

Gilded Age State Building in the West

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Abstract: The anti-government stance of the western states is a staple of western history and political studies. I argue here that in the late nineteenth century the western states did not exhibit hostility to government or much faith in the market. Writing their founding constitutions in the Gilded Age, westerners designed elaborate state governments to manage, as best they could, the development of their economies. In making these arguments, the essay contributes both to understanding American political development, and to the understanding of state constitutions.

The anti-government stance of the western states is a staple of western history and political studies. No less eminent western historians than Lewis Gould and William Lilley, for example, have argued that western states did not create public agencies to build and manage irrigation systems because “the West remained a prisoner of its belief that free enterprise alone should manage the work of irrigation;” “... the region’s unchanging commitment to a laissez-faire status quo ...” made the West “its own worst enemy.” (1966, pp. 58-9). I argue here that in the late nineteenth century the western states did not exhibit hostility to government or much faith in the market. Moreover, westerners designed elaborate state governments to manage, as best they could, the development of their economies.

The papers of western leaders of the Gilded Age and Progressive Era, the newspapers of the same years, and the minutes of their constitutional conventions show that citizens in the west resented the neglect of the federal government, which they hoped would assist them with irrigation, transportation,

corporate regulation, and keeping the peace. And at their constitutional conventions, they designed state governments to be the voice of the west in Congress, the enforcing arm of popular will, a peacemaker between labor and capital, the protector of residents from the irrigation company, railroad, or mine, and of the many from the distant, indifferent, and predatory few.

My texts for these arguments are the minutes of constitutional conventions of five western states, held in the last quarter of the nineteenth century: Colorado (1876), California (1879), Montana (1888), Idaho (1888), and Wyoming (1890).¹ Constitutional conventions are a good place to explore the sentiments of citizens in the region. The conventions were elected, and broadly representative. Their long agendas provoked conversation about a wide range of topics -- among them, the architecture of government, suffrage, corporations, settlement, and rights – revealing agreement and division about public life. Delegates did not design elegant, spare machines that would go of themselves, but complex governments with diverse institutions to address a broad range of tasks.

The items on the agenda of the constitutional conventions may be grouped under three headings. First, creating state governments – the three branches, the lesser governments of counties and cities, and the auxiliary institutions of education, prisons, and the like. Second, expanding Bills of Rights. The list of rights in state constitutions grew as the century progressed, and their

¹ With the exception of California's constitution, which was its second, all of the conventions examined here were the founding conventions of their states, written at the transition from territorial status. Utah (1895) and Washington (1889) also wrote founding constitutions in these years. All but Montana's (rewritten in 1972) are the still constitutions of their states (if much amended).

scope increased as well. Unlike the federal bill of rights, written to protect liberty by limiting government, many gilded age additions to bills of rights prohibited private behaviors; state government was meant to enforce these bans. Third, designing law and institutions to facilitate growth and prosperity, a task I call managing the periphery. The west was the periphery of the United States not only as the geographic edge, but also as the country's least developed region. The west displayed the characteristics Immanuel Wallerstein described for areas peripheral to the world economy -- the west exported primary products, lacked resources necessary for its own development, and was dependent on distant investors and government for its future prosperity (1974, p. 59 ff). Delegates to state constitutional conventions hoped the state governments they created would protect their communities from the worst potential outcomes of these relations, and foster the best ones. It was for managing the periphery that the conventions were most expansive in building new institutions, and expanding the range and responsibilities of existing institutions of state government. The sustained focus on managing the periphery distinguishes the constitutional conventions in western states in the gilded age from earlier state constitutions in the west, and from state constitutions elsewhere in the union.

Attention to managing the periphery also allows me a re-reading of state constitutions. State constitutions have only recently been the subject of serious academic reading. Most readings emphasize the constraints constitution-writers placed on the state governments they were creating. Debates about managing the periphery not only highlight Gilded Age statebuilding, they also reveal much

of the political dynamics of western territories. And, equally important, they demonstrate that those who created the western state governments did so with hard-headed -- and hard-fought -- responses to real economic problems.

The first section below describes the constitution-writing process at state constitutional conventions, and academic assessments of their work. The subsequent section presents evidence of state-building in pursuit of managing the periphery. A final section summarizes my arguments and places them in relation to the claims of other students of state constitutions

Conventions and Constitutions

State constitutions are long documents, riddled with provisions limiting the power and range of state government, and bloated with legislation. The contrast between the rambling state constitutions and the elegant federal document led commentators to disparage state constitutions as hasty, cut-and-paste constructs, uninformed by legal or political theory.² In the last dozen years, essays by Christian Fritz (1994) rehabilitated both the authors of state constitutions and their products; the work of G. Alan Tarr presented a coherent account of state constitutionalism and tracked change and development in state constitutions over the course of US history (1991). M Gordon Bakken has written extensively about the constitutions, and constitution writing, in the Rocky Mountain west (1987). In the same years there has been tremendous growth in the study of state constitutions; the preponderance of these efforts have focused

² a reading maintained today in the work of James Gardner, 1995, 2005. Like the majority of recent authors writing about state constitutions in the last decade, Gardner's focus is on civil rights jurisprudence.

on civil rights jurisprudence. Although the constitutions I discuss here contributed to the growth of positive rights, my focus is where the focus of the delegates focus was, on designing state government.

State constitutional conventions were not elite assemblies in the style of the federal convention of 1787. Delegates were elected, and reflected the societies and the partisan tendencies of the communities that elected them. There were delegates who had long lived in the territory, and migrants from other territories or states, some of whom had participated in a constitutional convention elsewhere. There were aspiring politicians and men with long political careers, many lawyers, small businessmen and representatives of larger interests, and, in smaller numbers, there were populist partisans, farmer's advocates, workers from the mines, and Mexican Americans (there were no women, Native Americans, Asians, or African Americans). Delegates were attentive to constituent sentiment not only because they took that attention to be part of their job, but also because proposed constitutions required ratification by popular vote.

Delegates saw their meetings as "constituent assemblies", "the practical embodiment of popular sovereignty"(Fritz 1994, p. 984). Carl Swisher saw the congratulatory self-description in California. There "the delegates looked upon themselves as more truly the representatives of 'the people' than any subsequently chosen legislature, and thought it was their duty to include a large amount of legislation in the constitution, where it would not be easily subject to change" (Swisher 1930, p. 65). Christian Fritz wrote that "conventions implicitly operated with ... greater competence" than the territorial legislature (Fritz 1994, p

854). Conventions were held in high regard, and justifiably so. John Hicks observed,

Many citizens of national reputation, rarely or never available for service in a state legislature, willingly assumed the burden of leadership in the constitutional convention. Third rate politicians were seldom candidates. They cared little for the hard work of convention delegates, which was not necessarily rewarded by future prominence, and might leave an embarrassing record on the questions of the day” (Hicks 1990, p. 27).

