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Preface and Acknowledgments

Years ago I began work on a book, The Progressive West, meant to provide an account of politics in the western states in the early twentieth century. Chapter 2 was to be about the constitutions of the eleven western states. I thought that since California wrote the first in 1849, and New Mexico and Arizona wrote the last in 1910, a review of the constitutions would be an efficient way to bring myself and my readers from the middle of the nineteenth century to the midpoint of the Progressive Era. I began by reading the minutes of the Colorado constitutional convention (1875–1876). A great read. Articulate delegates, interesting debates about many, many things. So well transcribed, the minutes are a veritable “You Are There” of that convention as, later, were the minutes of most of the other constitutional conventions. I presented a talk, “Making a Place for Themselves,” about the Colorado convention at the University of Wisconsin–Madison. My audience—mostly historians—thought I should forsake The Progressive West and instead write a book about the initial constitutional conventions of the western states. Democratic Beginnings is that book.

It is a pleasure to acknowledge the people who have helped me. I am deeply grateful to the National Endowment for the Humanities and the American Council of Learned Societies, which funded a year for me to devote to research. I owe much, too, to Fred Woodward, longtime director of the University Press of Kansas. Fred was my faithful academic suitor for years; I enjoyed our conversations at many academic conferences and have been sustained by his confidence. It is my good fortune that Charles Myers is the current director of the University Press of Kansas; he has not only the post but also the patience and tact of his predecessor. Paul Emerson Herron and Paul Frymer have been generous colleagues and critics; I regret that I have not (yet) taken all of their advice. I am grateful to Robin Einhorn for suggesting the title Democratic Beginnings,
exactly right. The editors of *Studies in American Development* published “Managing the Periphery,” portions of which appear in chapters 1 and 3, and provided helpful commentary as I wrote and revised it. Julie Novkov, Bruce Cain, Melanie DuPuis, Charles Anthony Smith, John Dinan, Howard Schweber, and Alan Tarr provided careful and instructive readings, as did readers of the manuscript of *Democratic Beginnings* for the University Press of Kansas.

Richard Kronick, among many other gifts, read and commented on many chapter drafts and has maintained the effective balance between insistence that I finish this book and patience that partners of academics strive for. Along with Rick, Emma and Zach, and Dorothy and Etan bring joy to my life and remind me of what is important.

Amy Bridges
Bethesda, MD
ADDRESS TO THE PEOPLE

Your Representatives, in convention assembled...for the purpose of framing a Constitution for the State of Colorado, have completed their work, and herewith submit the result of their labors for your adoption or rejection. ... The Convention labored assiduously to frame a fundamental law, wise and wholesome in itself, and which would be adapted to the general wants of the people. ... we believe it contains not only all of the primitive rights guaranteed in our National Constitution, but most of those reformatory measures which the experience of the past century has proven to be wise and judicious. ... The maintenance of free public schools, and the gratuitous instruction therein for all children between the ages of six and twenty-one is forever guaranteed. ...

Probably no subject has come before the Convention causing more anxiety and concern than the troublesome and vexed question pertaining to corporations. The Legislatures of other States have, in most cases, been found unequal to the task of preventing abuses and protecting the people from the grasping and monopolizing tendencies of railroads and other corporations. Experience has shown that positive restrictions on the powers of the Legislature in relation to these matters are necessary.

To this end we have provided for the wiping out of all dormant and sham corporations claiming special and exclusive privileges. We have denied the General Assembly the power to create corporations. ... We have declared that railroad corporations shall be liable as common carriers ... [and] must subject themselves to all the provisions and requirements of this constitution. ... We have carefully guarded the right of eminent domain ... while some of our sister States have not gone far enough in placing restrictions on the legislative power, others have gone too far, and have had to recede. We have endeavored to take a middle ground, believing it to be more safe. ...

Let us now look at the political and substantial advantages of Statehood as contrasted with our present condition of Territorial vassalage. ... Let us cherish, then, this occasion with more than ordinary zeal, actuated by the memories of the past, and inspired by the rewards for us in the future; let us arouse ourselves to the responsibilities of the hour and, as citizens of a free republic, become, in fact, as well as in name, citizens of the American Union of Sovereign States.

William M. Clark, Chairman, and nine other Delegates
March 14, 1876

1. Upon the Shores of an Unknown Sea

In *Democratic Beginnings* I offer accounts of the constitutional conventions that founded the western states—Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming—and the constitutions they wrote.\(^1\) California was the first of these; its constitution was written in 1849. Arizona and New Mexico were the last, holding their conventions in 1910. State constitutions are fundamental law, blueprints for government institutions, statements of principles, values, and goals, and declarations of collective identity, written with fostering settlement and prosperity in mind. In this extended essay, I describe the puzzles and dilemmas delegates faced, their arguments about remedies and responses, and the compromises they reached. Delegates had a long list of achievements to their credit. Delegates extended the reach and enhanced the authority of state governments. They wrote law where little existed, in water and protections for working men, women, and children. Delegates created new institutions (mine inspectors, departments of agriculture and labor, corporation commissions) and familiar ones (elementary and normal schools, universities, prisons, grand juries). They reformed court systems and added duties to lower courts and county officials. They expanded bills of rights, elaborating those in the federal Constitution, adding positive rights, and including sweeping injunctions for state governments to fulfill new obligations to their residents. They chipped away at the law of master and servant.

Two themes are prominent across the western conventions. First, their distinctive mission, and second, delegates’ frequent encounters with new and puzzling situations, for which they were without precedent in law or policy. At the conventions reviewed here, it is striking how very different delegates’ understanding of their task was from what the federal Founders set out to accomplish. In 1787 the Founders above all desired the
permanent and successful existence of the democratic republic they were founding. They created a government of three branches, each of which had a critical virtue, and—since politicians always sought to expand their power—also posed a distinctive threat. The executive, which promised unity and threatened tyranny; the legislature, which promised to tie the several interests of both the many and the few to government but which, unrestrained, might grow to self-serving oligarchy; and the people, whose rights were ascendant in a republic, but whose unrestrained control of government would bring disorder and destruction. In this they faced an eighteenth-century social choice problem: How to allocate the authority and prerogatives of the three branches to enable their strengths and stymie their threats? How to arrange the powers of each branch to create a government that was permanent, peaceful, and secure? The Founders’ success was, as Michael Kammen felicitously phrased it, that they created “a machine that would go of itself,” a democratic republic that is still our frame of government.

