of Equalization*, 6 Cal. 2d 557, 59 P.2d 119 (1936). See CAL. CODE CIV. PROC. § 1094.5 (West 1973).

199. The extent of a riparian landowner's rights to water depends on whether under all the circumstances his use is reasonable and consistent with the rights of his fellow riparians. If the water available is in excess of the riparian owner's reasonable requirements, the state has control of that excess, and it may make it subject to the appropriation of others who can beneficially use it. Cf. *Stevinson Water Dist. v. Roduner*, 36 Cal. 2d 264, 223 P.2d 209 (1950); CAL. WATER CODE §§ 1240-57 (West 1976).

200. *Meridian Ltd. v. City & County of San Francisco*, 13 Cal. 2d 424, 90 P.2d 537 (1939); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 3 Cal. 2d 489, 45 P.2d 972 (1935); *Peabody v. City of Vallejo*, 2 Cal. 2d 351, 40 P.2d 486 (1935); *Gin S. Chow v. City of Santa Barbara*, 217 Cal. 673, 22 P.2d 5 (1933). The adoption of this article was prompted by *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 252 P. 607 (1926) (discussing the police power of the state).

The effect of the control of water resources upon land use and economic development in the West is strikingly portrayed in fiction in J. MICHENER, *CENTENNIAL* (1974); for California, see E. TREADWELL, *THE CATTLE KING* 62-95 (1931).

201. On Hoover Dam and the Boulder Canyon project, see J. CAUGHEY, *supra* note 11, at 466-68.

California has sought to protect its prior beneficial use against the claim of later-developing users.<sup>202</sup> The state's control of unappropriated waters has made possible the development of the Central Valley Project and the controversial State Water Plan, whereby water has been taken from the northern slopes of the Sierra Nevada Mountains and conveyed south of the Tehachapi Mountains with water allocations all along the route.<sup>203</sup>

### C. Court Reform and Administration of Justice

The salutary reform accomplished when the judiciary was made nonpartisan has already been noted. A Commission on Judicial Appointments<sup>204</sup> has served impartially in passing on appointments to the appellate and supreme courts, and the Commission on Judicial Performance<sup>205</sup> has been effective in the careful consideration of complaints against judges and justices, ranging from allegations of serious misbehavior, to suggestions of mental or physical incapacity, and to deprecations of disappointed attorneys or litigants. Hearings are held, and recommendations for discipline or dismissal<sup>206</sup> are made to and acted upon by the supreme court. In practice, this has overshadowed the still-existing provisions permitting impeachment<sup>207</sup> or recall.<sup>208</sup>

The structure of the judiciary set up under the 1879 constitution underwent various changes. Those of greatest significance were the creation of the district courts of appeal, now courts of appeal, in 1905,<sup>209</sup> and the reordering of the inferior court structure in 1949, whereby municipal courts were firmly established, replacing most of the justice courts, the local police courts, and the recorder's courts.<sup>210</sup> In 1966, the jurisdiction of the courts of appeal was

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202. See, e.g., *Arizona v. California*, 283 U.S. 423 (1931) (a fight to enjoin the Hoover Dam project).

203. On the Central Valley Project, see J. CAUGHEY, *supra* note 11, at 468-70. On the State Water Project (Feather River), see R. ROSKE, *supra* note 6, at 573-74. On the bond issue of \$1.750 million passed at the Nov. 1960 general election, see *THE RUMBLE OF CALIFORNIA POLITICS 1848-1970*, at 343 (R. Delmatier ed. 1970).

204. CAL. CONST. art. VI, § 7.

205. CAL. CONST. art. VI, § 8.

206. CAL. CONST. art. VI, §§ 8, 18.

207. CAL. CONST. art. IV, § 18(b).

208. CAL. CONST. art. XXIII.

209. The (district) courts of appeal came into being under a 1904 amendment to the 1879 constitution. CAL. CONST. art. VI, § 4.

210. See Traynor, *Rising Standards of Courts and Judges*, 40 CAL. STATE BAR J. 677, 688 (1965).

extended to all cases in which superior courts have original jurisdiction, and the supreme court was given mandatory appellate jurisdiction only when judgment of death has been pronounced. The effect of the 1966 amendments was to give the supreme court discretion to determine what causes it would hear. The supreme court, courts of appeal, superior courts, and their judges were given original jurisdiction in habeas corpus proceedings, and proceedings for extraordinary relief such as mandamus, certiorari, and prohibition. Superior courts have original jurisdiction in all cases except those given by statute to other trial courts, and have appellate jurisdiction in causes prescribed by statute that arise in municipal and justice courts in their counties. In addition, the legislature may permit appellate courts to take evidence and make findings of fact when a jury trial is waived or is not a matter of right.<sup>211</sup>

The pressures of the caseloads emphasize the necessity of viewing the trial as a means for ascertainment of truth. Even laymen have come to deplore the "technicalities of the law" that seemingly prolong the trial process unnecessarily. Hence, in the 1976 constitution we find the significant declaration:

No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to a matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.<sup>212</sup>

This commendable direction to courts that immaterial error can be ignored furthers justice, but the courts refuse to apply it in criminal cases where constitutional rights are involved.<sup>213</sup>

In British courts, comments of the judges upon the evidence and expressions in general upon the cause are normal procedure. Our state constitution provides: "The court may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause."<sup>214</sup> Jurors often welcome such assistance from the impartial, experienced

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211. CAL. CONST. art. VI, §§ 10-12.

