Title

The Shackles of the Past Constitutional Property Tax Limitations and the Fall of the New Deal Order

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The shackles of the past:

Constitutional property tax limitation and the fall of the New Deal Order

By Isaac William Martin

On April 26, 1979, George Hardy, the president of the Service Employees International Union, wrote a letter to his fellow union presidents to warn them of a new threat. “The right wing is spending millions of dollars this year to organize American workers—including our members—to support their political aims. For the first time in our history, they are succeeding,” he wrote. “Conservative organizations supporting Proposition 13 initiatives have captured the attention of the nation by presenting a unified national voice calling for tax relief for the everyday taxpayer.”[1]

Hardy was right to sound the alarm. The 1978 ballot initiative called Proposition 13 had amended the California state constitution and imposed a new, and permanent, condition of austerity. Local governments could no longer levy property tax rates in excess of one percent. Revenues from real estate taxes could no longer grow with the California real estate market. State legislators could no longer approve new taxes by a simple majority. In one blow, the amendment ended the era of easy finance that had enabled decades of progressive innovation in California’s public sector in the postwar decades.

Worst of all, from the perspective of Hardy and other labor leaders, was that Proposition 13 appeared to symbolize the fracturing of the New Deal coalition.

[1] SEIU Executive Office files: George Hardy collection, Wayne State University, box 93, folder 5.

Proposition 13 was approved by 65% of the state's voters. Even before the polls were closed, legislators in other states had begun to copy the language of Proposition 13, in hopes of claiming credit for a populist tax cut of their own. National polls showed that a majority of Americans favored "a measure similar to Proposition 13." Within weeks, talk of Proposition 13, and the new mood of austerity that it was thought to symbolize, came to dominate Congressional debates over taxing and spending on programs from transportation to welfare.[2]

Previous scholarship has explained the success of Proposition 13 by pointing out how it exploited longstanding weaknesses of the New Deal order. As characterized by Steve Fraser and Gary Gerstle, this "order" was more than an electoral alignment; it was also a set of policies and institutional arrangements that supported that alignment. The fundamental political and institutional settlement of the New Deal order combined rising wages, modest public social provision, the promise of home ownership, and macroeconomic stabilization through government-subsidized housing finance. This

[2] Isaac William Martin, *The Permanent Tax Revolt: How the Property Tax Transformed American Politics* (Stanford: Stanford University Press, 2008), 109; John Kingdon, *Agendas, Alternatives, and Public Policies* (New York: Pearson, 1995), 97; Monica Prasad, *The Politics of Free Markets: The Rise of Neoliberal Economic Policies in Britain, France, Germany, and the United States* (Chicago: University of Chicago, 2006), 46; Brian Steensland, *The Failed Welfare Revolution: America's Struggle over Guaranteed Income Policy* (Princeton: Princeton University Press, 2008), 213; Peter Schrag, *Paradise Lost: California's Experience, America's Future* (Berkeley and Los Angeles: University of California Press, 1999).

combination had provided many working class Americans with economic security—but it had also made them acutely sensitive to property taxes, and had encouraged them to develop loyalties to a particular suburb rather than to a class or a workplace. The two-tiered structure of the New Deal welfare state had locked in support for federal old-age pensions while ensuring that state and local public finance was linked to welfare programs that were comparatively stigmatized and unpopular. It was these deep structural flaws in the New Deal order that made a state and local property tax crisis into a political crisis for organized labor and its liberal Democratic allies.[3]

But why was the crisis resolved by a constitutional amendment that limited the taxation of property? There was nothing about the tensions in the New Deal order that made this outcome inevitable or even particularly likely. Until the California primary election of 1978, homeowners' grievances about property taxes could be, and often were, yoked to campaigns for progressive tax reform. Working class resentment of rising property taxes helped propel the populist Dennis Kucinich into the mayoralty of

[3] Steve Fraser and Gary Gerstle, eds. *The Rise and Fall of the New Deal Order, 1930-1980* (Princeton: Princeton University Press, 1990). On the contradictions of the New Deal order, see Ira Katznelson, *City Trenches: Urban Politics and the Patterning of Class in the United States* (Chicago: University of Chicago Press, 1981); Robert O. Self, *American Babylon: Race and the Struggle for Postwar Oakland* (Princeton: Princeton University Press, 2005); Theda Skocpol, "The Limits of the New Deal System and the Roots of Contemporary Welfare Dilemmas," in *The Politics of Social Policy in the United States*, ed. Margaret Weir, Ann Shola Orloff, and Theda Skocpol (Princeton: Princeton University Press, 1988), 293-311.

Cleveland in 1977. It provided fuel for new populist community organizing projects from ACORN in Little Rock to Massachusetts Fair Share in Boston. For most of the 1970s, a loose coalition of progressive labor unions and former civil rights and welfare rights organizers competed successfully for leadership of the property tax revolt. They demanded tax relief for low-income homeowners and increased taxation of business and the rich.[4]

To explain how this populist rebellion became a force for permanent austerity, we need to understand the intellectual roots of Proposition 13 itself. It was not until this policy was ratified by California voters in 1978 that the promise of economic security for working class homeowners came to be bound up with a policy regime that imposed austerity on the public sector. We have learned a great deal in recent years about the intellectual foundations of the broad assault on the public sector. Intellectual historians such as Nancy MacLean and Angus Burgin have illuminated the conservative traditions that survived alongside the New Deal order and informed the political visions of its opponents. But the intellectual genealogy of Proposition 13 had less to do with the airy visions of neoliberals, and the think tanks and academic centers that supported them, than with the history of practical strategies by which a changing constellation of interest