By contrast, authors of state constitutions, as John Dinan explained, prized the accumulated wisdom and “the institutional knowledge and experience that was unavailable to the eighteenth-century founders.” Delegates to state constitutional conventions were at work in the democratic republic the Founders created, a young nation they understood to be learning as it practiced republican democracy. Continuous learning required that state governments and their constitutions be revised and updated. This was exemplified in the conventions considered here by praise of the Indiana Bill of Rights at the Oregon convention in 1857. There, Delazon Smith proposed that the constitution include an article to be a Bill of Rights. One of his colleagues was dismissive, remarking that bills of rights were frivolous, mere Fourth of July orations. Smith defended his proposal, praising Indiana’s Bill of Rights. Not confined to the ten sections of the federal constitution, the Bill of Rights in Indiana’s 1851 constitution included others discovered in “seventy years of progress.” Similarly, in 1876, Colorado delegates, in their Address to the People, explained that the constitution they proposed had “not only the primitive rights guaranteed in our National Constitution, but most of those reformatory measures which the experience of the last century has proven to be wise and judicious.”
In addition, as the country grew, changing conditions meant some provisions became outdated. This was best explained by J. F. King, a delegate to Oklahoma’s founding convention, held 1906–1907. “Time,” he said, impairs constitutions as it does all things and if they be not amended and repaired to meet changed conditions, new questions, and the ever-altering situations of an enterprising and progressive people, there is an end to good government. . . . And as fast as great questions of government policy emerge settled from the political arena, the field and the forum they should be embodied in the Constitution that they may become a permanent guide to the official and an inspiration and a protection to the people. . . . This and every other generation of a free people has its own peculiar problems to face in Constitution making. . . . We would be unworthy sons of worthy sires if we fail to meet and courageously solve the problems now pressing upon our people for solution.⁷

Even Matthew Deady, who, of all the delegates at the conventions reviewed here was most committed to maintaining his territory just as it was, declared, “Let every day and generation do for itself as it needs it.”⁸ Changing conditions and rethinking citizenship in a democratic republic enjoined delegates to design state constitutions with provisions that had demonstrated greatest utility and prescribed practices that followed the guidelines of contemporary understandings of equity and justice. The commitment to learning from the past, and adding “improvements” or progress to the constitutions they wrote, was a constant across conventions. Delegates might, from a federal Founder’s point of view, look a bit feckless, as when one said, “We are a new people, free as air to select what is good from all republican forms of government.”⁹ And another, that he did “not believe in sacrificing to any time-honored evil, simply because it has the sanction of time.”¹⁰ Authors of state constitutions were neither feckless nor cavalier. The obligation to be attentive to progress and accumulated wisdom informed delegates’ deliberations at every convention. Nor did delegates believe their work marked an end to new wisdom; the commitment of delegates to the idea that constitutions should incorporate accumulated wisdom is revealed not only in their general deliberations but also in provisions for amendment and revision in the future. Dinan argued that provisions for amendment and greater ease of amendment than the federal constitution were motivated by delegates’ adherence to
Chapter One

the principle that constitutional revision was necessary in the democratic republic of the United States.

The second theme is the appearance of new challenges. Over the course of eleven founding conventions, delegates again and again were faced with new questions, developments new to them and to their generation. This happened at the Washington convention. In the foreword to the proceedings, Charles Gates wrote:

There was a disposition on the part of a number of delegates to view such conventions as laboratories where the states might correct existing political weaknesses by introducing corrective measures. For some of these matters history offered no precedents; the problems called for new solutions even though they might be untried and experimental. Thus members of the convention put up propositions and counter propositions for consideration on a wide variety of points. . . . The opening weeks of the convention featured especially this kind of originality and inventiveness.11

Water was the occasion for several of these dilemmas. On January 14, 1879, Wiley Tinnin presented the report of the Committee on Water and Water Rights to California’s second constitutional convention. Tinnin explained that “the use of water for . . . irrigation and mining was, until the last twenty-five or thirty years, practically unknown to the American people.” Other societies had managed irrigation for decades. Yet their “experience . . . cannot be fully applied to this free Government, for the reasons that governments that have brought forward and completed great irrigation schemes were arbitrary governments . . . whose citizens had no privilege, no right to use water.” By contrast, in the United States “the rights of the citizens are paramount in a great sense, in many respects, to the government.” For the United States, or state governments, to attempt to “place [water] under legislative control, we are embarking on a new era. We stand upon the shores of an unknown and unexplored sea.”12 The absence of appropriate precedents was often a challenge at the founding conventions of the western states. In 1876, when William Clark introduced the section on mines and mining to the Colorado convention, he explained that the committee “had much difficulty . . . because of the absence of all precedent.”13 And one delegate to California’s 1849 convention, as banks were discussed, compared the territory to New York State, explaining “how very different are [our] circumstances,
representing as we do a young and virgin territory, without banks, and whose great natural wealth is unparalleled.” For these reasons, they were starting afresh; “this is an original question with us.” Each generation faced its own, new challenges. California, Oregon, and Nevada puzzled over the limited liability corporation and weighed the claims of race on suffrage. Colorado, Idaho, Montana, Washington, Wyoming, and Utah grappled with the prospects of distant investors assisting their growth or failing to, worried about industrial conflict in the mines, and settled on a few protections for labor. Deliberations in Arizona and New Mexico were much taken up with direct democracy; Arizona abrogated, and New Mexico declined to consider, the fellow servant doctrine.