Delegates were anxious that the product of their debates make legal sense as well as practical sense; they were insistent that the organic law they were writing make constitutional sense, aligned with the history of constitution-writing across the country. Delegates showed their legal learning if they had it, others were embarrassed and deferential if they were unschooled in law.

State constitution writing was to some extent autonomous of the federal constitution. Certainly the process of writing state constitutions gave evidence of independence of the federal constitution. Delegates had compilations of state constitutional provisions ready to hand, and provisions might be judged by the subsequent experience of their home states (Fritz 1994). Delegates in the western states often looked to Illinois and Missouri, which were considered other ‘western’ states. The western states that wrote constitutions after Colorado all looked to her laws as the most recent and truly western precedent. For example, in discussing water law and irrigation, a delegate to Idaho’s constitutional convention looked to Colorado:

Colorado ... is generally conceded [to] have the best laws relating to the question of irrigation of anywhere in the United States I have been over that state a little, ... particularly in the portions where they irrigate ... and I know to what perfection the country

which was naturally an arid country has been redeemed by this until land is worth \$100 an acre for agricultural purposes alone, and I don't think we can do very much better than to follow them (Wilson in *Id* 1912 II:1361).

Colorado pioneered innovations in water law and was the first state to forbid so-called "iron clad" labor contracts in its constitution. Although for many years students of state constitutions disparaged these borrowings as hasty "cut and paste" composition, subsequent to an essay by Christian Fritz enjoining students of state constitutions to reconsider these judgments, the care and seriousness of purpose of constitutional borrowing has been recognized. Delegates to constitutional conventions read the provisions of other constitutions, which informed "extended debate over ... different constitutional practices of other states..." (Fritz 1994, p. 982) and enabled a search for precedents and best practices.

With this in mind, state constitutions can be understood as the product of a far-flung and extended conversation among convention delegates across generations, and across the whole of the United States. It follows that chronology – the date of writing – and sequence are important to understand state constitutions.

Each generation of delegates had its own agenda of purposes and concerns. Authors writing about state constitutions have recognized the importance of historical context in their selection of cases. Donald Johnson (1992) chose the first three constitutions written in the west – California, 1849, Oregon, 1859, and Nevada, 1864 – to study the founding of the far west. John Dinan (1999) selected constitutions written in the Progressive Era. Beyond

asserting the general importance of historical context, Cornell Clayton, beginning with that insight, has laid the groundwork for a theory of state constitutions (2001). Clayton argues that a theory of state constitutions should begin with “original intent and history” to “generate an organize and independent theory of substantive values embodied in the state’s charter.” Clayton observes first that authors of the Washington Constituion of 1889 had different worries than the federal founders: “the tyranny they feared most was not the tyranny of the majority, but the tyranny of corporate power ... that might ... control or ... corrupt governing institutions.” More positively, “the framers of Washington’s Constitution were strong believers in popular sovereignty and believed that liberty could best be secured through open, democratic government” (2001, p.66). The provisions of the constitution followed from these fundamental beliefs.

In this essay I examine constitutions from the last quarter of the nineteenth century. The central narratives of the Gilded Age – the appearance of large corporations, clashes between labor and capital, the mobilization of populist sentiment, and the settlement of the west – are all elaborated at these conventions. G. Alan Tarr has argued that “comparisons of state constitutions over times and among states ... reveals patterns in American political development” (1988, p. 4). Similarly, knowledge of American political development provides insight into state constitutions, revealing what was at stake and illuminating the intent of the authors.

Region also made its mark on state constitutions. Regions have distinctive political, social, and economic histories. Writing about the late

nineteenth and early twentieth centuries, James Henretta argued that authors of state constitutions saw a “potential for tyranny ... in party government. Parties ... were the real majoritarian menace.” In the first generation of the twentieth century, “reformers turned their attention to systematically attacking the party machines” that exercised political control of state politics. Henretta provided evidence from New York and New Jersey to support this argument, claiming “the New York experience was typical” (1991, p. 823). New York was not typical. Overbearing parties were not the issue in the Rocky Mountain states, appeared only in compromised ways in the Pacific coast states, and figured not at all in southern turn of the century debate.

The west and the south feared other Goliaths. In the west “foreign” corporations posed threats to local autonomy, economic development, and social peace. Moreover, in the west the limited liability corporation remained morally suspect. Some delegates thought the corporation should be done away with, and business conducted by partnerships. In Colorado S. J. Plumb wanted to abolish limited liability (Hensel 1957, p. 152). And a majority at California’s convention supported expanded stockholder liability, placing this section in the constitution:

Each stockholder of a corporation ... shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred, during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation (Article XII, Sec 3 Ca 1880 I:383-88).

Nevertheless, writing constitutions required creating a legal environment for property. Even at the periphery, there could be no growth without property, and

no property without law. One California delegate explained the problem this posed. Discussing water rights, James Hale argued,

There are two distinct phases of this question One is the security of the rights of those parties who make these appropriations [of water], and the other to secure the public against oppression from their use (Ca 1880 II:1021)

Although he spoke of water rights, the “two phases” he identified were not confined to water, but appear again and again in convention deliberations. One would be hard pressed to find a more succinct statement of government’s role in the late nineteenth century as these delegates understood it.

Finally, each state’s society shaped constitutional provisions. In the discussion that follows, for example, Wyoming’s radical water rights policy is described and attributed to the dominance of stock growers in the territory’s politics and economy. Other Rocky Mountain state economies were dominated by mining industries, and home to well organized mine workers. Concessions to their demands appear in several state constitutions, as well as provisions acknowledging the interests of their employers. Southern Colorado housed a large Mexican population, whose representatives secured two provisions, that laws be published in Spanish, and that there be no educational qualification for voting for twenty-five years (Fernandez 2003, pp. 41-2, Co 1907 p. 730).

The question of how delegates thought about the governments they were creating remains. In “Mostly Anchor, Little Sail”, Kermit Hall argued that state constitutions were “diffuse, overly long, negative documents that generally prevented the positive exercise of public authority” (Hall 1991, p. 406). There were two reasons for delegates to restrict state governments. The first is

doctrinal, found in the contrast between the federal constitution and state constitutions. The federal government is a government of enumerated, delegated powers. All powers not granted the federal government – “plenary legislative powers” (Tarr 1998, p. 8) – belonged to the states. It followed that if the states were not to become little Leviathans, their constitutions must limit the reach of state authority. John Morgan explained this at the Idaho constitutional convention:

The difference between the constitution of the United States and of the several states is this: The constitution of the United States is a granting of power to the federal government. The people give the federal government power to do certain things. It is also to some extent a limitation upon that power, and it is a grant by the sovereign people of all the states ... On the contrary, the constitution of the state is a limitation of power; the power resides in the people. The legislature of a state can do anything, unless it is restrained by the constitution. We are seeking here to frame a constitution which shall restrain and limit the powers of the legislature of this state and of the courts (Id 1912 I:343).

