CALIFORNIA'S "LIBERAL MOMENT":

The 1849 Constitution and the Rule of Law

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INTRODUCTION

November 13, 1849, was a wet and dreary day in California.[1] But on that day, California voters braved muddy roads and pouring rain to ratify a constitution that had been debated for a month and a half in a convention held at Monterey.[2] In that moment when the proposed constitution was ratified, something momentous though not apparent happened: a liberal society was born. It was California's "liberal moment." Once Spanish, then Mexican, now American, California witnessed more than a changing of the guard with the ratification of the 1849 Constitution. It witnessed the emergence of a society based on the *rule of law*.

The convention that drafted the 1849 California Constitution and the election that ratified it were monumental events given the territory's history and the circumstances that crystallized during that history. Indeed, the 1849 Constitution appears as a climax of events and developments that began before California was known to the Western mind. In particular, when one considers the legal institutions and jurisprudence that developed in the Iberian Peninsula, and which were later imported to the New World and eventually California, then modified by Mexican rule, and eventually adapted by American conquerors, one realizes that

[1] The *Alta California* informed its readers, "The day of the election was very disagreeable. Several showers of rain fell, and the mud, which was unfathomable before, suddenly disclosed a 'lower deep.'" ALTA CALIFORNIA (San Francisco), November 15, 1849.

[2] The Constitution was formally adopted by the voters on November 13, 1849 by a margin of 12,061 to 811. KENNETH STARR, CALIFORNIA: A HISTORY 94 (2007); Myra K. Saunders, *California Legal History: The California Constitution of 1849*, 90 L. LIBR. J. 447, 466 (1998).

the 1849 Constitution is a singularly important moment in the legal *progression* of California; it represents a fundamental change in the legal foundation of a society.

This realization becomes all the more meaningful when one explores why the 1849 California Constitution happened at all. In some ways, the 1849 Constitution was a product of its circumstances. Americans flooded the state after the American conquest and the discovery of gold, turning the tide of demographics toward the numerically dominant foreigners. However, despite the sudden rush of humanity, the native Californians (known as *Californios*) and their massive landholdings stood as a bulwark, frustrating the intentions of the Americans to settle and develop their new acquisition. While the Americans chafed under the oppression of Mexican laws and legal institutions maintained by their military governors and the *Californios* stood in anxiety about what was to become of them and their posterity, the United States Congress became mired in the question of slavery as it took up the task of providing a government for California.

Eventually, the Californians, as the natives and foreigners alike now called themselves, shook themselves free of the respectful bounds of patience and adopted the mantle of self-determination to realize the formidable promise inherent in the people and the land. Eventually, the military government of California, after several attempts to impose a satisfactory solution, realized they could not deprive the people of their desire to organize a civil government. The military government, hoping to bridle the energy and momentum of existing movements for local government and prevent future and conflicting assemblages, sanctioned the election of delegates to a convention charged with the duty to draft a constitution. After several warm debates and careful attention, a constitution was endorsed on October 11, 1849 and ratified on November 13, 1849.

The 1849 California Constitution itself was a peculiar instrument for the time. California's first Constitution preserved the Hispanic legal institution of community property, a concept foreign to most of the delegates. And, though it became a major issue in the United States Congress upon California's petition for statehood, the delegates readily prohibited

slavery in the new state without much debate or quarrel. On its surface, this result is especially surprising since much of the delegation was from the American South. However, less liberal motives played out to produce this progressive result. And, perhaps most importantly, the delegates, who all knew the oppression of governments that had complete power over them, granted to the new legislature the broadest powers, resting assured its republican form would serve to check abuse.

The 1849 California Constitution is significant not simply because it happened. It is significant too because of what it replaced. I hope to show that the legal system which came before the 1849 California Constitution was a natural precedent. More importantly, I hope to show that the 1849 Constitution was part of a process; it marked the beginning of a new era whose significance can only be fully understood when examined in the light of previous eras. Seen in this way, the 1849 Constitution is a major fulcrum in a larger, comprehensive process which ties modern California's legal systems to its earliest origins.

California's "liberal moment," as I call the ratification of the 1849 California Constitution, was one step in the progress of legal history. It included the ratification of the 1849 Constitution and the start of not just a new government, but a government different from any before. The 1849 Constitution ushered in a society based on the rule of law where there had been a bureaucratic state maintained under Spanish, Mexican, and American military regimes. In explaining this theory, I borrow from the work of Roberto Unger.[3] Unger theorizes that the rule of law is the product of a social process that forms a cycle, a microcosm of a larger procession of historical-legal events. As society develops, the character of its law also changes.[4] Unger posits that society, and the law it promulgates, progresses in four stages: customary, bureaucratic, liberal, and postliberal. California's early social and legal history indeed progressed from

[3] For Unger's theories, this article draws exclusively from Roberto Unger, Law in Modern Society (1976).

[4] *Id.* at 47. Unger writes that "one should also expect to find that the character of law changes from one form of social life to another. Each society reveals through its law the innermost secrets of the manner in which it holds men together. Moreover, the conflicts among kinds of law reflect different ways of ordering human groups." *Id.*

the customary stage to the bureaucratic and then took a dramatic turn to the liberal stage.

The customary stage of California legal history need not delay us long. For that stage took place not in California, but in the Iberian Peninsula, the place where Hispanic jurisprudence was born.[5] The customary stage can be found in the first civilizations of the Iberian Peninsula: the Celts and Iberians,[6] who were governed largely by customs and societal expectations of conduct.[7] Their law was not written, nor did it distinguish between private and public spheres.[8] It was altogether different from the bureaucratic legal system to which it gave rise and from which California took its dramatic turn to the liberal stage in the nineteenth century.

I. THE BUREAUCRATIC STAGE IN SPANISH & CALIFORNIA LEGAL HISTORY

A. Origins of Bureaucratic Law in Spain

The bureaucratic stage of California legal history began in Spain with the Roman conquest in 250 B.C. To govern their newly conquered Iberian

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[5] As discussed *infra*, indigenous Native Americans had lived and thrived in California for millennia before the arrival of Europeans. However, to begin the analysis with the native population would be inaccurate as the polity from which modern-day California has its genesis, the endpoint of this paper's analysis, was composed of Europeans, Americans, Mexicans, mission Indians, and an odd assemblage of various foreigners. It is from this polity in which modern California had its birth, and, consequently, it is this polity's legal history that will be analyzed here.

[6] The Iberians appear to have emigrated from North Africa sometime prior to the sixth century B.C. The Celts came from north of the Pyrenees, crossing that frontier in the seventh and sixth centuries B.C. The ethnicity of the Peninsula was further supplemented by the Phoenicians, Carthaginians, Romans, Visigoths, and, eventually, Moors. KENNETH L. KARST & KEITH S. ROSEN, LAW AND DEVELOPMENT IN LATIN AMERICA 20 (1975).

[7] *Id.*

[8] *See* Unger, *supra* note 3, at 49 (defining custom as "any recurring mode of interaction among individuals and groups, together with the more or less explicit acknowledgement by these groups and individuals that such patterns of interaction produce reciprocal expectations of conduct that ought to be satisfied").

subjects, the Romans imported their civil law, which sharply distinguished state and society. Though the civil law both created and occupied the field of public law, the Romans permitted the native customary law of the Celts and Iberians to persist in prescribing the rules of private law.[9] Unger's transition from the customary stage to the bureaucratic stage requires such a distinction between state and society. In the bureaucratic stage, customary law is often still present, governing much of everyday life and the areas where the public law does not reach.[10]

The Romans also imported positive law, a development necessary for the transition to the bureaucratic stage. The civil law was composed of various edicts and orders by the local prefects, governors, the Roman senate, and the emperor. They fit the mold of "explicit prescriptions, prohibitions, or permissions, addressed to more or less general categories of persons and acts" that Unger describes as composing positive law.[11]

The Visigoths who replaced the Romans as rulers in the fifth and sixth centuries A.D. maintained the law as both a public and positive institution. The great legal work during this period, the *Fuero Juzgo*,[12] was both a statement of the public law and a work of positive law. It incorporated Roman civil law, ancient Gothic custom, and the edicts of Visigoth

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[9] One legal historian has concluded, "The impression remains that, during Spain's Roman period, Roman private law was the 'official law,' but that *de jure*, by the measure of its recognition of native law, and *de facto*, by the tenacity with which the population clung to its traditional usages, the importance of old customary law remained." Ángel R. Oquendo, Latin American Law 90 (2005) (quoting Eelco Nicolaas van Kleffens, Hispanic Law Until the End of the Middle Ages 39-40 (1968)).

[10] Unger, *supra* note 3, at 52.

[11] *Id*. at 51.

[12] Seeking to unify his nation, the Visigoth king Chindasvinth (641-652) enacted a unified legal code that combined both Roman and Gothic law in an effort to reconcile the interests of both peoples. The work, published during the reign of Chindasvinth's son Reckesvinth (652-672), was initially titled the *Liber Judicorum*. In its final revision, promulgated in 694, it was published as the *Fuero Juzgo,* the first great monument of original Spanish jurisprudence. Rejecting the direct validity of Roman law, it, at the same time, drew heavily from it. Furthermore, it drew upon ancient Gothic custom, acts of ecclesiastical councils, and edicts of the Visigoth kings. It thus represented the contributions of the entire Hispanic legal tradition up to that point. Oquendo, *supra* note 9, at 91.

kings. Like the Romans, the Visigoths maintained a legal distinction between themselves and their conquered subjects, permitting the Hispano-Romans to abide by their previous customs and laws.[13]

The Muslim conquest in 711 A.D. divided the Iberian Peninsula into Christian and Muslim regions. The resurgence of the Christian kingdoms in northern Spain and the burgeoning *Reconquista* resulted in the disintegration of any remnants of a monolithic society and heralded the creation of a hierarchical one. This new hierarchical society had its origins in the *fueros* which developed and became institutionalized during this period, as follows:

Medieval Spanish society was composed of several distinct corporate estates: the nobility, military, clergy, merchants, and guilds. In time, these distinct groups became exempt from the jurisdiction of the king's courts and were governed by their own judicial institutions and legal codes, known corporately as *fueros*. These specialized and limited *fueros* "were the juridical expression of a society in which the state was regarded not as a community of citizens enjoying equal rights and responsibilities, but as a structure built of classes and corporations, each with a unique and peculiar function to perform."[14]

With the development of the *fueros*, society was split into its constituent elements, with the king being the nominal head of a heavily bureaucratized state.[15] However, there was no effective hierarchy. The nobility was

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[13] *Id.*

[14] *Id.* at 93 (quoting Karst & Rosen, *supra* note 6, at 20-30) (citing Lyle McAllister, The *Fuero Militar* in New Spain 5 (1957)).

[15] *Id.* at 93. The development of *fueros* was further accompanied by the regularized practice of granting special legal privileges, also known as *fueros*, in the charters of newly liberated municipalities. These particular *fueros*, made between kings and the people of the municipality, were contractual in nature, setting forth the rules for self-governance, codifying local customs, and articulating restrictions on the king's power (such as limits in the realm of taxation). *Id.* at 94. A particularly interesting reflection of this institution is that, as part of their coronation, the kings of the various Spanish kingdoms were usually obliged to take an oath to respect the *fueros*. This oath was no formality: "In Spanish law, the oath created the power, and violation of the *fuero* effectively freed the subjects of their duty to obey. When a sovereign violated the *fuero* revolt almost always ensued, and sometimes the prince who had thus broken his covenant with this people was dethroned." Oquendo, *supra* note 9, at 94 (quoting Karst & Rosen, *supra* note 9, at 20-30) (citing Elena De La Souchere,

sovereign in many areas, with its broad privileges and rights confirmed in the *Fuero Vieja de Castilla* (eleventh century) and the *Fuero de Nájera* (twelfth century). The cities and clerical orders governed themselves under their own *fueros*. And, following the tradition of the ruling race, Jews, Mudejars, and Mozarabs were governed under different legal regimes.