Democratic Beginnings is, first, a study of state constitutions. The chapters that follow include every founding constitutional convention in the West, enabling the reader to trace the evolution of issues and writing constitutions in the West across the sixty years from 1849 to 1910. I compare western constitutions to constitutions in other states to demonstrate ways constitutional law and, by inference, politics in the West differed from the constitutions and politics in other regions. My presentation of the proceedings includes much more of the argument and debate that took place in their meetings than will be found in other accounts. The proceedings, arguments, and debates are the evidence for my claims about the intentions, differences, and eventual agreements of the delegates. Delegates’ conversations show what they saw to be at stake in their debates and the process of reaching majority consensus. One of the pleasures of reading the proceedings of the conventions is that the verbatim accounts recorded by stenographers and journalists offer an immediacy to convention debates not available elsewhere. Sharing delegates’ words and arguments with the reader seemed to me far superior to any paraphrase I might offer. Among other things, the sophistication of many of the arguments, how deeply delegates felt their positions on some issues, and how articulate and well versed in history, myth, and the Bible speakers were are especially impressive in light of the absence of any—or the existence only of rudimentary—systems of public education in the states. Until well into the twentieth century many American children, and like them many of these delegates, were educated by their mothers. The debates and conversations reproduced here also show the
tenor and content of delegates’ deliberations. Their conversations display, too, the roles of time and place in their deliberations.

Democratic Beginnings is also a study of American political development, adding an account of the West to state constitutions, and a report of western development to US politics and history. Political scientists have paid scant attention to the West. Although there is a long tradition of western studies among historians, for a generation historians turned away from politics and political economy. Scholars of American political development have also neglected the West. Like other scholars of politics and history, our understanding of the United States rests heavily on the history of the Northeast, secondarily on the South, and on the West hardly at all. Writing about the Colorado Constitution in 1903, Elbert Meyer observed, “The pioneers of the West labored, like their fathers in the East, through years to establish free institutions; but, while the children of Colorado know well the history of the great struggle of the Puritans and the founders of Virginia, they know relatively nothing of the pathfinders of the mountains and the plains.” The same observation is true of students in Kansas, Oregon, and New Mexico. If we were to follow carefully the trajectories of constitutional development in the nation’s regions, our studies would, as Meyer suggested, “result . . . in a broader view of American institutions and in a realization that the work of the founders was to transplant the old institutions and to transform them, in a measure, to fit new conditions” of varying sorts from place to place. Democratic Beginnings follows the transplants and transformations of old institutions, and the development of new ones, in the western states.

Richard Bensel has been attentive to region in a different way. Beginning with Sectionalism and American Political Development, Bensel has written a history of, and explained, the development of the federal government.17 In his work the central tensions underlying US political economy are those between the politically and economically dominant Northeast (the “core”) and the quasi-colonial South (the “periphery”). Democratic Beginnings is about the other periphery in the United States, the West. The vast West had its own distinctive geography and political economy, centered not on farming but on mining and ranching. There were areas devoted to farming, especially in Washington and Oregon, and also in Colorado, Idaho, California, and Montana, but the West did not
have the densely populated agricultural areas of the South or the plains. The West also had a distinctive population, counting tens of thousands of Native Americans, few African Americans, populous Mexican regions incorporated by the US conquest of Mexico, Anglos from the East, and—working alongside them in the mines, towns, and forests and on ranches and the railroads—European immigrants, Mexicans, and Chinese.

The West has not had the substantial presence in national politics that the South has enjoyed. For much of the nineteenth century, most of the West was territorial, with only nonvoting representation in Congress. The West joined the Union slowly and was thinly settled. In 1880, only four of what became the eleven western states had voting representation in Congress. In 1890, when there were eight western states, the population of the West was so slight that the region sent only sixteen representatives to the House, while the South sent eighty-seven. In 1912, when all eleven western states were represented in Congress, twenty-four representatives spoke for them, while ninety-eight representatives were sent to the House from the eleven states of the South. Population was not the only political resource of the South; each region sent twenty-two senators to Washington, so in the Senate southern strength might have been matched by the West. It was not. In the Senate the presence of the South was bolstered by its staunch one-partyism, shared political economies, and policy unanimity, while the western states were divided by party, as well as by their quite different terrains, societies, and economic foundations.

*Democratic Beginnings* includes sustained attention to territorial government and political economy. In the nineteenth century, when the federal government was a state of courts and parties, it was also a state of states. State governments performed the long list of tasks assigned to them, sometimes by default, in the federal constitution—family policy and law (marriage, adoption, divorce, custody of children, assignment of property); education; law enforcement and prisons; roads, water, sewerage, and other infrastructure; fire protection and building codes; and poor relief. States also managed, as best they could, the local consequences of federal economic policies (the tariff or the gold standard, for example) and the deprivations of a depression (“panic”) in every generation: 1833, 1853, 1873, and 1893. In thinly settled areas, territorial and state governments worked as best they could to encourage settlement and growth. Well before the
federal government addressed these issues, politicians in state governments, as well as ordinary citizens, argued about what was fair and appropriate in a democratic republic (that, for example, imprisonment for debt was wrong), enacted protective legislation for children and adults at work, and implemented “reformatory measures which . . . experience . . . has proven to be wise and judicious.”¹⁸ For many issues to which the general population and its leaders were attentive, Washington was distant and oblivious. The result was that, even as they pleaded with Washington for assistance, states developed policies to address their problems; not a few of their solutions provided precedents for federal courts and policies. We can make better sense of the history and politics of the United States in the nineteenth and early twentieth centuries by paying attention to territories and states.

In this chapter I introduce the arguments of Democratic Beginnings, present a general understanding of state constitutional conventions and constitutions, offer a way to study state constitutions, and preview the chapters to follow. In chapters 2, 3, and 4, I show that the constitutional convention was an institution with distinctive characteristics, making it more sensitive and responsive to public opinion than territorial or state legislatures. I argue that delegates to state constitutional conventions had a mission quite different than the task the federal founding fathers undertook. I observe that in convention deliberations there were two narratives, one national and the other territorial. I present dilemmas and challenges that were new to each generation, and so without precedent in public policy. Although delegates routinely denounced placing “legislation” in constitutions, they did so nevertheless; I present their reasons and argue that their choices were sensible.

