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The California Constitutional Convention of 1878-9

I.

THE primary object of this paper is to present the leading political and economic motives actuating the members of the California constitutional convention of 1878-1879. No attempt will be made to trace the campaign made for the ratification of the new constitution by the people, nor will the author here attempt in any way to examine the workings of the constitution after it was adopted.

Several attempts had been made prior to 1878 to obtain a constitutional convention. The success of the later effort was due to a general belief in the defects of the constitution of 1849 and to special local conditions. These special conditions, moreover, deeply impressed themselves upon the new organic law.

An enumeration of the chief defects of the older constitution will be of aid.

1. The matter of taxation. The constitution of 1849 was particularly devoid of tax regulations; the legislature's power was practically unrestricted. Two quotations from the debates in the convention of 1878 will exemplify the prevailing unrest.¹ "This was the only question that was advocated in the calling of this convention It was to make taxation equal and uniform that we were sent here; and for no other purpose." "I say that this question of taxation is what has brought this convention together in a great measure. That and the Chinese

¹Debates and Proceedings, pp. 851, 852. The debates are in three volumes, with the pages numbered consecutively to 1578. Hereafter the word "Proceedings" may be omitted in footnotes.

trouble have been two great motive powers that have brought this Convention together."

Taxes were believed to bear oppressively upon the poor and the farmers.

2. On the subject of finance the old constitution was silent. The legislature might regulate at pleasure; funds and salaries were completely under their control.

3. There was no control over the legislature's relation to the public domain and the property of the state.

4. No provision had been made for separate senatorial and assembly districts, whereby the people might be represented by districts.

These four points, it can be seen, were based on a distrust of the legislature. As we shall see later, this distrust can be observed both in the debates and in the finished document. As one member said:² "It is true that there is a widespread sentiment among the people, opposed to legislation generally." This sentiment, which seems actually to have existed, was due both to some bad legislation by preceding legislatures and to skillful exaggeration by clever politicians. Commenting on the legislature under the old constitution, Bancroft says:³ "The case was this; that the whole political duty and power of the people under it was to vote into place the men who would legislate away their substance—the constitution gave them no remedy."

5. The tyranny of the corporations, especially the railroads. This argument appealed particularly to the farmers.⁴

6. The unrestricted pardoning power of the governor.

7. The incongruity of the old constitution, alleged with good reason to have been copied from the constitutions of the agricultural states, with the natural, commercial, and political condition of the country. This plea, says Bancroft,⁵ was "much exaggerated."

8. The judicial system was unsatisfactory; the courts were overcrowded and decisions were not reported.

But it is doubtful if these defects, serious as they were, would

² Debates, p. 744.

³ Works, vol. 24, p. 371. Further references to Bancroft will be to this volume of his works.

⁴ Haynes, *Third Party Movements*, p. 56.

⁵ Bancroft, p. 371.

have resulted in the calling of a convention if special and local causes had not existed. Bancroft, for instance, remarks:⁶

"At the bottom of the discontent was a cause more pregnant Along with the rather phenomenal growth of the state, there had run a reactive tendency Many of those who had esteemed themselves favorites of fortune when the tide was at flood, now found themselves stranded on barren sands but they still had the restless, aspiring, projective spirit, and were unwilling to go down to oblivion. These men believed, or affected to believe, in the efficiency of a new constitution to cure the ills from which they suffered."

Bancroft also refers⁷ to men of foreign birth, disappointed "at not finding either a fortune or political preferment for the asking." There were also the laboring and the agricultural classes, "who looked to a new constitution to lighten taxation and modify the mortgage laws." The two latter classes merit special consideration, being by far the most influential in the convention.

There had been some years prior to 1878 a strong farmers' organization in California, which elected a United States Senator in 1873.⁸ This party, known as the Independents, had been largely recruited from the Republican ranks. As a result of popular nominations by the Republican party in 1875, and the return of a large number of its members to that party, the Independent vote suffered a large decrease in that year.⁹ Following the organization in 1877 by Dennis Kearney of the Workingmen's party, to be considered shortly, many of the Independents cast their lot with the new organization.¹⁰

In 1877 and 1878 California was suffering from "hard times". This was aggravated by the collapse in mining stocks, which from a value of three hundred million dollars in 1875 had fallen to thirty million dollars in 1878. The hard times "prepared the public mind to accept any change which promised the recovery of the state from the depression into which business had been thrown."¹¹ The hard times undoubtedly resulted in throwing out of work a large number of men, who would naturally con-

⁶ Id. pp. 371, 372.

⁷ Id. p. 372.

⁸ Buck, *The Granger Movement*, p. 100.

⁹ Haynes, *Third Party Movements*, p. 64.

¹⁰ Id. p. 65.