The second reason to limit the legislature was experience. By the Gilded Age, the corruption of the territorial assemblies by large interests was common enough that constitution writers felt compelled to put limits on legislative discretion. Limits often took the form of explicit constitutional prohibitions on legislative action. In Hall’s reading, the conventions in this way hobbled – by design -- the very governments they created.

Hall was certainly right about limits on state legislatures. No sentiment was as frequently expressed at these conventions as the disparagement of state legislatures. The “shall not” provisions in articles designing the legislative branch in the constitutions considered here are often by far the longest sections. There

were additional strictures on state governments elsewhere in the same constitutions. Most constitutions placed severe limits on the debt governments could incur, and most forbid special charters for corporations, or special legislation for particular constituents. The constitutionalization of politics (that is, the appearance of much that could be called “legislation” or “policy” in state constitutions) precluded decision-making by state governments themselves. In each of these ways delegates revealed their lack of confidence that the state governments they were creating would deliver their preferred legislation or policy.

John Hicks read the constitutions of the northwest states differently. He saw that in the Gilded Age “... people were confronted ... by the need of an immediate expansion of state activities to meet new and unprecedented conditions” (1990, p. 31). The result was that “undoubtedly, the sentiment of the country favored more government, not less”, and more elected officials, not fewer (1990, p. 75). “More government” sometimes took the form of new institutions. In other instances more government was designed by the affirmation or declaration of governmental prerogatives or powers. Wyoming created a Board of Control to distribute rights to water, Montana and Colorado created Commissioners of Mines, several states affirmed the authority of state government to set railroad rates, or county governments to set the price of water. As the list suggests, more government was especially prominent in provisions for managing the periphery.

Managing the periphery placed great responsibilities on western state governments. Major tasks in managing the periphery included creating systems of water rights, the distribution of public lands, regulating and taxing corporations, and the protection of labor. These issues shared distinctive characteristics. Each had enormous economic value, presenting opportunities, often realized, for corruption. Too, issues of managing the periphery had widespread salience. These were not arcane debates, but the stuff of community interest, likely to move citizens when constitutions were judged by popular vote. Managing the periphery required difficult moral and political choices, especially trying when the alternatives (as in the cases of water and land) appeared to be zero-sum. Finally, managing the periphery presented complex practical, political, and intellectual puzzles. For the states to perform these tasks, delegates to constitutional conventions created new institutions and added to the responsibilities of existing institutions, increasing the reach of state government.

Strategies, tactics, and precedents for managing the periphery were created in practice, in courts, and in territorial legislatures. The initial forays of the territories form the subtext, and sometimes provided the actual text, of convention deliberations. The text of the constitutions was merely the tip of an iceberg of common law, legislative compromise, judicial decision, and extra-governmental practice. And for all the efforts of convention delegates to bring order and clarity to managing the periphery, legislative compromise, judicial decision, extra-governmental practice, and the incremental change of common law continued once the constitutions were in place.

Each of my claims about managing the periphery, and the inescapable centrality of state government to that effort, can be illustrated by convention discussions of water rights. Water rights posed issues with enormous economic stakes, high salience, difficult choices, and complex puzzles. Discussion of water, and of irrigation, also brought to the fore the ambivalent stance of the west toward corporations, and the region's wistful demands of the federal government. At the same time, water presented a particularly western problem. As one delegate remarked, "God does not sprinkle these plains, and so they are an absolutely barren waste, and without water can never be used" (Id 1912 II, p.1358). Not a territory in the west had enough water when and where it was needed, and the region was without a well-developed legal framework for water rights. Yet there was great potential for the west's settlement and prosperity, if the region were properly irrigated. In a typically optimistic appraisal of the region's prospects, a delegate to Montana's convention argued the territory "was capable of supporting a population of ten million people if a proper system of irrigation can be had there ..." (Mt 1889, p. 500).

The shortfall between 'barren waste' and prosperous settlement made water and irrigation important political issues. Farmers in Colorado were dissatisfied with private irrigation companies, supported state ownership of water companies, and endorsed demands for federal reclamation projects (Wright 1974, pp. 31-40). In Montana corporations did not have a good record for providing irrigation. When out-of-state companies did invest in irrigation systems, they set extortionate rates for water. "The ... law that provides that the county

commissioners shall regulate the price of water has been practically abrogated by the promoters of this enterprise going to the farmers themselves and exacting from them contracts” at “exorbitant” prices (Mt 1889, p. 497). As a result farmers in Montana too were unhappy with private irrigation companies, and pressed for federal assistance from the Populist era until the turn of the century (Clinch 1970, p.14). In Idaho political agitation about irrigation was at the heart of Populist politics. Farmers’ Alliances in Washington, Elmore, and Latah counties denounced plans to “contribute a billion dollars to improve the rivers that could be navigated only by turtles and catfish,” but failed “to appropriate a cent to irrigate arid land in ... South Idaho” (Griffiths 1992, pp. 441-2). In these three states, then, as well as California, there was broad mobilization around water issues through the 1880s, and for decades after.

Convention deliberations about water began with division about the meaning of “property” in water and confusion about the meaning of its “appropriation.” There was uncertainty about conflict between state rules and the federal government’s management of navigable waters. And there were diverse rights doctrines in each territory. Riparian rights were the right to use water that coursed through, or bordered, one’s own land; the flow of water was not to be substantially diminished. The doctrine of “first appropriation” or “first in claim, first in right” meant exactly what it said. Unlike riparian rights, rights of first appropriation were in principle unlimited. A mining company’s claim near the headwaters of a river, for example, could deprive farmers downstream of water that ran through their property. And there were community or pueblo rights. The

details of convention deliberations should not obscure how fundamental the question of water rights – that is, property in water -- was.

The management of water raised several issues. Convention delegates felt called upon to create a legal framework for water rights, make decisions about eminent domain and its delegation, the reach of beneficial or public use, and the regulation of corporations that constructed irrigation systems or sold water. The organizing principles of water management were not well established. Delegates explained that in the midwest and the east, where water was plentiful, the common law of riparian rights provided adequate guides for the distribution of rights to water.³ Riparian rights awarded use (although not exclusive use) of water to those whose lands were adjacent to the natural waters of rivers, streams, and lakes. Where water was plentiful riparian doctrine served as a practical general guide. Instances of dispute were resolved in court, not with reference to legislation, but rather as matters of common law adjudicated by the presentation of facts and the exercise of the court's judgment. As exercises in common law, these decisions were guided by principle, custom, fact, and considerations of equity.