Conventions and Constitutions

Scholars long disparaged state constitutions — for their meandering length, their adoption of provisions of other constitutions, the apparent haste of their composition, and the seeming absence of legal or political theory. By contrast, contemporary scholars offer more positive accounts, recognizing delegates’ seriousness of purpose, system in borrowing, commitment to revision and ease of amendment, and inclusion of positive
rights and the role of the states in the practice and creation of American constitutionalism. Democratic Beginnings builds on this more recent reading of state constitutions.19

The constitutional convention was quite different than territorial and state legislatures, and its distinctive characteristics resulted in conversations and decisions more representative of and responsive to public opinion than state and territorial legislatures were. Delegates’ elections, their representation of territorial occupations, and their attention to the sentiments of their constituents were the special institutional characteristics of the constitutional convention. Together they created a setting that provided opportunities for popular voices to make an imprint on the law. Constitutional conventions were the setting for the founding of the western states, and it was the institutional characteristics of the conventions that made the foundings democratic beginnings. First, in almost every case delegates to state constitutional conventions were elected by popular vote. Election gave delegates democratic legitimacy and also enabled delegates to speak authoritatively about what their constituents wanted to see in the constitutions and what they were likely to oppose. Moreover, delegates had every reason to believe the public was attentive to their deliberations. A steady stream of memorials and petitions was delivered to the conventions; occasional guest speakers argued strongly for one provision or another. The territorial press was very attentive to the conventions, much more attentive than they were to territorial, and later state, legislatures. Newspapers introduced the delegates, followed the debates, explained partisan differences, and offered analysis and evaluation both in their reports and in their editorials. Since the constitutions required endorsement by popular vote, information and threats about how constituents were likely to vote were always important, and sometimes dispositive, for what appeared in the document.

Second, state constitutional conventions were not elite assemblies in the style of the Federal Convention of 1787. Delegates reflected the societies and the partisan tendencies of the communities that elected them. In western conventions there were delegates who had long lived in the territory, as well as 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, farmers, and representatives of larger interests; in smaller numbers, there were populist partisans, farmers’ advocates, workers from the mines, and Mexican Americans (there were no women, Native Americans, Asians, or African Americans). In most conventions there was representation of a territory’s major occupations, if well short of representation in proportion to their presence in the population. This was important. In these small meetings, an articulate and effective spokesman might well turn the outcome of a debate. That said, that representation of occupations was not proportional to their presence in the population was central to many outcomes. The leading example is that in every convention, farmers’ preferences for riparian rights to water were defeated by mine owners’ insistence on the doctrine of first in claim, first in right, and not without some bullying of farmer delegates by their better-heeled colleagues.20

Third, delegates were attentive to constituent sentiment not only because they took that attention to be part of their job but also because proposed constitutions had to be ratified by popular vote. The specter of defeat of the constitution at the polls, Henry Bromwell reported the Colorado convention “tended to modify the action of the some of the [Republican] majority of the convention, in deciding upon the questions affecting corporations, railroads, water rights, and fees and salaries . . . which gave especial effect to the opposition from without to the measures proposed and urged by a minority in dealing with those subjects.”21 Not only was the public very attentive to convention debates, but resistance to statehood was common and could threaten ratification. In Oregon, Colorado, and Wyoming, majorities expressed a preference for territorial status in several elections, often to avoid increased taxes and, in Colorado in the early 1860s, for fear of the draft.22 As a result, delegates had every reason not to alienate the public.

Delegates saw themselves as superior in talent and intent to state or territorial legislators, and the territorial press agreed. “The territory has never been represented as it is represented here today,” the Idaho Weekly Statesman reported, concluding, “It is a grand Convention. They are making a superb Constitution. They are a superb company of men. . . . The State of Idaho will for years rejoice in their work.”23 John Hicks argued that delegates to constitutional conventions were men of better character than
state legislators. Writing the history of the constitutions of the northwest states, 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.”

Lord Bryce made similar observations, seeing the constitutions as “the work of abler, or at any rate honester, men, acting under a commission which imposes special responsibilities.”

Writing constitutions was difficult, intense, and time-consuming (see table 1.1). Delegates met a minimum of five days a week, and often six days, and into the evenings. Wyoming and Montana wrote their constitutions in about a month; the second California convention in 1878 was the outlier, with delegates spending five months at argument and compromise. Delegates regularly complained of long days in meetings and many days away from work and family. Possibly for this reason, conventions brought forward more serious and honest delegates than served in territorial legislatures. If the Idaho Weekly Statesman exaggerated the eminence and wisdom of delegates to Idaho’s founding convention, it was surely the case that among the delegates to constitutional conventions were men of more political experience and higher public regard than most territorial or state legislators. Former territorial governors, once denounced as carpetbagging and incompetent patronage appointees, were highly valued members of founding conventions, both because of their time served as chief territorial executives and because of their experience negotiating with the federal government. Once the constitutions were ratified, convention veterans accounted for several elected state governors, among them Joseph Toole in Montana and George W. P. Hunt in Arizona.

Delegates and deliberations at the conventions shared other values and practices. Alongside their mission of learning from the history of the Republic, delegates were required to innovate. In their effort to resolve “great issues of government policy . . . settled”—and sometimes newly posed, or fiercely debated—in “the political arena, the field, and the forum,” delegates were creative and constructive, increasing the authority and reach of state governments, creating new institutions, new rights,
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<th>Total</th>
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<th>Democrat</th>
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<td>48 days</td>
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<td>22</td>
<td>15 Whig, 11 unknown</td>
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<td>36 days</td>
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California 1876: Carl Brent Swisher, Motivation and Technique in the California Constitutional Convention 1878–1879 (Pomona, CA: Claremont College, 1930), 32 (dates); 24 (delegates).  
Utah: Jean Bickmore White, Charter for Statehood: The Store of Utah’s Constitution (Salt Lake City: University of Utah Press, 1966), 45, 88 (dates); 49 (delegates).  
and broad imperatives for state responsibility. These efforts meant that deliberations at the conventions were both national and specific to each territory. From the first to the last, the territories show themselves as anything but island communities. At the early conventions, in California (1849), Oregon (1857), and Nevada (1864), antagonism between North and South was a looming presence. The central narratives of the Gilded Age—the appearance of large corporations, clashes between labor and capital, the mobilization of farmers, the rise of populist sentiment, and the settlement of the West—were all elaborated at western conventions held between 1876 and 1895: Colorado, Washington, Wyoming, Montana, Utah, Idaho, and California’s second (1878). The issues that consumed the political energy of leaders across the country were also central concerns of western leaders. The taxation of corporations, which raised all sorts of puzzles, is an example. Even as the delegates to the constitutional conventions of Idaho, Wyoming, Montana, and Washington were debating how to tax corporations, E. R. A. Seligman was charting the progress of the states in that project in Political Science Quarterly. As they were debated across the country, issues of the Progressive Era—direct democracy, protections for labor, and the regulation of corporations—were central at conventions that authored constitutions for New Mexico and Arizona in 1910.