[4] See Todd Swanstrom, *The Crisis of Growth Politics: Cleveland, Kucinich, and the Challenge of Urban Populism* (Philadelphia: Temple University Press, 1985); Martin, *Permanent Tax Revolt*, 69-70, 98-104; Arkansas Community Organizations for Reform Now, "ACORN Cites Developments in Its Campaign for Pulaski Tax Equalization," June 21, 1974, Wisconsin State Historical Society, Movement for Economic Justice Records, box 21, folder 4.

groups sought to limit the property tax. At the time that California voters cast their ballots for Proposition 13, the tradition of property tax limitation already stretched back a century, and the links in this chain were forged in a series of improved responses to property tax crises.[5]

THE FIRST CONSTITUTIONAL PROPERTY TAX LIMITATION

The roots of Proposition 13 can be traced to an antidemocratic counterrevolution. The first people to draft a constitutional limitation on the local property tax were delegates to the Alabama constitutional convention of 1875. They sought to protect white supremacy by depriving the fledgling multiracial democracy of its power to tax.

Reconstruction had precipitated a property tax crisis throughout the former Confederacy. Financing economic reconstruction was expensive. The defeated states issued bonds for railroad development backed by property taxes, and they assumed new responsibilities for the education of the formerly enslaved labor force. The war, however, had left them with a diminished tax base from which to raise the revenues to meet these expenditures. Not only had the war destroyed the value of some taxable lands and luxury goods, but much of the taxable wealth of the antebellum South had consisted of enslaved

[5] See Angus Burgin, *The Great Persuasion: Reinventing Free Markets since the Depression* (Cambridge, Mass.: Harvard University Press, 2012); Nancy MacLean, *Democracy in Chains: The Deep History of the Radical Right's Stealth Plan for America* (New York: Viking, 2017); Kim Phillips-Fein, *Invisible Hands: The Making of the Conservative Movement from the New Deal to Reagan* (New York: W. W. Norton, 2009).

people. Emancipation shifted the tax burden from owners of slaves to owners of land. Some white smallholders who had never owned slaves faced steep tax increases. Some of them, particularly in the hill country of North Alabama, had little cash income with which to pay their taxes.[6]

The crisis came to a head in the election of 1874. The financial crisis of September 1873, and the ensuing depression, discredited radical Republican rule in the eyes of many voters and exacerbated intra-party conflicts between freed black voters and upcountry whites. Democrats swept the elections in 1874 after a campaign of intimidation and violence in which organized terrorists suppressed black turnout by burning crops, homes, and ballots, leaving at least nine people dead. Many black leaders in and out of the Alabama legislature appealed to Congress for federal military intervention, but Congress adjourned in March 1875 without action; the Alabama Democratic party then moved to consolidate its rule by calling a constitutional convention with delegates apportioned in manner that favored sparsely populated, majority white counties. In the words of the Democratic state Representative Thomas H. Price, the purpose of a convention was to "put a reasonable limit on taxation, make it

[6] Michael R. Hyman, "Taxation, Public Policy, and Political Dissent: Yeoman Dissatisfaction in the Post-Reconstruction Lower South," *Journal of Southern History* 55, vol. 1 (1989): 49-76; Thornton, J. Mills, III. "Fiscal Policy and the Failure of Radical Reconstruction in the Lower South" in *Region, Race, and Reconstruction: Essays in Honor of C. Vann Woodward*, ed. J. Morgan Kousser and James M. McPherson (New York: Oxford University Press, 1982), 349-94.

impossible to increase the public debt, [and] put it out of reach of counties to tax the people out of house and home."[7]

Putting a limit on taxation was the first order of business when the convention met in September 1875. The president of the convention, Leroy Pope Walker, urged tax limitation as a substitute for suffrage restriction. Walker had voted for secession, and he had served as Secretary of War in the Confederacy. But in 1875, with the Fifteenth Amendment newly ratified, federal troops still stationed in Louisiana, and restoration of military rule a live possibility, he urged his fellow delegates to accept universal manhood suffrage as a *fait accompli*, even if they did not embrace it as a principle. "Let us recognize this fact with broad significance," he told the assembled delegates, "and incorporate into the Constitution the National spirit and the National law of the perfect political and civil equality of all men, of whatever race, color, or previous condition." Political and civil equality, but not economic or social equality: the task for the convention, as he saw it, was to limit the damage that freedmen could do with the franchise—by limiting the power of their elected governments to tax. "An eminent statesman has said, 'The power to tax is the power to destroy,'" Walker advised the

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[7] William Warren Rogers, *The One-Gallused Rebellion: Agrarianism in Alabama, 1865-1896* (Baton Rouge: Louisiana State University Press, 1970), 41-2; Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper Collins, 1988), 552-3; Allen Going, *Bourbon Democracy in Alabama, 1874-1890* (Montgomery: University of Alabama, 1951), 18-22; Price quoted in Malcolm Cook McMillan, *Constitutional Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism* (Chapel Hill: University of North Carolina Press, 1955), 181.

delegates, paraphrasing Chief Justice John Marshall's opinion in *McCulloch v. Maryland*. "Governments should provide against possibilities, as possibilities often become facts. Limit, therefore, the legislative power of taxation; and yet so impose this limitation as to shield from suspicion the honor and credit of the state."[8]