In the west riparian doctrine was controversial. Writing the west's first Gilded Age constitution, delegates in Colorado confronted this difficulty immediately. The Committee on Irrigation, Agriculture, and Manufacture

³ Donald Pisani (1996) has shown that the claim that riparian rights were the exclusive water rights practice in the east is incorrect. Prior appropriation had precedents in Eastern states. It was, however, the argument presented at these conventions, e.g. Senator Stewart speaking at Montana's convention (MtCC p. 806).

proposed a first section of the article on water innocently enough: “The water of every natural stream within the State of Colorado is hereby declared to be the property of the people of said Sate, and the same is dedicated to their use forever.” It was quickly objected that “the section interfered with the rights of individuals under the old doctrine of riparian rights”, to which another delegate responded “there was no such thing as riparian rights in Colorado” (DDT⁴1/19/176, p. 4).

The second section proposed that priority of appropriation should give priority of right. In other words, the first person to make a property claim on a body of water, or the water of a river or stream, had legal right – were it not limited by law – to all of it. To priority of appropriation it was objected that although the principle may have been drafted to protect “the poor man”⁵ the provision “would operate to enable rich corporations to appropriate all the water of the streams, to the serious injury and grievous oppression of the poor.” Surely all could agree that “when a man took up land in a valley adjoining the valley of a stream, he ought to have the right to secure water to irrigate it” (DDT 2/19/76, p. 4). In each convention farmers championed riparian rights and worried that rights of first appropriation – the preference of mine owners -- threatened them. To repair the potential deficit to agriculture, two provisions were required. First, prior appropriation was modified by a hierarchy of uses, so that when water was

⁴ Delegates to the Convention refused to hire a stenographer, but allowed the press access to their deliberations, which were published by the Denver Daily Tribune, hence, DDT. After reading the Tribune coverage and writing this discussion, I learned that the proceedings were published in 1907.

⁵ “First in claim, first in right” was a doctrine for mining, and insured claims of “poor men” against wealthier or corporate claimants.

insufficient for all purposes, domestic use would have first priority, then agriculture, then manufacture. Of course disputes about water rights continued; these were to be settled by lower courts. Second, county commissioners were empowered “to establish reasonable maximum rates to be charged for the use of water” (DDT 3/2/76, p. 4). Colorado’s deliberations present the parameters of subsequent convention debates: riparian rights; right of prior appropriation; the hierarchy of domestic use, agriculture, industry; government price-setting and, at least implicitly, the courts. Fifteen years later H. P. H. Bromwell, who served on the convention’s irrigation committee, wrote of the courts, “[their judgments] have proved so satisfactory throughout the many water districts, that they have never found their way into the reports of Supreme Court decisions ... it may now be truly said that our courts have given to Colorado a far better system of adjudicated irrigation law, than could have been expected, under the scanty enactments of Congress, the Territorial legislature, [or] the constitution and statues of the State” (Hall 1890, p.313). For Bromwell, this record was a vindication of common law processes.

Conflicts at the Colorado convention were repeated elsewhere. At each convention farmers championed riparian rights and protested the threat of rights of first appropriation. “First in claim, first in right” was the principle embraced by mine owners. At Idaho’s convention there were repeated protests that prior appropriation “might exclude the riparian owner”, and “overturn the common law” (Id 1912 II: 1123). The result, if “the water power of this country can be used to prevent irrigation, if it can be held by virtue of a prior right, good-bye to all the

prosperity that we expect to come from the use of the water in irrigating our plains” (Id 1912 II, p. 1123). The same objection was raised at California’s convention, where corporations made first appropriation claims. “When they made these appropriations of the headwaters of the San Joaquin, who ever asked permission of the farmers along the banks of that stream? No man. And when the miners wanted water, which of them asked the farmers along the banks of the Sacramento and its branches? Never a solitary instance” (Ca 1880 III:1373).

Idaho and Montana followed the path cleared by Colorado. At Idaho’s convention territorial legislation from 1881 served as the starting point of deliberation. Territorial statute protected settlers along ditches, declaring their right to the amount of water “good husbandry shall require.” The same law guaranteed all landowners near streams a right to use the water for irrigation. Having thereby endorsed riparian rights, Idaho’s statute also endorsed the rule of prior appropriation. Leaving no legitimate claim unrecognized, the law required courts to recognize any existing custom and practice of common right. Finally, the law created water districts to select, by majority vote, water masters who would supervise and distribute water (Colson 1991, pp. 162-3). The creation of water districts was also meant to serve as a political settlement between farmers and miners, as mining areas and farming areas were for the most part distinct from one another.

In Montana too the familiar set of articles was proposed: that all water not yet appropriated be declared a public use; that the right to divert unappropriated

water to beneficial uses not be denied, that priority of appropriation gave the better right, and that county commissions should set “reasonable maximum rates” for water (Mt 1889, pp. 138-9).

Wyoming’s constitutional convention built even more government. Article VIII Irrigation and Water Rights opened with the declaration,

Water is state property. The water of all natural streams, springs, lakes, or other collections of still water ... are hereby declared to be the property of the state.

Subsequent sections provided for a board of control to “have the supervision of the waters of the state, and of their appropriation, distribution, and diversion...” (although its decisions were subject to review in the courts) and for a state engineer. The state was to create four water divisions; their superintendents and the engineer would comprise the Board of Control. Priority of appropriation “gave the better right” to water.

The declarations of Article VIII, presented to the convention by the Irrigation Committee on September 12, were met with confusion and protest. Did not the federal government have eminent domain over all the country’s land? Would a settler need two titles, one to land and one to water? What of riparian rights? Might it not be best to declare all irrigation ditches common carriers? What of the large alternate tracts of land owned by the railroads? Would a settler on one of the public tracts have access to water from a railroad tract, or might the railroad sell the water at extortionate prices? Charles Burritt, Chair of the Irrigation Committee, intervened to say that the territory’s irrigation system was in a sorry condition. Elwood Mead, the territorial engineer, had written a report

explaining “the evils of our present irrigation system, and the ... state board of control [proposed] to reverse that system” (Wy 1893, p. 293). Copies of the report were distributed, and discussion of Article 8 was postponed.