212. CAL. CONST. art. VI, § 13.

213. As originally adopted this was limited to criminal cases. For current application, see *In re Winchester*, 53 Cal. 2d 528, 348 P.2d 904, 2 Cal. Rptr. 296, *cert. denied*, 363 U.S. 852 (1960); *People v. Elliot*, 54 Cal. 2d 498, 354 P.2d 225, 6 Cal. Rptr. 753 (1960). See also Note, *Harmless Constitutional Error*, 20 STAN. L. REV. 83 (1967).

214. CAL. CONST. art. VI, § 10.

observer, the judge. But counsel contend that it is unfair that the weight of the judge's influence upon the jury be thrown in the balance, even though the jury is to be instructed that it is the exclusive arbiter of the facts if the judge exercises his constitutional power to comment. As a result, some trial judges are reluctant to comment. One thing seems clear under the cases: the judge's power is not limited to mere summation of the evidence on either side of a cause. The cases display a variety of results from strict to liberal application of this section.<sup>215</sup>

Although not mentioned in the California constitution, the duty to provide counsel for the defense of indigent prisoners in a criminal case is a matter of federal constitutional dimensions. Such provisions for assignment and payment of counsel are at present statutory, although the office of public defender is included in some county charters.<sup>216</sup>

The creation of the Judicial Council by the constitutional amendment adopted on November 2, 1926, now found in article VI, sections six, fifteen and eighteen, subdivision (e), has as its stated purpose the improvement of the administration of justice. Under its power to adopt rules for court administration, practice, and procedure, large segments of court procedure are determined by the council when not inconsistent with statute. The chief justice is to expedite judicial business and equalize the work of judges. The council makes recommendations annually to the legislature and the governor, and judges are required to report to the Judicial Council, as the chief justice directs, concerning the condition of their courts. In addition, the chief justice may assign any judge to another court, but if it is a court of lower jurisdiction,

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215. *E.g.*, *People v. Warren*, 16 Cal. 2d 103, 104 P.2d 1024 (1940); *People v. Patubo*, 9 Cal. 2d 537, 72 P.2d 270 (1937); 113 A.L.R. 1303 (1937); *People v. Davis*, 260 Cal. App. 2d 211, 17 Cal. Rptr. 35, *cert. denied*, 393 U.S. 890 (1968); *People v. Wright*, 199 Cal. App. 2d 30, 18 Cal. Rptr. 243 (1962); *People ex rel. Dept. of Public Works v. Murray*, 172 Cal. App. 2d 219, 342 P.2d 485 (1959); *People v. Mason*, 72 Cal. App. 2d 699, 165 P.2d 481 (1946).

216. Defense of indigents is constitutionally required. CAL. CONST. art. I, §§ 14, 15. *See Ligda v. Superior Court of Solano County*, 5 Cal. App. 3d 811, 85 Cal. Rptr. 744 (1970). *See generally* David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753 (1961). By statute, the public defender may be called upon to defend the indigent. CAL. GOV'T CODE §§ 27700-11 (West 1976); CAL. PENAL CODE, §§ 987, -.2, -.3 (West 1976).

As early as January 1855, the Superior Court of Contra Costa County fixed the fees to be allowed counsel assigned to defend indigents. Defending a felony punishable by death netted the attorney fifty dollars; defending a felony not punishable by death, twenty-five dollars; and defending a misdemeanor, fifteen dollars. J. MUNRO-FRASER, *HISTORY OF CONTRA COSTA COUNTY* 223 (1882).



the judge must consent. A retired judge who consents may be assigned to any court. The judge assignment system has provided flexibility in meeting the demands of backed-up caseloads, has allowed reassignment in causes where a judge is disqualified to sit, and has provided assistance to courts where it is needed because of vacations, illness, or the existence of judicial vacancies yet unfilled.

The judicial council includes, in addition to the chief justice, one justice of the supreme court, three from the courts of appeal, five judges of superior courts, three judges of municipal courts, and two judges of justice courts, each appointed by the chief justice for a two-year term. In addition, there are four members from the state bar appointed by its board of governors for two-year terms, and one member of each house of the legislature appointed by that house.

#### D. Public Housing System

Article XXXIV of the 1976 constitution was added as an initiative measure in the election of November 7, 1950. It provides that no low-rent housing project shall thereafter be developed, constructed, or acquired in any manner by any state public body unless a majority of the qualified electors of the entity where it is proposed to develop, construct, or acquire the same, vote in favor thereof.<sup>217</sup> While the creation of housing authorities designed to meet the housing needs of low-income persons was held to be a municipal affair at an early date,<sup>218</sup> there was no sustained effort in this direction until their institution under state law. Called into being by the action of local authorities, the property concerned was removed from the tax rolls, although all municipal facilities continued to be furnished at local expense. At first such authorities were considered to be quasi-departments of the sponsoring entities. Then it was determined that, once called into being, such agencies were independent and not subject to local control.<sup>219</sup> Hence, in selection of projects and sites, they were in a position to cast unappreciated fiscal burdens upon the local government. These and similar factors were responsible for the above-mentioned constitutional provision whereby fiscal arrangements can be made by contract to reimburse the host entity for the public costs such a housing development entails. In recent years the claim has been made that such a requirement should be rejected, the thesis being that

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217. *But see* James v. Valtierra, 402 U.S. 137 (1971).

218. *Willmon v. Powell*, 91 Cal. App. 1, 266 P. 1029 (1928).

219. *Housing Authority v. City of Los Angeles*, 38 Cal. 2d 853, 243 P.2d 515 (1952). A housing authority has jurisdiction over the selection of sites to be improved. *Riggin v. Dockweiler*, 15 Cal. 2d 651, 104 P.2d 367 (1940).

such provisions condemn low-income persons to substandard housing in decaying cities.