When Alfonso X, known as *El Sabio* (the Wise), ascended the throne of Castile and León in 1252, an effort was made to rein in the diversity of Spanish law in the interest of national unity and consolidation of royal power. Alfonso X's greatest contribution in this regard was the composition of the *Fuero Real*, a "royal" compilation borrowing from the *Fuero Juzgo*, the *fueros* of the various municipalities, and elements from Roman law. The main purpose of the *Fuero Real* was to consolidate royal power and unify the country under one head.[16]

However, royal power was solidified only with the enactment of the *Siete Partidas* (seven-part code), also developed during the reign of Alfonso X. The *Siete Partidas* was heavily influenced by the newly rediscovered *Corpus Juris Civilis* of Justinian and represents a positive transition from custom to *ratio scripta* (written reason). [17] Several factors moved Alfonso to "update" Spanish law with the ancient *Corpus Juris*. The technically superior Roman law simplified his effort to unify the oppressive legal diversity prevailing across Spain. The Roman law also facilitated

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An Explanation of Spain 41-42 (First Vintage Ed., 1965)). Additionally, the *Reconquista* institutionalized the granting of the *encomienda*, "a temporary grant of territory, cities, towns, castles, and monasteries, with powers of government and the right to receive the revenues, or a stipulated part thereof, and the services owed to the Crown by the people of the area concerned under fuero and custom." *Id.* at 94 (quoting Karst & Rosen, *supra* note 6, at 20-30) (citing Robert S. Chamberlain; *Castilian Backgrounds of the Repartimiento — Encomienda, in* Carnegie Institution, 5 Contributions to American Anthropology and History 21, 35 (No. 25, 1939)). In its most basic expression, the *encomienda* was a charge of government, with the *encomendero* exercising the authority of the crown in the area involved. *Id.* at 94.

16 *Id.*

17 The *Siete Partidas* has been described as "one of the most remarkable monuments of legislation of the Middle Ages, and which the Spaniards regard with the highest veneration, and as a model of both style and precept." Myra K. Saunders, *California Legal History: A Review of Spanish and Mexican Legal Institutions*, 87 Law. Libr. J. 487, 493 (1995) (quoting Gustavus Schmidt, The Civil Law of Spain and Mexico 28-29 (1851)).

the analogy of the Spanish king to the emperor of Rome, a move calculated to expand royal power. But, because it centralized power in the king, the *Siete Partidas* was resisted by the estates who viewed it as an abrogation of their *fueros*. As a result of this tension, Alfonso's attempts to promulgate the *Siete Partidas* never met with success.

Rather, it lay with Alfonso's great-grandson, Alfonso XI, to enact the *Siete Partidas*, albeit it under a different guise and in an inferior form. In 1348, the *Ordenamiento de Alcalá* was enacted. Rather than representing a replacement of the then-discordant Spanish law with a new unified legal code based on Roman law, the *Ordenamiento* established a rank-ordering of sets of juridical norms with the king as the ultimate arbiter of conflicting laws and the source of all new ones.[18] The various *fueros* governing the nobility, clergy, and communities were to remain in force, with any conflicts to be decided by interpretation of the Siete Partidas.[19] Most importantly for the expansion of the king's power, it prescribed that the king could decide issues of law.[20]

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18 Oquendo, *supra* note 9, at 97.

19 The *Ordenamiento* prescribed that "proceedings and disputes which cannot be determined by the laws of [the *Fuero Real*], or by the said *fueros*, *be decided by the laws of the Siete Partidas* which King Alfonso our great-grandfather ordered to be put in proper order." Oquendo, *supra* note 9, at 97 (quoting Karst & Rosen, *supra* note 6, at 20-30) (quoting from the *Ordenamiento de Alcalá*, Title 28, Law 1 (1348), emphasis added). Importantly, because the *fueros* did not cover every contingency or address every possible case, the *Siete Partidas* was often the basis for judicial decisions. This reliance on the *Siete Partidas* was reinforced by the fact that Spanish lawyers were trained in civil law, a necessary result considering that the universities were religious institutions and the canon law taught there was based on the Roman civil law. *Id.* Later, in 1505, certain gaps left by the *Ordenamiento* were filled in by the enactment of the *Leyes de Toro*. Thus, in the lacunae of the law the Spanish king found his power.

20 The *Ordenamiento* provides, in relevant part:

> [W]e decree that if in the said *fueros*, or in the book of the *Partidas*, or in this [the *Fuero Real*], or in one or more laws contained therein there is need of explanation or interpretation, or of amendment or deletion or alteration, it should be done by us [the king]; and if any contradiction should become apparent in the aforesaid laws *inter se*, or in the *fueros* or in any one of them, or if any doubtful point should be found in them, or any fact because of which no decision based on them can be taken, that we be notified thereof, in order that we may give an interpretation and decision or an amendment

Viewed in light of Unger's theory, the *Ordenamiento de Alcalá* is a paradigm of an instrumental measure designed to enforce the positive rules that preserve a hierarchy. The *Ordenamiento* brought the different *fueros* (i.e., the clergy, nobility, and guilds) under the authority of the king, yet preserved an area of sovereignty for the *fueros* that the king could not reach.[21] But, the *Ordenamiento*, and the later *Leyes de Toro*, are probably best seen as enforcing the public nature of the law. They instituted the king, or state, above the conflicting groups in the Spanish kingdom. By creating a central authority, they necessarily limited the powers of the different *fueros* vying for power. Thus, the *Ordenamiento* and *Leyes de Toro* preserved the system and enforced the law as a cohesive agent necessary for the bureaucratic system to thrive.

Lastly, the primacy of religion in the *Reconquista* and Spanish legal development represents Unger's observation that a bureaucratic state

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as we may deem appropriate, or give a new law as we may deem appropriate for the case concerned, so that justice and law be safeguarded.

Id. (quoting Karst & Rosen, *supra* note 6, at 20-30) (quoting from the *Ordenamiento de Alcalá*, Title 28, Law 1 (1348).

[21] While the hierarchy of the Spanish legal system was firmly established by the *Ordenamiento*, the clarity of the law was ever in doubt. To find the applicable law, one had to follow the hierarchy, beginning with "sift[ing] through a mass of unindexed royal letters and ordinances, the *Leyes de Toro*, the *Ordenamiento de Alcalá*, the municipal *fueros*, the *Fuero Real* (to the extent that one could prove it was in use), the *Fuero Juzgo*, and, the *Siete Partidas*." *Id.* at 106 (quoting Karst & Rosen, *supra* note 6, at 33-42 (1975)). In a futile attempt to remedy the confusion, the *Nueva Recopilación de las Leyes de España* ("New Recompilation of the Laws of Spain") was promulgated in 1567 with the goal of unifying "all existing compilations and subsequent legislation and decrees." Saunders, *supra* note 17, at 493 (quoting John Thomas Vance, The Background of Hispanic-American Law 131 (1943)). This new compilation failed in its goal because it was "badly organized, and made no effort to do more than gather together the most important laws, leaving earlier compilations in force." Oquendo, *supra* note 9, at 105 (quoting Karst & Rosen, *supra* note 6, at 33-42). Yet, sadly for Spanish lawyers, it remained in force and was updated regularly. The *Nueva Recopilación* went through 10 editions over the next 110 years. Oquendo, *supra* note 9, at 106. These amendments were known as *Autos Acordados*. Saunders, *supra* note 17, at 493 (1995). Finally, the *Nueva Recopilación* was recompiled in 1805 and published as the *Novísima Recopilación* ("Newest Recompilation"). Conforming to the apparent tradition, this newest recompilation was again poorly compiled, leaving many gaps and doubts as to which laws should apply. Saunders, *supra* note 17, at 493.

characteristically adheres to religious precepts. The Spanish king claimed a divine right to authority as God's representative on earth.[22] In time, the theory of divine right evolved to prescribe the king's duty as dispensing justice on earth.[23] Eventually, the Spanish state became "a federal unity of the diverse yet interconnected interests of men, directed and held together by the sovereign who was to be the arbiter to resolve their conflicts and the dispenser of justice which should define the order in which they were to function."[24] Thus, as Unger predicted, the laws came "to embody some inherently right or necessary order . . . treated by both the rulers and the ruled as standards that government cannot or should not disturb."[25]

B. The Extension of the Bureaucratic Stage into Colonial Latin America

The advent and development of the Spanish legal system in the New World represents the continuation of the bureaucratic stage, but in a strengthened form. The Spanish colonies belonged to and were under the direct authority of the crown through the Council of the Indies;[26]

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22 The "divine right" theory had been developing since the Middle Ages and matured into a notion that the king was God's representative on earth, with disobedience being sinful and not just unlawful. Oquendo, *supra* note 9, at 83.

23 With the advent of an absolute monarchy under Ferdinand and Isabella, the king became "the head, chief, father, representative of God on earth, supreme dispenser of all favors, and rightful regulator of all activities, even to all the personal and individual expressions of his subjects and vassals." Oquendo, *supra* note 9, at 83 (quoting Karst & Rosen, *supra* note 6, at 20-30).

24 *Id.* at 106 (quoting Karst & Rosen, *supra* note 6, at 30-33).

25 Unger, *supra* note 3, at 65.

26 Though Ferdinand and Isabella were restricted in their prerogatives by the *fueros* of the various estates, they did not face such restrictions in the New World. Rather, the New World was legally defined as the hereditary domains of the sovereigns of Castile. Edward G. Bourne, Spain in America: 1450–1580 221 (Barnes & Noble: 1962) (1904). In other words, the New World was the exclusive property of the crown, immune from control by the other estates:

> [F]rom the outset the Indies were treated as the direct and exclusive possession of the crown . . . .
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> . . . The king possessed not only the sovereign rights but the property rights; he was the absolute proprietor, the sole political head, of his American dominions. Every privilege and position, economic, political, or

they were not subject to the authority of the *cortes* (legislature) which circumscribed the king's power in the Iberian Peninsula.[27] A strict hierarchical structure was imposed in the New World, consisting of the Council of the Indies at the top[28] and the viceroyalties and

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religious, came from him. It was on this basis that the conquest, occupation, and government of the New World were achieved.

CLARENCE H. HARING, THE SPANISH EMPIRE IN AMERICA 5 (Harbinger Ed. 1963).

[27] As personal possessions of the crown, the New World colonies were not presumptively governed by any Peninsular laws. Indeed, the municipal *fueros* and the *cortes* of Castile, the legislative bodies of the Iberian provinces, had nothing to do with the New World. Their jurisdiction was limited to the conglomeration of medieval kingdoms that formed the domain of the Catholic Monarchs as of 1492, the year the Moors were conquered and the *Reconquista* deemed complete. To govern their new dominions, the Spanish monarchs enacted a large body of special legislation through the Council of the Indies that tended to reinforce the geographical division of governmental, judicial, and legislative powers between the royal councils of Castile and the Council of the Indies. Oquendo, *supra* note 9, at 101 (quoting RUDOLF B. SCHLESINGER, HANS W. BAADE, MIRJAN R. DAMASKA, & PETER E. HERZOG, 1994 SUPPLEMENT, COMPARATIVE LAW 35-39A (Fifth Ed.) (1994)). This division was cemented by a royal decree of December 15, 1614 which provided that Peninsular legislation became effective overseas only if reenacted by the Council of the Indies. *Id.* (citing Schlesinger et al, *supra*, at 35-39A).

[28] The Council of the Indies was the final form in an evolution of rudimentary institutions created to oversee the Spanish king's increasingly large and complex overseas dominions. In 1493, after Columbus's first voyage, colonial administration was placed into the hands of a single minister, directly appointed by Ferdinand and Isabel and selected from the members of their immediate council. The initial role of this first minister was to help plan a second voyage to the New World. However, as commerce increased and emigration became more popular, the workload of this first minister of the Indies soon became unmanageable. In 1503, the *Casa de Contratación* was established at Seville as a response and putative solution to this increased workload. This institution, quintessentially described as being "at once a board of trade, a commercial court, and a clearing-house for the American traffic," was the long-arm by which the Spanish crown governed its flourishing possessions in the New World. Bourne, *supra* note 26, at 222. As political questions arose in the Indies, King Ferdinand sought the creation of a new royal council devoted to Spain's New World possessions that would be a peer with the other royal councils. In 1507, the officials of the *Casa de Contractación* were ordered to confer with the king's secretary in Indian affairs. By 1509, the decisions of this *ad hoc* council were recorded as those of the Council of the Indies. *Id.* at 224. On August 4, 1524, the Council of the Indies (*Real y Supremo Consejo de las Indias*) was formally organized as a permanent and

captaincies-general,[29] *audiencias* (combined district and court),[30] and

independent council, a far cry from a varying group of temporary advisers on Indian affairs. *Id*. By 1542, the Council of the Indies became consolidated as the supreme legislative, executive, and judicial body of Spanish America, subject only to the king. Oquendo, *supra* note 9, at 104. In its legislative role, the Council of the Indies was responsible for preparing and dispatching, subject to the king's approval, "all laws and decrees relating to the administration, taxation, and police of the American dominions." Haring, *supra* note 26, at 98. In its executive role, the Council proposed the names of colonial officials, held them accountable, and considered and approved all colonial expenditures and local schemes for government. Lastly, in its judicial capacity, the Council was the court of last resort in important civil suits that were appealed from the colonial *audiencias*, heard the final appeal of civil and criminal cases from the judicial chamber of the *Casa de Contractación*, and served as the court of first instance in cases involving *encomiendas* of Native Americans. *Id*. *See also* Bourne, *supra* note 26, at 226.

