1-1-1989

More Than 'Shreds and Patches': California's First Bill of Rights'

Christian G. Fritz
University of New Mexico - School of Law

More Than "Shreds and Patches": California's First Bill of Rights

By CHRISTIAN G. FRITZ*

Annoyed by his colleagues lack of originality, one delegate to California's first constitutional convention accused his fellow delegates of "servilely" copying provisions of pre-existing American constitutions.[1] He wondered why the California constitutional convention "was not as capable of being original as any other," and he urged his fellow delegates not to make California's first state constitution a mere composition "of shreds and patches."[2]

This delegate's outburst may have reflected his frustration at not having greater influence on the form and substance of the provisions the convention was adopting as California's first "Declaration of Rights."[3] But his comment also raises questions of considerable importance and relevance today: What sources did the founding fathers of the California Constitution draw upon to fashion the state's first bill of rights? How did they understand that process of incorporating fundamental principles into the constitution and what did they achieve?

Although the 1849 constitution was superseded by the 1879 constitution, the original bill of rights provisions have largely survived and re-

* Assistant Professor of Law, University of New Mexico School of Law; B.A., University of California, Berkeley, 1975; J.D., University of California, Hastings College of the Law, 1978; Ph.D., University of California, Berkeley, 1986. The author would like to thank Ms. Donna Penwell and the staff of Colton Hall Museum, Monterey, California, for their splendid assistance, Michael Browde, Joseph Franaszek, and Marlene Keller for their extremely helpful comments, and Dean Theodore Parnall for providing a research grant that supported this work.

1. The delegate was Charles T. Botts, representing Monterey and a lawyer who originally came from Virginia. His remarks, as part of the debates of the convention, were officially recorded by J. Ross Browne. *See* J. BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION 51 (1850).

2. *Id.*

3. For clarity, this Article will refer to California's Declaration of Rights as a bill of rights since what was routinely referred to as a declaration of rights in the context of 18th and 19th-century state constitution-making is now commonly termed a bill of rights. *See* SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS *passim* (W. Swindler ed. 1973-1979).

main applicable today.[4] Indeed, of the twenty-eight sections that compose California's present bill of rights, only eight are not directly based on the protections guaranteed under the 1849 constitution.[5] The constitution-making at Colton Hall in Monterey 140 years ago takes on added importance given that independent state constitutional grounds are currently being urged and accepted as giving broader protection for individual rights and liberties than those provided by the Federal Constitution.[6] Indeed, the debate over the role of state constitutions, much of it stimulated by decisions of the California Supreme Court, has produced an extensive literature.[7] Most of the commentary focuses only on whether state constitutions should receive independent attention, why this is so, and how this should be reduced to practice.

There has been a remarkable dearth of scholarly writing on nineteenth century constitution-making.[8] As one scholar recently has observed, "[F]ew themes in the history of American government have been

4. The second constitution was adopted in convention on March 3, 1879, and ratified by the voters on May 7, 1879.

5. The 20 sections of California's present Declaration of Rights that are largely based on the declaration of rights passed in 1849 are the following sections of the California Constitution: art. I, § 1 (virtually verbatim from 1849 section 1); art. I, § 2 (1849 section 9); art. I, § 3 (1849 section 10); art. I, § 4 (1849 section 4); art. I, § 5 (1849 sections 12 and 13); art. I, § 6 (1849 section 18); art. I, § 9 (1849 section 16); art. I, § 10 (1849 section 15); art. I, § 11 (1849 section 5); art. I, § 12 (1849 sections 6 and 7); art. I, § 13 (virtually verbatim from 1849 section 13); art. I, § 14 (1849 section 8); art. I, § 15 (1849 section 8); art. I, § 16 (1849 section 3); art. I, § 17 (1849 section 6); art. I, § 18 (virtually verbatim from 1849 section 20); art. I, § 19 (1849 section 8); art. I, § 20 (1849 section 17); art. I, § 21 (1849 article XI, section 14 was incorporated into the bill of rights in 1974); art. I, § 24 (1849 section 21).

The eight sections of article I of the California Constitution that are not derivative of the 1849 constitution are the following: art. I, § 7 (pupil school assignment or transportation, privileges and immunities); art. I, § 8 (employment discrimination); § 22 (voting not conditioned on property qualification); art. I, § 23 (grand jury); art. I, § 25 (fishing rights); art. I, § 26 (provisions of the constitution mandatory or prohibitory); art. I, § 27 (death penalty); art. I, § 28 (Victim's Bill of Rights).

6. *See, e.g.*, Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379 (1980).

7. Much of this literature is conveniently noted in Linde, *supra* note 6, at 396 n.70; *see also Developments in the Law — The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Galie, *The Other Supreme Courts: Judicial Activism Among State Supreme Courts*, 33 SYRACUSE L. REV. 731 (1982); *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959, 959-1375 (1985); *State Constitutional Jurisprudence*, 15 HASTINGS CONST. L.Q. 391, 391-478 (1988); R. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (1988).

8. For exceptions dealing with the Western experience, see G. BAKKEN, ROCKY MOUNTAIN CONSTITUTION MAKING, 1850-1912 (1987); Reid, *Governance of the Elephant: Constitutional Theory on the Overland Trails*, 5 HASTINGS CONST. L.Q. 421 (1978); J. Smurr, Territorial Constitutions: A Legal History of the Frontier Governments Erected by Congress in the American West, 1787-1900 (1960) (unpublished dissertation).

less adequately studied."[9] Even a cursory examination of the process by which California's first state constitutional convention drafted a bill of rights suggests the potential insights to be gleaned from nineteenth century state constitutions.