### E. Motor Vehicle Revenue Subventions

The state collects motor vehicle license fees partially in lieu of personal property taxes upon vehicles that would otherwise be due the jurisdiction of their situs.<sup>220</sup> Collection by the state and then apportionment to such jurisdictions was to the advantage of local governments because the mobility of vehicles had allowed many to escape taxation. But since the legislature was forbidden to impose any tax for municipal purposes,<sup>221</sup> such a system required constitutional authority. The same constitutional problem arose when it was proposed to allocate a portion of motor vehicle "gas taxes" to cities and counties for highway purposes, where the local streets and highways were taken into the highway system, and local governments were contracting to maintain them. In addition, the prohibition against gifts to municipalities was involved.<sup>222</sup> The necessary constitutional amendments were made to enable such procedures,<sup>223</sup> and these have been carried forward and expanded in the 1976 constitution.<sup>224</sup>

For a generation, all attempts to make use of gas tax revenues for purposes other than the maintenance and construction of the state highway system were defeated. On June 26, 1974, motor vehicle revenue purposes were broadly defined in a new section of the constitution to include public mass transit guideways and the maintenance and cost of mass transit power systems, but excluding maintenance and operating costs of mass transit passenger facilities, vehicles, equipment, and services.<sup>225</sup> The legislature is required to provide for the allocation of revenues, to be used for all the purposes specified, in such a way as to ensure the continuance of the existing statutory allocation formulas. Any future statutory revision of the formulas shall give

equal consideration to the transportation needs of all areas of the state and all segments of the population consistent with the orderly achievement of the adopted local, regional, and statewide goals for ground transportation in local general plans . . . and the California Transportation Plan.<sup>226</sup>

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220. CAL. REV. & TAX CODE §§ 10751, 10752, 10758, 11004.5, 1105.6 (West 1976).

221. See note 173 *supra*.

222. CAL. CONST. art. IV, § 31 (1879), *as amended*, CAL. CONST. art. XVI, § 6.

223. CAL. CONST. art. XXVI (1938).

224. CAL. CONST. art. XXVI.

225. CAL. CONST. art. XXVI, § 1(b).

226. CAL. CONST. art. XXVI, § 3.

It should be noted that the expenditures for mass transit, except for research and planning, must be authorized by a majority vote in the county or counties within which the revenues are to be expended.<sup>227</sup> Thus the electors can make a choice whether to have the extra monies expended upon the authorized mass transit facilities or to continue their own road programs without supplementary state funds. The legislature may authorize the revenues approved for allocation to be used for debt service on voter-approved bonds issued for the specified purposes, and up to twenty-five percent allocated for public street and highway purposes may be used for debt service on voter-approved bonds issued for such purposes.<sup>228</sup>

#### **F. The State Civil Service: The Merit System**

Pursuant to the establishment of nonpartisan local government, the merit system in local civil service was conscientiously administered and raised the quality of public service in local government to high levels of stability and efficiency. This encouraged the establishment of state civil service under the merit system by amendment of the 1879 constitution in 1934.<sup>229</sup> Except for offices provided for in the constitution, every officer and employee of the state of California is included within the system. Appointment and promotion are required to be made under a general system based on merit ascertained by competitive examination. Several exemptions are specified,<sup>230</sup> but attempts to further enlarge the exempted category were defeated by the voters at a recent election.<sup>231</sup> The constitution allows the legislature to provide preferences for veterans and their widows.<sup>232</sup> The system is administered by a State Personnel Board of five members, each appointed to a ten-year term by the governor, and confirmed by the state senate.

#### **G. Recall of Public Officers, the Initiative, and the Referendum**

##### *1. Recall*

Recall, the power of electors to remove an elected officer, has been stated in and implemented by the constitution since 1911, when

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227. CAL. CONST. art. XXVI, § 4.

228. CAL. CONST. art. XXVI, § 5.

229. CAL. CONST. art. XXIV.

230. CAL. CONST. art. XXIV, § 4.

231. Proposition 7, to exempt personnel of the Post-Secondary Education Committee, defeated at the June 4, 1974 election. 1974 Cal. Stats., ch. 6, at 3576.

232. CAL. CONST. art. XXIV, § 6.

it was adopted as part of the program of progressive reforms of that year.<sup>233</sup> The 1976 constitution eliminated a statement of procedural details, and they are now relegated to statute.<sup>234</sup> The legislature also is required to provide for the recall of local officers, although city and county charters frequently carry their own provisions or expressly adopt the state law. The recall has not been extended by the constitution to appointive officers, but to do so might be of practical consequence in view of the proliferation of governmental agencies whose officials are not directly responsible to the people. While the recall has been employed frequently in cities, the high percentage of signatures required to initiate a recall of an official elected statewide appears to have discouraged attempts to use the procedure for such purpose.

An interesting quasi-recall procedure is involved in the reaffirmation of the appointment of an incumbent justice of the supreme court or court of appeals. If a justice does not resign he must offer himself for re-election periodically, but only his name appears on the ballot. Under the present constitutional provision, the voter then votes yes or no on whether he shall be retained.<sup>235</sup> No justice has ever been unseated under this system, although in recent elections the voters voting no were in the majority in certain counties. This constitutional provision also allows such a system to apply to judges of superior courts, by vote of the electors within the county, but the option has not been exercised to date.