Walker's dual charge to the delegates—limit the power to tax, but don't hurt the state's credit—corresponded to the delicate political situation of the Alabama Democratic party. Some agrarian delegates from the northern part of the state argued for repudiation of the state's railroad debts. Walker, along with Governor George Houston and other "Bourbon" party leaders, agreed that the total debt was unpayable, but thought that repudiation would hurt the state's industrial development. They argued for adjustment rather than repudiation. The governor hoped to persuade bondholders to accept a haircut in exchange for a credible repayment plan, and thereby to preserve the state's credit so that it could borrow again. Writing a low tax rate into the constitution could strengthen the state's bargaining position, by demonstrating its determination to keep taxes low—but only if the rate was not so low as to foreclose *all* possibility of repayment. The optimal tax rate to solve this bargaining problem was anyone's guess.[9]

It was this peculiar political situation that accounted for the unprecedented and essentially quantitative nature of the constitutional exercise. Existing models for

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[8] McMillan, *Constitutional Development*, 189; Walker's speech is in *Journal of the Constitutional Convention of the State of Alabama, Assembled in the City of Montgomery, September 6th, 1875* (Montgomery: W. W. Screws, 1875), 5-6; see *McCulloch v. Maryland*, 17 U.S. 316, at 432.

[9] McMillan, *Constitutional Development*, 203.

constitutional limits on the power to tax were useless. The federal constitution limited the qualitative choice of tax instruments—"no capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken"—but its only quantitative limitation was a dead letter that was irrelevant to the problem at hand, namely a cap on slave import duties expressed in dollars per capita ("not exceeding ten dollars for each person"). The confederate constitution of 1861 had merely copied the relevant sections of the federal constitution. No state constitution had ever imposed a maximum percentage tax rate; indeed, Louisiana voters had only the previous year amended their constitution to establish a *minimum* state property tax rate in order to secure a favorable interest rate on state bonds. Alabama delegates had the unprecedented task of solving an imponderable political equation to yield a definite number.[10]

They ultimately solved the problem by a simple application of the availability heuristic. After some debate, the delegates agreed that the maximum rate of tax should be three fourths of one percent, the statutory tax rate already in effect. The specific numerical parameter did not derive from any high principle or draw on any careful analysis of the debt problem. It merely responded to a temporary crisis by freezing the current tax rate in amber so that future legislative majorities could not increase it.[11]

The constitution of 1875 also imposed limitations on local property tax rates, and those limitations, too, simply codified existing legislative practice. The Alabama

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[10] *Constitution of the United States of America*, Art. I, section 9; cf. *Constitution of the Confederate States*, Art. I, section 9. See the discussion in *State of Lousiana vs. Jumel*, 107 U.S. 711, at 719-720.

[11] McMillan, *Constitutional Development*, 203.

legislature regularly authorized property tax rates for particular cities and counties. The delegates merely generalized this principle, adopting the rules that "No county in this State shall be authorized to levy a larger rate of taxation, in any one year, on the value of the taxable property therein, than one-half of one per centum" and that "No city, town, or other municipal corporation... shall levy or collect a larger rate of taxation, in any one year on the property thereof, than one-half of one percentum of the value of such property, as assessed for State taxation during the preceeding year," with allowances for additional millage to pay off existing debts of county and municipal governments. These rules were not designed to limit local decision-making bodies. If delegates had sought to limit the behavior of city council members or county commissioners they might have accomplished that purpose by statute. A constitutional provision was only necessary to constrain the actions of future *state* legislative majorities.[12]

In short, constitutional property tax limitation was invented as way to lock in the policies of a fragile legislative majority, itself of questionable democratic legitimacy, whose members feared that future majorities might attempt to overturn those policies. The Democratic party campaigned for ratification of the new document with explicit appeals to protect white supremacy against the "Jacobin Republicans" who wrote the

[12] *Constitution of the State of Alabama* (1875), Article X, sections 5 and 7. On special legislation establishing tax rates for Alabama cities and counties see, e.g., *Journal of the Session of 1872-73 of the Senate of Alabama* (Montgomery: Arthur Bingham, 1873), 167, 349, 434, 472, 608; and, more generally, Scott Allard, Nancy Burns and Gerald Gamm, "Representing Urban Interests: The Local Politics of State Legislatures," *Studies in American Political Development* vol. 12 (1998), 267-302.

previous constitution of 1868. "Who made the present constitution?" the Montgomery *Advertiser* asked rhetorically, and answered: "Corn field Negroes, corrupt carpetbaggers and United States soldiers. Vote for the new one, made by your own representatives." The Republicans, for their part, denounced the new constitution as fiscally unsustainable, and accused it of choking off resources to public schools. The partisan and racial basis of the conflict was clear to everyone involved. Four black belt counties voted against ratification. The rest of the state voted for it. In 1901, when the state was convulsed by the debate over another constitutional convention, the *Advertiser* explained to its readers that the main purpose of the 1875 constitution had been to "fix things so the Republicans could do little harm if they should return to power."[13]

The new constitution fixed things perhaps too firmly. Before long even many Bourbon Democrats began to chafe at the state's constitutional property tax limitations. Businessmen complained that the state's constitutional tax limitations held back infrastructural improvements and forced municipal governments to borrow at unfavorable rates. The state's schools complained that the limitations impaired the availability and quality of public education. Cities regularly petitioned the legislature for constitutional amendments to relieve localities from the strictures of the property tax limitation. When a convention was finally called for 1901, a coalition of Alabama cities petitioned the delegates to repeal the property tax limitation altogether. The delegates declined.