29 By 1574, it became conventional to describe the Spanish-American world as consisting of two "kingdoms": New Spain and Peru, both governed by a viceroy. The vast distances between points in Spanish America and the need for prompt, informed action led to the carving out of new viceroyalties from the territories of New Spain and Peru: New Granada (1717) and Buenos Aires (1778). Eventually, smaller captaincies-general were created in, Cuba (1764), Venezuela (1777), and Chile (1778). The viceroy was the personal representative of the king and his basic mission was to improve the welfare of the king's subjects and vassals as the king would do if he were governing in person. In his *audiencia* district, the viceroy served as governor and as commander-in-chief of the military. And, in the *audiencia* itself, he served as its presiding officer. Oquendo, *supra* note 9, at 111. In the *Recopilación de Leyes de Los Reynos de las Indias*, there are over seventy laws devoted to specifying the viceroy's duties. Bourne, *supra* note 26, at 229. But, in brief, the viceroy was expected to be:

> the father of the people, the patron of monasteries and hospitals, the protector of the poor, and particularly of the widows and orphans of the conquerors, and the old servants of the king, all of whom would suffer were it not for the relief afforded them by the viceroy.

Id.

30 The *audiencia* was both a district and a court composed of magistrates appointed by the king. Interestingly, the *audiencia* was both the viceroy's council (his "viceregal audience") and the highest court of appeal in its jurisdiction. The main officer, the governor or captain-general, was the *ex officio* president of the *audiencia*. In its conciliar role, the *audiencia* would regularly meet with the viceroy or its president in an *acuerdo* to discuss the pressing and important issues of government at hand. The viceroy or president could not vote in matters of justice, but he had the important power to screen a question as being one of justice or politics in character. *Id*. at 232-233. If there was no viceroy or captain-general in the district, the *audiencia* assumed his political functions. *Id*. at 235.

cabildos (councils)[31] as the successive lower echelons. This hierarchy reinforced the king's power over American affairs. Furthermore, the laws governing the colonies were stated in positive terms, with the *Recopilacion de Leyes de los Reynos de Las Indias* (1680)[32] and later versions being the heart of a vast body of law and practices designed to strengthen the king's hold over his overseas dominions, verify suspicions of corruption,[33]

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31 The *audiencias*, in turn, were divided into *gobiernos*, *corregimientos*, and *alcaldias mayores*, all headed by a *cabildo*, or town council. *Id.* at 234, 236. The *cabildos* had power to legislate local laws, enforce sanitary regulations, and create and supervise other social programs. They also appointed a *procurador* to represent their interests in the Council of Indies. Bourne, *supra* note 26, at 237. Originally, the officials of these local governments were appointed by the crown or viceroy. By 1523, citizens of new towns were granted the opportunity to elect *regidores* (city councilmen) to form a *cabildo*. *Id.* at 236. Fearing that the *cabildos* were the germ for representative assemblies in the colonies, the crown moved to restrict their powers of self-government. Beginning with Philip II in 1557, *cabildo* offices were regularly sold to the highest bidder. *Id.* at 237-238. Interestingly, this practice was approved by Montesquieu. *Id.* at 238 (citing L'Esprit des Lois, liv. V, chap. XIX).

32 This supreme compilation was composed by selecting and systematically arranging all of the major relevant texts up to the year 1680, incorporating the above-mentioned rule that Peninsular law applied in the New World only if enacted by the Council of the Indies. Oquendo, *supra* note 9, at 107 (citing Karst & Rosen, *supra* note 6, at 33-42).

33 The Spanish crown's deep-seated suspicion that the king's far-off representatives would abuse their authority resulted in a confusing colonial administration that included various institutional checks. At the end of their term, the viceroy and all administrative officers had to undergo a *residencia*, an inquest into their conduct in office. As part of the *residencia*, one or more commissioners were appointed to open a court, at which all persons with grievances or injustice to complain of against the outgoing viceroy or officer could present their charges. At the end of the court session, which was limited to six months, the commissioner prepared a report and forwarded it to the Council of the Indies for a final decision. Bourne, *supra* note 26, at 230-232. The *residencia* embodied the Spanish notion that the viceroy is ultimately a servant of the king and that abuses against the king's subjects and vassals would not be tolerated nor condoned by silence. But, in practice, the *residencia* did not seem to be a very effective check against the arbitrary powers of the viceroy or other administrative officials. Indeed, it appears that the *residencia* was more effective in bringing subordinate officials to justice. *Id.* at 232, n. 2. As applied to viceroys, one viceroy of Peru compared the *residencia* "to the whirlwinds which we are wont to see in the squares and the streets, that serve only to raise the dust, chaff, and other refuse and set it on our heads." *Id.* at 232. And, in certain cases, if a viceroy had enough favor at court, he could be exempted from a *residencia*. *Id.*

and root out disloyal officers.[34] Thus, the legal and governmental structures developed to govern Spain's American colonies grandly exhibited the distinctive features of the bureaucratic stage: positive law coupled with a dominant state.

C. The Bureaucratic Stage of California Legal History

The bureaucratic stage was extended into California[35] by the Sacred

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[34] Other checks on abuse included the *visita* and direct appeal to the king. The *visita* was simply a secret inquiry by a special magistrate into the performance of a particular official. Oquendo, *supra* note 9, at 110. Usually, the aim of the *visita* was to prod colonial officials into fulfilling their obligations or remedying a situation which upset the crown. *Id*. Unlike a *visita*, which was action by the king, an appeal to the king was the avenue of relief open to every subordinate officer. Subordinates were encouraged to appeal to the king if they disagreed with a superior order. The appeal to the king followed the Spanish legal formula of "I obey but do not execute," which reflected the Spanish legal notion that "royal provisions and decrees which are issued contrary to justice and in prejudice of suitors are invalid and should be obeyed but not executed . . . and the reason for this is that such provisions and mandates are presumed to be foreign to the intention of the Prince, ..." Haring, *supra* note 26, at 122-123 (quoting the Spanish jurist Castillo de Bavadilla). The main virtue of this principle was that it afforded colonial administrators flexibility and autonomy, something needed in far-off provinces. It is no surprise, then, that the Spanish crown sought to enforce this principle as a matter of prudent governance. As a last measure, the crown also made it a practice to appoint *peninsulares* (persons born in Spain) to government posts over local born *créoles*. As one historian notes, "In the long list of over seven hundred and fifty viceroys, governors, and presidents of *audiencias*, less than twenty *créoles* appear." Oquendo, *supra* note 9, at 113 (quoting Karst & Rosen, *supra* note 6, at 33-42) (citing Cecil Jane, Liberty and Despotism in Spanish America 7 (1929)).

[35] California appeared in the Western consciousness not by discovery, but by fantasy. In 1510, Garci Ordóñez de Montalvo published a fantastical sequel to the epic Amadis of Gaul called Las Sergas de Esplendian. In it, Queen Califia, the beautiful Amazon queen of California, saves Christian forces from annihilation during a fictional siege of Constantinople by the strength of griffins and the prowess and strength of beautiful Amazon warriors. 13:77 The Atlantic Monthly 265 (March 1864), *available at* http://cdl.library.cornell.edu/cgi-bin/moa/sgml/moa-idx?notisid=ABK2934-0013&byte=250391002 (click "Queen of California"). Montalvo describes Queen Califia as "very large in person, the most beautiful of all of [the Californians], of blooming years, and in her thoughts desirous of achieving great things, strong of limb and of great courage, ..." *Id*. at 266. But, it is Montalvo's description of California that draws the most interest:

Expedition of 1769.[36] The entire colonization effort was a state-sponsored

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> Know, then, that, on the right hand of the Indies, there is an island called California, very close to the side of the Terrestrial Paradise, and it was peopled by black women, without any man among them, for they lived in the fashion of Amazons. . . . Their island was the strongest in all the world, with its steep cliffs and rocky shores. Their arms were all of gold, so was the harness of the wild beasts which they tamed and rode. For, in the whole island, there was no metal but gold.

Id. at 267. It is amazing to think that, before any Western eyes gazed upon the rocky shores and towering sea cliffs of the California coast, or put their tin pans in the golden ravines of the Sierra Nevada, such an amazing place could only be thought of as fantasy. In 1533, a Spanish expedition under the command of Fortún Jiménez discovered what we now know as Baja California. Thinking that they had discovered an island, the Spanish named the peninsula "California" in the belief and hopes that they would find there the gold and precious stones described by Montalvo. Starr, *supra* note 2, at 6. Later, after Juan Rodriguez Cabrillo's exploration of the coast of modern-day California in 1542, the concept of Alta (upper) and Baja (lower) California emerged. For a much longer and more detailed account of the theories of how California received its name, *see* Charles E. Chapman, A History of California: The Spanish Period 55-70 (1921).

[36] Though explored intermittently by the Spaniards, the settlement of Alta California was largely the product of the reform experienced after the succession of Carlos III to the Spanish crown in 1759. In 1765, Carlos III sent José de Gálvez as Inspector-General to New Spain with a mission: suppress the Jesuits, reform colonial administration, and organize the settlement of Alta California. Starr, *supra* note 2, at 32. In 1768, Gálvez expelled the Jesuits from Baja California and replaced them with Franciscans from the College of San Fernando in Mexico City, whose father-president was the now-famed Junípero Serra. *Id.* Gálvez then appointed Gaspar de Portolá to serve as governor of the Californias. Finally, under the guidance of this unusual group — Gálvez, Portolá, and Serra — the settlement of Alta California was organized. The principal reasons for this northward expansion of Spanish territory were two-fold. First, rumors that the Russians and English were making incursions along the Northwest coast with the intent to plant a colony and stifle Spanish expansion prompted the king to take action. Irving B. Richman, California under Spain and Mexico: 1535–1847 64 (1911). Second, observations by Spanish missionaries of the lack of civilization among the Native Californians required an ecumenical presence. It is these two institutions, military and religious, that would come to define the Spanish presence in California. In January of 1769, a meager land and sea expedition, known to history as the "Sacred Expedition," left from Mexico to plant a mission and presidio at San Diego and Monterey. After a long and arduous passage, described by one as a "phantasmagoria of physical hardship, deprivation, suffering, and death," the four divisions of the Sacred Expedition were finally united at the end of May 1770 in Monterey. *Id.* at 88. To inaugurate the colony, a solemn mass and

enterprise with the backing of the Catholic Church. The same laws[37] and bureaucracy[38] that existed in the other American colonies were extended to California, making the California enterprise no different in nature from the colonial experience in the rest of Spanish America.

However, there were some peculiar modifications in the Spanish colonial system as it applied to California. Before 1781, Spanish secular

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ceremony was celebrated on June 3. To formalize possession by the state, "grass and stones were wrenched from the earth and scattered to the four winds." *Id.* The end of these ceremonies symbolized the successful end of the Sacred Expedition and the beginning of Spanish colonization in California.

37 The California provinces, both Alta and Baja California, were governed by the Laws of the Indies, subject to the Viceroy in Mexico City, who was subject to the Council of the Indies and, ultimately, the Spanish king. But, from the beginning, California was envisioned as a missionary enterprise supported by the military — "the man with the crucifix to be backed by the man with the musket." *Id.* at 122. The 1769 Sacred Expedition to found a mission and presidio at San Diego and Monterey exemplified this mentality and foreshadowed the frequent political conflicts between the secular and religious elements in Alta California.

38 Until 1768, the viceroy of New Spain was formally charged with the newly settled areas of northern Mexico. But he was overburdened with matters much closer to home. As Gálvez himself wrote of the northern provinces, because

> of the distance of more than six hundred leagues from this capital at which they are situated; and the great mass of occupations and cares, near at hand, which weigh upon the attention of a viceroy of New Spain; since, destitute of subaltern aids [sic], it is impossible that either his active dispositions or the influence of his authority should reach to the remote confines of an empire almost illimitable.