## 2. *The Initiative and Referendum*

Another of the 1911 constitutional innovations was the amendment providing:

The legislative power of this State shall be vested in a senate and assembly . . . but the people reserve to themselves the power to propose laws and amendments to the constitution, and to adopt or reject the same, at the polls independent of the legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature.<sup>236</sup>

In the 1976 constitution this is shortened to read: "The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves

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233. CAL. CONST. art. XXIII (1976).

234. CAL. ELEC. CODE §§ 23600-54 (West 1976).

235. CAL. CONST. art. VI, § 16.

236. CAL. CONST. art. IV, § 1 (1911). For debate concerning the system, see *How Shall the People Rule in an Era of Entrenched Organization?*, in CALIFORNIA CONTROVERSIES, *supra* note 35, at 120-42.

the powers of initiative and referendum." The procedures are set forth now in article IV, sections twenty-two through twenty-six.

These powers of initiative and referendum have been exercised freely and widely, probably more so than in any other state. Perhaps half of the constitutional amendments since 1911 have been made by initiative. While the 1976 constitution permits the legislature to amend or repeal referendum statutes, an adopted initiative measure may only be repealed by another initiative or referendum approving a repealing statute unless, of course, the initiative measure itself contains a clause permitting amendment or repeal without the voters' approval.<sup>237</sup> A referendum may not be had as to statutes or parts of statutes that are emergency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for the usual current expenses of the state.<sup>238</sup>

#### H. Alcoholic Beverage Control

In repealing the Eighteenth Amendment to the United States Constitution, the Twenty-first Amendment prohibited the transportation or importation of intoxicating liquors into any state in violation of the laws thereof. In 1932, an amendment to the California Constitution provided that the legislature should have the exclusive right and power, subject to the revenue laws of the United States, to license and regulate the manufacture, sale, purchase, possession, and transportation of alcoholic beverages within the state, as well as their importation and exportation, subject to federal control of interstate and foreign commerce. The legislature is forbidden to make the state or any agency thereof a manufacturer or seller of alcoholic beverages.<sup>239</sup>

These provisions and their statutory implementation ended over eighty years of local option and local control of the liquor traffic. It thereby transferred the pressures for licensing and control of establishments to the state, ridding localities of corrupt influences in local politics. The state thereafter became the object of those influences and the liquor lobby has been one of the most potent in state politics.<sup>240</sup> Many cities that formerly had barred liquor establishments found to their chagrin that they were licensed by the state to the full number

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237. CAL. CONST. art. IV, § 24(c).

238. CAL. CONST. art. IV, § 23(a).

239. CAL. CONST. art. XX, § 22.

240. This was demonstrated by the considerable influence of Arthur (Artie) Samish from 1930 to 1953. In 1953 he was sent to prison for income tax evasion. R. ROSKE, *supra* note 6, at 533-34.

permitted by law within their boundaries.<sup>241</sup> Local governments fell heir to the extensive police problems created by the liquor traffic. When the cities urged some legislative relief, the concession was that ninety percent of the license fees locally generated should go to the local governments.<sup>242</sup> This was, of course, an incentive to permit more licensing. The mounting social and fiscal problems arising from alcoholism in California may suggest the imminence of further constitutional limitations on alcoholic beverages.

### I. Workmen's Compensation

Another of the progressive reforms of 1911 accomplished by constitutional amendment was the provision giving the legislature unlimited plenary power to establish a system of workmen's compensation.<sup>243</sup> The amendment defined the complete system to be established, which was to relieve workers and those dependent upon them for support from the consequences of any death or injury incurred by the workers in the course of their employment, regardless of the fault of any party. The program was to make full provision for securing safety in places of employment and provide full medical, surgical, hospital, and other remedial treatment necessary to cure the effects of such injury. There was provision for insurance coverage to pay or furnish compensation, including the establishment and maintenance of a State Compensation Insurance Fund, and full power was to vest in an administrative body for determining any dispute under such legislation, including the payment of workmen's compensation. The administration was designed to accomplish substantial justice in all cases expeditiously and without incumbrance of any character.

The legislature was vested with plenary power to provide for settlement of any disputes under such legislation through the courts, by arbitration, or by an industrial accident commission either separately or in combination, and to fix the method and manner of trial of any such dispute and the rules of evidence. The decisions of any such tribunal are of course subject to review by the appellate courts of the state. If an employee without dependents dies in the course of employment the legislature has power to provide that the death benefits otherwise payable may be used to pay extra compensation for injuries to other employees of the employer. As amendments were made to

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241. This was the case in San Marino.

242. CAL. BUS. & PROF. CODE § 25761 (West 1976).

243. CAL. CONST. art. XX, § 21.

the constitutional provision, the existing industrial accident commission and state compensation insurance fund were ratified and confirmed in their creation and existence.

While similar laws are now in effect in many states, California was a pioneer in establishing the system that the section declares expressly "to be the social public policy of this State, binding upon all departments of the State government." The theory that injuries and death sustained in the course of employment, regardless of fault, were part of the social cost of the enterprise, and should be absorbed in the cost of doing business, has been vindicated by the practical operation of the system. It is a radical departure from when an employee might have to sue for compensation for his injuries through several tiers of courts, often being frustrated by the assumption of risk and fellow-servant rules of the common law.

#### **J. Public Relief and Welfare**

In 1938, a constitutional amendment was passed, giving the legislature plenary power to provide for the administration of any constitutional provision or laws enacted concerning the administration of relief.<sup>244</sup> The legislature may modify, transfer, or enlarge the powers vested in any state agency or officer concerned with the administration of relief. The relief of hardship or destitution, whether resulting from unemployment or other causes, may be effected directly by the state government or through the counties of the state. In the latter case, the state may give aid to the counties or provide for reimbursement. By amendment of the provisions in 1962, the state is authorized to cooperate to such extent and in such manner as may be provided by law whenever the United States or any officer or agency thereof shall provide pensions or other aid for the aged.