The background and specific proceedings of the Monterey Convention have received attention from historians, as have specific substantive controversies within the convention.[10] On the other hand, little attention has been paid to the nature of the constitution-making, its sources and models, the attitudes of the delegates, and the core values they sought to protect.[11] Indeed, nineteenth century state constitution-making generally has been neglected, overshadowed by studies dealing with the Federal Constitution. This is unfortunate because the nineteenth century state constitutional conventions produced constitutions that reflected both continuities with eighteenth century American constitutionalism and the concerns of the age in which they were created.[12] California's 1849 constitution (as well as the other state constitutions drafted in the previous century) ought to be considered in this broader context of nineteenth century political thought. The objective of this Article is to begin that inquiry with a preliminary exploration of the extent to which ex-

9. Keller, *The Politics of State Constitutional Revision, 1820-1930*, in K. HALL, H. HYMAN & L. SIGAL, THE CONSTITUTIONAL CONVENTION AS AN AMENDING DEVICE 68 (1981).

10. For treatment of the California Constitutional Convention of 1849, see H. BANCROFT, HISTORY OF CALIFORNIA 284-304 (1888); R. HUNT, THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1848-1849) (1895); C. GOODWIN, THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA, 1846-1850 (1914); J. Ellison, *The Struggle for Civil Government in California, 1846-1850*, 10 CAL. HIST. SOC'Y Q. 3, 3-26 (1931); Bayard, *California's First Constitution: A Reflection of the Political Philosophy of the Frontier*, 4 PAC. HIST. REV. 221, 221-34 (1935); J. ROYCE, CALIFORNIA: FROM THE CONQUEST IN 1846 TO THE SECOND VIGILANCE COMMITTEE IN SAN FRANCISCO 205-13 (1948); Bowman, *The Original Constitution of California of 1849*, 28 CAL. HIST. SOC'Y Q. 193, 193-97 (1949); Crotty, *The California Constitutional Convention of 1849*, 31 CAL. HIST. SOC'Y Q. 155, 155-66 (1949); W. Ellison, *Constitution Making in the Land of Gold*, 18 PAC. HIST. REV. 319, 319-30 (1949); David, *Our California Constitutions: Retrospections in This Bicentennial Year*, 3 HASTINGS CONST. L.Q. 697, 710-22 (1976); N. HARLOW, CALIFORNIA CONQUERED 338-53 (1982); Grodin, *Some Reflections on State Constitutions*, 15 HASTINGS CONST. L.Q. 391, 391-96 (1988).

11. One important exception is D. Johnson, Pioneers and Politics: State Making in the Far West 1845-1865 (1977) (unpublished dissertation).

12. *See, e.g.*, F. GREEN, CONSTITUTIONAL DEVELOPMENT IN THE SOUTH ATLANTIC STATES, 1776-1860 (1930); B. Still, State Constitutional Development in the United States, 1829-1851 (1933) (unpublished dissertation); W. ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980); AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH (K. Hall & J. Ely ed. 1989). The abundance of raw materials to study development of state constitutionalism is suggested by the fact that some 226 state constitutional conventions were convened between 1776 and 1976. *See* Keller, *supra* note 9, at 69.

isting nineteenth century state constitutions were drawn upon in the creation of the bill of rights portion of California's first constitution.

I. More Than Copying

On the centennial of the 1849 constitution, one historian, Robert Glass Cleland, characterized the state's first constitution as "not a highly original document."[13] Agreeing with an earlier historian who concluded that the 1849 constitution was "practically a compilation of articles and sections from other constitutions,"[14] Cleland saw such extensive borrowing as evidence that the delegates were "realists instead of theorists."[15] As he put it, "[I]f they suffered from a dearth of new political ideas, they at least produced a good run-of-the-mill, workable constitution."[16]

Both historians missed an important point about the convention. Each implicitly equated originality of wording and concepts with a truer or more legitimate process of constitution-making. Therefore, each implied that the 1849 convention was less significant by virtue of not having created a "novel" product. Those who have shared this judgment about the convention's work were correct in one respect but wrong in a more significant and profound way. With some notable exceptions, the delegates' discussion over California's first bill of rights concededly did not demonstrate much originality of subject matter. But they did display an acute awareness of the significance of the *process* they were engaged in and the significance of the provisions they adopted—original or not.

On one level it was and is unrealistic to expect that a constitutional convention called in the mid-nineteenth century would or should be able to make unique contributions to American political life. Most of the state constitutions enacted after 1787 used the Federal Constitution as a partial model,[17] and by the time the California delegates met, state constitutions routinely borrowed heavily from earlier state models.[18] Indeed, the ability of nineteenth century constitutional conventions to make wide-ranging comparisons with other state constitutions was facilitated by the existence of numerous pocket-sized compilations of state

13. *Introduction to* CONSTITUTION OF THE STATE OF CALIFORNIA, 1849, at 8 (R. Cleland ed. 1949).

14. *Id.* at 9. Cleland quoted the work of historian Cardinal L. Goodwin. *See* C. GOODWIN, *supra* note 10.

15. Cleland, *supra* note 13, at 9.

16. *Id.*

17. W. ADAMS, *supra* note 12.

18. *See* W. SWINDLER, *supra* note 3, *passim*.

constitutions.[19] In terms of the core subject matter for a bill of rights, by 1849 the constitutional field had been thoroughly explored. One delegate to Oregon's first state constitutional convention in 1857 remarked that "[t]he making of a constitution now is not such an interesting proceeding as it may have been heretofore. What is said and done is not of that character, and the constitution that we make, and every principle we can engraft into it, has been discussed and decided time and again."[20]

As with any new political body, the initial concerns were procedural in nature. Disagreement existed over whether several or only one committee should be formed to draft proposed sections of the constitution.[21] The delegates agreed that the California Constitution ought to draw upon, as one delegate put it, "the cream of the whole—the best material of the Constitutions of the thirty States."[22] The idea was to draw upon the more than seventy years of experience of American constitution-making. One delegate noted his preference to create a constitution "from the thirty Constitutions of the Union," but felt that this process was best initiated by taking a single constitution as a model.[23] Another delegate expressed uncertainty that their final product would be superior to the constitutions of the other states, but predicted that by taking from state constitutions "such provisions as were most applicable . . . and by combining the wisdom of the whole" the delegates might "make a better constitution than could be accomplished in any other way."[24]