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[13] Montgomery *Advertiser* quoted in McMillan, *Constitutional Development*, 211, and in Harvey H. Jackson, III,"White Supremacy Triumphant: Democracy Undone," in *A Century of Controversy: Constitutional Reform in Alabama*, ed. Bailey Thomson (Tuscaloosa: University of Alabama Press, 2002), 17.

Property tax limitation was too popular with the state's white farmers, and the threat of repeal was alarming to landowners who thought they might thereby lose an important guarantee of their economic security. Alabama "incorporated no new ideas on taxation in the Constitution of 1901"—which would remain the state's constitution for the rest of the twentieth century and into the twenty-first. The property tax limitations of 1875, in short, have remained stuck in the constitution of Alabama. But they have not remained *only* there.[14]

HOW PROPERTY TAX LIMITATION BECAME A THING

Leroy Pope Walker, in his address to the Alabama constitutional convention of 1875, described the ideal constitution as an organic whole, which he contrasted to the "unseemly mosaic, composed of shreds and patches gathered here and there, incongruous in design, inharmonious in action" that was the Alabama constitution of 1868. In his romantic constitutional theory, the property tax limitation was part of this organic unity and inseparable from the whole. But constitutions abstract. Their power to bind the future conduct of government comes from their articulation of general principles purified of the particulars that belong to the immediate context of their drafting. Constitutions thereby become machines for standardization of political action. Once translated into the abstract language of constitutionalism, an expedient decision undertaken to solve an idiosyncratic problem becomes an abstract policy device that can be copied and applied in

[14] McMillan, *Constitutional Development*, 234, 329-30; Jackson, "White Supremacy Triumphant."

circumstances far removed from its immediate origins. So it was with constitutional property tax limitation. The Alabama delegates of 1875, by writing maximum property tax rates into their constitution, not only bound future Alabama legislators, but also invented a device that could be taken out of its originating context and used to bind state and local legislators in other times and places: constitutional property tax limitation.[15]

It did not take long for others to take it up. The first were Redeemers in other Southern states. Texas Democrats wrote limitations on local property tax rates into their constitution in 1876. Arkansas, Georgia, and Louisiana followed suit, as did the border states of Missouri, Kentucky, and West Virginia. Property tax limitation spread through these states as part of a wave of reactionary constitution-writing that, in the words of Eric Foner, aimed to "dismantl[e] the Reconstruction state, reduc[e] the political power of blacks, and reshap[e] the South's legal system in the interests of labor control and racial subordination." From there, property tax limitation spread to the West, for no better reason than that several new Western states held their first constitutional conventions in the 1880s and 1890s, and the delegates copied parts of other constitutions that sounded good. Constitutional conventions in states such as Utah, Wyoming, and North and South Dakota copied Southern states' property tax limitations into their founding documents. By the end of the century, eighteen states, almost all of them in the South or the mountain West, had adoped constitutions that imposed at least some quantitative limitation on the rate of state or local property taxes.[16]

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[15] *Journal of the Constitutional Convention of the State of Alabama, Assembled in the City of Montgomery, September 6th, 1875* (Montgomery: W. W. Screws, 1875), 5.

Constitutional property tax limitation proved to be a multi-purpose tool. In the early twentieth century, some Progressives in the northeast and midwest discovered new uses for constitutional tax limitation as part of a general package of property tax reforms intended to rationalize state and local taxation In practice, the assessment of property values for tax purposes often permitted local officials enormous discretion, and favorable assessments could be a valuable political currency. Some civic reformers hoped that legislation to limit property tax rates would curb corruption and disempower the political machines. If revenue-seeking local governments could not increase property tax rates, then they might have to increase their property *assessments* up to the legal standard—and thereby give up on favoritism. Other civic reformers saw property tax limitation as an indirect way to ensure economy in government.[17]

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[16] Thomas M. Milling, "Tax Limitations," in *Proceedings of the Annual Conference on Taxation under the Auspices of the National Tax Association*, vol. 18 (Nov. 9-13, 1925), 39; Mabel Newcomer,"The Growth of Tax Limitation Legislation." in *Property Tax Limitation Laws*, ed. Glen Leet and Robert M. Paige (Chicago: Public Administration Service), 38; Daniel R. Mullins and Kimberly A. Cox, *Tax and Expenditure Limits on Local Governments* (Washington, D.C.: Advisory Commission on Intergovernmental Relations, 1995); Foner, *Reconstruction*, 588. On the role of borrowing in Western states' constitutional conventions, see Christian G. Fritz, "The American Constitutional Tradition Revisited: Preliminar Observations on State Constitution-Making in the Nineteenth-Century West," *Rutgers Law Journal*, vol. 25, no. 4 (1994), 945-98.

[17] Jens P. Jensen, "Tax Limitation," *Proceedings of the Annual Conference on Taxation under the Auspices of the National Tax Association*, vol. 28 (Oct. 14-17, 1935), 340-56;

But it was not until another property tax crisis that constitutional property tax limitations began to spread rapidly. The Great Depression provoked a revenue crisis for state and local governments: while property values plunged, the expense of state and local government did not. State and local officials struggled to collect property taxes from income-constrained property owners who were being taxed at historically high rates on assessed values that had not been adjusted adequately for worsening market conditions. Homeowners and apartment owners in several big cities threatened property tax strikes in 1932 and 1933. City managers described "hysterical attacks on government" by "local chambers of commerce, real estate board[s], taxpayers organizations, city club[s], and other organizations" that demanded property tax limitations and reduced spending. Farmers and bankers joined in. So did mortgage lenders, who discovered a sudden new interest in property tax limitation when they took possession of foreclosed properties and became liable for paying the taxes on them. The National Association of Real Estate Boards (NAREB) actively encouraged the campaign for property tax limitations by disseminating arguments and model legislation. "It must not be supposed that the proponents of tax limitation put forward such a measure as something ultimate, to be retained always," explained NAREB's secretary, Herbert Nelson. "We advance it only as a method which meets, ultimately, an urgent present need."[18]

Harley L. Lutz, "Motives behind the Tax Limitation Movement" in *Property Tax Limitation Laws*, ed. Glen Leet and Robert M. Paige (Chicago: Public Administration Service, 1936), 17; Clifton Yearley, *The Money Machines: The Breakdown and Reform of Governmental and Party Finance* (Albany: State University of New York Press, 1969).