Pursuant to these provisions, the administration of public relief and welfare now involves a major portion of the public revenues. Various federal programs not only require the use of matching funds but establish the terms and conditions under which the state and its agencies can operate.

#### **V. The Zenith of Constitutional Reform: The Progressive Years, and the Amendments of 1911**

The constitution of 1849 and that of 1879 were the results of crises in governmental relations. In many respects, the reforms sought

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244. CAL. CONST. art. XVI, § 11.

in the adoption of the 1879 constitution were not accomplished, although the restriction of special legislation and the enlarged responsibilities permitted cities were major improvements. Immigration was still an economic and social problem to be solved. Influence of corporations and particularly the railroads affected the politics of the state. Election chicanery was prevalent. Another scandal was generated by graft and corruption in San Francisco. San Franciscans, aroused to civic consciousness and civic action by the tragedy of the 1906 earthquake and fire, saw poorly constructed city buildings as direct evidence of graft and corruption. Boss Abe Ruef was sent to prison after a trial in which district attorney Heney was shot. Support of the Union Pacific Railroad helped to elect James N. Bennett as governor in 1908. In his regime, the legislature did pass a direct primary law as an informed electorate began to contest machine control.

A new voice then was heard in California politics: Hiram Johnson was elected governor and began holding meetings in Santa Barbara and San Francisco to begin drafting constitutional amendments and legislation. It seemed as if solutions to all of the problems that were unresolved for thirty years found their way into the proposals, and the Californians who had rebuilt San Francisco were zealous for social advances as well. For once they joined with the traditionally more liberal southern Californians who had elected Johnson and he prevailed over the power of the railroad in his election. Then followed what Theodore Roosevelt described as "the most comprehensive program of constructive legislation ever passed at a single session of an American legislature."<sup>245</sup>

In this session there were twenty-three constitutional amendments and a wide range of statutes passed, and it was followed by an extra session. As previously indicated, this era beginning in 1911 was the zenith of constitutional developments from 1879 to date.

Constitutional amendments approved by the electors: (1) established a new Railroad Commission, with adequate powers to control the railroads and other utilities;<sup>246</sup> (2) granted to municipalities the right to own and operate their own utilities;<sup>247</sup> (3) granted suffrage to women;<sup>248</sup> (4) provided for the initiative, referendum, and recall;<sup>249</sup>

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245. See J. CAUGHEY, *supra* note 11, at 411.

246. 1911 Cal. Stats., ch. 60, at 2164; 1911 Cal. Stats., ch. 69, at 2181.

247. 1911 Cal. Stats., ch. 67, at 2180.

248. 1911 Cal. Stats., ch. 16, at 1548. This amendment to article II, section 1 of the 1879 constitution excluded natives of China, and required that electors should be



(5) provided for impeachment of officers;<sup>250</sup> (6) provided for the State Board of Equalization and local boards of equalization;<sup>251</sup> (7) fixed the jurisdiction of courts;<sup>252</sup> (8) provided for officers of the courts and supreme court;<sup>253</sup> (9) expanded the charter powers available to combined cities and counties;<sup>254</sup> (10) provided that counties might become chartered;<sup>255</sup> (11) provided that any city with 3,500 population might adopt a freeholders' charter, removing the 100,000 population limitation;<sup>256</sup> (12) established workmen's compensation and the Industrial Accident Commission;<sup>257</sup> (13) fixed terms of public officers, not otherwise established by law;<sup>258</sup> (14) provided for the selection of textbooks by the state board of education, and their free distribution to pupils;<sup>259</sup> (15) banned free railroad passes for officials;<sup>260</sup> (16) provided that judgments should not be set aside for procedural errors where no miscarriage of justice results;<sup>261</sup> (17) prohibited discrimination in transportation rates and charges;<sup>262</sup> (18) provided for the deposit of funds of

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able to read the constitution and write their own names. The 1976 constitution, in article II, sections 2-4, is much less restrictive.

249. 1911 Cal. Stats., ch. 22, at 1655 (initiative and referendum); 1911 Cal. Stats., ch. 47, at 2032 (recall). The recall was regarded as a particularly radical innovation. 1911 Cal. Stats., ch. 30, at 122, provided for recall of officers of county, township, or supervisorial districts.

250. 1911 Cal. Stats., ch. 70, at 2182 (also provided that an officer impeached was additionally subject to criminal charges).

251. 1911 Cal. Stats., ch. 335, at 530.

252. 1911 Cal. Stats., ch. 56, at 2161.

253. 1911 Cal. Stats., ch. 57, at 2162.

254. 1911 Cal. Stats., ch. 61, at 2166.

255. 1911 Cal. Stats., ch. 64, at 2168.

256. 1911 Cal. Stats., ch. 65, at 2175.

257. 1911 Cal. Stats., ch. 66, at 2179. As originally enacted, it was a simple declaration that the legislature may provide for compensation to be paid by the employer irrespective of fault. The present version has been greatly expanded.

258. 1911 Cal. Stats., ch. 63, at 2167. The term of an appointive office was set for a maximum of four years, if not otherwise specified by law. Those serving in civil service and under municipal corporation provisions were exempted. 1911 Cal. Stats., ch. 62, at 2167 (biennial legislative sessions).