In every decade the Congress and President were critical audiences for the delegates; they decided whether admission was granted. That authority made delegates attentive to increasingly detailed enabling acts. Compromises were tailored with congressional, and later presidential approval in mind, and sometimes in defiance of anticipated disapproval. Across the West, political leaders resented the always distant and sometimes indifferent, sometimes hostile, sometimes patronizing, sometimes racist attitudes of members of Congress, revealed as they wrote enabling acts for the territories. Both when delegates were discussing national questions and as they worked to create governments for their new states, delegates engaged the central issues and challenges of American life in their generation.

Conversation and debate at the conventions were specific to each territory and in that way demonstrate the importance of place. Each territory had its own political history, demographics, natural setting, prominent leaders, and economy; these, too, shaped the constitutions delegates
wrote. The economies of Arizona, Nevada, Colorado, Idaho, and Utah were dominated by mining. Stock growers held sway in Wyoming and New Mexico. In Montana, mining and ranching were twin contenders. Farmers were very important in Washington and Oregon and, along with the timber industry, were primarily responsible for settlement and growth. In Colorado, Idaho, and Utah, farmers and miners wandered in and out of alliance and competition. California, Colorado, Montana, and New Mexico had sizable Mexican and Mexican American populations who, since they voted, required political attention. Native Americans and Chinese worked in and suffered violence in almost every state; populations of the Native Americans declined precipitously. In California, where the Chinese population was larger than in other states (both in absolute numbers and as a proportion of the population), politics was seared by the mobilization of anti-Chinese sentiment.

At every convention, region mattered; region was another important meaning of place for residents, as it should be for scholars. The West is not an academic construct placed unnaturally over these territories and states. Delegates spoke often of themselves and their territories as western. Many politicians and delegates to conventions had careers that spanned several western states. For example, Peter Breen was a mine worker who chaired the labor committee at the Montana convention after years as a labor activist there and in Idaho. Henry Bromwell led the Granger faction in the Colorado convention. Long a prominent Republican, Bromwell cast his Electoral College vote in Illinois for Fremont in 1856 and for Lincoln in 1860 and was a delegate to the convention revising the Illinois Constitution in 1869. Regional identity was also important when borrowing constitutional provisions. Although delegates looked to older states to see how issues they were facing had been managed by those with more experience of industrial relations, or railroads, or school systems, more often than not, delegates relied for precedent on other western states.

Delegates frequently borrowed sections and even articles from other state constitutions, a practice once dismissed as hasty cutting and pasting. Marsha Baum and Christian Fritz showed that borrowing was not thoughtless; it was a deliberative process. Delegates were equipped with digests of the provisions of state constitutions in order to consult systematically decisions of their predecessors across the country. The digests
informed “extended debates over . . . different constitutional practices of other states.” At the conventions reviewed here, delegates sought to borrow from a state that was arguably like their own. The subsequent prosperity, or peace, or consensus in the lending state demonstrated the provision’s utility. In this book, chapters 2, 3, and 4 also show borrowing to have been careful. Delegates at the conventions reviewed here were especially attentive to other western states. In 1876 Colorado delegates borrowed from Illinois, as other states borrowed from Missouri, because in the 1870s and even later, delegates thought of Illinois and Missouri as western states. Delegates to later western conventions borrowed from Colorado, a regional cousin, and a state where prosperity in the years after admission to the Union spoke well of its constitution and laws. And when western states considered direct democracy, they most often spoke not of South Dakota, the first state to adopt the initiative, but of Oregon, the first western state to adopt initiative, referendum, and recall. The frequency of reading and borrowing suggests that constitutional conventions, whenever they were held, sustained a far-flung and constructive conversation among the states.

State constitutions are long and detailed. It was not uncommon at the conventions for a delegate to object to putting “legislation” in the constitution. Indeed, the long and detailed provisions do resemble ordinary legislation more than organic law. Delegates argued for these provisions on several grounds. One claim was that state legislatures were not responsive to demands for some laws. Despite repeated pleas in California, for example, the state legislature had failed to regulate private companies in control of water. Too, legislatures were corrupt. A delegate favoring a provision was likely to say, “Don’t leave it to the legislature.” Placing legislation in constitutions was defensive. So-called legislation in the constitution was more secure than ordinary legislation. Constitutional provisions were safe from territorial courts. This was a particular concern for labor because territorial supreme courts were likely to declare laws protective of workers unconstitutional, as they declared laws enfranchising women unconstitutional. Finally, since the western states, unlike states in other regions, had competitive party politics, laws passed by one partisan majority in the legislature might well be repealed when the other party (or a third party) held sway. Each of these arguments in support
of detailed provisions in constitutions appears in chapters 3 and 4. In all three circumstances, placing so-called legislation in state constitutions was defensive, securing laws more than ordinary legislation would have, and so, rational.