Property tax limitation spread because it met *many* urgent needs. Interest groups campaigned successfully for new constitutional limitations on local property taxation in Ohio, Michigan, West Virginia and Oklahoma. In California, after a grassroots initiative campaign for property tax relief failed at the ballot box, voters approved a compromise amendment to the state constitution that limited annual growth of city, county, and school district expenditures to grow no faster than 5 percent per year—an expedient designed to limit the growth of property taxes.[19] Tax experts who studied the "property tax limitation

[18] Clarence E. Ridley and Orin F. Nolting, "Tax Reduction through Efficient Management," in *Property Tax Limitation Laws*, ed. Glen Leet and Robert M. Paige (Chicago: Public Administration Service, 1936), 33; Herbert U. Nelson, "The Case for Tax Limitation," in ibid., 11; Jensen, "Tax Limitation Laws"; Martin, *The Permanent Tax Revolt*, 29-30; David Beito, *Taxpayers in Revolt: Tax Resistance During the Great Depression* (Chapel Hill: University of North Carolina Press, 1989).

[19] The so-called Riley Stewart amendment of 1933 shifted public utility property from the state to the local property tax rolls, and imposed a limitation of 5% on the annual growth of local budgets for the next two years so that local governments could not simply treat the increase in the tax base as a revenue windfall. The result was a constitutionally required cut in local property tax rates. The amendment also authorized the state legislature to limit local property tax rates by statute. See California Senate Constitutional Amendment 30 (1933), http://repositoryuchastings.edu/ca_ballot_props/303, retrieved August 31, 2015; James E. Hartley, Steven M. Sheffrin and J. David Vasche, "Reform During Crisis: The Transformation of California's Fiscal System During the Great Depression," *Journal of Economic History*, vol. 56, no. 3 (1996); see also Newcomer,

movement" of the 1930s were struck, often unfavorably, by the sheer variety of problems that constitutional property tax limitation was purported to solve. Advocates argued for property tax limitations to improve property values, restrain public expenditures, force state and local governments to broaden the tax base, and combat creeping socialism. The advocates of tax limitation reminded the economist Jens Jensen of the parable of the blind men and the elephant: they mistook it for a whip, an awl, a crowbar, a cloth, or a wall, depending on which part of the animal they touched; everyone agreed it was a tool, but a tool for what? The Princeton economist Harley Lutz dismissed the movement as an incoherent jumble of "diverse, illogical motives." An expert committee convened by the National Tax Association to evaluate property tax limitations titled the opening section of its report "A Movement of Mixed Purposes," and concluded wryly at the end of three years' study that the committee members were not in a position judge whether property tax limitations accomplished their intended purpose, because they could not tell what that purpose was: "Advocates of property tax limitation are apparently not agreed on the choice of emphasis as to the most important end to be achieved by the movement."[20]

"The Growth of Tax Limitation Legislation," 38.

[20] Jensen, "Tax Limitation"; Lutz, "Motives," 20; Raymond D. Thomas, Edward P. Doyle, T. Levron Howard, Jens P. Jensen, Melvin B. McPherson, R. W. Nelson, J. A. Scott, Don C. Sowers, George G. Tunnel and Lent D. Upson, "Report of the Committee on Property Tax Limitation and Homestead Exemption." *Proceeindgs of the Annual Conference on Taxation under the Auspices of the National Tax Association*, vol. 31 (Oct. 24-28, 1938), 796.

These economists, despite their unanimous condemnation of constitutional property tax limitation, may have contributed to its spread by reifying it as a discrete policy tool. The progressive critics of constitutional tax limitation did not think of constitutions as organic wholes. Jensen ridiculed constitutional tax limitation as "an elephant of a new species... escaped from some menagerie of Untried Taxation Devices, into the green pastures of Ohio"; but ridiculous or not, it was an animal that stood on its own, and might wander from one pasture to another. Harley Lutz called it a "crude, unscientific device," but thereby conceded that it *was* a device, severable from the constitutions in which it was embedded. The proliferation of commentaries by experts like Lutz and Jensen—classifying types of constitutional property tax limitation, evaluating them, arraying them in tables, and debating their merits—all contributed to codifying the idea that constitutional property tax limitation was in fact a discrete and transposable object. It was a provision that could be cut from one constitution and pasted into the next, like a standardized part that could be lifted out of one machine and fit into another, there to accomplish a different purpose.[21]

SPECIES OF PROPERTY TAX LIMITATION

The property tax limitation movement of the Depression years left the legal landscape littered with constitutional tax limitations that would be rediscovered when the next property tax crisis came. It was decades in coming. The Second World War further increased the fiscal reach of the federal government, and for a time the combination of rising living standards and a new influx of federal funds relieved the pressure on the local

[21] Jensen, "Tax Limitation," 340; Lutz, "Motives," 20.