In addition to this self-consciously derivative approach, the debates over California's first constitution lacked the visionary quality that accompanied the making of the Federal Constitution. The debates at Monterey offered only faint echoes of the kind of breathless wonder and heightened self-awareness of the unique task of framing a government that filled the debates and writings of the eighteenth century Founding Fathers.[25] The qualitative difference may also contribute to the impres-

19. *See e.g.*, THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA; WITH THE LATEST AMENDMENTS: ALSO THE DECLARATION OF INDEPENDENCE, ARTICLES OF CONFEDERATION, WITH THE FEDERAL CONSTITUTION (1820); THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA; WITH THE LATEST AMENDMENTS: ALSO THE DECLARATION OF INDEPENDENCE, ARTICLES OF CONFEDERATION, WITH THE FEDERAL CONSTITUTION (1824).

20. THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 141-142 (C. Carey ed. 1926).

21. J. BROWNE, *supra* note 1, at 7-29.

22. *Id.* at 25.

23. *Id.* at 27.

24. *Id.* at 28.

25. *See, e.g.*, B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 160-319 (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969).

sion that what happened at Monterey was less inspired and hence less significant.

Notwithstanding their lack of originality and self-absorption, the Monterey delegates believed that the freedoms and liberties of future Californians rested in their hands. The convention president set the tone of the gathering in his opening address when he reminded delegates of their task, stating, "You are called upon, by your fellow citizens, to exert all your influence and power to secure to them all the blessings that a good government can bestow upon a free people."[26] Delegates, too, acknowledged that they had been sent to Monterey "to form the organic law" of a future state.[27] They were "to perform the most solemn of trusts—to decide upon the fundamental principles of a Government."[28] The convention thus reflected the gravity of purpose and wisdom the delegates associated with constitution-making in "the older States."[29]

The delegates may well have created a "patchwork quilt" with respect to the bill of rights, but they had a clear sense of its importance in protecting the individual from the powers of government. Indeed, the claim of unoriginality can be turned around to underscore the critical importance delegates placed on establishing guarantees of freedoms and rights in the constitution they drafted. The fact that the delegates carefully canvassed, studied, and ultimately chose provisions from many preexisting state constitutions supports the idea that they recognized they were engaged in the important process of constitution building. The comparative analysis of state constitutions within the convention, which occurred on a broader scale than many have realized, is a measure of their seriousness of purpose.

II. The Borrowing Begins

Traditional accounts of California's first constitutional convention suggest that the deliberations were dominated by two principal models: the state constitutions of Iowa and New York.[30] William M. Gwin, the San Francisco delegate and later one of California's first senators, had taken the liberty of bringing enough printed copies of the Iowa Constitution to distribute to all the delegates. Gwin explained his choice of Iowa's Constitution as a model "because it was one of the latest and

26. J. BROWNE, *supra* note 1, at 18.
27. *Id.* at 28.
28. *Id.* at 27.
29. *Id.* at 28.
30. *See, e.g.*, H. BANCROFT, *supra* note 10, at 289-90, 296; R. HUNT, *supra* note 10, at 55-56; N. HARLOW, *supra* note 10, at 338.

shortest."[31] Even though the convention failed formally to adopt Iowa as a model for consideration, it remains clear that Gwin's influence as a member of the select committee to draft a bill of rights succeeded in sending a proposal to the convention floor that drew heavily upon Iowa's constitution. In fact, Gwin reported to the convention that half of the proposed provisions came from Iowa's constitution and half from New York's.[32]

A number of delegates urged the inclusion of certain principles because they seemed important after a reading of the thirty state constitutions in force at the time.[33] Moreover, apart from direct evidence indicating that copies of Iowa's and New York's constitutions were circulating among delegates, numerous proposed provisions (unattributed at the time) can be identified as verbatim borrowing from other state constitutions. The Federal Constitution was mentioned as a possible model for California's bill of rights, but its guidance was touted because it "embraced the principles of all the State Constitutions."[34]

Not only did the delegates have thirty state models to draw from, they also began their deliberations against the backdrop of a spate of recent state constitution-making. Indeed, eight different states had held conventions to draft new constitutions in the decade before the Monterey convention.[35] Rhode Island drafted a new constitution in 1842, New Jersey did so in 1844, and in 1845 both Texas and Louisiana drafted constitutions. The oft-cited constitutions of Iowa and New York were drafted in 1846, and Illinois and Wisconsin drafted new constitutions in 1848. Thus, the delegates at Monterey—some of whom had attended and witnessed these other state conventions—not only had plenty of models, but could draw upon the relatively recent experiences of other states.

If the state constitutions were modeled after the Federal Constitution and, in effect, derived from it, one might expect that state constitutional protections would tend to be greatly similar, if not identical to federal protections. In a limited sense that may be true, but in matters of constitutional interpretation, wording does make a difference. Califor-

31. J. BROWNE, *supra* note 1, at 24.

32. *Id.* at 31. Actually, of the sixteen provisions of the initial proposed bill of rights, eight were drawn verbatim from and one was based upon New York's 1846 constitution, five were drawn verbatim from and one was based upon Iowa's 1846 constitution, and the provision prohibiting the quartering of soldiers copied the Third Amendment of the Federal Bill of Rights which was also copied virtually verbatim in Iowa's constitution.

33. *See, e.g., id.* at 28, 36, 56.

34. *Id.* at 28.

35. W. SWINDLER, *supra* note 3, vol. 3, at 250, 434; vol. 4A, at 94; vol. 6, at 453; vol. 7, at 192; vol. 8, at 386; vol. 9, at 260; vol. 10, at 418.

nia's first constitution, in common with the existing state constitutions of the time, bore significant and substantial differences from the Federal Constitution. Those differences meant that the final bill of rights adopted in Monterey offered significantly broader coverage and protection of individual rights than did the Federal Bill of Rights.