Nine days later Burritt had succeeded at persuading the convention to adopt Article 8. On the question of irrigation, he claimed, the Article “is twenty-five years ahead” of California and Colorado, and hence of any area in the arid west. More, the system proposed “would give [Wyoming] the most perfect water system that has been tried in this country.” In their haste to arrange for irrigation, many had lost sight of the other beneficial uses of water, other just claims -- mining, manufacture, stock raising, and domestic purposes – “all of which, so far as our constitution is concerned, are entitled to equal protection and privileges.” No one need worry about the small farmer, for if a man settled on his hundred and sixty acres, and there was a small stream running through it, his “domestic and family purposes, should by all laws of nature give [him] the better right”, even if the stream commenced a bit outside the boundaries of his farm (Wy 1893, pp. 498-500). Reassurance was rejected as disingenuous; here as in the other conventions, vociferous objection to the doctrine of prior appropriation remained. Attempts to define “appropriation” were deterred by arguments against “putting definitions” in the constitution, “making this a dictionary” (Wy 1893, pp. 500-1). With only a few delegates dissenting, Article 8 was adopted at the next reading (Wy 1893, pp. 534-7).

Why did Wyoming adopt the Board of Control to manage water and water rights? Andrew Morris has argued that Wyoming’s system of water management

by experts and bureaucrats was the system of choice of the territory's cattle ranchers (2001, pp. 905-937). In Wyoming farmers and mine owners were lesser players than in Montana, Colorado, and Idaho; in Wyoming cattle ranchers were dominant in the economy, in politics (Jackson, 1947), and at the Constitutional Convention. The same men invested in irrigation, another sizable business effort in the territory. The Cheyenne Daily Leader explained that "in every part of the territory are favorable locations for the investment of capital in the construction of irrigation works of great magnitude" (Morriss 2001, p. 911). The new water law regime was a weapon in the long-running war of cattlemen and irrigation investors against farmers whose homesteads interfered with their ability to control land and threatened their control of water (Morriss 2001 p. 866). If, in Colorado, Bromwell lionized the courts as providers of justice and equity, for those very reasons the courts in Wyoming were the bane of cattlemen's dominance. For those who raised cattle, juries were "a 'vexatious' problem because they followed popular notions of justice rather than the letter of the law" (Morriss 2001 p. 866).

Discussion of water rights at California's convention began with a long disquisition of which the lesson was that large scale irrigation systems faced insurmountable hurdles. "The use of water for irrigation and mining was, until the last twenty-five or thirty years, practically unknown to the American people. ... when we attempt to ... place it under legislative control, we are embarking on a new era." W. J. Tinnan argued that all the world's experience of large-scale irrigation was in autocratic countries. Egypt and India were cases in point. Their

governments, unhindered by the rights of the people, imposed taxes and enlisted labor as they willed. The cost had only to be calculated to reveal that prospects for such grand projects in a democracy were poor. Large scale irrigation systems were expensive, and who would be willing to pay the taxes necessary to build them? Estimating the cost at “three or four hundred millions of dollars to even start this great enterprise”, Tinnan asked “would the farmers of San Diego, Los Angeles, Santa Barbara, Ventura, Santa Clara, Humboldt, Mendocino and miners of the state of California, submit to such a tax? Certainly not” (Ca 1880 II:1020).

The subsequent discussion of water rights was acrimonious. Issues and conflicting interests common to water rights deliberations in other conventions were debated in California with strong statements, ad hominem aspersions, and little resolution. Three issues triggered debate. The first division provoking hostile debate was about the meaning of “rights” in water. Dennis Herrington (Santa Clara), explained that rights to water were only use.

There never has been any higher degree of proprietorship of in the waters of this state than a use. That is all. And there is no one that can acquire any other different property in it, except he appropriate it, and the extent of that appropriation goes only to that which he uses personally (Ca 1880 II: 1021).

C. W. Cross agreed. “...it is only the use of water that any man can have. No law in any country has ever intended to grant any man any interest in water, except the right to the use of water than any man can have” (Ca 1880 III: 1372).

Joseph Brown countered that

water is property, and it is not the use which is taken, but the water itself.
... a man has a right to waste or destroy it, just the same as he has a right
to kill his own horse if he chooses (Ca 1880 II:1021)

Volney Howard read a law text endorsing Brown's view: "a grant of land conveys
to the grantee not only the 'field' ... but all the growing timber and water standing
and being thereupon; and a stream of water is therefore as much the property of
the owner of the soil over which it passes as the stones scattered over it" (Ca
1880 II: 1025).

At the second discussion of water Brown objected again to the idea that
property in water was simply use:

This idea that there can be no property in water is wrong. ... These wild
notions are all wrong... We had better be guided by the decisions of the
courts of the land, and by experience, and by a sense of justice than to
launch out upon an unknown sea (Ca 1880 III: 1373)

The second contentious issue was the rights that might follow from
appropriation. How extensive were the privileges justified by the doctrine "first in
claim, first in right"? Herrington described the dangers of the rule:

When they made these appropriations of the headwaters of the San
Joaquin, who ever asked permission of the farmers along the banks of
that stream? No man. And when the miners wanted water, which of them
asked the farmers along the banks of the Sacramento and its branches
Never a solitary instance.... No one has a right to take these waters
unless it can be shown that it is taken for a public use, and for the benefit
of the public. Anything else is robbery. (Ca 1880 III: 1373)

Appropriation made no difference. "What different right do you acquire by
sticking up a notice, and declaring that you take it? It is all nonsense" (Ca 1880
III: 1373).

The villain here was the corporation. A delegate from San Francisco
made the case most forcefully:

We find, all over the State, an attempt made to condemn and monopolize all the waters of the State by corporations. Especially, sir, this is the case in San Francisco, where the influence of these tremendous water companies is so manifest. (Ca 1880 II:1021)

And their influence was felt in the convention too. "I am thoroughly convinced", observed Herrington, "that if this question had been managed and manipulated by the Spring Valley Waterworks, it could not have been managed more to suit their taste ..." (Ca 1880 II: 1027).

The third division (also debated in Colorado, Idaho, and Montana) was about whether water users should have access to water if access were dependent on a path through the land of someone else. This privilege, were it granted, allowed the devolution of the power of eminent domain to individuals whose takings were possibly for private use. Objection was immediately voiced. "This I look upon as only another mode of confiscation. ... This is simply an attempt to infringe upon the sacred right of private ownership where no public interest is involved"(Ca 1880 III: 1374). In Colorado, Idaho, and Montana, devolution of eminent domain for the creation of ditches for irrigation or for functions related to mining was confirmed. In California, possibly because mining was not so great an industry as in the three mountain states, it was denied (Ca 1880 III: 1375).

In the California convention of 1878, debate about water was so heated and bitter that it was not possible to draft a set of water rights or rules that could gain majority support. The result was a minimalist article that nevertheless affirmed the role of government in managing water. The article specified, first, that all appropriated water was a public use, and so subject to state regulation.

Second, that the right to collect rates or compensation for water supplied to the public was a franchise, to be awarded and regulated by law. And third, that boards of supervisors or other local governments should set water rates annually.