¹¹ Bancroft, p. 372.

gregate in the larger cities. At such times agitation finds a very fertile field. But to the normal discontent of a period of idleness, for which such men were in no way responsible, was added the fact that a large number of Chinese were being employed at lower wages than the white laborers felt they could decently afford to accept. It is probable that in time the presence of the Chinese laborers would have resulted in action by the national government; but at this time it was an immediate cause of the formation of the Workingmen's party, largely instrumental in causing the convention of 1878 to be called.

II.

Dennis Kearney, a laboring man of rare personality and strength, was in California at the time. His remarkable oratorical powers gave him great influence among the workers; nor did he fail to criticize Governor Stanford and the other capitalists, particularly those employing Chinese, in the bitterest terms. By his opponents Kearney was characterized as developing into "a violent revolutionist",¹² while his friends termed him the "great and efficient apostle of the laboring classes of California."¹³ Kearney was the moving spirit in organizing the Workingmen's party, sometimes termed the "sand-lot group". Its power in San Francisco was enormous, and in some other portions of the state it was very strong. Although somewhat socialistic and communistic in their ideas, the members were on the whole moderate in their demands in the convention.

This movement was not an exclusively Californian affair. It was but a phase of the widespread feeling, especially in the western part of the country, which brought about such movements as the Grangers' party and the Greenback party, during the last quarter of the nineteenth century. Nor are such movements and efforts without real value, though their immediate results may be small and transitory. They often act, at least for a few years, as reformers of the greater parties; moreover, they give us an insight in many cases into the deeper feelings and thoughts of the great masses of the electorate. Thus it is quite probable that the California convention turned out a constitution which more

¹² Appleton's Annual Encyclopedia, 1878, p. 76.

¹³ Id. p. 530.

nearly represented the thoughts of the people of California of that day, particularly the workers and farmers, than would have been the case had not the Independent party and the Workingmen's party of California been in existence.

Strange as it may seem, there were in the Convention relatively few denunciations of the Workingmen's party either as an organization or as a principle. As there was, however, much opposition throughout the State to this movement and as a partisan organization it rapidly declined, a consideration of some of the remarks made concerning the Workingmen's movement will be of some interest.

Mr. Barnes, for instance, stated that the greater part of the militia force should be located in San Francisco, where there was the greatest need for it.¹⁴ That city was the hotbed of the Workingmen's party and the accompanying agitation. Mr. Shafter, former Speaker of the Assembly in Wisconsin and Secretary of State in Vermont, referred to the "coarseness (of language) of Kearney" and to his "virulence."¹⁵ He referred to the Workingmen in San Francisco as "a mob, utterly incapable of reason, already heated to the point of threatening the lives and property of quiet men and good citizens." At another time he said that "iguorance and violence" were undertaking to rule the state.¹⁶ Mr. Stuart, leader of the pro-Chinese element in the State, referred to "fear of the torch that is daily threatened us."¹⁷ What truth, if any, there was in the allegation of intimidation we do not know. He again refers to "a few insane foreign and alien leaders of a party in San Francisco, who are deceiving their followers, and will cause want and distress in their wake. All such upheavals and excitements are but of short life and barren of good results, and soon to be forgotten." More temperate and more logical was Mr. Winans:¹⁸ "A new party has arisen in this State. It contains many agitators, many demagogues, many men who are selfishly seeking their personal advancement. But these are the mere scum upon the surface, while beneath lies a vast seething mass of human suffering."

¹⁴ Debates, p. 731.

¹⁵ Id. p. 51.

¹⁶ Id. p. 673.

¹⁷ Id. p. 1238.

¹⁸ Id. p. 680.

As an organization what principles did this new party hold?

Kearney himself declared in 1877 that the chief reason for the organization of the party was opposition to Chinese labor.¹⁹ As many of the farmers were in sympathy with the new party, and as the Kearneyites were the primary cause of the convention's being called,²⁰ we should naturally expect to find that their views were of great importance in the debates and the framing of the new constitution. It is entirely logical, in view of the facts, to assume that the Chinese question influenced many laborers to vote for the calling of the convention and for ratification.

An examination of some of the doctrines of the party as expressed prior to the convention is interesting historically and important as showing the fundamental beliefs of many members of that body. In 1878 the Workingmen's party went on record as opposing holdings of land of over one square mile.²¹ "Our previous legislatures have abused the trust confidingly reposed in them by a misguided people, by allowing a corrupt ring of land monopolies to exist." Other resolutions declared,²² "Eight hours is a sufficient day's work for any man, and the law should make it so," and "millionaires and money monopolists must be made impossible by a proper system of taxation." A belief in compulsory common school education was expressed.²³

In 1878 a split occurred in the labor party, but the Kearneyite faction was by far the more powerful of the two factions resulting, and, so far as the author is aware, all the Workingmen delegates to the convention belonged to the Kearney group. A third labor party, of little importance, however, was the National Greenback Labor party.

The following resolutions were adopted at the Kearney convention of 1878:²⁴ "Land grabbing must be stopped. . . . Land monopoly must be restricted, and in the future prohibited. . . . Money, mortgages, and bonds must be taxed. . . . The legislator who violates his pledges given to secure his election, should be punished as a felon. . . . Chinese labor is denounced.