In comparing the federal with state bills of rights, one should not lose sight of the differing conceptions of the purpose of a national versus a state government. The Federal Constitution, of course, was designed to unite pre-existing governments—a significantly different task than forming or reforming state governments. As such, it was only natural that a perception of the appropriate limits to be placed on the national government thousands of miles away might differ from limits placed on the local government, which was at most only a few hundred miles away. Nonetheless, because of the incorporation doctrine, under which the United States Supreme Court has held many protections of the Federal Bill of Rights applicable to the states, the language of the Federal Bill of Rights—particularly as it differs from state bills of rights—is especially important. The differing constitutional purposes that underlie the federal versus state bills of rights only underscores the importance of the historical context in which nineteenth century state constitutions were formed and changed.

The search for the sources of the California Bill of Rights quickly reveals that almost every state bill of rights is longer than that of the Federal Constitution (even including personal rights found elsewhere in the federal model such as the writ of habeas corpus, Article IV privileges and immunities, and the Contracts Clause).[36] The point is not that state constitutions were wordier in enumerating rights and protections in a bill of rights, but that in describing those rights the state constitutions often amplified and enlarged upon them, suggesting wider application and greater protection than the Federal Bill of Rights. Whatever our attachment to the familiar phrasing of the Federal Bill of Rights, the fact remains that many, if not most, state constitutions clearly intended to provide broader individual rights than did the federal model. Looking only at the language used in California's Bill of Rights to describe similar federal principles as well as the articulation of rights and protections not found in the Federal Constitution, it becomes evident that broader protections are accorded under California's 1849 constitution than under the Federal Constitution.

36. U.S. CONST. art. I, § 9, cl. 2; art. IV, § 2, cl. 1; art. I, § 10, cl. 1.

III. The Federal Model

The Federal Constitution and California's constitution contain identical protections in only six areas: the right of habeas corpus, the right of assembly, prohibitions on quartering soldiers, protection against unreasonable searches and seizures, a restrictive definition of treason, and the assertion of the nonexclusivity of the enumeration of rights.[37] Section 5 of California's bill of rights limited the circumstances under which the writ of habeas corpus might be suspended in terms identical to Article I, Section 9, Clause 2 of the Federal Constitution.[38] Likewise, the provision for the right of assembly granted in the First Amendment to the Federal Constitution was protected in very similar though not identical terms in section 10 of California's constitution.[39] California's section 13 restricted the quartering of soldiers in times of peace or war in virtually identical terms as the Third Amendment.[40] Finally, the last three sections of California's bill of rights—sections 19, 20, and 21—were virtually identical with portions of the Federal Constitution that protected individuals from unreasonable searches and seizures, defined treason, and affirmed the principle that rights enumerated in the Bill of Rights did not impair or deny others retained by the people.[41] Of these six areas, only

37. Technically there are seven areas if section 16 of California's 1849 Declaration of Rights is included. That section prohibited the passage of any bill of attainder, ex post facto law, or law impairing the obligation of contracts. But since Article I, Section 10, Clause 1 of the Federal Constitution prohibited states from passing any such laws, section 16 provided no protection that did not already exist.

38. Article I, section 5 of California's 1849 constitution provided: "The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require its suspension."

Article I, Section 9, Clause 2 of the Federal Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

39. Article I, section 10 of California's 1849 constitution provided: "The people shall have the right freely to assemble together, to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances."

The First Amendment to the Federal Constitution provides, in part: "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

40. Article I, section 13 of California's 1849 constitution provided: "No soldier shall, in time of peace be quartered in any house, without the consent of the owner; nor in time of war, except in the manner prescribed by law."

The Third Amendment to the Federal Constitution provides: "No soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner prescribed by law."

41. Article I, section 19 of California's 1849 constitution provided:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons and things to be seized.

three—habeas corpus, assembly, and unreasonable searches and seizures—might today be considered "core" principles in a bill of rights.

With respect to other basic liberties, such as freedom of speech and religion, and right to jury trial, California's bill of rights often went beyond the Federal Constitution by adopting the broader language and meaning of other state constitutions. For example, in civil cases the Seventh Amendment grants a jury trial "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars," but California's section 3 provided that the right to a jury trial "shall be secured to all, and remain inviolate forever."[42] Thus, California imposed no threshold level of an amount in controversy, even though it allowed parties to waive jury trials in civil cases. In this regard the California convention partially based section 3 on a provision of New York's constitution, but California went further. New York's relevant provision limited that right to "all cases in which it has been heretofore used," whereas the California version omitted that language.[43] With respect to criminal cases, California's section 8 did not provide the Fifth Amendment's explicit and broad guarantee of a grand jury presentment or indictment, but went beyond the language of the Fifth Amendment stating that "[in]

Compare the Fourth Amendment to the Federal Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article I, section 20 of California's 1849 constitution provided: "Treason against the State shall consist only in levying war against it, adhering to its enemies, or giving them aid and comfort. No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act, or confession in open court." Compare Article III, Section 3, Clause 1 of the Federal Constitution: "Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or in Confession in open Court."