State constitutions contain provisions limiting the reach of the governments they created. One reason follows from constitutional theory. The federal constitution created a government of enumerated, delegated powers. All powers not granted the federal government—“plenary legislative powers”—reside in the states. It followed that if the states were not to become little Leviathans, their constitutions had to limit the reach of state authority; many restrictions were put in place. By the middle of the nineteenth century there were additional reasons to limit legislative discretion. Large state debts, often incurred to assist railroads, cautioned delegates to place severe limits on government debt and to forbid future subsidies. The corruption of territorial assemblies and state legislatures by large interests was common enough that constitution writers felt compelled to put explicit and specific limits on legislative discretion, thereby “hamstringing” state legislatures. The “shall not” sections of articles creating state legislatures are lengthy and detailed. The California Constitution of 1879, for example, listed thirty-three cases “in which the Legislature shall not pass local or special laws.” The Pennsylvania Constitution of 1893 has an even longer list. The wording “local or special” is central here. The language is a legacy of principled Jacksonian evenhandedness, and it appears in every state constitution. Prohibitions of local or special legislation, and, similarly, objections to “class” legislation, were efforts to forestall legislative favors to specific individuals or groups. Later in the century the same language was used to object to laws for the protection of labor. Kermit Hall best described the result. In his essay “Mostly Anchor and Little Sail,” Hall argued that state constitutions were “diffuse, overly long, negative documents that generally prevented the positive exercise of public authority.” In Hall’s telling, state constitutions thereby crippled, by design, the very governments they were creating.

There is another reading of state constitutions, emphasizing their generative capacity. John Hicks observed in 1924 that rather than crippling state government, in the Gilded Age “people were confronted . . . by the need of an immediate expansion of state activities to meet new
and unprecedented conditions.” Similarly, describing California’s 1878 constitutional convention in 1930, Carl Swisher wrote, “Undoubtedly, the sentiment of the country favored more government, not less,” and more elected officials, not fewer. In chapter 3 the reader will see that “more government” meant bureaus of labor, mine inspectors, and assertions of state government’s authority on a list of issues. Kermit Hall’s conclusions might well have been different, had he paid more attention to western state constitutions. There were as well sweeping constitutional directives to newly formed state governments. The Wyoming Bill of Rights provided that “the rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the State.” Utah’s constitution included a nearly identical provision, as well as this directive: “The Legislature shall prohibit . . . the political and commercial control of employees.” In “State Constitutions and the Evolution of Positive Rights,” Burt Neuborne argued that the capacity for the design and implementation of positive rights was ever part of state constitutionalism. Neuborne lamented that “a generation of intense effort to mine positive rights for poor people from the federal Constitution ended in failure.” No one should have been surprised. The federal document, Neuborne argued, had no textual basis for positive rights, lacked a positive rights tradition, was inflexible, and was “laissez-faire” rather than populist. State constitutions differed on all four measures and so were likely to be more productive ground for such an effort. More broadly, Neuborne claimed that

most state constitutions are enabling documents designed to authorize, not restrain, the government. Most state constitutions are acutely aware that it is the responsibility of the states to deal with education and . . . breakdowns in the availability of food, shelter, and health care. Indeed, if the federal Constitution can be confidently described as a laissez-faire document, many . . . state constitutions can fairly be described as communitarian; even populist.

Not only the legislature but also the courts had this capacity. Neuborne wrote that “state courts are imbued with the power and creative ethos of the common law tradition.” Judith Kaye wrote that the common law tradition provided an opportunity: “Nourished by our bedrock constitutional values and updated by our evolving sense of justice, the
common law can embolden state courts . . . and encourage the sort of experimentation that has long been a strength of the American justice system,” including “the development of an expanded sense of rights.”42 While Neuborne and Kaye were speculative and prospective, Emily Zackin’s work is historical and empirical. Zackin argues that the United States has a history of long-recognized government obligations, positive rights that are products of “vigorous campaigns Americans have waged” in the states.43 In chapter 3, I call attention both to the positive rights included in Gilded Age constitutions and to the broad imperatives for state governments to be found in the texts of western state constitutions. More broadly, the creativity of delegates and their design of new institutions support these authors’ understanding of state constitutions’ generative character. The same positive rights and injunctions to state governments were among the responses delegates devised to the unprecedented dilemmas they faced.

How to Study State Constitutions

Every serious study of state constitutions begins with the records of the constitutional conventions. These records are lengthy and detailed. A good stenographer captured both the speeches and something of the audience response (usually in a parenthetic expression, for example, applause, cheers, laughter). As extensive as the minutes are, they are not comprehensive. For example, there are few if any notes or journals from committee meetings, where one imagines there were many tough arguments, allowing provisions to be drafted before being discussed at the convention. And the minutes are an insufficient source for explanation. Secondary sources and other primary sources give greater depth both to constitutional debates and to their resolutions. Newspaper coverage, which was all explicitly partisan, is a source for party positions on various issues, not always clear in convention debate. Newspapers closely followed and reported convention debates. Newspaper coverage also discussed which interests lobbied for, or were likely to benefit or suffer from, possible constitutional provisions. For Democratic Beginnings, I read convention coverage in pursuit of this information. Contemporary
newspaper coverage explains territorial politics, sometimes providing accounts of bargaining not found in the minutes; for some conventions, the press offered brief sketches of delegates’ lives and political activities. I also read some of the delegates’ and politicians’ papers. Newspaper coverage suggests that the press was reluctant to criticize convention proceedings, possibly for the same boosterish and political reasons that led the press to present idealized descriptions of the delegates. Delegates’ post hoc discussions of the conventions can provide more frank appraisals of the proceedings (although sometimes self-congratulation inhibits full disclosure), as well as discussions of pressures from lobbyists and constituents not provided by the proceedings.

Understanding the decisions delegates made requires attention both to the institutional characteristics of constitutional conventions and to time and place—the historian’s most basic tools. Time and place matter both in the large and in the small. Chronology matters; the familiar nomenclature of political and economic change—the ante-bellum generations, the Gilded Age, the Progressive Era, the New Deal, and the Cold War—each signify social structure, demography, dominant issues, and political patterns. The central narratives of these eras were the concerns of delegates to western constitutional conventions. For that reason I have grouped my discussion of the conventions into three generations: antebellum (California, Oregon, Nevada), Gilded Age (Colorado, Idaho, Montana, Utah, Washington, Wyoming, and California’s second), and Progressive (Arizona and New Mexico). Accepting that delegates were serious in purpose and rational in pursuit of goals for their communities, attention to time and place provides insight into their decisions. Each generation of delegates to state constitutional conventions had their own concerns, from the infant states of the 1780s to the states revising constitutions late in the twentieth century, and these have not been independent of national and international developments. We read delegates’ considerations of events beyond their territorial communities in every report of convention proceedings; it is in those contexts that their deliberations and decisions make the most sense. The same markers designate assumptions and beliefs common to their time.