¹⁹ Davis, *California Political Conventions, 1849-1892*, p. 368.

²⁰ Bancroft, p. 407.

²¹ Davis, *California Political Conventions, 1849-1892*, p. 379.

²² *Id.* p. 380.

²³ *Id.* p. 381.

²⁴ Davis, *California Political Conventions, 1849-1892*, pp. 384-386.

. . . . No property valued at less than \$500 should be taxed.
 All farming lands of equal productive value should be
 equally taxed, without reference to the improvements. . . .
 Growing crops should not be taxed." They also declared for
 sessions of the legislature once in four years only, and said special
 legislation must be prohibited.²⁵

III.

The legislature had ordered a special election for delegates to the convention, as well as an election on the adoption of the new constitution. The election for delegates was held in June. The Workingmen's party had its own ticket; in most of the counties, the Democrats and the Republicans made joint nominations on a Non-Partisan ticket. The Workingmen carried the city and county of San Francisco with fifty delegates; the Non-Partisans the state with eighty-five; the Republicans had nine and the Democrats eight delegates—a total of one hundred and fifty-two.²⁶

Many of the delegates on the Workingmen's ticket belonged to other classes of society than the labor class; thus there were five merchants; five farmers; nine lawyers; one teacher; and two physicians—a total of twenty-two out of fifty.²⁷ On other tickets than the Workingmen's there were thirty farmers, for the most part elected as delegates at large; one dairyman; and one planter—a total of thirty-two representing the agricultural interests.²⁸ There were, therefore, thirty-seven men in the convention who can be said to have represented the rural communities. Deducting these men from the two sides there were forty-five members of the Workingmen's party in the convention and seventy members of other parties. The farming group held the balance of power, a fact to be remembered in considering the debates and the new constitution.

The convention met at Sacramento, September 28, 1878 and adjourned March 3, 1879. The constitution was voted for on May 7, 1879, and adopted by a vote of 77,959 to 67,134. Most of the newspapers of the state were bitterly opposed to its adoption, the San Francisco Chronicle being the only big paper

²⁵ On the workers' opposition to Chinese labor, see especially Chapter 28 in Davis.

²⁶ Bancroft, p. 374.

²⁷ Compilation from tables in Davis, pp. 390-392.

²⁸ *Supra*, n. 27.

to support it. The country districts gave heavy majorities for it, but some of the labor constituents voted against it.²⁹

The most important changes made in the new constitution centered around the power of the legislature and the position it should occupy. As previously stated, there had been much opposition to and fear of previous legislatures. As we should naturally expect, we find bitter criticisms of specific legislatures and of the theory of legislative power in the debates in the convention. The results are shown in the finished document submitted to the people for ratification.

One of the last acts of the convention was an address to the people of California, pointing out the merits of the constitution and asking that it be ratified. In this address, adopted by a vote of one hundred and three to thirty,³⁰ these statements were made as to the changes made which affected the legislature:³¹

"For many years the people of this State have been oppressed by the onerous burdens laid upon them for the support of the government, and by the many acts of special legislation permitted and practiced under the present Constitution. Its provisions have been so construed by the Courts as to shift the great burden of taxation from the wealthy and non-producing class to the labourers and producers."

"The only restriction upon a Legislature is the Constitution of the State and of the United States. It, therefore, becomes necessary that State Constitutions should contain many regulations and restrictions, which must necessarily be enlarged and extended from time to time to meet the growing demands of the sovereign people."

IV.

When we consider the Constitution itself we find that the Convention carried out very fully its expressed belief that a Constitution should contain "many regulations and restrictions" upon the legislature. Perhaps the chief positive restriction upon the legislature was the prohibition of special legislation in the future; all legislation was to be general. Some thirty-three specific restrictions were placed on the Legislature in addition to a number of general or implied restrictions.

²⁹ Bancroft, p. 407.

³⁰ Debates, p. 1524.

³¹ *Id.* p. 1522.

Previous legislatures had been but little restricted; special and local laws of all kinds had been passed, and there was much distrust of the legislators and dislike of many of the laws they had framed. Thus, Mr. Caples referred³² to "that great radical evil" of special legislation. "The records of former Legislatures show that more than two-thirds of all the time consumed had been consumed in special legislation." Mr. Larkin remarked³³ that: "Under this (new) Constitution none but general laws will be considered by the Legislature." He predicted that this would expedite business and secure better bills. Mr. White said:³⁴ "We are about to do away with special legislation. Out of seven hundred laws in these volumes there are five hundred and odd of them which are local laws." And Mr. Laine noted that³⁵ "Four-fifths of the legislation has been upon local matters." Two other remarks indicate the general feeling. Thus Mr. Hale said³⁶ that attempts at legislative control of corporations had proved abortive for fifteen years, while Mr. West said:³⁷ "I cannot say what freaks the Legislature may take."