Article I, section 21 of California's 1849 constitution provided: "This enumeration of rights shall not be construed to impair or deny others retained by the people." Compare the Ninth Amendment to the Federal Constitution: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

42. Article I, section 3 of California's 1849 constitution provided: "The right of trial by jury shall be secured to all, and remain inviolate forever; but a jury trial may be waived by the parties, in all civil cases, in the manner to be prescribed by law." The Seventh Amendment of the Federal Constitution, on the other hand, provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

43. Article I, section 2 of New York's 1846 constitution, on which California's section 3 was based, provided: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury-trial may be waived by the parties in all civil cases in the manner prescribed by law."

any trial in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions."[44]

In terms of freedom of speech and the free exercise of religion, a comparison between the First Amendment and California's provisions reveals that the California Constitution also offered broader coverage. Instead of the First Amendment's terse prohibition of any "law . . . abridging the freedom of speech, or of the press," California's delegates drew verbatim from New York's constitution to provide positive affirmation that "[e]very citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or the press."[45] Likewise, California's bill of rights offered an additional gloss on the First Amendment's prohibition against any "law respecting an establishment of religion, or prohibiting the free exercise thereof." California's section 4 affirmatively provided for the "free exercise and enjoyment of religious profession and worship, without discrimination or preference," and it further specified that "no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief"—a protection not explicitly provided by the Federal Constitution.[46]

---

44. Article I, section 8 of California's 1849 constitution provided, in part:

> No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land and naval forces in time of war, or which this State may keep with the consent of Congress in time of peace, and in case of petit larceny under the regulation of the Legislature) unless on presentment or indictment of a grand jury; and *in any trial in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel, as in civil actions.* (Emphasis added).

The Fifth Amendment of the Federal Constitution, on the other hand, provided, in part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."

45. The full text of article I, section 9 of the 1849 California Constitution provided:

> Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions on indictments for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libellous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

California's section 9 drew verbatim from article I, section 8 of New York's constitution.

46. The full text of article I, section 4 of 1849 California Constitution provided:

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

A clearer example of the California delegates extending a federally guaranteed right concerns the provisions regarding bail. The Eighth Amendment to the Federal Constitution provides in part, "Excessive bail shall not be required . . . ."[47] Section 6 of California's bill of rights contained the exact same prohibition but, in addition, California's delegates inserted a provision, section 7, that declared "[a]ll persons shall be bailable, by sufficient sureties: unless for capital offenses, when the proof is evident or the presumption great."[48] This extension of making bail more widely available was a right that could be found in dozens of state constitutions from the time of Kentucky's 1799 constitution through the 1848 Illinois Constitution.[49] The particular wording that California adopted in section 7 was copied verbatim from the identical language found in the Ohio and Indiana Constitutions.[50]

IV. Borrowing Beyond the Federal Model

If the incorporation of state constitutional provisions tended to expand the scope of rights or principles that could be found in the Federal Constitution, that borrowing process had even greater significance when provisions had no analog in the Federal Bill of Rights. Some of the obvious departures, such as the prohibition against slavery (section 18), were products of the antebellum political debate.[51] Jacksonian democracy and the political culture it fostered also account for broad assertions of political equality, such as the requirements (drawn from Iowa's constitution) that all laws of a general nature shall have uniform operation (section 11) or that representation shall be apportioned according to population (section 14).[52] Iowa's constitution also proved to be the source of an even more general proclamation of fundamental political principles, namely

---

This section was taken verbatim from article I, section 3 of the 1846 New York Constitution.

47. The full text of the Eighth Amendment to the Federal Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

48. Article I, section 6 of California's 1849 constitution provided: "Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted, nor shall witnesses be unreasonably detained."

49. *See, e.g.*, article X, section 16 of Kentucky's 1799 constitution; article I, section 17 of Alabama's 1819 constitution; article II, section 16 of Arkansas's 1836 constitution; article XIII, section 13 of Illinois's 1848 constitution, in W. SWINDLER, *supra* note 3, vol. 4, at 163; vol. 1, at 32, 339; vol. 3, at 268.

50. *See* article VIII, section 12 of Ohio's 1802 constitution; article I, section 14 of Indiana's 1816 constitution, in SWINDLER, *supra* note 3, vol. 7, at 554; vol. 3, at 366.

51. Article I, section 18 of California's 1849 constitution provided: "Neither slavery nor involunary servitude, unless for the punishment of crimes, shall ever be tolerated in this state."

52. Article I, section 11 of California's 1849 constitution provided: "All laws of a general nature shall have a uniform operation" and article I, section 14 of that same constitution read:

the section 2 declaration, "All political power is inherent in the people. Government is instituted for the protection, security, and benefit of the people; and they have the right to alter or reform the same, whenever the public good may require it."[53]

Another provision (taken verbatim from Iowa's constitution) prohibited imprisonment for debt except in cases of fraud.[54] A further provision, also based on Iowa's constitution, provided that foreign residents in California were to enjoy the same property rights as native-born citizens.[55]

Iowa also provided the source for two other sections that, in part, reflected eighteenth century constitutional concerns. The American revolutionary generation had deeply rooted fears of standing armies and restrictions against them often found their way into the early state constitutions. While the Federal Constitution contained restrictions against quartering soldiers in private homes—another grievance of the American Revolutionaries—it contained no restrictions against standing armies other than limiting Congress's ability to support armies by appropriations of up to two years at a time.[56] California's section 12 explicitly reaffirmed the eighteenth century republican principle that "the military shall be subordinate to the civil power" and that "no standing army shall be kept up by this state in time of peace."[57] The other California constitutional section that had its origins in eighteenth century expressions of American constitutionalism and that did not appear in the Federal Constitution was section one. A close paraphrase of the Declaration of Independence, that section provided: "All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and pro-

"Representation shall be apportioned according to population." For similar provisions in Iowa's constitution, compare article I, section 6 (laws having uniform nature).

53. Article I, section 2 of Iowa's 1846 constitution.

54. Article I, section 15 of California's 1849 constitution (taken verbatim from article I, section 19 of Iowa's 1846 constitution) provided: "No person shall be imprisoned for debt in any civil action, on *mesne* or final process, unless in cases of fraud; and no person shall be imprisoned for a militia fine in time of peace."

55. Article I, section 17 of California's 1849 constitution (apparently based on article I, section 22 of Iowa's 1846 constitution) provided: "Foreigners who are, or who may hereafter become *bona fide* residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property, as native-born citizens."

56. *See* U.S. CONST. art. I, § 8, cl. 12.