Id. 122 (citing Mexican Archives, Arch. Genl., *Prov. Int.* 154). The king responded and created a new *comandancia-general* (military department) that encompassed the *Provincias Internas* (internal provinces) of Sonora, Sinaloa, Nueva Vizcaya, and eventually Alta and Baja California. Richman, *supra* note 36, at 122. The *comandante-general* was invested with substantial autonomy from the viceroy of New Spain, but was dependent directly on the king and orders received from the Council of the Indies. *Id.* at 430. He only owed the viceroy of New Spain the obligation of making regular reports and asking for aid when deemed necessary. *Id.* at 122. The *comandante-general* independently supervised the *Real Hacienda* (treasury) of the *Provincias Internas* and was invested with the *patronato real* (royal patronage) over the religious institutions within his jurisdiction. *Id.* at 430. All judicial appeals were to be made to the *audiencia* at Guadalajara. But in matters military or financial, the *comandante-general* exercised exclusive jurisdiction. *Id.*

society in California consisted only of the Spanish military headed by the *jefe military* (army chief), also called the *comandante de armas*, appointed by the *comandante-general* resident in New Spain.[39] While civil government was formally introduced with the establishment of the first *pueblos* (towns) of San José (1777) and Los Angeles (1781), these settlements were governed by a direct military representative of the *jefe militar* known as a *comisionado*.[40] The *alcalde* (mayor) and the local *ayuntamiento* (council, as the *cabildos* were called in California) were subordinate to the *comisionado*, who could annul the acts and decisions of these officials.[41] This system characterized early Spanish government in California[42] and persisted until Mexico separated from Spain in 1821.[43] In the beginning, the offices of *jefe militar* and civil governor (*jefe político*) were united in the same person, Felipe de Neve. This was a matter more of fact than law because de Neve, as an exercise of his authority as *comandante de armas*, founded the pueblos to support the *presidios* (forts). *Pueblos* were supposed to be headed by *alcaldes* and *regidores* (aldermen) according to Spanish law and custom. But, because the *pueblos* serviced the *presidios*, the military closely governed their affairs.[44] Indeed, later *jefes militares* thought it farcical for them to occupy the office of civil governor given the military nature of secular society in California.[45] This system gave too much power to the military over the civil affairs of California.

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39 Richman, *supra* note 36, at 140.

40 David J. Langum, Law and Community on the Mexican California Frontier 32 (2d ed. 2006). The *comisionado*'s responsibilities included conferring titles to land, collecting local taxes, carrying out the governor's decrees, and guarding the pueblo from physical and moral threat. Theodore Grivas, *Alcalde Rule: The Nature of Local Government in Spanish and Mexican California*, 40 Cal. Hist. Soc'y Q. 11, 12 (1961).

41 Grivas, *supra* note 40, at 12.

42 Richman, *supra* note 36, at 285.

43 Langum, *supra* note 40, at 32; Grivas, *supra* note 40, at 12-13.

44 The representatives chosen by the military governor were empowered to annul acts of the town councils and the decisions of the *alcaldes*. Langum, *supra* note 40, at 32.

45 Richman, *supra* note 36, at 140. *See also id.* at 285 (stating how this was the case with Governor José Arrillaga).

It was during the Spanish period in which the office of the *alcalde* was first introduced to California.[46] Though it was not a universal aspect of Spanish government, the office of *alcalde* was recognized as an efficient unit of government for Spanish colonies.[47] Consequently, it was incorporated into the governmental structure of the Spanish colonies through its inclusion in the *Recopilación de Leyes de los Reynos de Las Indias*.[48] Eventually, the *alcaldes* were taken for granted in New Spain and Mexico, and they became part of local legal institutions in the various Spanish colonies.[49] When California was first colonized in 1769, *alcaldes* were not provided for, in large measure due to the military nature of Spanish colonization. *Presidio* commanders assumed the traditional roles of *alcaldes* up until the founding of the first *pueblos* of San José and Los Angeles, and the founding of the *presidio* of San Francisco (1776), which had a large civilian population. At this point, *alcaldes* were formally introduced as part of the governmental apparatus by Governor Don Felipe de Neve.[50] In Spanish California, the *alcaldes* also presided

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46 The office of the *alcalde* traces its origins to the Arabian and Moorish *Cadi*, or "village judge." One historian provides the following description of the duties of the traditional Spanish *alcalde*:

> As the office evolved in Spain the alcalde was a locally elected community official who served as both a mayor and a town judge. Additionally, he had some legislative duties and often presided over municipal councils. Almost always that town's alcalde was the most respected figure in the community. He was usually a revered village elder, and his administration of justice was paternalistic and benevolently dictatorial. In municipal matters and local disputes the alcalde's word was literally the law itself, unfettered by substantive standards (legal rules) for the resolution of conflicts. He could decree as he thought fit, confined only by the cultural and religious mores of the local village in which he sat.

Langum, *supra* note 40, at 30.

47 *Alcaldes* were a popular institution because they "offered a locally controlled justice system with extremely easy access, and it was not burdened by legal technicalities. Any peasant could feel comfortable relating his viewpoint of a dispute to the alcalde." Langum, *supra* note 40, at 30.

48 Grivas, *supra* note 40, at 11.

49 Langum, *supra* note 40, at 31.

50 Gov. Felipe de Neve, Regulations for the Government of the Province of California, Title 14, § 18, *in* H.W. Halleck, *Report on the Laws and Regulations Relative to Grants or Sales of Public Lands in California*, H.R. Exec. Doc. No. 17, 31st Cong.,

over the local *ayuntamiento* and eventually evolved to become the head officials of the *pueblos*, deciding local cases with direct appeal to the governor.[51] The military government even sought to introduce the system of *alcaldes* and *regidores* among the Indian populations resident at the many missions.[52] The *alcalde* has been described as "[d]oubtless, the most important single officer in the administration of local government in California, both before and after the American conquest."[53]

A particular challenge in understanding California's history under Unger's theory is how to characterize the Native American experience. Before 1769, California was inhabited exclusively by Native American peoples, whose numbers and diversity of languages and societies made the region a center of Native American culture.[54] Unger's theory would most likely characterize Native American society as existing in the customary stage of legal development. The Native Americans neither wrote their law down, nor made any distinction in their customs between the private sphere and a state.

The impetus for progress into the bureaucratic stage among this population came with Spanish settlement and institution of the mission system. Immediately, the Spanish missionaries tried to "reduce" the Native Americans to Spanish settlements and habits, exposing them to new beliefs, systems, and a hierarchy.[55] Their subjugation and enculturation

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1st Sess. at 139-140 (1849) [hereinafter *Halleck Report*]. Under de Neve's regulations, the *alcaldes* were to be appointed by the governor for the first two years. After two years, *alcaldes* were to be elected. *Id*. But, military governors used the *comisionado* to directly and indirectly influence local affairs. Langum, *supra* note 40, at 32.

51 *Id*. at 39.

52 Lands of Promise and Despair: Chronicles of Early California, 1535–1846 217 (Rose Marie Beebe & Robert M. Senkewicz eds., 2001).

53 Grivas, *supra* note 40, at 151.

54 The historical record is replete with the cultural and political accomplishment of the native population. For a general account, *see* Starr, *supra* note 2, at 12-16.

55 The purpose of the missions, besides religious doctrines of salvation and redemption, was "to secularize the Indian; to municipalize him by reducing him to a condition of pueblo life." Richman, *supra* note 36, at 285. In these mission societies, the *padres* were to be supreme. Indeed, the legal relationship between mission *padres* and the natives was the same as that between father and son (*in loco parentis*). *Id*. at 95, 412. While this secularization and reduction to *pueblo* life was occurring, the mission *padres* would be the legal owners of the land and its produce, holding it

were thought essential if the Spanish were to turn the remote region into a genuine bulwark against Russian, British, and American advances. California was not to be a repeat of Texas.[56]

The product of this effort was a large population of neophytes accustomed to Spanish culture and practice. To be sure, the mission *padres* were the heads of their congregations, directing their development and law, thereby enforcing the conclusion that, during this time, the "reduced" Native Americans were in the bureaucratic stage. With the abolishment of the mission system in 1845,[57] the Native Americans associated to the secularized missions were subject to Mexican law to the fullest degree. But, secularization did not signal a transition out of the bureaucratic stage — it only signaled a change in government.

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in trust for the natives until the mission became a civil *pueblo*. During the mission phase, the natives would be taught religion, agriculture, and simple industry. It was expected that this transition from religious outpost to civil settlement would occur after 10-15 years of religious and practical instruction. At the transition from mission to *pueblo*, so the theory went, the lands would be parceled out to the natives, a settlement christened, and the mission converted into a parish. In practice, the result was, as history has shown, a "violent intrusion into the culture and human rights of indigenous peoples." Starr, *supra* note 2, at 41.

56 In practice, however, the military authorities found that they could not rely on the missions to support their efforts. To fulfill their mission of evangelization, the *padres* took great care to minimize contact with the presidios and the corrupting influences that regular contact with the soldiery was thought to engender. Richman, *supra* note 36, at 127. Strictly speaking, the mission *padres* were the executives of the missions, subject only to the superior authority of their president, the College of San Fernando in Mexico City and the pope himself. *Id.* at 114-115. As a result, the missions enjoyed an autonomy that drew the suspicion of the presidio commanders and resulted in a tension that swayed in favor of the military or missions depending on the views of the current governor. On May 6 or 9, 1773, after intense lobbying by Father Serra, Viceroy Antonio Bucareli issued instructions securing the autonomy of the missions and the superiority of the *padres* over the soldiery at the missions. *Id.* at 94. Later, in 1785, the "division between State Sacerdotal and State Secular" was affirmed in a decision by the *audiencia* and *comandante-general* of the *provincias internas*. *Id.* at 152.

57 Decree of the Departmental Assembly (May 28, 1845), *in Halleck Report*, *supra* note 50, at 163.

II. THE RULE OF LAW IN CALIFORNIA

A. Mexican Independence & Continuation of the Bureaucratic Stage

Mexico gained its independence from Spain and assumed government over California in 1821. In 1824, the Mexican republic adopted a new constitution reflecting the principles and structure of the federal Constitution of the United States. Indeed, Mexico's first constitution was intended to reflect the contemporary Enlightenment ideas prevailing in Europe and North America. However, a strong federal government failed to emerge under the 1824 Mexican Constitution. The government's weakness fueled a contest for power that eventually led to its overthrow in 1835 and to amendment of the 1824 Constitution by the conservative *Siete Leyes* (1835) and the 1836 Constitution Laws. These reforms created a strong central government whose main goal was simply to preserve independence. During this period, California was not recognized as a constituent state in the Republic of Mexico and was under the direct government of the central government.[58]

Representing Unger's prediction that the liberal stage is a rare historical phenomenon, the Mexican constitutions during this period *failed* to spark the transition of California out of the bureaucratic stage. These constitutions were highly protective of the Catholic Church and did not allow for the legal recognition of any other religion.[59] Although the 1824 Constitution reflected principles of liberty and freedom, its impotency prevented any realization of a society where such values were enforced. And, the reforms of 1835 to 1836 had as their main goal preservation of Mexican sovereignty. This Catholic protectionism and the utilitarianism

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[58] Under the Constitution of 1824, upper and lower California, along with Colima, were gathered together into one political unit, *id.* at 469, and were put under the control of the central Mexican government and subject to its supreme executive authority. The CONSTITUTIVE ACT OF THE FEDERATION [Mex.] (January 31, 1824) provides in Article 7 that "The Californias . . . will for the present be territories of the Federation and directly subject to its supreme power." Translated in J.A. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES 375 (1839).

[59] Richman, *supra* note 36, at 256.

of government prevented the development of a truly pluralistic society that would eventually culminate in a liberal society.

The political instability that was felt in Mexico City was also felt in California. The liberal government which prevailed in Mexico at independence appointed liberal-minded José María Echeandía as governor of California in 1825. His arrival in the territory created excitement and hope that liberal ideas would be instituted in local government.[60] Echeandía's major impact in this regard was the establishment of a representative assembly (known as a *diputación*) for both Alta and Baja California. However, as Mexico fell into faction and discord, so, too, did California. Liberals and conservatives rose, to and fell from, power in California in much the same procession as they did in Mexico City. Californians fought each other and the stability of the territory was ever in doubt. But, during this period, there was always a lingering desire for liberal reform and the abolishment of the military's power over civil affairs. One California delegate to the Mexican national congress, Carlos Carrillo, argued that, from the military's control over civil affairs,

> has flowed the accumulation of evils upon the unhappy population [of California], governed as they are at the discretion of Military Commanders great and small who hold in their hands all executive and judicial powers, the exercise of which no one is able to dispute. It is easy to imagine, under such conditions, the tortures endured day after day by those wretched people for lack of courts of justice. They must accept unalterable decisions

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60 One contemporary resident of Alta California wrote:

> With respect to Sr. Echeandía, . . . when we arrived in California in 1825 he came speaking of the republican and liberal principles which filled the heads of Mexicans in those days. He was a man of advanced ideas, enthusiastic and a lover of republican liberty. Certainly he put these ideas into practice; in fact, he had been sent to California to implant the new regime. Up until then, during the administration of Arguello, the regime of government had been the same as existed under Spanish domination except for the constitutional *Diputación* and the *Ayuntamiento*.