259. 1911 Cal. Stats., ch. 68, at 2180, provided for the State Board of Education to adopt texts which would be used for at least four years and provided at cost. This was later amended to provide for free distribution. 1913 Cal. Stats., ch. 4, § 1, at 2; *id.*, ch. 8, § 1, at 11. An initial appropriation of \$500,000 was made. 1913 Cal. Stats., ch. 552, § 1, at 934.

260. This did not apply to members of the Railroad Commission, who presumably needed them in the conduct of their duties. 1911 Cal. Stats., ch. 69, at 2181.

261. 1911 Cal. Stats., ch. 36, at 1798. The section, in its original form, related to judgments in criminal cases only.

262. 1911 Cal. Stats., ch. 14, § 17(2), at 27. Rates were to be justified to the Railroad Commission and discrimination among both places and persons was to be prohibited.

the state and local governments in banks, prescribing that they be secured;<sup>263</sup> and made other changes not noted here. In addition, there was a tremendous statutory record; only the first legislature in 1850 had such an extensive program. The Direct Primary Act was amended and strengthened, and, as we have noticed, provided for nonpartisan local, school, and judicial offices;<sup>264</sup> extensive amendments were made to the Bank Act of 1909, to control and supervise banking;<sup>265</sup> there was a statute to control child labor;<sup>266</sup> provision was made for a juvenile court;<sup>267</sup> a Public Utilities Act was passed, in amplification of the constitutional provisions concerning the Railroad Commission;<sup>268</sup> reserves were required of banks;<sup>269</sup> a Building and Loan Commission and regulations for building and loan associations were established;<sup>270</sup> and the Alien Land Law of 1913 was adopted.<sup>271</sup> A proposal did not pass in 1915 to make all state offices nonpartisan. The environment was not neglected: The California Redwood Park was established;<sup>272</sup> it was made unlawful to discharge sewage into streams;<sup>273</sup> a fish and game preservation fund was established;<sup>274</sup> the killing of wild turkeys was prohibited;<sup>275</sup> and the legislature by joint resolution requested the Congress to appropriate \$1 million for the improvement of Yosemite National Park.<sup>276</sup>

In the 1911 Legislature, several joint resolutions were passed, including a resolution to approve the income tax amendment to the United States Constitution, and a resolution to request that Congress designate San Francisco as the site of an exposition to celebrate the opening of the Panama Canal.

This was unquestionably the high water mark of constitutional and social progress in California since 1849. There was a decade of high-minded uncorrupted government. Now, sixty years later, other states

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263. 1911 Cal. Stats., ch. 289, at 482.

264. 1911 Cal. Stats., ch. 17, at 66; more extensively revised in 1913 Cal. Stats., ch. 690, at 1379.

265. 1911 Cal. Stats., ch. 495, at 1008.

266. 1911 Cal. Stats., ch. 456, at 910.

267. 1911 Cal. Stats., ch. 48, at 63; *id.*, ch. 369, at 658.

268. 1911 Cal. Stats., ch. 14, at 18-64.

269. 1911 Cal. Stats., ch. 2, at 2.

270. 1911 Cal. Stats., ch. 4, at 6.

271. 1913 Cal. Stats., ch. 113, at 206.

272. 1911 Cal. Stats., ch. 705, at 1379.

273. 1911 Cal. Stats., ch. 339, at 565.

274. 1911 Cal. Stats., ch. 400, at 807.

275. 1911 Cal. Stats., ch. 156, at 322.

276. 1911 Cal. Stats., ch. 4, at 253.

are just beginning to adopt some of the California advances made during this period.

Important substantive constitutional changes have been made since, as previously noted, for example, the constitutional control of unappropriated water by the state under the police power.<sup>277</sup> Revision of constitutional provisions for state senator representation, mandated by the "one man, one vote" determination under the federal Constitution, changed the entire course of California politics, since rural counties no longer could resist the populous centers and the political power center shifted south of the Tehachipi mountains.<sup>278</sup> Other more recent revisions were the reform of the inferior court system;<sup>279</sup> the creation of the Judicial Council;<sup>280</sup> organization of the integrated state bar;<sup>281</sup> the expansion of the welfare systems under the plenary authority of the legislature;<sup>282</sup> and the provision for expansion of public transportation systems,<sup>283</sup> all of which are individual developments of great significance.

## VI. The State Constitution and Influences of the California Supreme Court and the Federal Government

No history of the California Constitution would be complete without a discussion of the role played and decisions made by the California Supreme Court. This is an expansive subject, complete in itself, which cannot be explored here beyond notice of a few recent decisions. Since the United States Supreme Court has been active in many fields with decisions touching upon states, the California Supreme Court has been impelled to give much attention to these determinations, especially in the field of criminal law.

Article I, section twenty-four of the 1976 constitution states significantly: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Perhaps be-

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277. See notes 199-203 and accompanying text *supra*.

278. See *Legislature of California v. Reinecke*, 9 Cal. 3d 166, 507 P.2d 626, 107 Cal. Rptr. 18 (1973), *as modified*, 10 Cal. 3d 396, 516 P.2d 6, 110 Cal. Rptr. 718 (1974). See also *Silver v. Brown*, 63 Cal. 2d 270, 405 P.2d 132, 46 Cal. Rptr. 308 (1965), *petitions denied*, 63 Cal. 2d 841, 409 P.2d 689, 48 Cal. Rptr. 609 (1966).