As adopted, the Constitution provided that in thirty-three enumerated cases "the legislature shall not pass local or special laws."³⁸ Among the most important were (2) "for the punishment of crimes and misdemeanors"; (10) "for the assessment or collection of taxes"; (11) "providing for conducting elections, or designating the places of voting, except on the organization of new counties"; (15) "refunding money paid into the State Treasury"; (33) "in all other cases where a general law can be made applicable."

Interesting debates took place on the question of prohibition of the extension of state credit,³⁹ the prohibition of grants to religious societies by the Legislature and sub-divisions of the State,⁴⁰ and on the capacity of the Legislature to provide for orphan and old folks' homes.⁴¹ One speaker cites some of the

³² Id. p. 1246.

³³ Id. p. 1246.

³⁴ Id. p. 757.

³⁵ Id. p. 1246.

³⁶ Id. p. 454.

³⁷ Id. p. 1413.

³⁸ Id. p. 1513.

³⁹ Id. p. 820.

⁴⁰ Id. p. 819.

⁴¹ Id. pp. 783-789.

notorious special laws previous legislatures had passed.⁴² Lobbying was made a felony both as to the lobbyist and the guilty legislator. It was further sought to safeguard the public by this provision: "The provisions of this constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."

Relating to the legislature itself a resolution was offered providing for a unicameral legislature⁴³ but nothing more was heard of it. It was probably killed in committee. A proposal for proportional representation⁴⁴ had no more success. It was proposed that no one should be eligible for membership in the legislature unless he had been a citizen of the State and of his district for one year.⁴⁵ It was moved to amend this to require three years citizenship in the State. The arguments for it were first, that it would drive out the carpet-baggers⁴⁶ and second, that it would insure legislators more conversant with the needs of the state.⁴⁷ It was opposed as a "drifting back to Know-Nothingism"⁴⁸ and because the people in any district should be the absolute judges as to the men they wished to send to the legislature.⁴⁹ The amendment was adopted by a vote of sixty-eight to forty-one. An amendment providing for an age restriction was lost fifty-three to sixty.⁵⁰ There was a brisk debate on the number of members to be in each branch and as to apportionment.⁵¹ After some argument it was decided by votes of forty-six to thirty-nine and fifty-five to twenty-seven that English should be the sole language used in publishing the debates in the convention, legislature, and official acts of the State.⁵² Another topic which created a great deal of discussion was the frequency with which the legislature should meet, and on the duration of the sessions.

⁴² *Id.* p. 804.

⁴³ *Id.* n. 77.

⁴⁴ *Id.* p. 82.

⁴⁵ *Id.* p. 745.

⁴⁶ *Id.* p. 746, (Inman).

⁴⁷ *Id.* p. 746, (Brown).

⁴⁸ *Id.* p. 746, (O'Donnell).

⁴⁹ *Id.* p. 746, (Larkin).

⁵⁰ *Id.* p. 747.

⁵¹ *Id.* p. 747-757, 1248-1249.

⁵² *Id.* pp. 801-802. For an interesting statement as to the practice in other states see the remarks of Mr. Beerstecher, *Debates*, p. 801. The author does not vouch for the accuracy of his statements; nor will he vouch for statements as to past or contemporaneous history made in the Convention and noted in this paper.

The Workingmen's party, it will be remembered, had declared for sessions once every four years.

The Committee on the Legislative Department had proposed biennial sixty day sessions. Speaking on this Mr. White said:⁵³ "The legislature we are going to have we are going to take away all the special legislation from it. . . . The feelings of my district are uniformly that the legislature should only be allowed to meet once in four years, for really the people, when the legislature has met, have felt the greatest anxiety for them to adjourn." He would, however, give the governor power to call special sessions if he deemed it necessary. Other arguments advanced were that four year sessions would save expense and reduce the number of politicians and secure better legislators. On the opposite side Mr. Larkin said:⁵⁴

"I am in favor of the legislature meeting every two years. Really, I would prefer the legislature should meet annually instead of every four years. I believe in bringing the Government as near to the people as possible. I do not believe in leaving it to the governor. I think we proposed to bring the representatives a little nearer to the people of this State. That is the policy of a republican government."

Agreeing with Mr. Larkin, Mr. Filcher declared:⁵⁵

"I know that certain candidates told the people that they were in favor of having fewer sessions, or quadrennial sessions, or less time. I am convinced that is not the right principle, and would work an evil to our general form of government. . . . The oftener you can send up persons directly from the people, and in this capacity legislators come, to look into and examine the affairs of State, and confront the officers invested with the power by the people, the better our government would be."

Another speaker claimed that the appeal for few terms was in the interests of the corporations,⁵⁶ as so much of the attention of the sessions would be taken up with the election of United States Senators that there would not be left the time "necessary to protect the people against the power of corporations."

In addition to the restrictions upon the legislature previously noted, it was provided that no bill should be introduced during the

⁵³ Debates, p. 742.

⁵⁴ Id. p. 743.

⁵⁵ Id. p. 744.