Angustias de la Guerra, *Occurrences in Hispanic California* in Beebe & Senkewicz, *supra* note 52, at 344.

> from which there was no appeal, usually imposed unjustly by men who are absolutely ignorant of the simplest ideas of law.[61]

Reflecting this brewing liberalism, in 1833, the citizens of San Diego petitioned the governor to grant them the right to elect an *ayuntamiento* to govern local affairs complaining that "in this port alone one has to submit his fate, fortune, and perhaps existence to the caprice of a military judge who, being able to misuse his power, can easily evade any complaint that they might want to make of his conduct."[62]

The centralist Mexican government that prevailed only made one substantive attempt to reorganize civil life in California through legislation. In 1837, the Mexican government replaced the existing laws in California with two pieces of legislation — the laws of March 20, 1837, and May 23, 1837.[63] These laws erected a hierarchical government rooted in Mexico City[64] and a judicial system more sophisticated than the local *alcalde* system originally instituted by the Spanish.[65] While most of

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61 *Id*. at 388 (from a speech by Carlos Carrillo, October 18, 1831).

62 *Id*. at 392 (from a petition by citizens of San Diego, February 22, 1833).

63 Jabez Halleck & William E. P. Hartnell, *Translation and Digest of Such Portions of the Mexican Law of March 20 and May 23, 1837 as Are Supposed to Be Still in Force as Adapted to Present Conditions*, *in* J. Ross Browne, Report of the Debates in the Convention of California, On the Formation of the State Constitution, in September and October, 1849 app. XXVI (University of Michigan 2006) (1850). The first statute, that of March 20, summarily declared that "the laws which organized the economic-political government of the Department are abolished." *Id*. at § VIII, art. 4.

64 Under the new governmental structure created by the Law of March 20, 1837, California government was divided into three basic levels: department, district, and local. At the head of the government of the department was a governor elected by the Mexican congress. As provided by the statute, the governor's cabinet consisted of a secretary of state, prefect, and commander-in-chief. Additionally, the department was granted a departmental legislature. At the district level, a sub-prefect was placed at the head of the district, with a secretary being his cabinet. At the local level, there were two forms which the government could take based on whether the locality was urban or rural. If urban, the locality would be granted an *ayuntamiento*, or town council, headed by an *alcalde* and ultimately subject to the sub-prefect and the departmental government. *Id*. at § V, arts. 1 and 10. If the locality were rural, it would be under the direct control of a prefect with justices of the peace providing for the execution and enforcement of the laws. *Id*. at § V, art. 1.

65 Under the new judicial structure created by the Law of May 23, 1837, the judicial system was divided into three levels: a Superior Court, Courts of First Instance,

the reforms heralded by these laws were delayed or never materialized,[66] they remained ostensibly in force until the American conquest.[67] Thus, the military dominated civil affairs during the Mexican period much as it had done during the Spanish period.[68]

The consensus is that the Mexican period did not bring about any significant changes in California and that Spanish law, in all manner of practices, remained in force.[69] This conclusion is corroborated by the fact that the Spanish law was officially codified in the first Mexican Civil

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and *alcaldes*. The Superior Court was to be constituted with four judges and one attorney general. *Id.* at app. XXXV § I, arts. 1 and 10.. The three senior judges were to sit as the first bench (called a *sala*) and the remaining junior judge was to act as the second bench. The second bench was to hear the first appeals (*segunda instancia*) and the first bench heard the second appeals (*tercera instancia*). Halleck & Hartnell, *supra* note 63, at app. XXXV, § I, art. 7. Each chief town would have a Court of First Instance, consisting of one or more judges, who would exercise criminal and civil jurisdiction in that district. *Id.* at app. XXXVI, § II, art. 1. In places with more than one thousand inhabitants, *alcaldes* exercised conciliation jurisdiction, a general verbal process jurisdiction, and exercised jurisdiction when necessity demanded. *Id.* at app. XXXVIII, § III, arts. 1-3. In those places with less than one thousand inhabitants, justices of the peace would exercise jurisdiction when there was not enough time to refer the case to the nearest respective authority. *Id.* at app. XXXVIII, § III, art. 4.

66 The prefecture system was not organized until 1839 and the hierarchical court system provided by the Law of May 23, 1837 was never established. Langum, *supra* note 40, at 39. The *Tribunal Superior* did not convene for the first time until 1842. *Id. See also* Richman, *supra* note 36, at 288. As a result, the Mexican government issued a decree in 1843 authorizing *alcaldes* and justices of the peace to act as judges of the first instance. Langum, *supra* note 40, at 40.

67 Halleck & Hartnell, *supra* note 63, at app. XXV, as follows:

> The laws of March 20th and May 23d, 1837, are regarded as the laws in force in California up to the time of the conquest. The Mexican Constitution of 1844, partially adopted in Mexico, was never regarded as in force in California, nor was it known here that these laws were materially modified by any decrees or orders of the Mexican Congress.

68 Langum, *supra* note 40, at 32; Grivas, *supra* note 40, at 12-13.

69 Saunders, *supra* note 17, at 495; Herman Belz, *Popular Sovereignty, the Right of Revolution, and California Statehood*, 6 Nexus 3, 4 (2001); Dana V. Kaplan, *Women of the West: The Evolution of Marital Property Laws in the Southwestern United States and their Effect on Mexican-American Women*, 26 Women's Rts. L. Rep. 139, 151 (2005).

Code of 1837, which remained unaltered during Mexico's brief rule over California.[70] One historian has gone so far as to declare:

> Strictly speaking, there was no Mexican period of California history. During a quarter of a century the sovereignty of [Mexico] was more or less continuously acknowledged, but the actual intervention of Mexico in the affairs of its distant province consisted in little more than the sending of governors and a few score of degraded soldiery.[71]

Notably, the Americans who came after the American conquest were frustrated by this apparent lack of law. Justice Nathaniel Bennett, one of the first justices of California's Supreme Court, expressed the sentiments of many:

> Before the organization of the State Government, society was in a disorganized state. It can scarcely be said that any laws were in existence further than such as were upheld by custom and tradition. This was the case more particularly in Northern California and in the mineral region, — in Southern California, perhaps to less extent.[72]

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[70] W. S. McClanahan, Community Property Law in the United States (1982) at 8-9, n. 14.

[71] Chapman, *supra* note 35, at 455. Similar opinions have been expressed:

> California was transferred from Spanish imperial to Mexican republican rule in the Revolution of 1824. Scholarly opinion concurs that the change was nominal, and that government in the remote province remained that of "petty military despotism." Mexican sovereignty was practically nonexistent. The existing government was indistinguishable from chronic disorder and revolutions, where one set of rulers frequently replaced another. According to historian Frederick Merk, "To the outside world California seemed a derelict on the Pacific . . . considered likely to be towed soon into an American port."

Belz, *supra* note 69, at 4.

[72] Orrin K. McMurray, *The Beginnings of the Community Property System in California and the Adoption of the Common Law*, 3 Cal. L. Rev. 359, 368 (1914-1915) (citing to 1. Cal. Preface (1852)). Another justice of the California Supreme Court, Justice Hugh C. Murray, agreed with his colleague:

> California . . . had long been looked upon as one of the outposts of civilization. Its commercial, agricultural and mineral resources undeveloped, it

In particular, the Americans suffered from the lack of a legal means of effecting commercial transactions. As a result, they routinely disregarded Mexican law and employed the common law to carry on their business:

> As the great population poured into California in 1849, commercial transactions in an immense amount, and large transactions in real estate, were entered into under the common law as modified and administered in the United States and without regard to the unknown laws of the Republic of Mexico and the equally unknown customs and traditions of the Californians.[73]

The Americans did have reasons to complain. A scarcity of legal materials and the long distances such materials would have to travel made it difficult for the people of California to ascertain the laws in force.[74]

> was considered of little importance by the Mexican government. The body of Mexican laws had been extended over it, but there was nothing upon which they could act, and they soon fell into disuse. The system of government was a patriarchal one, and administered without much regard to the forms of law, which were scarcely alike in any two districts.

Id. at 367 (citing to 2 Cal. 47-48 (1852)).

[73] Charles S. Cushing, *The Acquisition of California, Its Influence and Development Under American Rule*, 8 Cal. L. R. 67, 74 (1919-1920). Justice Murray also wrote:

> Emigration brought with it business, litigation, and the thousand attendants that follow in the train of enterprise and civilization. The laws of Mexico, written in a different language, and founded on a different system of jurisprudence, were to them a sealed book. The necessities of trade and commerce required prompt action. This flood of population had destroyed every ancient landmark, and finding no established laws or institutions, they were compelled to adopt customs for their own government. The proceedings in courts were conducted in the English language, and justice was administered by American judges, without regard to Mexican law.

McMurray, *supra* note 72, at 368 (citing to 2 Cal. 47-48 (1852)). For a study of commercial transactions in Mexican California *see* Karen Clay, *Trade Without Law: Private-Order Institutions in Mexican California*, 13 J. L. Econ. & Org. 202 (1997).

[74] The historical record contains several testaments to the lack of written legal materials in Spanish and Mexican California. One author has written:

There were few lawyers in Mexican California.[75] The *alcaldes*, who were the only available adjudicators in the *pueblos*, did not look to positive law for guidance in coming to a decision.[76] And, it was not uncommon "for an *alcalde* to apprehend and arrest a person, preside over his trial, pass sentence, and finally execute the sentence."[77]

This legal chaos was a natural incident of the tumultuous American conquest.[78] Nor did blame lie with the Mexican government. Because

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> In order to ascertain what was the law in California, it was necessary to examine the codes of Spain; the royal and vice-royal ordinances and decrees; the laws of the Imperial Congress of Mexico; the laws of the later Republican Congress of Mexico; presidential regulations; decrees of dictators and acts of pro-consular governors. Many ordinances and decrees claimed to have the force of law had not been printed even in Mexico, and they, as well as other books upon Spanish and Mexican law, could be procured only with great difficulty and much expense. Many of these laws had never, as a practical matter, been enforced in California, and particularly in northern California.

Cushing, *supra* note 73, at 74 (1919-1920). Another has written:

> The country possesses no written law book, with the exception of the Laws of Spain and the Indies, published in Spain a hundred years ago, and a little pamphlet, setting forth the duties of various judicial officers, which was published by the Mexican government since the revolution.

McMurray, *supra* note 72, 363 (citing to Oszwald, Californien und seine Verhaltnisse 71 (Leipzig, 1849)).

75 Langum, *supra* note 40, at 45.

76 Grivas, *supra* note 40, at 26. This was the traditional approach of the *alcaldes* since their advent in the Iberian Peninsula. *See* Langum, *supra* not 40, at 30 (stating that *alcaldes* were traditionally unfettered by substantive standards (legal rules) for the resolution of conflicts). When *alcaldes* were introduced into California under de Neve's regulations, they similarly were not guided to use any substantive standards to come to a decision in a case before them. *Halleck Report*, *supra* note 50, at 139. And, under the Laws of 1837, the *alcaldes* were given, by statute, full discretion in making a decision that was within their geographic and subject matter jurisdiction. *Report of the Debates in the Convention of California* app. XXXVIII at § III, arts. 9 and 16. As Langum quotes, the traditional *alcalde* system has been aptly described as "a formalistic administration of law that was nevertheless based on ethical or practical judgments rather than on a fixed, 'rational' set of rules." Langum, *supra* note 40, at 30 (quoting Douglas Hay, *Property, Authority and the Criminal Law*, *in* Albion's Fatal Tree 40 (Douglas Hay ed. 1985)).

77 Grivas, *supra* note 40, at 15 (citing to Stephen J. Field, Personal Reminiscences of Early Days in California 30 (Washington, D.C.)).

78 Some Americans clearly recognized this. On January 22, 1848, the *California Star* wrote that "since the United States flag was hoisted over it, [California] has been

international law demanded that California had to be governed under the laws of the ousted regime until its conqueror organized a new civil government, Mexican law properly prevailed.[79] Blame for lack of enforcement of Mexican laws during the American military government, therefore, lay with the Americans, who failed to enforce the Mexican laws.