57. Article I, section 12 of California's 1849 constitution (taken almost verbatim from article I, section 14 of Iowa's 1846 constitution) provided: "The military shall be subordinate to the civil power. No standing army shall be kept up by this state in time of peace; and, in time of war, no appropriation for a standing army shall be for a longer time than two years."

tecting property; and pursuing and obtaining safety and happiness."[58] With the exception of the addition of the right of privacy and with minor changes of grammar and gender, this provision remains as the first section of California's current bill of rights.

Virtually all of the state constitutions contained, as did California's, references to additional rights and principles that are absent in the federal model. The wider availability of bail, the prohibition against imprisonment for debt, and the assertion that "the military shall at all times be subordinate to the civil authority" were ideas consistently enshrined in state bills of rights.[59]

Finally, the phraseology of specific provisions and the final version of article I suggests that delegates sought to provide a host of enumerated and described rights. In this sense they proved themselves more venturesome than the drafters of the Federal Constitution. Indeed, California's 1849 Bill of Rights suggests that its authors not only wished to safeguard individual liberties by crafting language to prohibit and restrict what the state government could do, but also sought to affirm inalienable rights that the people possessed and that the government should inculcate and support. Thus, the framers may have sown the seeds for two enormous developments beyond the scope of the Federal Constitution: requiring the state to promote individual liberties and giving constitutional protection to purely private infringements of those individual liberties.

V. Efforts At Originality That Failed

Following his complaints about the lack of originality of the constitution they were drafting, one delegate proposed an addition to the bill of rights designed to ensure that at least one section was wholly original. He sought to add the following directive of constitutional interpretation that went beyond the Tenth Amendment to the Federal Constitution: "As constitutions are the instruments by which the powers of the people are delegated to their representatives, they ought to be construed strictly,

58. California's section 1 was identical to article I, section 1 of Iowa's 1846 constitution, except that California's constitution substituted "independent" for the word "equal." The language was also reminiscent of the statement in the Declaration of Independence that: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

59. The language of the subordination of military power comes from article I, section 17 of Texas's 1845 constitution and is typical of the language used in other state constitutions.

and all powers, not expressly granted, should be taken to be reserved."[60] The convention declined to indulge his request that there be "at least one original section in the Constitution"; nor did it accept such a strict constructionist statement in the California Constitution.[61]

Another proposed section for California's bill of rights would have provided more far-reaching protection for individuals accused of crimes than anything enumerated in the Federal Bill of Rights. Immediately after the prohibition on slavery was passed, Lansford Hastings, a Sacramento delegate, proposed a new section that declared, "As the true design of all punishment is to reform and not exterminate mankind, death shall never be inflicted as a punishment for crime in this State."[62] Hastings did not defend his proposal on religious or philosophical grounds, but rather on the basis that it was beyond the power of the government to take the life of one of its citizens. Hastings posited that the government had no rights, as a government, other than those it derived from the people, as the source of popular sovereignty. Thus, the people could not transfer rights they did not have to their government. Since justifiable homicide hinged upon self-defense, and since individuals within the community were unjustified in pursuing and killing persons who killed in the absence of self-defense, the government could not claim a right that did not belong to the people. Hastings argued,

> Life is taken; the party is arraigned long after the act is committed. The Government, in cold blood, pursues, arrests, and murders the criminal. Why can the Government, the representative of individuals, do this, when the individuals themselves cannot do it?—when it is admitted that no right can be delegated by individuals which they do not possess?[63]

Hastings also urged his proposal on the grounds that while one goal of punishment was deterrence, the overriding goal was to reform the individual.[64] He argued that, in any event, life imprisonment was a more effective deterrent to criminals than the death penalty.[65] Although one delegate half-heartedly seconded consideration of Hastings' proposal, the

60. J. BROWNE, *supra* note 1, at 51. The Tenth Amendment to the Federal Constitution only provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

61. J. BROWNE, *supra* note 1, at 51.

62. *Id.* at 45. Hastings's conclusion that the death penalty should be unconstitutional might have been original, but he appeared to take the premise for that conclusion verbatim from article XIII, section 14 of the 1848 Illinois Constitution that provided: "All penalties shall be proportioned to the nature of the offence [sic]; the true design of all punishment being to reform, not to exterminate mankind."

63. J. BROWNE, supra note 1, at 45.

64. *Id.*

65. *Id.*

convention—with no recorded debate—quickly rejected making the death penalty unconstitutional.[66]

This comparative analysis of provisions in the Federal Constitution that protect individual liberty and freedom with those of California's first bill of rights is not intended to disparage the very real and important individual freedoms granted by the United States Constitution. Rather, the intent has been to show that by the literal terms of the two documents, California's delegates often went further than did the Framers of the Federal Constitution. But this tendency was not entirely uniform. As previously noted, the broader language in the Fifth Amendment requiring presentment and indictment is not paralleled in California's analogous provision.[67] In only one area, however, did the Federal Bill of Rights clearly provide a substantive right omitted in California's constitution: the right to bear arms. Article seven of the 1849 constitution provided for the organization of the militia, but did not couple its creation, as did the Second Amendment to the Federal Constitution, with "the right of the people to keep and bear Arms."[68]

VI. The Nature of the Enterprise

Early in the deliberations over the bill of rights draft proposed by the select committee, one member objected to the proposal because it contained a number of "legislative enactments."[69] A bill of rights, he argued, "should only be declaratory of general fundamental principles."[70] He wanted the convention to accept explicitly this idea as its guiding light in framing the bill of rights. While a resolution to that effect failed, subsequent events demonstrated that, by and large, the convention shared the sentiments expressed in the resolution.[71]

---

66. *Id.*

67. *See supra* note 44 and accompanying text.