⁵⁶ Id. p. 742, (Joyce).

last ten days of any session without the consent of two-thirds of the members. This was designed to prevent hasty legislation. It was proposed by others, but defeated, to limit the number of days during which pay could be drawn, as it was thought that this would prevent ill-advised and hasty legislation at the close of the sessions.⁵⁷

As an oddity may be noticed the following amendment declared out of order, offered by Mr. Beerstecher:⁵⁸

"There shall be no legislature convened from and after the adoption of this Constitution, in this State, and any person who shall be guilty of suggesting that a Legislature be held, shall be punished as a felon without the benefit of clergy."

Enough has been noted to indicate clearly that the prevailing sentiment was one of distrust of the legislature. As Bryce remarks "Little hope was entertained of securing the election of honest men." It was believed that it would be dangerous to bestow upon the legislature the complete power of making laws. There was an attempt to cover in minute detail the matters of defining the laws the legislature was prohibited to enact and of defining the laws which it was ordered to place upon the statute books. The Constitution resembled a series of statutes rather than an organic law. The legislature was to be restricted wherever possible.

V.

There were few direct attacks on the governors of the State, nor were there any fundamental changes in the executive power in the new constitution. The only one of any real importance was a slight restriction placed on the governor's pardoning power.⁵⁹ Here the chief changes were: (1) that the governor must present to the legislature his reasons for all reprieves, pardons, and commutations of sentence granted, and (2) that a man thrice convicted of a felony could not be pardoned nor his sentence commuted. Another minor change proposed was that in the case of pardons and commutations the Chief Justice be associated with the governor. This was defeated, because there was fear of the union of the two branches of the government in

⁵⁷ Id. p. 743, (Larkin and Van Dyke).

⁵⁸ Id. p. 745.

⁵⁹ For debates on the pardoning power of the governor, see *Debates*, pp. 274, 354, 360, 366, 371, 1195.

any way⁶⁰ and a belief that the Chief Justice would not be able to devote the requisite time to the task proposed. Although it was stated, when the question arose, that the governors had expressed a desire to be relieved of the pardoning power, a proposal for a pardoning board was defeated. Veiled references to past abuses in the exercise of the pardoning power were made by Mr. Shafter:⁶¹

"There are cases where simple sentiment, simple emotion, or outside influence has operated upon the executive and induced him to grant pardons. . . . But there have been great abuses in this State and elsewhere, as everybody understands. Men have been pardoned when there was no reason for it . . . at least an outsider can see no reason for it."

VI.

The next topic to be considered is the treatment of the judiciary in the convention. There were several important changes in the judicial machinery. It was provided that in civil actions three-fourths of the jury might render a verdict; the right of trial by jury was secured. Other changes, of less importance, were made in the jury system. It was provided that cases affecting real estate should be begun in the counties in which such land was situated. There were regulations as to the salaries, duties, attendance, etc. of the judges. These were designed to secure continuous sessions, speedy trial, and early decisions, ordered to be in writing, with the reasons therefor. The new system was more expensive than the old but it was argued that penuriousness here would not be true economy.

The Constitution as adopted provided:⁶² "In the determination of causes, all decisions of the Court in bank or in department shall be given in writing, and the grounds of the decision shall be stated." The previous Constitution had been silent upon this point and the courts had given many decisions without stating their reasons either orally or in writing. Attempts of the legislature to remedy this situation were declared unconstitutional.⁶³ This tended to confusion and probably led to the feeling indicated in the following remark made by Mr. Filcher:⁶⁴ "You could prove

⁶⁰ Id. p. 274, (Campbell); p. 275, (White); p. 276, (Hall).

⁶¹ Id. p. 274.

⁶² Art. VI, § 2.

⁶³ *Houston v. Williams*, 13 Cal. 24.

⁶⁴ *Debates*, p. 857.

almost anything by the decisions of the Supreme Court of this State."

The general argument for written decisions was stated by Mr. Wilson:⁶⁵ "The importance of requiring the Court to give written opinions cannot be overrated. They not only become the settled law of the State . . . but in many cases . . . they are instructions to the Court below, and are the controlling rule in the subsequent litigation." That is, unless the reasons for a decision were clearly stated, a remanded case would present the difficulty that neither lawyers nor lower court would know on which of several points the Supreme or higher court might have ordered the new trial. It was not alleged that by refusing to give written opinions the courts were trying to thwart deliberately the will of the people or the welfare of the commonwealth; on the contrary it was declared that the reason for the lack of written opinions was overwork imposed on the courts. To remedy this it was provided that there should be two departments of the Supreme Court, but that on very important questions a case should be heard by the whole court.

Another scheme proposed, but defeated, was to permit the Supreme Court to sit in both Los Angeles and San Francisco, as it had done previously.⁶⁶ Much of the argument seems to have been caused by sectional rivalry between different parts of the State.