This fact did not stop Americans from complaining of the burden imposed by the Mexican laws and in particular by the *alcaldes*. Americans perceived that the *alcalde* combined the powers they normally ascribed separately to a mayor, arbitrator, justice of the peace, trial judge, *and* legislator.[80] In 1848, as the era of Mexican law was drawing to a close in California, an American observer in Monterey eloquently summarized the roles and duties of the *alcalde*:

> By the laws and usages of the country, the judicial functions of the alcalde . . . extend to all cases, civil and criminal . . . He is also guardian of the public peace, and is charged with the maintenance of law and order, whenever and wherever threatened or violated; he must arrest, fine, imprison, or sentence to the public works, the lawless and refractory, and he must enforce, through his executive powers, the decisions and sentences which he has pronounced in his judicial capacity. His prerogatives and official duties extend over all the multiplied interests and concerns of his department, and reach to every grievance and crime from the

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in a sad state of disorganization; and particularly as regards the judiciary. Indeed, sir, we have had no government at all during this period, unless the inefficient mongrel military rule exercised over us be termed such." Cardinal Goodwin, The Establishment of State Government in California 64 (1914). With regard to the *alcaldes* in the post-conquest environment, Justice Stephen Field wrote in his memoirs:

> Under the Mexican law Alcaldes had, as already stated, a very limited jurisdiction. But in the anomalous conditions of affairs under the American occupation, they exercised almost unlimited powers. They were, in fact, regarded as magistrates elected by the people for the sake of preserving public order and settling disputes of all kinds.

Stephen J. Field, California Alcalde 27 (BioBooks 1950).

79 *See infra* at note 105.

80 Saunders, *supra* note 17, at 489. *See also* Langum, *supra* note 40, at 51.

> jar that trembles around the domestic hearth to the guilt which throws its gloom on the gallows and the grave.[81]

Another contemporary American, perhaps capturing the sentiment of his fellow compatriots, claimed that the *alcaldes* exercised an "authority far greater than any officer in our republic — the president not excepted — uniting in their persons executive, legislative, and judicial functions. The grand autocrat of all the Russians . . . is the only man in Christendom I know who equals him."[82] One American *alcalde* was so disturbed by his grant of power that he voluntarily petitioned the governor to divorce the *alcalde* from the town council so that the *ayuntamiento* could function independently.[83]

Because of the *alcalde*'s nearly plenary power within his jurisdiction, Americans saw the Spanish-Mexican legal system as inadequate, primitive, and unsuccessful in administering justice.[84] *Alcaldes* did not preside over courts, but held informal arbitration hearings guided by equity and local custom.[85] And lawyers could not effectively challenge their authority, for Mexican law "permit[ted] lawyers as counsel, but preclude[d] their pleas. They may examine witnesses, sift evidence, but not build arguments."[86] One observer wrote of a trial before the *alcalde* that the "plaintiff and defendant simply appeared before the *alcalde*, and stated their case on either side, produced their witnesses, if they had any, and the *alcalde* decided the case speedily; generally on the spot, without delay."[87] Imagine the reaction of those familiar with the common law

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81 Walter Colton, Three Years in California 230-31 (1850).

82 Goodwin, *supra* note 78, at 64. Similarly, Walter Colton, appointed *alcalde* of Monterey by Commodore Stockton, wrote, "There is not a judge on any bench in England or the United States whose power is so absolute as that of the alcalde of Monterey." Colton, *supra* note 81, at 55.

83 Grivas, *supra* note 40, at 18.

84 Goodwin, *supra* note 78, at 495.

85 Saunders, *supra* note 17, at 489. *See also* 6 Hubert Howe Bancroft, History of California 258, n. 8 (San Francisco, The History Company 1884-1890). However, the American *alcaldes* made efforts to emulate common law procedures. Grivas, *supra* note 40, at 22-23 (describing how the empanelling of juries became well-established in *alcalde* courts).

86 William H. Davis, Sixty Years in California 106 (1889).

87 *Id.* at 104.

tradition, as were the American merchants who made up much of the American population at the time. The *California Star* told its audience in 1847, "We have *alcaldes* all over the country, assuming power of legislatures, issuing and promulgating their *bandos* [decrees], laws, and orders, and oppressing the people. . . . The most nefarious scheming, trickery, and speculating have been practised by some that was ever discovered to the light of heaven."[88]

Thus, the American view of the law in California up until the time of the American conquest is paradoxical. Americans complained there was no law, and there was too much law, in the *alcaldes*' hands. More confusingly still, the military government embraced the *alcalde* system,[89] and American communities elected their own *alcaldes*.[90] *Alcaldes* presided in places that were not entitled to *alcaldes* under Mexican law[91] and in places beyond traditional Spanish and Mexican jurisdictions, as in the mining camps and other impromptu American settlements.[92] What is

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88 Goodwin, *supra* note 78, at 63.

89 The American military governors appointed Americans as *alcaldes* in many localities. Grivas, *supra* note 40, at 19; Bancroft, *supra* note 85, at 258. One explanation for this phenomenon is that

> [i]t was expedient for the military commanders of the United States to continue the office of alcalde and to retain as many loyal Californians in the office as was practicable. The combination of legislative, executive, and judicial duties in one man, although odious to many American immigrants in California, was nonetheless advantageous to the military governor in California. The conflicts that would necessarily arise with the division of these functions in separate individuals was prevented by the adoption of the alcalde system by the Americans.

Theodore Grivas, Military Governments in California, 1846-1850 at 165 (1963).

90 Bancroft, *supra* note 85, at 281.

91 Under the Law of March 20, 1837, only the capital, coastal towns with at least 4,000 people, interior towns with at least 8,000 people, and towns that had *alcaldes* prior to 1808 were entitled to *alcaldes*. Halleck & Hartnell, *supra* note 63, at app. XXXI § V, art. 1. This meant that only San José, Monterey, Villa de Branciforte (Santa Cruz), and Los Angeles were entitled to *alcaldes*. Grivas, *supra* note 40, at 13.

92 Susan Scafidi, *Native Americans and Civic Identity in Alta California*, 75 N. D. L. Rev. 423, 440 (1999) (writing, "On every bar, and in every gulch, and ravine, where an American crowd was collected, there an American Alcalde was elected"). *See also* Grivas, *supra* note 40, at 15 and 24.

more, is that this system was described as "wildly efficient."[93] Americans' disdain of the Mexican and Spanish system therefore seems cynical, contrived to bolster the movement to adopt a legal system rooted in the common law tradition. As we will see a bit later, their motives became especially clear in debates at the constitutional convention in 1849.

The lesson from the historical narrative is that, despite American protestations to the contrary, there was some kind of law in California during the Mexican period. While it was not what the Americans knew, it was suited to the values and needs of the native Californian population.[94] In most disputes, one or another form of Spanish law prevailed, and the officially constituted state hierarchy was that outlined by the laws of 1837.[95] The most significant legal institution during this period was the *alcalde*, the only broker of justice known to most native Californians.[96] Californians during this period lived under a legal regime substantially similar to the militaristic regime (*comisionado*) brought by the Spanish. That regime resisted substantive change because of Mexico City's distance and lack of attention to California and the lack of a large population necessary for a meaningful civil society.

The law which existed during the Mexican period was surely bureaucratic. As the Spanish law and a hierarchical regime was in place, much of what is said here of the Spanish period in California legal history

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93 Scafidi, *supra* note 92, at 440.

94 In other words:

> The rude institutions that served well enough for a pastoral people living in a sparsely settled community, whose disputes, if any arose, the *alcalde* or justice of the peace, administering a patriarchal justice, summarily adjusted, were wholly unsuited for Americans, accustomed to regularly constituted courts and statutory law.

McMurray, *supra* note 72, at 360.

95 *See* Antonio María Osio, The History of Alta California: A Memoir of Mexican California (Rose M. Beebe and Robert M. Senkewicz, eds.) (1996).

96 William Writ Blume, *California Courts in Historical Perspective*, 22 Hastings L. J. 121, 124. Justice Bennett is quoted as having said "that judges of First Instance were never appointed and never held office in California under the Mexican regime, but the Alcaldes possessed the powers and jurisdiction of judges of First Instance." *Id.* Professor Blume has hypothesized that the conflation of *alcalde* and judge of First Instance may explain why the *alcaldes* were able to legitimately exercise almost unlimited judicial power. *Id.*

properly applies to the Mexican period. While there may have been some semblance of law and order at the local level, California was a fractured territory during this period. Disparate factions constantly fought each other, with no group emerging as the superior, or prompting the factions to unify under a liberal government.[97] There was no time when any "group occupie[d] a permanently dominant position."[98] Thus, the bureaucratic stage persisted through the Mexican period of California history.

B. American Conquest and the Road to the 1849 Constitutional Convention

The American conquest of California was the true prelude to the establishment of a liberal state in California. Since the beginning of the Mexican period, Americans became an increasingly significant part of California politics and society.[99] Americans played a role in the stifled 1836 bid for California independence, and were engaged in the hide and tallow trade that sustained the missions and the ranchos during their isolation in the Mexican period. And American participation in

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97 Chapman, *supra* note 35, at 473. See Chapters 12 and 13 of Richman, *supra* note 35, for a narrative of these events. In 1836, the Native Californians actually attempted to secede from the Mexican republic. Osio, *supra* note 95, at 157; Goodwin, *supra* note 78, at 8-12; Starr, *supra* note 2, at 46; Richman, *supra* note 36, at 258.

98 Unger, *supra* note 3, at 66.

99 The United States had long been interested in California. In 1804, William Shaler, captain of the merchant ship Leila Bird, observed, "It would be easy to keep California in spite of the Spaniards as it would be to wrest it from them in the first place." Goodwin, *supra* note 78, at 2. Later, in 1835, President Jackson ordered the charge d'affaires in Mexico to purchase the Bay of San Francisco for $5 million. The plan failed because of British opposition. *Id.* at 7. Finally, a veritable dress rehearsal for the eventual Mexican-American war took place on October 19, 1842 when Commodore Thomas Catesby Jones captured the *pueblo* of Monterey under the mistaken impression that war had begun between the United States and Mexico. After being convinced that no such war had begun, he restored the Mexican flag, withdrew his troops, and sailed away. Finally, on the eve of the war with Mexico, President Polk authorized the U.S. minister to Mexico to purchase Alta California and New Mexico for $15-20 million (he was authorized to offer as much as $40 million). *Id.* at 16. This plan was interrupted by the Mexican-American War.

the California polity helped lead to the creation of a pluralistic society in which several constituencies vied for, but were unable to gain, superiority.

The native Californians were the dominant landholders in California, owning almost all of the real property in the territory. This result was reinforced by the Mexican government's policy of restricting the sale of land to foreigners.[100] After the American conquest of California, the Treaty of Guadalupe Hidalgo preserved the titles of the native Californians to their lands.[101]

The American conquest of California was precipitated by the Mexican-American War. On May 13, 1846, the United States declared war on Mexico. Shortly thereafter, on June 14, 1846, Ezekial Merritt, a pioneer trapper, successfully led a rag-tag band of volunteer American frontiersmen who captured General Mariano Vallejo and the Mexican barracks at Sonoma and immediately declared the "Bear Flag Republic."[102] This Bear Republic was short-lived. Commodore Sloat captured Monterey in an amphibious assault on July 7, 1846, raised the American flag over the customs house, and proclaimed California annexed to the United States. The native Californians led an armed uprising against the Americans, but were ultimately unsuccessful. On January 13, 1847, the Capitulation of Cahuenga was signed by the American and Mexican leaders, closing the California Theater of the Mexican-American War. On February 2, 1848, the Treaty of Guadalupe Hidalgo was signed

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100 Decree of August 18, 1824, *in Halleck Report*, *supra* note 50, at 140; Goodwin, *supra* note 78, at 7.

101 Section 8, Treaty of Peace, Friendship, Limits and Settlements with the Mexican Republic, May 10–May 30, 1848, U.S.-Mex., 9 Stat. 922, 926 (1851) [hereinafter *Treaty of Guadulupe Hidalgo*]. Of course, most of the Mexican-Californians were stripped of their land grants by the federal Land Commission and the courts in the fifty years following the American conquest. W. W. Robinson, Land in California 91-110 (University of California, 1979).