From Wyoming's constitution, with the most elaborate provision for centralized public water management, through the three mountain states with their competing principles and hierarchy of uses, to California's constitution, with the most brief and minimal article on water rights, the one constant was the critical role of state government in the management of water. It was never proposed in any of the conventions that the market, left to its own devices, would deliver water to all who needed it. Private sector provision of water or water management was nowhere praised; hostility to corporate water management was the rule. One Montana delegate expressed resentment toward 'foreign' corporations that might provide irrigation:

If you have got to coddle and fondle and caress these great capitalists in order to get them to come out here and invest their money in these enterprises, then I ... say that we don't want these entrepreneurs, for home capital will produce them; home capital will be invested in these enterprises just as fast as the demands of the people call for it ... (Mt 1889, p. 675).

In California it was domestic corporations that oppressed their fellow citizens.

We find, all over the State, an attempt made to condemn and monopolize all the waters of the State by corporations. Especially, sir, this is the case in San Francisco, where the influence of these tremendous water companies is so manifest. (Ca 1880 II:1021)

One delegate to Montana's convention expressed common sentiment about the ultimate resolution of disputes about irrigation; he looked to government. " ... I hope to see the day come", he said

when systems of irrigation shall be either under the control of the state or of the United States We are opposed to landlordism; we don't want any company or any corporation or any individual to own vast tracts of the land in which they may have tenants. But ... if the companies or individual or corporations are to own the vast water courses, that would be a species of landlordism of the worst kind..." (Mt 1889, p. 472)

Another delegate endorsed this view. "Well now", he began,

suppose heaven, in its infinite mercy, would bestow a little sense upon these men in Congress – it is devoutly to be hoped for, although unreasonable to be expected – and those men would wake up to the interests of northern Dakota [Territory], that is capable of supporting a population of ten million people if a proper system of irrigation could be had there, and the waters that are now going to waste could be mixed with the soil of God's earth to bring forth its increase. Until that thing is done there is no reason for us to hope for a permanent dawn of prosperity. (Mt 1889, p. 500).

Absent that assistance, water issues remained a continuing source of conflict and adjudication across the west.

Although in many respects managing water paralleled other issues in managing the periphery, in one important way it differed. Water, and the disposition of public land, were not issues in which corporate power was a central concern. Yet corporations, especially corporations with out-of-state owners, were a most important concern in managing the periphery. For western leaders, including delegates to constitutional conventions, foreign corporations brought both alluring possibilities of growth and prosperity, and threatening potential for

exploitation, struggle, and disruption. No corporations presented these alternatives more persuasively than the railroads.

The regulation of railroads was an issue across the United States. Debate about railroads moved from east to west with the rails. In regions without railroads, states and towns were eager to recruit them; regions well crossed by railroads insisted on their regulation (Miller 1971, pp. 42-58). Early in the century states and towns subsidized their growth – an experiment of which the unfortunate consequences were well known by the Civil War. The lessons of that experience were written into gilded age constitutions: states were not to own or subsidize corporations, and that the debt of county and town governments was severely limited. Changes in railroad organization after the civil war magnified the divergence of railroad from community interests. Although earlier, towns or counties might have imagined that their community and a small railroad shared prospects for growth, a decade after the war it was clear that enormous railroad corporations, with interests spanning whole regions, had their own goals and prospects, independent of communities or states. Despite these experiences, after the war areas without railroads remained most anxious to recruit them. This was especially so in the west because its main exports – precious metals, lead, and coal -- were so heavy, and bound for distant markets. As a result, short of outright subsidy, communities without railroads were generous in offering freedom of action to railroad corporations. By contrast, where railroads were well

developed citizens were most anxious to regulate them.⁶ The impulse to regulate took institutional form in the 1870 Constitution of Illinois and the legislation passed in its wake.

At Colorado's constitutional convention, the familiar debate between regulation and welcome was between counties that had railroads and counties that did not, between investors and advocates of railroads and delegates with Granger views. After carefully counting votes at the convention, the constitution's historian declared, "Party affiliation meant nothing" (Hensel 1957, p. 145). The argument for regulation was based on both experience and principle. George White, from Jefferson, voiced a bitter critique of railroads. By land grants and subsidy, the "government had built the railroads, and now the ... great cormorant power was reaching out and swallowing up all the railroads in the country The counties of Jefferson and Boulder had been grievously wronged by these companies ... should there not be placed in the constitution a clause for the protection of the people?" (DDT 2/29/76, p. 4).

In 1876, as the convention met, there were only 675 miles of track in a territory where all pinned their future on the mines, and none of the track served mining areas. Short as the lines were, many counties had gone far into debt offering subsidies in their efforts to lure railroads. Those sad experiences were a prime motive for constitutional limits on county debt (subsequently flaunted). The

⁶ This argument was offered in Miller's narrative (1971) and in Hensel's analysis of votes at the Colorado Constitutional convention (1957, see below). Kanazawa and Noll found that at the Illinois convention "railroads had most success with delegates from areas without service, and less success with delegates from monopolized areas than from more competitive ones", while "party affiliation appears to have been unimportant" (1994, p. 46).

outcome of this debate could hardly have been in doubt. The railroads were well represented among delegates and, according to one delegate, the “siege upon the convention in the railroad matter was led by the most influential of the public men of the Territory...” (Bromwell, 1890, p. 305). Henry Thatcher, representative from Pueblo and an investor with large holdings in railroads, offered a doomsday scenario if rate regulation were placed in the Constitution. Wisconsin and Minnesota regretted and repealed their regulatory legislation, he claimed, while Kansas and Iowa refused to countenance enacting it. And wherever railroad commissioners had been appointed, they concluded that setting rates was too complex a task for government. To the proposal that Colorado courts determine fair rates, Thatcher replied, “Enact these sections and not another mile of railroad will be built in Colorado. Capital, ever sensitive and timid, will find more secure investment elsewhere.” “Competition”, Thatcher insisted, “... will do more to regulate and cheapen the rates of fare and freight than all the legislation of the country ...” (DDT 2/28/76, p. 4). Although the Constitution declared railroads common carriers (thereby requiring that they treat all passengers and shippers equally), delegates refused to appoint any agency to regulate rates, as it declined even to deny the use of free passes to state workers or politicians.