Time also matters in the shorter intervals of sequence. Every commentator on state constitutions has been attentive to “borrowing.” There
is much in any state constitution that is not original; often the published minutes and journals of state constitutional conventions dutifully list the sources of their provisions. It was borrowing that led many students of state constitutions to infer that they were hastily produced, with little creative effort. Later commentators have viewed borrowing more generously. In my reading of constitutional conventions, I see delegates conscientiously seeking states that might model the future of their own. These considerations were clearly stated by the delegates, whose conversations reveal the importance of sequence: every convention and constitution added choices for the consideration of delegates at later conventions. Presidential comments on public policies and the federal government’s innovations, too, affected convention debates and policies in the states. Changes in federal law, and rulings on state law by federal courts, changed the substance of convention deliberations. State conversations about regulating corporations were different after *Munn v. Illinois* (which confirmed the authority of states to regulate common carriers) than before, after the creation of the Interstate Commerce Commission than before, and after the passage of federal legislation on mining than before.

Place matters in history, politics, and economy and so also in state constitutions. Region made its mark on state constitutions. Regions have distinctive political, social, and economic histories; we have every reason to expect their trajectories of constitutional development to differ. In *Understanding State Constitutions*, in addition to showing elements shared by nearly all state constitutions, Alan Tarr showed that regions exhibit different patterns of constitutional development. Tarr provided overviews of constitutional development in New England and the South. His account of southern state constitutions began with antebellum constitutions much like those in the North, with the addition of protections for slavery. Seven of the eleven Confederate states wrote new constitutions as the Civil War began. In the wake of the Civil War, Reconstruction constitutions appeared in every state below the Mason-Dixon Line. These reflected the Radical Republican agenda imposed on the South, as they “guaranteed the rights of African-Americans, encouraged government support for economic enterprise, . . . expanded the scope of government responsibility with provision for . . . public education, poor relief, [and other government tasks, as well as] reconstructing local government
to dislodge local oligarchies.” The demise of Reconstruction brought new constitutions renouncing the activist states of the years following the Civil War. At the turn of the twentieth century, new constitutions in southern states consolidated white supremacist regimes. The short life of southern state constitutions followed from the many sharp changes in political direction taken by those states. So too the West had its own constitutional path, moving through the Gilded Age and arriving at the Progressive Era with its own distinctive politics.

Regions also have strategic relations with one another. Immanuel Wallerstein recognized these relations on an international scale in *The Modern World-System.* Wallerstein argued that trading partners around the globe resided in areas with different roles in the world economy. “Core” countries controlled a preponderance of capital; this enabled the most advanced economies to draw resources from other, “peripheral” economies. Countries in the periphery lacked sufficient capital to fund their own development and provided raw materials or primary products to core countries. Richard Bensel has applied a parallel framework to the United States, arguing that the northeastern core succeeded at establishing federal policies that enhanced its ability to draw resources from the South. In the Gilded Age the most important of these policies was the gold standard. The West and the South displayed the characteristics Wallerstein described for areas peripheral to the world economy—both regions exported primary products, lacked resources necessary for their own development, and were dependent on distant investors and the equally distant federal government for their future prosperity. 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.

Place mattered as well in the characteristics of the territories. Not least, territories had histories of government and law that were the prologue to convention deliberations and served as a resource for delegates. Delegates did not start from nothing. Strategies, tactics, and precedents were created in practice, in courts, and in territorial legislatures. The initial forays of the territories form the subtext, and sometimes provide 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 extragovernmental practice. And for all the efforts of convention delegates to bring order and clarity to their nascent states, legislative compromise, judicial decision, extragovernmental practice, and the incremental change of common law continued once the constitutions were in place. It could hardly have been otherwise. Constitutions did not stop debate, disagreement, or conflict, much less history. Rather, they created institutional and legal settings for resolving disagreement and finding consensus.

In the chapters that follow, I discuss each of the three generations of western state constitutions. I report the issues, debates, and compromises of each generation’s conventions.

“Frontier Foundings” is devoted to the conventions and constitutions of California, Oregon, and Nevada. Broadly speaking, the three constitutions were not very different from contemporary constitutions in other states, no doubt in part because, as David Johnson wrote, they shared the antebellum values that were nearly universal in their time. The three western states, like states across the country, denied the vote to people of color, were unsettled by the appearance of limited liability corporations, and insisted that corporations be granted charters only by general laws rather than by legislation specific to a particular company. At the California and Oregon conventions, delegates confronted the dilemmas caused by corporations and banks. These institutions were an affront to central antebellum values of citizen character and evenhanded government. Nevada, already a society of large corporations, debated the value of assistance to railroads and struggled with choices for taxing corporations more than thirty years before taxing corporations became a question for states across the nation.

Although they shared these values, the three territories were home to quite different societies. California territory was home to gold rush society in the north and conquered Californio society in the south. At the 1849 convention, the state’s future as regional hegemony was not visible to the delegates. Oregon was a territory of family farmers, dependent on imports to meet many of their needs. Nevada was an industrial society, advanced beyond its years by the end of placer mining and the beginnings
of large-scale industrial mining. Distance from the existing states, and recent settlement of the three territories encouraged delegates to resist the examples of older states and declare themselves free to construct governments appropriate to their own communities.