102 Goodwin, *supra* note 78, at 13; Starr, *supra* note 2, at 67-68. This new republic promised to secure civil and religious liberty, "insure security of life and property; detect and punish crime and injustice; encourage virtue, industry and literature; foster agriculture and manufactures, and guarantee freedom to commerce." Goodwin, *supra* note 78, at 13.

between the United States and Mexico, ending the Mexican-American War.[103]

Although the United States was in firm possession of California after the ratification of the Treaty of Guadalupe Hidalgo, it was understood that Mexican law and governmental structures prevailed until a new civil government could be erected. The United States and its military governors were limited by the principle of international law that "a military governor might *suspend*, but could not simply by virtue of his office, *abolish* any law of the country by military authority."[104] The consequence was that preexisting Mexican law continued to be in force until the United States, as the country that would permanently hold California, should pass any laws to the contrary.[105] Despite popular beliefs prevailing at the time, the laws and Constitution of the U.S. did not presumptively apply because of the fact of conquest.[106]

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103 *Treaty of Guadalupe Hidalgo*, *supra* note 101. Under the treaty, Mexico ceded all territories north of the Rio Grande in return for $15 million in cash and $3.25 million in claims by Mexican citizens against the United States. *Id*.

104 Myra K. Saunders, *California Legal History: The Legal System Under the United States Military Government, 1846–1849,* 88 L. Libr. J. 488, 492 (1996) (citing to Gregory Yale, Legal Titles to Mining Claims and Water Rights in California 17 (San Francisco, A. Roman & Co. 1867)); Henry Wager Halleck, Halleck's International Law, or Rules Regulating the Inter-course of States in Peace and War 450 (Sir Sherston Baker ed., C. Kegan Paul & Co. 1861). Halleck provides that

> [t]he municipal laws of a conquered territory, or the laws which regulate private rights, continue in force during military occupation, except so far as they are suspended or changed by the acts of the conqueror. . . . On confirmation of the conquest by a treaty of peace, the inhabitants of such territory are, as a general rule, remitted to the municipal laws and usages which prevailed among them prior to the conquest.

Id. *See also* Leon Thomas David, *Our California Constitutions: Retrospections In This Bicentennial Year*, 3 Hastings Const. L.Q. 697, 706 (1975-1976).

105 Governor Kearny issued circulars that notified the population, "The country was to be held simply as a conquest, and as nearly as possible under the old laws, until such time as the United States should provide a territorial government." Bancroft, *supra* note 85, at 260.

106 *Id.* Governor Mason wrote that "many of my countrymen in California labor under a mistake in believing that, because we are in possession of the country, we are under the constitution and laws of the United States." Saunders, *supra* note 104,

Almost immediately, efforts were made to reestablish the pre-conquest legal regime. After the conquest of Monterey, Commodore Sloat issued a proclamation that invited the existing civil officials to return to their offices until the United States instituted a new government.[107] Commodore Sloat transferred power to Commodore Robert Stockton in July 1846 and departed from California. During his brief governorship, Commodore Stockton made the bold move of declaring California a territory of the United States and drafted a constitution for the territory modeled on the Mexican Laws of 1837.[108] However, Stockton's legal regime was never realized.[109] Stockton appointed General John Frémont as governor of California in January 1847 and left the territory shortly thereafter. Fremont's appointment was problematic, as his superior, Brigadier General Stephen Kearny, was in California at the time. Any confusion was cleared up a month later when, in February 1847, Colonel Richard Mason arrived in California with clear orders from the United States government appointing Kearny as governor.[110] Kearny began immediately to undo Stockton's work. On March 1, 1847, Kearny issued a

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at 494 (citing Letter from R.B. Mason to John Grisby (June 2, 1847), *in* H.R. Exec. Doc. No. 17, *supra* note 50, at 318-319. Saunders compares this approach with that used by General Kearny after his occupation of New Mexico in 1846. In that case, Kearny had issued a constitution and laws for the territory of New Mexico with the idea of establishing a permanent government while the United States and Mexico were still at war. This was disapproved of by President Polk who only approved of those regulations which preserved order, protected the inhabitants, and denied any military advantages to the enemy. *Id.* at 493. Perhaps Kearny was more conservative in his approach in California as a result of his actions in New Mexico.

107 *Id.* at 491 (1996) (citing Proclamation of John D. Sloat (July 7, 1846), *in* Documents from the State Department on Relations with Mexico, S. Exec. Doc. No. 1, 29th Cong., 2d Sess., at 644 (1850)). A proclamation similar to the one made at Monterey was made after Stockton conquered Los Angeles on August 17, 1846. *Id.* (citing Occupation of Mexican Territory, H.R. Exec. Doc. No. 19, 29th Cong., 2d Sess., at 109-110 (1847)).

108 *Id.* Under Stockton's Constitution, all municipal officers of cities, towns, departments, or districts formerly existing in the territory were to continue and be regulated by the preexisting laws of Mexico. Goodwin, *supra* note 78, at 32.

109 David, *supra* note 104, at 707 ("In August 1846, Commodore Stockton transmitted to George Bancroft, Secretary of the Navy, a proposed constitution for the territory of California. It died an administrative death.").

110 Goodwin, *supra* note 78, at 38. *See also* Saunders, *supra* note 104, at 491.

proclamation that promised the residents of California that self-government was forthcoming, that Mexican laws were to remain in force for the time being, and that the government implemented by Stockton would not continue.[111] Kearny resigned on June 1, 1847, appointing Colonel Mason in his stead.

Governor Mason made it clear to the inhabitants of California that they would not enjoy the promised civil government. Rather, under the principles of international law, the Mexican laws previously in force prevailed until the United States government provided a civil government. In defining the laws to be enforced, Mason designated only those laws implemented in California at the time of the American conquest.[112] Consequently, Mason ordered the *alcaldes* to continue their functions, reasoning that

> no civil officers exist in the country, save the alcaldes appointed or confirmed by myself. To throw off upon them or the people at large the civil management and control of the country, would most probably lead to endless confusions, if not absolute anarchy; and yet what right or authority have I to exercise civil control in time of peace in a Territory of the United States? . . . Yet, . . . I feel compelled to exercise control over the alcaldes appointed, and to maintain order, if possible, in the country, until a governor arrive, armed with instructions and laws to guide his footsteps.[113]

During the one and one half years of Mason's military rule, *alcaldes* were the only civil officers in the entire territory.[114] As stated, their combination of powers and the fact that *alcaldes* decided cases without looking to positive law provoked consternation and criticism from the inhabitants. The American military governors responded by appointing

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111 Goodwin, *supra* note 78, at 38; Saunders, *supra* note 104, at 492 (citing Proclamation to the People of California from S.W. Kearney (Mar. 1, 1847), *in* Presidential Message Transmitting Information on California and New Mexico, H.R. Exec. Doc. No. 17, 31st Cong., 1st Sess., at 288-289 (1849)).

112 Saunders, *supra* note 104, at 494.

113 Goodwin, *supra* note 78, at 49.

114 Governor Mason did not recognize or establish any of the other courts or other governmental offices outlined in the Laws of 1837. Saunders, *supra* note 104, at 494.

Americans as *alcaldes* in many localities.[115] These American *alcaldes* resorted to common law-inspired legal values and infused them into the Mexican legal system.[116] Ironically, American *alcaldes* had the power to import common law values only because Mexican practice allowed *alcaldes* to use their own sense of justice and legal values.

Governor Mason and his successor refused to make any land grants and invalidated any transfers that were made.[117] Their policy provoked immense dissatisfaction among those Americans who had come west with the expectation that there would be freely available land. They arrived instead to find much of the arable land held as huge ranches by native Californians. Americans responded by using the Mexican laws in their favor. They established towns or redesigned existing towns and parceled out land to themselves according to Mexican laws. But, this system failed to address the native lock-up of arable land.

Dissatisfaction with the *alcaldes* and with the land transfer eventually prompted the Americans to push toward a new government that they had a hand in creating. At the same time, native Californians began to lose political dominance. By 1849, native Californians were outnumbered roughly seven to one[118] and no doubt felt dependent on their conquerors' goodwill. Because their land titles remained valid in the new regime, they exercised some power in local affairs, but no longer claimed dominance. Their legal recognition and political power was weakened further following the 1848 gold finds, when the influx of Americans and foreigners made native Californians a minority.

This tension between the native Californians and Americans led to a pluralism characterized by group interests. Neither group was powerful

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115 *See supra* at note 89.

116 Saunders , *supra* note 104, at 496; Grivas, *supra* note 40, at 27.

117 Mason argued, "Emigrants coming into the country who wish their own rights respected should not violate the rights of others — the natives and adopted citizens." Saunders, *supra* note 104, at 504 (citing Letter from R.B. Mason to Alcalde William Blackburn (June 21, 1847), *in* H.R. Exec. Doc. No. 17, *supra* note 112, at 332-333).

118 Bancroft wrote in 1849, "The population of California at this period was estimated at 107,000; the number of Americans in the country 76,000; of foreigners 18,000; of natives 13,000." Bancroft, *supra* note 85, at 305-306.

enough to assert complete dominance over the other, hence the *modus vivendi* of pluralism. Because the legal systems of both the native Californians and the Americans were products of the Enlightenment, there existed between them a common notion of a higher universal or natural law founded in human dignity and human rights. Their proclivity toward abstract and uniform law was reinforced by their major religious belief systems, Catholicism and Protestantism — both transcendent religions. These two features, pluralism and a common philosophy of natural law, were necessary elements to move California into the liberal stage of legal development.

The remaining element that catalyzed California's movement into the liberal stage was the perceived ambivalence of the United States Congress. The United States federal government was at odds about what to do with California. It obviously endorsed Mason's military government as a stopgap measure, reasoning that

> [t]he consent of the people [for military government] is irresistibly inferred from the fact that no civilized community could possibly desire to abrogate an existing government, when the alternative presented would be to place themselves in a state of anarchy, beyond the protection of all laws, and reduce them to the unhappy necessity of submitting to the dominion of the strongest.[119]

The U.S. government communicated to the people in California that "termination of the war left an existing government, a government *de facto*, in full operation, and this will continue, with the presumed consent of the people, until Congress shall provide for them a territorial government. The great law of necessity justifies this conclusion."[120] But, the issue of slavery prevented the Congress from reaching a consensus on how to organize California or provide laws for its people. Californians grew increasingly upset with the lack of real progress in organizing a new government.

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[119] *Id.* at 509 (citing Letter from James Buchanan to William Vorhies (Oct. 7, 1848), *in* H.R. Exec. Doc. No. 17, *supra* note 112, at 7-8).

[120] *Id.*

Some began to voice a theory of government by which the *de facto* military government led only at the will of the people. Senator Thomas Benton of Missouri expressed this view in the *Alta Californian*: "Having no lawful government, nor lawful officers, you can get none except by your own act; you can have none that can have authority over you except by your own consent. Its sanction must be in the will of the majority."[121]

In December 1848 and January 1849, mass meetings were held in San José, San Francisco, and Sacramento to address the state of the law in California. On February 12, 1849, the people of San Francisco took action under this theory of *de facto* government. A convention of the people resolved that the circumstances "had forced the people to conclude that Congress had been trifling with them in delaying the long proposed constitution — that there was no more time to wait — and therefore that instant steps should be taken to establish a form of government for themselves."[122] At the same meeting, a plan of government was adopted and officers elected. The first meeting of the San Francisco assembly took place on March 5, 1849.[123] On March 27, 1849, General Smith (the military officer in charge of the U.S. forces at San Francisco) issued a reply refusing to support the San Francisco assembly on the grounds that the military regime had been recognized by the President as a *de facto* government, and must be so recognized until Congress should organize another.

Hopes for congressional action were dashed on May 28, 1849 when the steamer *Edith* brought news that the Congress had adjourned for the year without providing for a territorial government. The politics on the issue of slavery had kept Congress from arriving at a consensus. Responding to the people's despair, Governor Bennett Riley (who succeeded Governor Mason on April 12, 1849) issued a proclamation that emphasized respect for the laws in force at the time of the conquest: "[T]here can be no question that the existing laws of the country must continue

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121 Thomas H. Benton, *United States*, Alta Californian (San Francisco), Jan. 11, 1849, at 2.

122 Goodwin, *supra* note 78, at 72.

123 *Id.* at 67-68.

in force till replaced by others made and enacted by a competent power. That power, by the treaty of peace, as well as from the nature of the case, is vested in Congress."[124]

But, the volatile situation caused by Congressional inaction and the growing American dissatisfaction with *alcalde* rule prompted Governor Riley to make one very important concession. In his proclamation reiterating the need to abide by Mexican law, Governor Riley gave the people an opportunity to frame their own government. The proclamation ended with a call for a convention to "frame a State constitution, or a territorial organization, to be submitted to the people for their ratification, and then proposed to Congress for their approval."[125] On August 1, 1849, the people elected delegates to a constitutional convention.