279. CAL. GOV'T CODE §§ 71001-96 (West 1976); CAL. CONST. art. VI, § 11.

280. CAL. CONST. art. VI, §§ 6, 18(e).

281. CAL. CONST. art. VI, § 9; CAL. BUS. & PROF. CODE §§ 6000-6180.14 (West 1976).

282. CAL. CONST. art. XVI, §§ 10, 11, 13.

283. CAL. CONST. art. XXVI, §§ 1, 2, 4.

cause of this provision, our supreme court has assumed an activist role. It felt no constitutional restraint in taking on the task of legislative reapportionment when the legislature failed to act.<sup>284</sup> Although the matter was in the cognizance of the legislature, the court rejected the sovereign immunity of the state and its agencies,<sup>285</sup> forcing an indignant legislature to reassert its powers in a comprehensive statute.<sup>286</sup> In *People v. Anderson*,<sup>287</sup> the court held the death penalty was "cruel or unusual punishment" under the California Constitution, only to have the electorate respond in 1972 by the constitutional amendment, article I, section twenty-seven stating that such punishment was not in contravention of any provision of the California Constitution, and reinstating statutes authorizing the death penalty.<sup>288</sup>

*Serrano v. Priest*<sup>289</sup> held that the state system of school finance by school districts, insofar as it permitted inequalities of educational opportunities between the districts because of differences in their taxing capacity for school support, violated the constitutional provision<sup>290</sup> against granting privileges to a class of citizens not granted on the same terms to all citizens. Decided upon appeal from general demurrer, trial is still proceeding. There is no significant evidence that a movement is afoot to change the system, itself set up by the constitution.<sup>291</sup>

The practical interaction between the state and federal government on many programs provides another important input into the operation of the California Constitution. For example, the federal subvention system forces state compliance with federal administrative conditions in order to receive federal allocations, and those conditions also apply to the state's use of its own matching funds or supplements. This is most apparent in arrangements for relief. The provisions of the con-

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284. *Legislature of California v. Reinecke*, 9 Cal. 3d 166, 507 P.2d 626, 107 Cal. Rptr. 18, *as modified*, 10 Cal. 3d 396, 516 P.2d 6, 110 Cal. Rptr. 718 (1974); *Silver v. Brown*, 63 Cal. 2d 270, 405 P.2d 132, 46 Cal. Rptr. 308 (1965), *petitions denied*, 63 Cal. 2d 841, 409 P.2d 689, 48 Cal. Rptr. 609 (1966).

285. *Muskopf v. Corning Hospital Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961).

286. CAL. GOV'T CODE §§ 900 *et seq.* (West 1976). Settling a long-disputed issue, CAL. CONST. art. XI, § 12 gives the legislature authority over the presentation of claims to cities and counties.

287. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

288. CAL. PENAL CODE § 190 (West 1976).

289. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); 41 A.L.R.3d 1187 (1971).

290. CAL. CONST. art. I, § 7(b).

291. CAL. CONST. art. IX, § 6; *id.*, art. XVI, § 8.

stitution previously noted, article XVI, section eleven, authorize cooperation in respect to pensions or other aid for the aged. The state is legally free to refuse to accept such subvented funds but the pressure is great to cooperate because the citizens otherwise receive no benefits from the federal funds for which they are taxed. This whole matter is in political flux, and no resolution is immediately in sight despite measures to return some federally collected revenues to the states without any restrictions attached.

## VII. Advantages of Piecemeal Constitutional Revision

By a two-thirds roll call vote of each house of the legislature, the legislature may propose an amendment or revision of the constitution or may call a constitutional convention to revise the constitution, or may amend or withdraw its proposal.<sup>292</sup> Likewise, the electors may amend the constitution by the initiative process. There are some limitations, however. Initiative measures to amend the constitution to provide for the preparation, issuance, and sale of the bonds of the state are banned.<sup>293</sup> Likewise, the naming in an initiative of private individuals to office or corporations to a particular function is banned.<sup>294</sup> This was in reaction to the historically interesting welfare initiative which in 1939 proposed the issuance of thirty dollars of warrants each week for everyone not an employer or an employee, and naming the backers of the system as the persons to administer it.<sup>295</sup>

As the number of constitutional amendments mounted between 1879 and 1966 many efforts were made to call a constitutional convention. The legislature was disinclined to call a convention or to propose an entire constitution for adoption. It did propose certain amendments to eliminate obsolete provisions from the constitutional text. The Constitutional Revision Commission was then instituted to formulate amendments. Over a period of years it drafted a series of coordinated but piecemeal amendments.<sup>296</sup> In the main, this effort was designed

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292. CAL. CONST. art. XVIII, §§ 1, 2.

293. CAL. CONST. art. XVI, § 2.

294. CAL. CONST. art. IV, § 26.

295. Proposition 25, a constitutional amendment proposed by initiative at the general election on Nov. 3, 1938, provided for a state retirement life administration, thirty dollars every week to be given in thirty one dollar warrants to each person not an employer or employee. The warrants were redeemable for taxes. In a special election in 1939, Initiative Number 1 repeated the warrant scheme, additionally providing that warrants would be financed by a 3% income tax. These schemes were defeated.

296. See CALIFORNIA CONSTITUTION REVISION COMMISSION, PROPOSED REVISION OF THE CALIFORNIA CONSTITUTION, FINAL REPORT (1971) and interim reports.

to achieve textual coordination and simplicity rather than to make substantive changes. Thus, over a series of general elections, the existing 1976 constitution has emerged.