By the time Idaho, Montana, and Wyoming held their conventions, federal actions had changed the law of regulation. *Munn v. Illinois* (1877) confirmed the authority of state governments to regulate business. The Interstate Commerce Commission was the institutional result of the judgment that regulation was required. Although *Munn* legitimated state regulation of the rails, and the federal

commission confirmed the need for regulation, they failed to embolden Idaho, Montana, and Wyoming to follow the lead of Illinois. As in Colorado, the desire of the three territories for railroads, their lack of experience with railroads, the presence of railroad interests at the conventions, and dependence on outside investors stopped the creation of railroad commissions. The pressing need for railroads was often voiced. In Idaho John Morgan declared, “the great need in this country, it seems to me, is railroad lines, and whether they are competing or not I do not care, so we can get the railroads” (Id 1912 I: 880); William Claggett agreed, “We are a young country and what we want of all things is local lines of railway” (Id 1912 I :882). Surely “every sensible man sees at once that if we have railroads built here it will not be by our own people; we haven’t the money; the money has to come from abroad” (Id 1912 I: 885). Dependence suggested caution. In response to a proposal that the constitution ban consolidation of railroads, one delegate declared “It seems to me that we are acting upon the theory that now is the time to keep railroads from coming here.” As only the Union Pacific operated in Idaho, discouraging other railroads would “leave our state for all time in the hands of this one corporation” (Id 1912 I: 884-5).

Nevertheless, the constitutions of Montana, Idaho, and Wyoming stated clearly the state’s prerogative to set rates. State authority followed from declaring railroads to be public highways and common carriers, hence “subject to legislative control.” So in each constitution the legislature was given “the power to regulate and control by law the rates of charges for the transportation of passengers and freight” (Mt Cstn XV,6 and similarly Wy Cstn X,2; Id Cstn XI,5).

In Wyoming, former territorial governor John Hoyt provided the justification for exercising state authority. "I think every member appreciates the value of railroads, and we need more of them, and wishes to deal justly and fairly with them, but there are certain interests of the public, which the railroads themselves will concede, which should be preserved and protected, and the object of this proposition is to ... protect the interests of the entire public" (Wy 1893, p. 581). Other proposals failed. Efforts to ban free railroad passes for public officials did not pass in Montana (Mt 1889 pp. 584-5), nor did Idaho, Colorado, or Wyoming outlaw free passes. California alone prohibited the practice (CA Article 12, Section 19).

As Colorado, with few railroads, was most reluctant to constrain them, so California, well traversed by railroads, was most aggressive at regulation. Of course the state recognized the contribution of the railroads. "The railroads redeemed this State from a wilderness and made it what it is today" explained Shafter. "The railroad property of the state today pays taxes on five hundred millions of dollars ... Take away these roads, tear up the rails, and the country would soon revert to savagedom" (CA 1880 I:488). Nevertheless, in California railroads provoked tremendous hostility that was fully expressed at the constitutional convention. When the corporations article was discussed several delegates reviewed the state's miserable experience with railroads. "Way back in eighteen hundred and sixty," one delegate recalled,

this railroad excitement commenced. There was not a man in the State would not turn his pockets wrong side out to help build a railroad. The people were willing to give them all they asked and all they did was to take all the people gave them (Ca 1880 I:488)

Volney Howard agreed. Los Angeles had

contributed seven hundred and fifty thousand dollars to the railroad by way of subsidies, to enable the road to cut our own throats They have not only bought up the landings and wharves they are virtually monopolizing the ocean, by driving off all competition (Ca 1880 I:480).

Morris Estee, chair of the committee on corporations, drew the moral of this history. "... I now lay down the doctrine that "where combination is possible, competition is impossible, that in truth and fact there is no such thing as competition today in the great carrying trade of the country on land..." (Ca 1880 I:377). Equally to the point, "there is no such thing as the existence of a railroad anywhere, in any country, except by and through the sovereign will of the state." (Ca 1880 I:382). Moreover, in the wake of *Munn v. Illinois* it was perfectly clear that it was legally proper for states to regulate railroads.

Little could be hoped for from the state legislature. James Hale articulated the common judgment. Although the state and federal governments agreed that regulation was legal and necessary, "this ... fact stares us in the face, that we have been attempting, through the medium of the Legislature, to exercise this control for the past fifteen years, and thus far all efforts ... have been abortive" (Ca 1880 I:454). Charles O'Donnell claimed popular support for the convention to act. "Who has any confidence in the legislature that have been in the state for the last fifteen or twenty years? Most of us members were sent here for the purpose of regulating freights and fares ... Now don't you leave this thing to the legislature" (Ca 1880 I: 600).

The committee proposed a Railroad Commission for the state. California was to be divided into three districts, and each would elect a commissioner. Together the three commissioners would set rates and arbitrate claims.

Were the convention to adopt the proposed commission, it would “mark a new era in the history of the state; it will stamp upon the organic law of California that right of ... regulation of railroads necessary for the protection of our people” (Ca 1880 I:377). The proposal for a commission recommended itself, both because regulating railroads was beyond the competence of the legislature (it was corrupt and only met “once in every two years”), and second, because the multiplicity of disputes and claims could not be resolved by legislation (Ca 1880 III:1228).

Although there was agreement that railroads needed regulation, some delegates thought the commission would be more vulnerable to corruption than the legislature. Marion Biggs made the case against the commission:

I am opposed to the Report of the Committee of the Whole; and I want gentlemen to understand that I do not wear the collar of the railroad, or the corporation, or anything else. I am opposed to this report. It gives too much power to these men.... There is no appeal. They are the lords of all California, they are the lords of everything (Ca 1880 III: 1227).

William Dudley agreed. Insisting on his innocence of fealty to the railroads, Dudley argued that “... power over corporations is a power that belongs to the people of California Now, it is proposed here, by one fell swoop, to take that power from the people and give it into the hands of a triumvirate I believe it is a mistake” (loc. Cit.). Proponents of the commission countered that many states had created commissions to regulate railroads; Wisconsin and Illinois were happy with their commissions. Morris Estee offered an optimistic forecast: “I

believe that you can trust the people to elect three men who will deal fairly with these great evils.... Great responsibilities always bring great attention to duty, and I believe that the very existence of such a Commission will have a most marked influence upon the future prosperity of this state.” (Ca 1880 III: 1228). Despite the qualms of some delegates, the commission carried the day.

Other corporations also posed problems. The appearance in mining of large corporations, owned out of state, brought all manner of abuses to workers and violent labor-management conflicts. Delegates to western constitutional conventions also drafted provisions for the protection of labor. Colorado was the first state to outlaw, in the constitution, labor contracts which required employees to renounce seeking damages if injured at work, even when the injuries were clearly the result of employer negligence. Article XV Corporations, Section 15 declared “It shall be unlawful for any person, company, or corporation to require of its servants or employes, as a condition of their employment ... any contract or agreement whereby [the employer] shall be released ... from liability or responsibility on account of personal injury ...” (Co 1907, p. 609). Introduction of the same language at the Wyoming convention met with immediate resistance. Anthony Campbell argued, this “bill ... introduces a new element in the relation of master and servant, and ... if it is passed no corporation or person can afford to engage in any business whatever The doctrine of master and servant is pretty well defined, the courts are getting away from the rule further every year and giving it a more liberal construction in favor of the servant ..” (Wy 1893 p. 443).