In “Managing the Periphery,” I present the proceedings, and offer analyses, of the Gilded Age conventions. The central narratives of the Gilded Age—the appearance of large corporations, clashes between labor and capital, the mobilization of populist sentiment, the appearance of the Farmers’ Alliance and the People’s Party, and the settlement of the West—are prominent themes in the deliberations and the constitutions of these states. This generation of delegates completed three tasks. First, as in every constitutional convention, delegates in these territories fashioned government institutions. Second, they expanded bills of rights. Third, they made an effort to manage the periphery. Just as “the West” is not an artificial construct imposed on the region, so the region’s quasi-colonial relation to the eastern states and Europe is not very different from delegates’ own understandings (although they did not speak of themselves as the “periphery”). Both eager for investment and its benefits, and anxious about its possible ill effects, western delegates spent considerable effort trying to maximize the former and minimize the latter, the goals of managing the periphery. Managing the periphery also required law and institutions for managing competing social forces within the territory, claims on water, and relations between workers and employers. To these ends they created both law (for example, for property in water) and new government institutions (for example, mine inspectors). I examine debates about rights to water, railroads and other corporations, and the protection of labor on which delegates spent considerable time and energy; the resolutions of their debates appear in the constitutions.

The character and tenor of each convention also appear in this chapter. Colorado was the last cheerful and optimistic moment in the deliberations of western delegates; Idaho delegates were concerned, systematic, and resolute; Wyoming debates reveal open bullying about water law, mutual respect in consideration of the protection of labor, unity in hostility to railroads, and support of woman suffrage; Montana was a territory of cattle ranching and mining, with the latter contributing a significant worker contingent to the Populist Party; California’s convention was plagued by
heated rhetoric and ad hominem denunciation, its delegates most perceptive, thoughtful, and vexed by the dilemmas of writing law for property and corporations. Chapter 3 is the heart of this book, not least because there were more conventions. More substantively, the Gilded Age—the strength of the Populists and their agenda, the conflicts between labor and capital, and the role of state governments in those crises—birthed the agendas of the Progressive Era in these states as well as in the nation.

“Progressive Settlements” is devoted to the founding constitutional conventions of Arizona and New Mexico, which met in 1910. The constitutions they adopted were in their time extreme, Arizona to the left of Wilson and New Mexico to the right of Taft. Extremism was a product of the territories’ lopsided party systems. In Arizona Democrats usually drew a majority of votes; in New Mexico Republicans had the advantage. However, in neither territory was party ascendance secure. Republicans regularly won elections in Arizona as Democrats did in New Mexico. At each convention the agenda of the partisan majority was to increase and secure their standing among their central supporters. For Arizona Democrats, the central supporters, and the majority of their supporters, were organized laborers. For workers, Democrats supported direct democracy, protections for labor, and abrogation of the fellow servant doctrine. For New Mexico Republicans, Mexican American laborers, mine workers, and farmers provided a majority of votes. For their Mexican American constituents, Republicans delivered provisions forbidding segregation in schools, requiring bilingual teachers, and guaranteeing that speaking or writing English was not to be a requirement for voting or holding office. These policies bound workers to the Democrats, and Spanish-speaking New Mexicans to the Republican Party, for many years.

Three issues were central to their convention debates, and distinguished left from right in the nation: direct democracy, the law of master and servant, and the attempt to regulate corporations. In national politics differences on these issues distinguished Democrats, Progressive Republicans, and stand-pat Republicans from one another. Direct democracy had been on the agenda in several states since the late 1890s. In Arizona there was little doubt that there would be constitutional provisions for direct democracy. Similarly, in New Mexico the failures of initiative and recall were forecast as soon as delegates were elected; the inclusion of the
referendum was a compromise. President Taft rejected both constitutions. Taft judged the New Mexico Constitution as proposed too difficult to amend and insisted on revisions to make amendment easier. Taft objected to the recall of judges in Arizona’s constitution. The law of master and servant posed contentious issues for decades and received attention in Gilded Age conventions. Arizona’s conversation began where those left off; delegates furthered discussions of fairness and prudence in the protection of labor and were decisive in their rejection, the first among the states, of the fellow servant doctrine in all employments. The regulation of corporations by the states was uncertain territory everywhere. Both conventions created the broad outlines of sturdy political settlements that endured for decades to come.

“Creating the Western States” reviews the achievements of the conventions and discusses what the proceedings reveal about the conventions as deliberative bodies. I show how the conventions trace the development of the West and briefly look ahead to the western states on the eve of World War I. I argue that at the middle of the second decade of the twentieth century, the western states were distinguished by their greater commitment than states elsewhere to the protection of labor and to democratizing reform. The Gilded Age constitutions of the West provide earlier evidence of greater commitment to labor; studies of law subsequently show the same commitment. There is a great deal of evidence about the adoption of democratizing reform in the West, some of it appearing in state constitutions, and much of this too brought about by ordinary legislation. I argue that if, in the first instance, protections for labor and democratizing reform were created at constitutional conventions, in their wake those commitments were sustained by broad popular support. Among those supporters, the presence of many organized workers was the motive force of progressive reform.

In Democratic Beginnings, I present the constitutional conventions of the western states held between 1849 and 1910, and the constitutions they wrote. I report convention deliberations and identify the determinants of constitutional provisions. I argue that constitutional conventions were distinctive institutions, more alert and responsive to public sentiment than territorial or state legislatures. Delegates represented much of territorial societies and saw themselves as “select committees of the people” writing
documents in hopes of endorsement of their work by popular vote. They did not, like the federal Founders, attempt to write a document that would remain unchanged, but rather felt duty-bound to include innovations of demonstrated utility, the products of generations of political learning. At the same time, frequently the issues delegates faced were without precedent, new to their time and place. Delegates were industrious, pragmatic, and creative in devising policies and institutions in response. They were not citizens of island communities. Rather, in identity, worldview, getting and spending, and politics, they were very much part of the United States, and proudly so. I show that at each convention there are two conversations, one national and one territorial, and that these two histories draw attention to the roles of time and place. Constitutional conventions were not continuous but met at discrete times in selected places. For that reason they do not present a narrative of western history. Nevertheless, as delegates to the conventions discussed their constituents and their aspirations, acknowledged the strengths and difficulties of their territories, worked to manage their territories’ relations with distant investors and the national government, and engaged the central controversies of each American generation, their deliberations, and my report of them here, trace the arc of western development from the last antebellum decade to the height of the Progressive Era.