In the argument on the proposal, Mr. Smith asserted that the Supreme Court of Missouri met in four different places. Mr. Beerstecher asked: "What is the objection to the people south of San Francisco having Court at their very doors? Delay is a denial of justice." Another speaker said: "I believe in having justice at every man's door, as near as possible." To have the Court meet only in Sacramento would, it was urged, so greatly increase the expense of litigation that many cases would be prevented from coming to the Supreme Court, thereby preventing the doing of justice in many cases. In opposition Mr. Edgerton said: "Now, I claim that it adds stability to the Government to have all its departments in one place." And Mr. Hale said that the Supreme Court should sit at the capital, because "it is the

⁶⁵ Id. p. 950.

⁶⁶ Id. 950 et seq.

court of last resort for all the people of the State. . . . Let us have a Court that will have some stability." It was furthermore asserted that if the Court should meet in sections of the State, it would, instead of bringing justice to "every man's door", as the proponents alleged, in reality be a denial of justice in very many cases, as the people of the State would be limited as to the times of year they could take cases to the Supreme Court.⁶⁷

The only other topic in connection with the judicial department which caused much discussion was that over the length of terms of judges of the Supreme Court. The Constitution provides for twelve year elective terms. Some of the arguments made over the proposal for shorter terms bear a close resemblance to arguments now made for the judicial recall. Mr. Barbour, for instance, said: "I see no reason for applying a different rule or principle to judges from that applied to the other officers or servants of the people . . . I say that the proper method is to have the people free, whenever they can pass upon the qualification of their State officers, to pass also upon the judiciary." Mr. McCallum declared: "Now, sir, I cannot see that judges ought to be elected for a longer term than any other officers. . . . The faithful judge, as a rule, will be re-elected if he wishes to be." Replying to a statement that bad judges could be impeached Mr. Larkin said: "Not more than twenty men have ever been successfully impeached in all the States of the Union, while at any one time there has never been less than a thousand that ought to have been impeached." Again: "I am in favor of electing men for four years, and if these men fill the positions well, the people will re-elect them." This claim that good judges will be re-elected was vigorously combatted.

Those favoring long terms pointed out the necessity of long terms to influence the best lawyers to leave their profession and asserted that it would improve the ability of judges. One of their chief arguments was that long terms would tend to remove the judiciary from politics. Thus Mr. Smith said that short elective terms were all right in the eastern states but "there is conservatism that does not belong to this coast. . . . There is too much enterprise in politics in this State to have elections for judges so frequent. . . . You will throw judges into politics."

⁶⁷ Id. 952, et seq.

Under the old Constitution, judges served for ten year terms. Mr. Eagon maintained: "Give us a long term, and by that means we obviate the necessity of men going into politics for judicial positions." And Mr. Tinnin remarked: "If there has been any one thing that has been a greater disgrace to the State than another, it is that some of the political decisions have been made in response to public clamor or party interest. . . . Public clamor has its influence even upon judges. . . . I hope for this reason that the long term judiciary will be adopted."

Statements favoring the appointment of judges or life terms were not many, but some delegates did come out squarely for these propositions, and they probably voiced the real views of many others who feared the political result of such beliefs openly expressed. Mr. Van Dyke said: "If there is one vice in our judicial system more potent than another, it is the election of judges. We can remedy the evil somewhat by a prolongation of the term." Mr. Johnson added: "Those who have enlightened the jurisprudence of this country the most held a life office." And Mr. Belcher declared: "I should, myself, be in favor of an appointive judiciary." Mr. Rolfe deplored the practice of partisan elections of the judges. By far the best speech on the judiciary was that of Mr. McFarland,⁶⁸ whose statements bear a close resemblance to those made by the present opponents of the recall of judges.

"I would be in favor of a longer term. If there is any department of the Government that ought to be stable, it is the judiciary. If there is any officer who should be as sacred as possible, as to his tenure of office, it is the judge. . . . Now, sir, under our system of government, the whole American system of government, the judiciary is by far the most important department to the people. . . . Our rights of life, liberty, and property are determined by our judges. . . . A judge, in determining private rights, should not be influenced in the least by any thought of the popularity of his decision. . . . I say, when a man goes upon the bench, for my part, I am in favor of electing him for life, or, at least, during good behavior. . . . It is a perfect delusion to say that a good judge will be re-elected. . . . It will happen always, almost invariably, that the political party that happens to be in power will elect the judges. . . .

⁶⁸ *Id.* p. 958 et seq.

Let him not be dependent upon the conflicting waves of public opinion, upon the influence of money, or upon political influence."

The arguments of the conservatives prevailed. The chief changes, as was noticed before, in the judiciary were the provisions for sitting in bank, for written opinions, and certain changes in the jury system.

VII.

In the Bill of Rights we find the following: "No property qualification shall ever be required for any person to vote or hold office." It was provided in the Constitution that elections for State officers should be held on the even years between Presidential elections, so that, in the words of the Address to the State: "State politics will not be mixed up or overshadowed by national." By a system of unification, it was believed that two elections would now be held where six formerly occurred.