property tax. But the New Deal had already laid the groundwork for the next crisis. The bargain that brought prosperity to working class Americans also made millions of workers into first-time homeowners who were newly sensitive to property taxes. The New Deal also popularized a language of rights that would come to be wielded against local government. The rising cost of schooling and other local government services in the post-war era exacerbated conflict over property taxation in the courts. By the mid-1960s, the combination of a rights revolution in the judiciary and a technological revolution in public administration were forcing local governments to rationalize the assessment of property. Computer-assisted mass appraisals replaced the whim of the assessor and its attendant potential for abuse; but they also increased the speed and accuracy with which real estate price increases turned into tax increases. Housing inflation drove up residential taxes, and long-term residents in many urban and suburban markets began to fear that rising tax bills could drive them out of their homes.[22]

The crisis came early to California, and policy makers and activists in that state turned to many different sources for policy ideas that might address the crisis. Liberals allied with organized labor generally argued for progressive tax reforms that would shift the burden from working-class homeowners onto business property and high-income individuals. Conservatives picked up and repurposed property tax limitations that had

[22] On the New Deal contribution to the language of economic rights and conflicts over localism, see Karen Tani, "The Unanticipated Consequences of New Deal Poor Relief," this volume; on the transformation of property tax administration, see Martin, *Permanent Tax Revolt*, 44-73.

been devised in crises past, and drew on a century of experience to propose new constitutional limits on the taxation of wealth.

One strategy, devised by Los Angeles County Assessor Philip Watson, was modeled directly on the property tax limitations of the Depression era. Watson was an avid student of fiscal history who read deeply in the economics and law of the property tax. Watson collected boxes of material on the Depression-era campaign against the property tax in California, and consulted this history in drafting his first proposal for a new property tax rate limitation. His first attempt was a constitutional amendment to ensure that "the total ad valorem tax burden imposed in any tax year on all property in the State... shall not exceed one percent of market value to provide for the total cost of property related services," with an additional allowance for debt service. Following his Depression-era forebears, he recruited the backing of the California Real Estate Association. His proposal was opposed by the state's education lobby (schools objected to the exclusion of education from the definition of "property related services"), and voters rejected it roundly in 1968. His second effort, drafted after consulting with schools and a wider range of business interests, allowed for a more generous limitation: "The property tax shall be limited to 1.75% of market value for all purposes." It then added a long list of detailed instructions on how this total percentage was to be apportioned to cities, counties, and other local agencies. The resulting complexity may have hurt it at the ballot box. The provision applying to most school districts, for example, read as follows: "The tax levied by or on behalf of all intra-county taxing agencies, the boundaries of which are wholly within one county, or one city and county, shall not exceed in the aggregate FIFTY CENTS ($0.50) per ONE HUNDRED DOLLARS ($100) of assessed

valuation of taxable property within each such county, or city and county." There were similar sections describing limits for *inter*-county taxing agencies, alongside detailed instructions for the number of "DOLLARS per ONE HUNDRED DOLLARS" that could be levied by a city, a county, or a consolidated city and county. Voters rejected it by a two to one margin.[23]

Another strategy, pursued by California governor Ronald Reagan, had intellectual roots in neoliberal economics, and in particular in the Virginia school of political economy championed by James Buchanan. In the spring of 1972, Reagan convened a small group of advisors to draft a new proposal for a constitutional amendment that would restrain the growth of state and local government. The chair, Lewis Uhler, was a former John Birch Society activist who shared Reagan's mistrust of the welfare state. He managed to recruit a veritable *Who's Who* of neoliberal economists to the campaign advisory board, including Buchanan alongside the other future Nobel memorial prize winners Milton Friedman and Armen Alchian. The committee assumed a theory of

[23] Philip E. Watson, "Tax Reform and Professionalizing the Los Angeles County Assessor's Office," oral history interview with Steven Edgington and Richard Candida Smith (Los Angeles: Oral History Program of the University of California – Los Angeles, 1989), 85-6, 95, 109, 304-5; John D. Allswang, *The Initiative and Referendum in California, 1898-1998* (Stanford: Stanford University Press, 1998), 96; California Proposition 9 (1968), *Taxation, Limitations on Property Tax Rate*, http://repositoryuchastings.edu/ca_ballot_props/707, retrieved August 31, 2015; California Proposition 14 (1972) *Property Tax Limitations*, http://repositoryuchastings.edu/ca_ballot_props/765, retrieved August 31, 2015.

government as a revenue-hungry Leviathan staffed by crafty, revenue-maximizing bureaucrats.[24] After months of deliberation, it produced a comprehensive plan that was designed to leave those bureaucrats no wiggle room at all. There were pages of dense definitions and equations ("the State Tax Revenue Limit," for example, to be derived from the "State Tax Revenue Limit Income Quotient" and the "State Tax Revenue Limit Population-Inflation Quotient," each of which had a formula of its own). They included a section with instructions for the proper computation of inflation rates—and then authorized an independent state commission to do the computation, presumably because existing state agencies could not be trusted even to do arithmetic when their budgets were on the line. The drafters plainly sought to minimize flexibility in interpretation and implementation. In the process they produced a constitutional amendment that read like exactly what it was, a document produced by a committee of economists.[25]

This was a losing strategy. These men were ideologues, not campaigners, and they lacked a feel for the politics of the property tax. Their amendment included property tax limitation almost as an afterthought, and with much less attention to detail than they devoted even to the computation of inflation rates. The property tax rate for each local government was to be limited to the rate levied in fiscal 1972 or 1973, whichever was

[24] Milton Friedman papers. Folder 100.7. Lewis K. Uhler. "Remarks at UCLA Symposium – The California Tax Limitation Amendment: Wisdom or Folly?" July 10, 1973. On the Virginia school, see MacLean, *Democracy in Chains*, and "The Koch Network," chapter 9, this volume.