68. Article 7 of the 1849 constitution contained the following three sections:

> Sec. 1. The Legislature shall provide by law for organizing and disciplining the militia, in such manner as they shall deem expedient, not incompatible with the constitution and the laws of the United States.
>
> Sec. 2. Officers of the militia shall be elected, or appointed in such manner as the legislature shall from time to time direct, and shall be commissioned by the governor.
>
> Sec. 3. The governor shall have power to call forth the militia to execute the laws of the state, to suppress insurrections, and repel invasions.

In comparison, the Second Amendment of the Federal Constitution simply provided that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

69. J. BROWNE, *supra* note 1, at 32.

70. *Id.*

71. *Id.* at 30-31; W. SWINDLER, *supra* note 3, vol. 1, at 447-48.

This issue resurfaced when the convention began to discuss the proposed seventh section that specified the procedures for compensating individuals whose land was taken by the state (including the process of converting private roads to public ones).[72] The immediately preceding section—approved by the convention—had contained a guarantee of due process before takings of life, liberty, or property as well as a prohibition against the taking of private property for public use "without just compensation."[73] Several delegates objected to the seventh section as inappropriate to the bill of rights. As one delegate said, "The pages of the Constitution should not be encumbered with regulations in regard to local improvements."[74] This shared sentiment of the convention also accounted for the rejection of proposed provisions that forbade lotteries, limited the granting of divorces, and disqualified duelists from public office.[75] Nonetheless, all three of these provisions ultimately found their way into other portions of the constitution.[76]

Although delegates agreed to exclude "legislative enactments" from the bill of rights, what some of them considered "legislative" and hence inappropriate for the bill of rights might strike one as unusual today. For example, given the absence of a right to bear arms in the proposed bill of rights, one delegate proposed a section drawn verbatim from Michigan's constitution that stated, "Every person has a right to bear arms for the defence [sic] of himself and the State."[77] In the discussion

72. This proposed section (taken verbatim from article I, section 7 of New York's 1846 constitution) provided:

> When private property shall be taken for any public use, the compensation to be made therefore, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law. Private roads may be opened in the manner to be prescribed by law; but in every case the necessity of the road, and the amount of all damage to be sustained by the opening thereof, shall be first determined by a jury of freeholders, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

73. The relevant portion of this section (which ultimately became article I, section 8) provided: "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation."

74. J. BROWNE, *supra* note 1, at 41.

75. Proposed section 9 of the select committee provided in part: "No law shall be passed . . . nor shall any divorce be granted, otherwise than by due judicial proceedings, nor shall any lottery hereafter be authorized, or any sale of lottery tickets be allowed within this State." Proposed section 10 provided: "Any citizen of this State who may hereafter be engaged, either directly or indirectly, in a duel, either as principal or accessory before the fact, shall forever be disqualified from holding any office under the Constitution and laws of this State." For discussion of these proposals, see J. BROWNE, *supra* note 1, at 42-43.

76. *See* article IV, sections 26 (no divorces granted by legislature) and 27 (no lotteries) and article XI, section 2 (dueling) of California's 1849 constitution.

77. This proposed language was taken verbatim from article I, section 13 of Michigan's 1835 constitution.

that ensued, another delegate suggested that the proposal be amended to read, "providing they are not concealed arms," but eventually opposed the section on the grounds that it was too "legislative" for a bill of rights.[78] A sufficient number of delegates apparently agreed that it was either inappropriate or unnecessary to entrench that right into the bill of rights; as a result, the proposal failed.[79] Even section nineteen (incorporating the Fourth Amendment's language against unreasonable searches and seizures) drew objection to its placement in a bill of rights, on the ground that it "properly belonged to another part of the Constitution."[80] In this case, however, that objection was not sustained by a majority of the convention.

At one level, characterizing provisions as "legislative" or "fundamental" reflected a shifting understanding of what constitutions were supposed to accomplish. From the start of American constitution-making a tension existed between the notion of a constitution as a document "broadly outlining the structure and powers of government, and the prevailing state model of the constitution as that plus a mass of codelike specifications."[81] The course of nineteenth century state constitution-making reveals a shift toward a general acceptance of constitutions loaded with codelike provisions. The political pressures underlying this shift are better understood than how notions of constitutionalism changed to accommodate the result. California's 1849 convention offers an intriguing glimpse of the struggle to define the function of a constitution at mid-century.

VII. The Nineteenth Century View

The idea that the bill of rights ought simply to declare what one delegate described as "general fundamental principles"[82] raises the question of what those principles were. One insight can be found in nineteenth century constitutionalism and was manifested in the eight state constitutions drafted in the decade immediately preceding the Monterey convention. Not only do the eight state constitutions span a period that includes California's constitution-making, but they represent a broad geographical spectrum from New England to the deep South to the Northeast to the Midwest to the West.[83] Indeed, elements that bind these

78. J. BROWNE, *supra* note 1, at 47.
79. *Id.*
80. *Id.* at 48.
81. *See* Keller, *supra* note 9, at 70.
82. *See supra* text accompanying note 70.
83. The eight states were Rhode Island (1842), New Jersey (1844), Texas (1845), Louisiana (1845), Iowa (1846), New York (1846), Illinois (1848), and Wisconsin (1848).

constitutions together and distinguish them from the Federal Constitution provide an excellent clue to the significant changes in the constitutionalism of the nineteenth century.

The state constitutions framed in the 1840s shared with the California Constitution a core of rights and protections that in substance harken back to the Federal Constitution. Nearly all of them included prohibitions against unreasonable searches and seizures and excessive bail and asserted the rights of freedom of speech and of religion, due process, jury trials and procedures, the right of assembly, and the writ of habeas corpus. But, as noted with respect to California, those rights tended to be affirmatively expressed rather than, as in the Federal Constitution, protected simply by prohibiting governmental action. While state constitutions often contained a "state action" limitation, what is significant is that such language was usually linked with positive assertions or affirmations of principle that might also prohibit individual, private actors from abridging those rights. New Jersey's opening sentence in its constitutional section dealing with freedom of speech aptly illustrates this point. The section began, "Every person may freely speak, write, and publish his sentiments on all subjects . . . ."[84] Likewise, Rhode Island's relevant section began, "The liberty of the press being essential to the security of freedom in a State, any person may publish his sentiments on any subject . . . ."[85] Such affirmative language describing these principles was frequently, as in California's case, couched in broader terms than can be found in the Federal Constitution, raising the notion that these provisions would be read to prohibit purely private conduct.