Practical considerations support coordinated piecemeal amendment. If the attempt to frame an entire constitution by a convention is difficult, the adoption of an entire constitution by the electorate is a practical impossibility. The 1879 constitution, as we have seen, was adopted originally by a narrow margin.<sup>297</sup> Any group of the public dissatisfied with the provisions affecting its interests may be expected to lobby and vote against the entire proposal, and therefore, cumulative dissatisfactions could defeat the whole. In amending their charters—their local constitutions—the freeholders' charter cities long ago learned this lesson. Through the piecemeal method, public attention may be focused upon specific provisions, and an appropriate response may be secured which will more accurately reflect the public will. The most obvious defect of such procedure is the possibility that piecemeal amendment may produce a disjointed and uncoordinated instrument of government. Prior to the recently adopted revisions this was the criticism applied to the complex 1879 constitution.

Those people who conceive of a constitution as a stable statement of general principles, leaving wide latitude to the action of the legislature and to the adaptive processes of the courts, were disappointed in the 1879 constitution and they will continue to be. The constitution adopted in 1879 has been amended, including the late revisions, over 300 times.<sup>298</sup> Some people oppose detail in a constitution on the ground that the legislature should provide it in statutes. Our constitutional history indicates that there have been many pressures to restrain legislative power. Reliance upon "general principles" stated in a constitution invariably demands judicial interpretation and California has deliberately valued more certain constitutional directions. Specific provisions may actually be more effective in expressing the people's constitutional will. The California experience demonstrates that constitutional rigidity can speedily be overcome if the public so desires. As the constitution is the power of attorney from the electorate to its officials, citizens cannot be faulted if they closely define the parameters of the delegation. The 1976 constitution, article II, section one, de-

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297. This was a margin of only 10,000 votes.

298. For an analysis which predates the more recent revisions, see E. ENGLEBERT & J. GUNNELLY, *STATE CONSTITUTIONAL REVISION IN CALIFORNIA* (1961); MASON, *CONSTITUTION OF THE STATE OF CALIFORNIA, ANN.* (1946), Table of Amendments Proposed, at 1383-85.

clares: "All political power is inherent in the people. Government is instituted for their protection, security and benefit, and they have the right to alter or reform it when the public good may require."

The constitutional amendment process, so frequently exercised, in reality is a recognition that the legislature and the electorate are responsive to the needs of the times. It perhaps is significant that many proposals for constitutional amendment have been originated by the legislature itself. Sometimes this may have been to forestall a popular initiative proposed on the same subject. At other times, there may have been policy decisions which the legislators thought more appropriate or less politically dangerous for the electorate itself to make. There are questions upon which the divisions of public opinion are such that the legislature cannot determine the probable consensus. An actual vote is more reliable than public opinion polls. Matters relative to taxation are particularly sensitive, and the majority of the amendments to the 1879 constitution have related to taxation.

With the reordering of sections of the constitution by the revisory amendment approved in the June 8, 1976 election, one might have concluded that the amendment process would be abated. Yet, further amendments were adopted at the general election on November 2, 1976. The excellent work done in revising the 1976 constitution is marred by some disadvantages apparent to lawyers and the courts. Simplification by rephrasing long-standing constitutional provisions makes language unsettled and invites new thrashing of old straw. After almost 100 years of usage, renumbering and relocation of provisions not only confuses the present generation of practitioners, but makes decisions interpreting those provisions nearly impossible to find.

### **VIII. Epilogue: The Constitution and the Development of California**

The foregoing discussion of the constitutions under which California has been governed from 1776 to 1976 indicates above all the state's pragmatic approach to the problems of government. The colonization of Alta California was precipitated by the Russian colonization and trapping. Two hundred years later, the Russians are still on our coasts, not taking the skins of the otter but denuding the littoral by netting thousands of tons of fish. The United States has responded, by joining other modern nations in asserting seaward jurisdiction for 200 miles. Alta California was Spanish and Mexican in its beginnings. The imprint of that era is found in the all-

important water law, in the community property system, and indeed, a good deal of our Civil Code has affinity with the Code Napoleon. The proportion of residents in California with Spanish-Mexican surnames is now as high as it was after the American immigration in 1849-1850. From 1849 to 1872, our legal proceedings and our codes were all bilingual. In election procedures we have returned to a multilingual status,<sup>299</sup> and bilingual education in our schools is increasing. Clearly the Californian in 1976 is faced with the consequences of migration, as the *Californios* were in 1846.

California remains a national leader in the field of education, exemplified by the proliferation of community and junior colleges providing extensive low-cost educational opportunities to young people from all walks of life.<sup>300</sup> Economically, California is a prodigiously successful state, especially in terms of agricultural productivity,<sup>301</sup> merchant marine shipping,<sup>302</sup> and banking.<sup>303</sup> California was one of seven states having the highest per capita income in 1975.<sup>304</sup> But 1,248,000 persons had drawn unemployment benefits during the year.<sup>305</sup>

In objective terms, it would seem that the constitution of 1879 with its amendments, and the revision of 1976, have been a sturdy framework for progress and growth in California, in relation to land, agriculture, finance, business, education, and public welfare in general. The lesson of history is that the process of constitutional amendment will continue, reflecting California's political and social imperatives. The constitution will never stop being a pragmatic and living document, a testament to the pioneer spirit of the state and its people.

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299. Federal Voting Rights Act, 42 U.S.C. § 1973.

300. See *WORLD ALMANAC AND BOOK OF FACTS* 167-91, 194-97, for relevant figures.

301. *Id.* at 134-35, 138-39, 141-43, for relevant figures.

302. *Id.* at 115.

303. *Id.* at 87.

304. *Id.* at 88.

305. *Id.* at 69.