[25] See California Proposition 1 (1973), *Tax and Expenditure Limitations*, http://repositoryuchastings.edu/ca_ballot_props/776, retrieved August 31, 2015.

higher, with a subsequent adjustment of some kind "to reflect cost variations due to cost-of-living or population changes not offset by assessed valuation changes or to allow for other special circumstances creating hardship for individual Local Entities." The precise adjustment formula, and the precise definition of special circumstances, and hardship, were left to the state legislature—perhaps even, incredibly enough, to the Local Entities themselves. Democrats argued quite plausibly that it would not actually limit property taxes at all. Voters rejected this measure, called Proposition 1, by a vote of 54 to 46.[26]

Howard Jarvis devised a winning strategy for property tax limitation by taking yet a third approach: he stuck with the idea of a constitutional limit on the property tax, but radicalized the Depression-era precedent into a limitation on the growth not only of the *aggregate* local tax levy, but also of the tax bill of *every individual* property owner. Discovering the proximate intellectual sources of this strategy is not easy. Jarvis left few records and told many fables. He was not very knowledgeable about—or, apparently, very interested in—the details of state and local tax policy. Watson, who often debated him, complained that Jarvis sometimes misremembered, or simply misrepresented, the tax policies of other states, in order to invent precedents for his own ideas. Jarvis later claimed to have been involved in Depression-era state tax reform efforts in Utah, but he seems to have been lying. It is, indeed, easiest to say what his sources were *not*. They were not the neoliberal economists in the orbit around Ronald Reagan: Jarvis dismissed Reagan's Proposition 1 as an unintelligible policy—"you had to be a genius to figure out

[26] See California Proposition 1 (1973); Allswang, *Initiative and Referendum*, 97; Garin Burbank, "Governor Reagan's Only Defeat: The Proposition 1 Campaign in 1973," *California History*, vol. 72, no. 4 (1993), 360-73.

whether a yes vote or a no vote was a vote to reduce taxes," he said. Nor were they the historical researches of Philip Watson: although Jarvis copied the general idea of tax limitation from Watson, he deliberately ignored Watson's advice on just about every matter of detail. In early 1977, the two men met with an activist named Paul Gann to work out the legislative language of a new property tax limitation proposal. But when Watson, his health failing and his office under investigation, backed out of the campaign, Jarvis and Gann threw out his draft and penciled a new one that became Proposition 13.[27]

It was short but effective. In contrast to previous property tax limitation measures, which had presented the voters with pages of dense prose filled with fine conceptual distinctions and detailed schedules of tax rates and adjustment factors, Jarvis and Gann were brief, vague, and ungrammatical: "The maximum amount of any ad valorem tax on real property shall not exceed One percent (1%) of the full cash value of such property.

[27] Watson, "Tax Reform," 425-6; Howard Jarvis and Robert Pack, *I'm Mad as Hell* (New York: New York Times, 1979), 39; Isaac William Martin, *Rich People's Movements: Grassroots Campaigns to Untax the One Percent* (New York: Oxford University Press, 2013), 161. Watson later insisted that Proposition 13 retained the marks of his authorial hand, but when pressed for details about which provisions of his first draft Jarvis and Gann had retained, he admitted that it was perhaps only "the definitions" (Watson 1989: 425). Proposition 13 notoriously did not include any definitions. Jarvis clearly got the general idea of property tax limitation from Watson—prior to joining forces with the latter, he had been fixated instead on a quixotic campaign to abolish the property tax—but there is no textual evidence that he borrowed any policy specifics from either of Watson's previous measures.

The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties." They allowed an exception to the one percent cap for servicing previously incurred debts, permitted the state legislature to increase other tax revenues upon two-thirds majority of each legislative house, and permitted local governments to impose "special taxes" if and only if two thirds of their voters approved. The whole proposal was contained in ten short sentences.[28]

There was one additional, wholly original provision: a freeze on assessed values. The Jarvis-Gann proposal defined "full cash value" as the value that had been assessed for tax purposes in 1975, henceforth to be updated only upon change of ownership, and otherwise adjusted upward by not more than 2% per year. This assessment limitation effectively froze the distribution of property taxes in place. All of the other parts of Proposition 13, from the rate limitation, the exception for debt service, to the use of legislative supermajorities to constrain tax increases, had precedent in the tradition of constitutional property tax limitation. But the assessment freeze had no precedent.[29]

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[28] California Proposition 13 (1978), *Property Tax Limitation*, http://repositoryuchastings.edu/ca_ballot_props/850, retrieved August 31, 2015

[29] A Maryland statute of 1957 was the only previous state law to limit the increase of assessed values. They could increase by no more than 6% per year, a generous limitation that would affect the distribution of tax burdens only in extreme cases. This statutory limitation was not widely known even to experts at that time, or generally classed among property tax limitations. It is unlikely that Jarvis or Gann knew of it. See Mullins and Cox, *Tax and Expenditure Limitations*, 39; cf. Advisory Commission on Intergovernmental Relations (ACIR), *State Limitations on Local Taxes and Expenditures*

The assessment limitation may have been a wholly improvised response to a temporary emergency. At the time that Jarvis and Gann drafted their amendment, assessed values in Los Angeles County were increasing rapidly, in some cases doubling or tripling within a single year. Watson was of the opinion that limiting the growth of assessments was terrible policy, but he was not surprised when voters approved Proposition 13. Under the circumstances, he later said, "anything that got on the ballot would have won."[30]