Thomas Reed, defending the provision, argued that Campbell's reading was far too broad, and explained the correct interpretation.

... this is to reach what we originally call the old ironclad agreement. I can see the object of this because I have worked on all the railroads west of Chicago ... and they have all adopted a policy that this here touches upon. It was called the ironclad agreement, by which a man when he entered the employ of the company agree to release the company from all liability for any accident that might occur to him, no matter whether the fault was directly traceable to the company or not. I believe it should pass. It is to protect the poor man ... (Wy 1893 pp. 447-8).

George Baxter lent his support, pointing out that the "answer to the object that it will keep out capital, I have only to say this is found in the constitution of Colorado, and I doubt if any state in the union has received more rapid development and growth than that state ..." (Wy 1893 p. 450).

Smith tried to make the provision more expansive, offering an amendment, "and the rule of common law as to the negligence of fellow servants shall not prevail in the courts of Wyoming" (Wy 1893, p. 452).

The amendment failed, not to appear until Arizona wrote its founding constitution in 1911. For the moment, the authoritative statement on the Wyoming article was Palmer's:

I believe it is nothing more than right for us say that at railroad corporation, or any other corporation, cannot say to a man, if we employ you, you must take all the chances yourself, and this company will not be responsible to you for any damage that may result by reason of the negligence of ourselves or of any of our employes. (Wy 1893 p. 450)

Banning ironclad contracts passed unanimously. California and Montana too outlawed ironclad contracts (Mt Art 15, sec 16, Wy Art 10 Sec 4, Ca Art 12 sec 17). Wyoming passed in addition the proviso that there would

be no limit to damages for injury or death. Other protections were proposed, but failed. In Montana, for example, a proposal to censure blacklisting did not pass (Mt 1889 p. 216).

In Idaho discussion of the article on labor began a proposal for the creation of a commissioner, and bureau, of labor. The bureau would be important as Idaho was soon to be admitted as a state, and so would “very soon be confronted with problems of a very difficult nature relating to labor ...” The legislature and governor would need information to act wisely. More, the bureau would, in its annual reports, give labor a voice. Of course, labor might petition the government, but “the trouble with petitions is ... when they come up nobody knows whether they are the result of careful inquiry ... or not” while “if you have a commission whose special object is ... to keep run [sic] of all these matters ... we have a collection of statistics which may prima facie be considered as reliable.” (Id 1912 II: 1373-1375). The same argument was made successfully in Montana.

Delegates created agencies to regulate and oversee working conditions in the mines. In Colorado and Wyoming commissioners of mining were to be appointed to devise safety standards for underground mines, both ventilation requirements and requirements for shoring up ceilings. Like state bureaucrats who assembled credible information, mining commissioners became important advocates for working miners.

Conventions looked to a government role in the prevention of labor-management conflict. Boards or courts of arbitration might peacefully resolve their differences. Although agreements proposed by the arbiters were not made

mandatory, and no powers of enforcement were granted to them, provisions for arbitration were placed in constitutions in Wyoming, Idaho, and Colorado.

Finally, delegates sought to prevent the worst instances of conflict – and these were very soon to be upon them – by prohibiting the importation of private armed forces into the state, except at the request of the government. In the Montana convention J. K. Toole proposed that “No armed person or persons shall be brought into this state from any other state to preserve the peace, except upon the application of the legislature, or of the Executive when the legislature cannot be convened” (Mt 1889 p. 130). The targets of this provision, and others like it in Wyoming and Idaho, were the mercenary forces assembled by employers. In support of Toole’s proposal William Fields argued,

In Pennsylvania and other Eastern states in the past ... armed bodies of men have been imported ... for the purpose of intimidating and coercing honest laboring men ... [Congress investigated this and discovered that] in one valley alone ... there were 712 armed men under corporations ... to preserve the peace, and ... the workingmen of those districts ... were in a state which I would term chattel slavery (Mt 1889 p. 140).

The chair of the committee on labor, Peter Breen, explained “The resolution ... is offered particularly against those vast armed bodies of men, known as the Pinkerton detectives.” In Washington territory the constitutional convention “had the same matter before it, only they had an illustration of it last winter when there were armed forces of Pinkerton detectives brought into their coal mines ... We see examples of it all over the country ...” (Mt 1889 pp. 129-130; Washington did not adopt the section). The good intentions of the delegates notwithstanding,

these provisions did not prevent private armed forces from intervening in Cripple Creek, Butte, and Coeur d'Alene in the years to come.

These provisions, like the others reported here, were drafted in the service of managing the periphery. There were instances of legislation in the constitutions. For example, there were sections limiting the workday of public employees, and miners, and others limiting the labor of women and children. Delegates recognized that the Gilded Age could not be resolved by legislation, but were ongoing, and required more government. More often than legislation, then, delegates created agencies or confirmed the authority of existing agencies or governments to resolve conflicts among residents or between residents and “outside” interests. The conventions wrote laws for rights to water, but more importantly, rules or principles for resolving disputes about competing claims, and delegated their implementation to courts, counties, and new bureaucracies. Striving to be damned neither by the presence nor by the absence of railroads, delegates tread gingerly towards regulation, finally asserting that all corporations existed by the grace of government, and insisting on the authority of government to regulate railroads. Anticipating conflicts between labor and employers, delegates created bureaus for labor, and commissioners to set standards for the construction of mines, and monitor their condition. When their work was completed, they had designed more government – agencies, bureaus, courts, and commissions – to manage the periphery.

Conclusion

Aware of their lack of financial and political resources, and desirous of population, prosperity, and social peace, delegates to constitutional conventions wrote law and designed institutions to “secure property” while also securing the public against “oppression from its use.” Reading their deliberations, we can trace the importance of a changing national political and legal environment; the rulings in the Granger cases, the increased activism of farmers, and the organization of labor, for example, each made their impress on debates and constitutions. The distinctive history of the west, its dependence on outsiders for resources and its distance (political as well as geographic) informed writing constitutions so replete with provisions for attempting to manage their fragile economies. Distinctive too were the rights newly written in the west, positive rights meant for government to intervene between the many and the few.

To implement these decisions, as in the management of water, conventions expanded the purview of state government, creating new rules and institutions. As Tinnan explained to the California convention, “... we are embarking on a new era. We stand upon the shores of an unknown and unexplored sea” (Ca 1880 II:1020). State governments were both constrained and empowered. To manage the periphery, delegates at western constitutional conventions not only forged anchors, they also began to tailor sails -- bureaus of labor, mine commissioners, water masters, land trustees -- that their small ships of state might navigate the wide seas of the gilded age.

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