Indeed, the best indication of this positive affirmation of rights and the implied burden on state government to secure them to individuals against public and possibly private infringement can be found in the bills of rights of Rhode Island, Wisconsin, and Illinois. Each of these states had a provision in its constitution that proclaimed the citizen's right to expect justice and remedies for all legal wrongs. Illinois's provision was typical:

> Every person within this State *ought* to find a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property, or character; he *ought* to obtain right and justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, comformably to the laws.[86]

84. Article I, section 5, New Jersey's 1844 constitution.

85. Article I, section 20, Rhode Island's 1842 constitution.

86. Article XIII, section 12, Illinois's 1848 constitution (emphasis added).

These provisions recently have sparked much interest in the wake of legislative efforts to limit tort recovery as a means of stemming the burgeoning amounts of tort liability.[87] Challenges are now surfacing, charging that such limits offend these constitutional provisions that appear to guarantee all remedies for all legal wrongs.[88]

VIII. The Source of Power—Popular Sovereignty

Virtually all of the state constitutions began their bills of rights with broad statements reflecting their political and constitutional understanding of the source and purposes of their governments. Almost all of these constitutions alluded to or explicitly declared the principle of popular sovereignty as the foundation of their constitution-making in terms that harkened back to the "We the people" language of the Federal Constitution. Rhode Island, for example, invoked George Washington's declaration: "That the basis of our political systems is the right of the people to make and alter their constitutions of government . . . ."[89] Other states, like Illinois, simply stated, "[A]ll power is inherent in the people, and all free governments are founded on their authority . . . ."[90]

Often associated with this identification of the source of governmental power was a declaration of the purposes of government and the inalienable rights of the people. New Jersey's constitution explained that government was instituted "for the protection, security, and benefit of the people."[91] The nature of "the people" and their rights were often described in broadly affirmative terms. Typical was Illinois's constitution that began its bill of rights by declaring, "That all men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, and of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness."[92] California's 1849 constitution began

87. *See, e.g.*, Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 757 P.2d 251 (1988); Richardson v. Carnegie Library Restaurant, Inc., 763 P.2d 1153 (N.M. 1988); Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); Duren v. Suburban Community Hosp. Inc., 24 Ohio Misc. 2d 25, 482 N.E.2d 1358 (C.P. 1985).

88. *Id.*

89. Article I, section 1, of Rhode Island's 1842 constitution reads as follows:

> In the words of the Father of his Country, we declare: "That the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

W. SWINDLER, *supra* note 3, vol. 8, at 387.

90. Article XIII, section 2, Illinois's 1848 constitution.

91. Article I, section 2, New Jersey's 1844 constitution.

92. Article XIII, section 1, Illinois's 1848 constitution.

its bill of rights in similar terms,[93] though drawing, perhaps, more directly upon Iowa's 1846 constitution.

These statements of inalienable rights, though reminiscent of the Declaration of Independence, were not to be found in the Federal Constitution. These declarations were more than mere rhetoric and offer indications of the political climate of the times. The bills of rights of both Illinois and Wisconsin—each drafted the year before California's constitution—contained a separate section stressing the vital importance of the "fundamental principles" they were entrenching in their constitutions. Illinois's bill of rights included the observation "That a frequent recurrence to the fundamental principles of civil government is absolutely necessary to preserve the blessings of liberty."[94] Wisconsin's constitution was even more explicit. Its bill of rights concluded with the assertion that "[t]he blessings of a free government can only be maintained by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."[95]

Conclusion

This limited perusal of constitution-making in other states suggests that California's broader language and protections in its bill of rights than in the Federal Constitution was not unique. Indeed, while the exact dimensions of antebellum constitutionalism must await further study, it is evident that a pre-Civil War understanding existed about the nature and meaning of American constitutionalism. One apparent source of that understanding was the change in political and social attitudes fostered by Jacksonian democracy. But detailing the shifts in attitudes about the role and function of government, the interrelationship between law and written constitutions must await future research. Likewise, the backgrounds of the participants, their concerns, and understanding of the process in which they were engaged must also receive considerably more attention before we can begin to speak broadly about the intentions of the framers of nineteenth century state constitutions.

In the final analysis, California's process of constitution-making provides further evidence of the existence of a well-developed nineteenth century legal culture. Legal historians, principally John Reid and David Langum, have identified particular attitudes and an understanding of law among the Americans who came to California before and during the

93. Article I, section 1, California's 1849 constitution.
94. Article XIII, section 19, Illinois's 1848 constitution.
95. Article I, section 22, Wisconsin's 1848 constitution.

Gold Rush.[96] Langum, for example, has shown that immigrants to California expected a legal system to provide certainty, predictability, and efficiency in the enforcement of judgments and that they criticized the absence of those elements in the Mexican California system.[97] This review of state constitution-making suggests that the goals and objectives of those coming to California were much broader and more ambitious than previously believed. The work of the Monterey convention in 1849 suggests that the nineteenth century American legal culture had a shared constitutional dimension as well. Western history and California's legal history—including its constitutional history—will inevitably help explain the nature of American law in the nineteenth century. Moreover, closer attention to the formation of California's first constitution also aids the ongoing task of interpreting California's bill of rights.

96. J. REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1980); D. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821-1846 (1987); *see also* Reid, *Some Lessons of Western Legal History*, in 1 WESTERN LEGAL HIST. 3-21 (1988).

97. *See* D. LANGUM, *supra* note 96, at 131-52.