CONCLUSION: THE SHACKLES OF THE PAST

Something else *was* on the ballot—a labor-backed alternative to Proposition 13 that might indeed have won but for a stroke of bad timing. In the spring of 1978, while Jarvis and Gann were campaigning for their constitutional property tax limitation, the California Federation of Labor and a broad coalition of its Democratic allies were campaigning for a more progressive alternative. Proposition 8 would have expanded property tax relief for low income senior citizens, lowered the tax rate on residential property, limited the revenues of local government, and reduced homeowners' property taxes by 30%. In April, it was polling neck and neck with Proposition 13. On May 16, Watson's successor in the Los Angeles County assessor's office released new assessments that showed the average home had doubled in value—and the average homeowner would face double the taxes. The nightly news filled with stories of Los

(Washington, D.C.: ACIR, 1977), 20.

[30] Watson, "Tax Reform," 427.

Angeles homeowners who said they would have to take second jobs or sell their homes to pay their property taxes. By the end of May, polls showed a decisive lead for Proposition 13.[31]

The victory of Proposition 13 was not the inevitable result of deep fractures in the New Deal order. This constitutional amendment was one among many competing solutions to the property tax crisis, and its eventual triumph over the alternatives was accidental. Once it was written into the state constitution, however, this policy became difficult to dislodge. Constitutional property tax limitation created a new coalition where none had existed before. Homeowners now reckoned with fixed tax rates and low property assessments in perpetuity. As California real estate continued to increase in value in the decades after 1978, the gap between the property taxes that Californians paid and the property taxes that they *would* have owed if they were taxed on the market values of their homes grew wider and wider. The implied tax break was especially valuable to low-income homeowners. Polls taken on the thirtieth anniversary of Proposition 13 showed it was more popular even than when it had passed, and most popular of all among elderly homeowners who were being taxed on market values that were decades out of date. In a perverse parody of the New Deal bargain, a vested interest in retirement security now bound working-class homeowners to a policy regime that imposed permanent austerity on the public sector.[32]

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[31] Robert Kuttner, *Revolt of the Haves: Tax Rebellions and Hard Times*, (New York: Simon and Schuster, 1980) 75; David Sears and Jack Citrin, *Tax Revolt: Something for Nothing in California* (Cambridge, Mass.: Harvard University Press, 1985), 191-2.

Understanding how this bargain was made requires us to understand the genealogy of the policy that made it. The drafters of Proposition 13 did not deduce property tax limitation from an economic or political theory. They improvised it to meet an urgent political crisis. But in doing so, they borrowed elements of other public policies, themselves abstracted from other urgent crises and archived for future use by earlier practitioners of the practical arts of constitution-writing and constitutional interpretation. Their political imaginations were bound by, and often bounded within, the tradition of constitutional property tax limitation.

Some of the most celebrated theorists of neoliberalism offered theoretical justifications of Proposition 13 after the fact that characterized it as a blow for liberty. Milton Friedman welcomed it as a sign of growing popular distaste for government and a preference for the freedoms of the market. James Buchanan and his co-author Geoffrey Brennan proposed a new theory that justified constitutional limitations on the power to tax as devices for precommitment. "Constitutional commitments or constraints become means by which members of a polity can incorporate long-term considerations into current-period decisions," they explained in their 1985 text, *The Reason of Rules*. We should agree to constitutional limitations on taxation, in other words, because we would rationally prefer fiscal restraint, but we know that we cannot resist immediate

[32] Arthur O'Sullivan, Terri A. Sexton, and Steven M. Sheffrin, *Property Taxes and Tax Revolts: The Legacy of Proposition 13* (New York: Cambridge University Press, 1995); Mark DiCamillo, "Californians' Views of Proposition 13 Thirty Years after Its Passage," in *After the Tax Revolt: California's Proposition 13 Turns 30*, ed. Jack Citrin and Isaac William Martin (Berkeley: Berkeley Public Policy Press, 2009), 11-28.

gratification at the public expense. "Ulysses has himself bound to the mast of his ship as it approaches the sirens' shore," they wrote. "He recognizes his weakness of will; he does not trust his ability to resist temptation, and he knows that if he succumbs, the larger purpose of the voyage will be undermined."[33]

The allegory was inapt. In Homer's telling, Ulysses bound only himself, and left his oarmen free, trusting that they would guide him past the sirens and untie him when the danger was past. But the authors of constitutional property tax limitations were, from the beginning, interested in shackling *other* people. They ruled certain tax decisions outside the bounds of the ordinary political process, turned fine quantitative distinctions into absolute prohibitions, and replaced majority rule with a minority veto, all because, unlike Ulysses, they trusted themselves and mistrusted the majority. Voters approved permanent constitutional limitations on the property tax when these were presented to them as the way to address temporary emergencies. But when the sirens were past, there was no one left free to unbind them from the mast.

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[33] Lindley H. Clark, Jr., "Monetary Maverick: Milton Friedman, Man of Many Roles, Now Is a Tax Revolutionary," *Wall Street Journal*, July 17, 1978; Geoffrey and James Buchanan. 2000 (1985), *The Reason of Rules: Constitutional Political Economy* (Indianapolis: Liberty Fund), 82, 91; cf. Jon Elster, "Ulysses and the Sirens: A Theory of Imperfect Rationality," *Social Science Information*, vol. 16, no. 5 (1977), 469-526.