Although woman suffrage was, when proposed, defeated by large majorities, some of the debates on the subject are extremely interesting and to some extent foreshadow the arguments used of late years. The advocates of the extension of the suffrage were far more active in the debates, due perhaps to the confidence of their opponents. The leading speech for female suffrage was delivered by Mr. Blackmer.⁶⁹ In an historical survey, he compared the granting of the suffrage to women to the removal of the property qualifications in the United States, and the question of free versus slave labor.

"We have been governed by this aristocracy of sex. . . . We are told that if . . . women are allowed to go to the ballot box, that they will go out of their sphere. Now, sir, I beg to know by whose authority has that sphere been determined. . . . No class of people . . . can ever develop to their full capacity unless they are unrestricted in every direction. . . . Take off the restrictions that keep this class of people where they are, and then it will be time to determine what their sphere is. The demand (by the women) has been made in this country and in the old countries for more than thirty years. . . . Whatever rights are given to one citizen, ought to be given, under the same rule, to every other citizen. . . . The government . . . has no right to say that people who are of sound mind,

⁶⁹ *Id.* p. 832 et seq.

and of age, this whole class of citizens embraced within this definition in the Constitution of this country shall have no voice in the concerns of this government. . . . We are told that it will unsex her. Well, sir, if the exercise of a political right, or a political function, under any government, will succeed in doing that which neither God nor nature can effect, it will then be time to argue that they will be unsexed. I am ashamed of men who take that position."

Said Mr. Grace:⁷⁰

"I believe that a woman who has to pay her taxes has as good a right to vote as a man. If we give negroes, and Chinamen, and everything else, a right to vote, and proclaim the universal brotherhood of man and the fatherhood of God, why in the name of God, don't you give them equal rights?"

And Mr. McFarland declared:⁷¹

"I believe that government derives its just powers from the consent of the governed . . . and that the people are the sources of all political power. Women constitute nearly one half of the people. . . . How, then, does it come, sir, that they have no more political rights on this free American soil, on which they and their ancestors were born, than Chinamen or State prison convicts?"

The chief opponent was Mr. Caples.⁷² He ridiculed the idea that "taxation and representation" were founded on the Declaration of Independence, logically pointing out that universal suffrage did not exist even among men at the time of its passage, and that the Declaration did not declare for it.

"The demand is for an utter abolition of all distinctions of rights, immunities, privileges, and obligations; that women shall be made men; that men shall be made women. That is the demand. . . . The sovereign authority represented by the ballot is sustained by the sword that he is able to wield. . . . Here is the philosophy, the equity, the justice, and the common sense of universal or manhood suffrage. . . . They (women) lack the physical power, the physical courage, the endurance—not to say that it would interfere with and defeat the great end of creation, the reproduction of our species. . . . Women are not oppressed. On the contrary. The fact is that her sex is a patent of nobility. She is everywhere respected, honored, and cherished as a being above, infinitely above man, in all the moral attributes.

⁷⁰ Id. p. 833.

⁷¹ Id. p. 1004.

⁷² Id. p. 1005.

... Nor is there anything arbitrary in the situation. It is simply the outgrowth of human interests, growing out of the struggle for existence."

It was stated that only one member of the Committee on the Right of Suffrage was in favor of woman suffrage.⁷³ Not only was an amendment to permit women to vote defeated,⁷⁴ but another amendment to allow the legislature to grant woman suffrage, if it saw fit, was defeated by a vote of seventy-six to forty-five.⁷⁵

Section 3 of Article II provided: "No elector shall be obliged to perform militia duty on the day of election, except in time of war or public danger." Section 5 provided that "all elections by the people shall be by ballot." By Section 1, the right of suffrage was confined to males, native or naturalized or those made citizens by the treaty of Queretaro. "No native of China . . . shall ever exercise the privileges of an elector in this State." This was regarded as a very important point in the "Address to the State."⁷⁶

Under the old Constitution proposed amendments had to pass two legislatures before submission to the people. The new Constitution provided that any legislature by a two-thirds vote in both houses might submit amendments at the next general election. If two or more were submitted they were to be voted on separately. It was provided that future Conventions could submit their work as they saw fit, permitting a vote on separate articles if desired. A proposal that a majority vote should be substituted for the two-thirds above referred to was defeated⁷⁷ and had but little support.

As one of the very early grants of home rule, preceded, in fact, only by Missouri in 1875, the Constitution of 1879 is noteworthy. The general restrictions upon the legislature provided that corporations for municipal purposes should thereafter be created only under general laws. Section 8 of Article XI. provided that any city of more than one hundred thousand population might elect fifteen freeholders to frame a charter. This charter must not be inconsistent with the Constitution and laws of the State; must, after sufficient local advertisement, be voted on by

⁷³ Id. p. 833.

⁷⁴ Id. p. 1013.

⁷⁵ Id. p. 1365.

⁷⁶ Id. p. 1365.

⁷⁷ Id. p. 1277.

the electorate, and, if adopted, voted on by the legislature, the approval of both houses by majority votes being necessary. Moreover, it must be adopted or rejected as a whole by the branches of the Legislature. By subsequent amendments, in 1887 and 1890, cities of over thirty-five hundred have been given this power. This provision, as first proposed in the Convention, was declared to be modeled after that in Missouri.

There was, as we should expect, much objection to the passage of such a provision, which was finally adopted only by a vote of sixty-three to fifty-seven.⁷⁸ As originally proposed, with absolutely no provision for review by the legislature, it could not have passed. Its advocates were forced to make concessions to secure its passage. In support of the original provision it was urged that there was a necessity "for an entire and total change in the organic law of San Francisco",⁷⁹ due to the complexity of the existing charter rules and the difficulty of finding the law and to the fact that San Francisco had many boards, etc., peculiar to itself. (The existing charter and supplements consisted of three hundred and nineteen pages.) Mr. Reynolds declared: "The argument that it is creating a free city, that it is running away from the State, has no force whatever. Of course, this charter must be subservient to the Constitution and laws of the State." Mr. Wellin denounced the existing city government. In opposition Mr. McCallum asked: "Why make a city in our State different from all other cities?" He said that no necessity for the change had been shown. Mr. Hale, however, in the best speech in opposition, said that the new provision "makes it easy for the City of San Francisco to set up an independent government, entirely independent of the authority of the State." He pointed out that without any legislative check it would be practically impossible to place any check upon the sort of charter that might be adopted.⁸⁰

Despite the appeal to the principle of home rule and local self-government, the united support of the San Francisco delegation and of some members from other cities, it appeared that the provision as originally proposed would fail. Suggestions were made that the legislature be given a right to adopt or reject the

⁷⁸ Id. p. 1408.

⁷⁹ Id. p. 1059, (Barbour, the leading champion for San Francisco).

⁸⁰ Id. pp. 1060, 1061.

new charters that might be framed. Opposing this, Mr. Joyce said⁸¹ that such a provision would permit the railroad company to continue robbing San Francisco and Mr. Barbour argued it would constitute an abandonment of the principle of local self-government. But just prior to the adoption of the section, Mr. Hager proposed an amendment giving the legislature such power to accept or reject, as an entirety. The amendment was adopted, many members stating, and others probably holding the same ideas, that unless it was adopted they could not vote for the section as originally proposed.⁸² An amendment to give the legislature power to abrogate any charter at any time was defeated sixty-seven to fifty two.⁸³

Other provisions of Article XI. are of less importance. Section 7 provided that city and county governments might merge, providing that where the population exceeded one hundred thousand, there should be two branches of the council.⁸⁴ Section 11 provides that all communities shall "make and enforce within their respective limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." In the debate on the section⁸⁵ the general sentiment was strongly in favor of giving all possible freedom to the localities. Section 18 imposed certain restrictions on the amount of indebtedness that might be incurred. The principal one was that in cases where the new indebtedness was of general importance two-thirds of the voters must concur. Many other regulations were provided giving cities of over one hundred thousand certain powers. As San Francisco was the only city in this class, this amounted to local legislation in the Constitution. This aroused much opposition, in some cases probably due more to city rivalry, than objections to principle.⁸⁶

A provision providing for local option was defeated,⁸⁷ though its advocates urged its passage, in conformity with the general

⁸¹ *Id.* p. 1062.

⁸² *Id.* pp. 1407, 1408.

⁸³ *Id.* p. 1408.

⁸⁴ *Id.* pp. 1058-1059.

⁸⁵ *Id.* pp. 1051-1053.

⁸⁶ See especially for debates on Section 8 and general remarks, pp. 1059, 1061, 1379, 1406. Los Angeles was said to have a population not greater than 17,000.

⁸⁷ Debates, p. 1086.

spirit of belief in local self-government that had prevailed. The opponents declared that prohibitory legislation was a failure.

The only political device in the Constitution that has any real claim to novelty is that providing home rule for cities, and even here the provision was expressly stated to be copied from that of Missouri. But as the second attempt of the kind it deserves more than passing notice.

The motive force of most of the political ideas contained in the new constitution was distrust of the legislature, a belief that the economic ends desired could only be obtained by making it impossible for the legislature to thwart the will of the people. Indeed, in its "Address to the State", the Convention specifically says: "The power of the legislature has been restricted in every case where it would be safe to do so, in respect to the enacting of local or special laws."

The result was that the new law was in reality a code, one which could not be altered by every legislature. Specifically, the laws were designed to aid the workers and the farmers. Express regulations of the judiciary, taxation, corporations, etc. were placed directly in the Constitution to bind the legislature. The judiciary was improved, the power of amendment somewhat simplified, free public education was provided, but the important ideas from a political standpoint are the changes in municipal government and the restrictions on the legislature, by leaving it practically nothing to do but carry out the provisions of the Constitution.

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(TO BE CONTINUED)

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