C. The Constitutional Convention of 1849

The constitutional convention and its delegates convened as scheduled.[126] As the convention was prompted by the perceived ambivalence of the U.S. Congress and the inadequacy of prevailing Mexican law to meet the needs of Americans, many delegates predictably aimed to abolish those institutions that caused them the most inconvenience. Many American delegates expressed the popular sentiment that so long as the *alcalde* system persisted, there was no law. "We have no laws here," Delegate Myron Norton argued. "It has been impossible to ascertain

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124 Proclamation of B. Riley (June 3, 1849), *in* H.R. Exec. Doc. No. 17, *supra* note 112, at 776.

125 *Id.*

126 Though Governor Riley's proclamation for an election to send delegates to the convention only called for 37 delegates, the proclamation allowed for districts to elect more delegates if they wished to seek a larger representation at the convention. In the end, the Committee of Privileges and Elections admitted 48 members, with the white mining districts admitting most of the additional delegates at the expense of the Hispanic delegations from the South. Browne, *supra* note 63, at 16. *See also* Saunders, *supra* note 2, at 451. In general, the convention's members have been described as "young . . . , white . . . , and almost equally balanced between proslavery and antislavery contingents." Starr, *supra* note 2, at 92. Though there was some representation by the Hispanic population of California, the majority of the delegates were white and American, reflecting the recent change in demographics brought on by the Gold Rush.

what the law is, or to enforce it. The Mexican system, as retained in the existing civil government, is repugnant to the feelings of American citizens."[127]

Despite the animosity toward the Mexican law and native Californians, the American delegates understood the political need to win the natives' support. Their participation was viewed as an essential indicator of political stability, a feature that would have made the U.S. Congress more amenable to granting California statehood — something the American delegates deeply wanted.[128] As a result, compromises were made.

On voting rights, the Hispanic delegates won at least in principle. The original language proposed by the Standing Committee on the Constitution denied the franchise to Native Americans.[129] Many native Californians balked at the proposal, as the Mexican system permitted propertied Native Americans to vote and there were not more than two hundred such people in the territory at the time.[130] And the proposal was an embarrassment because its passage would require Manuel Dominguez, a *mestizo* delegate from Los Angeles, to sign a Constitution that would disenfranchise him.[131] In the end, the delegates offered an amendment granting Native Americans the franchise if two-thirds of the Legislature approved.[132]

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127 Browne, *supra* note 63, at 26. *See also* Saunders, *supra* note 2, at 451. Another delegate, Edward Gilbert, added, "It is notorious that the laws now in force are repugnant to the feelings, education, and habits of the great majority of the people." Browne, *supra* note 63, at 79. Lastly, one delegate went so far as to preclude any purpose for the presence of the eight Hispanic delegates. Mr. W.M. Gwin said, in open debate, "It was not for the native Californians we were making this Constitution; it was for the great American population, comprising fourth-fifths of this country." *Id.* at 22. Not surprisingly, it was thought that the Hispanic delegates came to prevent the "too liberal Americanizing of the country." Saunders, *supra* note 2, at 453 (citing Elisha O. Crosby, *The First State Election in California*, 5 Soc'y Cal. Pioneers Q. 65, 69 (1929)).

128 Saunders, *supra* note 2, at 453.

129 *Id.* at 461.

130 Browne, *supra* note 63, at 306-307.

131 Saunders, *supra* note 2, at 461, n. 94.

132 Browne, *supra* note 63, at 63; Cal. Const. of 1849, art. II, § 1.

Some historians have focused on the community property system as being a significant legacy of the 1849 constitution.[133,134] However, community property was not preserved because native Californians wished to perpetuate a familiar system, nor did Hispanic delegates rush to defend community property in the constitutional debates.[135] And, while it may be easy to characterize adoption of community property as a victory of the civil law against the common law, the system probably survived because of a progressive streak in the convention and as a recognition that the common law would ultimately prevail in the new state.[136] Indeed,

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133 *See*, *e.g.*, Walter Leowy, *Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California*, 1 CAL. L. R. 32, 33 (1912-1913). Loewy writes, "The community system may, in consideration of its influence upon the legal and economic development of the State, be regarded as one of the most important landmarks of Spanish civilization in California." *Id.*

134 The relevant section in the 1849 California Constitution provides: "All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property, and laws shall be passed more clearly defining the rights of the wife in relation as well to her separate property as to that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property." Cal. Const. of 1849, art. XI, § 14.

135 However, the Hispanic delegates did find an advocate in Henry A. Tefft, a delegate from San Luis Obispo, who supported the civil law. Tefft argued:

> It is our duty to give a favorable consideration to any proposition which does not do marked and radical wrong to any class in California, and which deeply concerns the interests of the Native Californians. It would be an unheard of invasion, not to secure and guarantee the rights of the wife to her separate property; and of all classes of California, where the civil law is the law of the land, where families have lived and died under it, where the rights of the wife are as necessary to be cared for as those of the husband, we must take into consideration the feelings of the native Californians, who have always lived under this law.

Browne, *supra* note 63, at 258.

136 McMurray, *supra* note 72, at 379. *But see* W. DE FUNIAK, PRINCIPLES OF COMMUNITY PROPERTY, 106-109 (1st ed. 1943) (arguing that there is conclusive evidence that it was the clear intention of the drafters to adopt the Spanish system of community property). Compare de Funiak's views with that of Dana V. Kaplan, who believes that the community property system was adopted as an expedient solution to minimize political instability in the wake of recent conquest. Kaplan, *supra* note 69, at 154.

one commentator notes that the convention's adoption of a provision for community property was peculiar because some of the delegates saw it as a change in the existing law. They thought the common law, not the civil law, was the law of California.[137]

The passions roused by the community property system traced in part to the divisive choice between a common law and civil law system.[138] Some American delegates opposed community property, mostly on the grounds that the convention should draft what is best for the majority.[139] Both sides rose to the occasion and marshaled their arguments to their fellow delegates.[140] The majority, however, voted to adopt

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137 McMurray, *supra* note 72, at 369.

138 One delegate, Francis Lippett from San Francisco, stated the issue in no uncertain terms:

> The general rights of property must be considered with reference to the great mass of the population, the Americans; the smaller party, the Californians, must yield. *But the right of property in reference to man and wife and a thousand other matters are totally different at present. The Americans have been living under the common law: the Californians have been living under the civil.* It is useless to disguise the fact that in course of a few months, the question has to be settled under what code of laws the people are to live.

Browne, *supra* note 63, at 260. McMurray, *supra* note 72, at 371.

139 To this end, Mr. Lippett argued, "The great mass must live under the common law. It would be unjust to require the immense mass of Americans to yield their own system to that of the minority." Browne, *supra* note 63, at 260-261. Mr. Lippett went on to state that the common law provides, in the form of ante-nuptial contracts, the same benefit as community property in preserving ownership over property brought to the marriage. *Id.* at 261. Mr. Charles Botts, a representative from Monterey, argued, "All distinctions should be lost among us; I consider that we are all Californians. The question then is, what is best for the great majority of the people of California?" *Id* at 259.

140 Kimball Dimmick, a delegate from San José and staunch defender of the common law, argued:

> The common law and no other law, is the law under which nine-tenths of the people not in California were born and educated; it is the only law which is known, the only law which her lawyers and judges know, and which we have access to. For this reason it must be the law of the land hereafter, whether it is established this month or next, this year, or next . . . .

Id. at 260. Another delegate, Mr. J. M. Jones from San Joaquin, took a road which led him to attack the common law:

the community property system as the best choice for the inhabitants of California.[141]

Another often discussed aspect of the 1849 Constitution has been its effect on the national slavery debate. The instrument declared, "Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State."[142] With ratification of the 1849 constitution, California statehood became an immediate national issue. One author has noted that the

> anti-slavery clause, which in our constitution had been so easily adopted, at once became a national question and threatened to disrupt the entire country. The demand of California to be admitted to statehood brought about what is called the 'Compromise of 1850,' and the controversy over the same resulted in one of the greatest battles ever waged in our national congress.[143]

Hubert Howe Bancroft charged, "Such was the fateful character imputed to the instrument draughted at Monterey by men of all sections . . . . [T]he admission of California as a free state led to the war of the rebellion."[144] Although the 1849 Constitution therefore precipitated the movement toward statehood and the ensuing national debate on

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> Where is this common law that we must all revert to? Has the gentleman from Monterey got it? Can he produce it? Did he ever see it? Where are the ten men in the United States that perfectly understand, appreciate, and know this common law? I should like to find them. When that law is brought into this House — when these thousand musty volumes of jurisprudence are brought in here, and we are told this is the law of the mass — I want these gentlemen to tell me how to understand it. I am no opponent of the common law, nor am I an advocate of the civil law. Sir, I am an advocate of all such law as the people can understand.

Id. at 264.

141 Browne, *supra* note 63, at 269; Cal. Const. of 1849, art. XI, § 14. Ironically, early judicial interpretation of community property leaned on common law property principles. Allan Pedlar, *The Implications of the New Community Property Laws for Creditors' Remedies and Bankruptcy*, 63 Cal. L. R. 1610, 1613 (citing to William Simmons, *The Interest of a Wife in California Community Property*, 22 Cal. L. R. 404 (1934)).

142 Cal. Const. of 1849, art. I, § 18.

143 Cushing, *supra* note 73, at 72.

144 Bancroft, *supra* note 85, at 344.

slavery, there is no apparent evidence that the slavery debate prompted the 1849 convention.

Nor does the 1849 Constitution merit praise for its ban on slavery. Consider the politics in play at the California constitutional convention. While most of the delegates to the convention arguably had sympathies with the South,[145] the body settled quickly and without objection to prohibit slavery. Bancroft reports that this outcome was the result of the Southern faction's attitude that if California became a free state there would be no harm to their cause. After all, "out of the remainder of the territory acquired from Mexico half a dozen slave states might be made."[146] To put it in another way, the significance of California's prohibition of slavery was not in the prohibition, but the extent of the territory to which such prohibition extended:

> After all, California, as ceded by Mexico, embraced a vast area extending to the Rockies. There was enough territory for several states, and it was not seen as politically probable that Congress would approve a constitution making all that territory free of slavery. . . . The southerners in the 1849 convention assented to the boundary adopted, believing that another part of the territory could still be established as a slave state if economic conditions justified it.[147]

Unsurprisingly, the debates on the state's boundaries proved to be the most heated and contested of the convention.[148]

After a month and a half of open debate and committee meetings, the convention finished its business on October 11, 1849, approving the production of copies of the first Constitution of the State of California in

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145 Bancroft writes, "The convention was not lacking in talent. It was not chosen with regard to party proclivities, but was understood to be under the management, imaginary if not real, of southern men." Bancroft, *supra* note 85, at 286.

146 Bancroft, *supra* note 85, at 291. Bancroft also intimates that another reason why none of the delegates who were from the southern states stood against the prohibition on slavery was because they feared it would cost them future public office. *Id.*

147 David, *supra* note 104, at 713.

148 For a general discussion of the arguments presented at the convention, *see* Bancroft, *supra* note 85, at 290-296.

both Spanish and English.[149] A copy was forwarded to Governor Riley and, on October 13, the delegates gathered together one last time in the morning for the solemn and happy ceremony of signing the Constitution.[150] On November 13, 1849, the people of California voted in favor of their first constitution and elected their own government for the first time.[151] Governor Riley proclaimed the Constitution ratified on December 12, and turned over the government to civil authorities on December 20. The state operated on a *de facto* basis until California was admitted as a state on September 9, 1850. The Constitution created at the 1849 convention served the state for thirty more years. The Bill of Rights lasted even longer; its main part forms the heart of the current Constitution of the State of California.[152]

D. California's 1849 Constitution and the Shift to the Liberal Stage

The 1849 California Constitution ratified by the people of California reflects in many ways the process of compromise and the liberal spirit that drove the delegates. This spirit of compromise was not just between Hispanics and the American delegations. Rather, the American delegation was divided on several topics that had a profound effect on the Constitution's final outcome. This tension in the convention's chamber reflected tension building among varying factions in the territory since the American conquest. The 1849 constitution stands as evidence that the people, despite their differences, agreed to be governed under a collectively embraced instrument. One historian remarks, "The fact that the convention was held at all demonstrated an irrepressible urge for self-government

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149 Browne, *supra* note 83, at 462.

150 After signing, a 31-gun salute thundered from the nearby presidio, and an English ship in the harbor raised the Stars and Stripes in celebration. Starr, *supra* note 2, at 94. In the afternoon, the delegates walked over to the gubernatorial adobe in Monterey and personally presented the first Constitution of the State of California to Governor Riley, who wept at receiving it. *Id*.

151 *See supra* at note 2.

152 Reiner and Size have written, "Most of the provisions of our present California Declaration of Rights go back to our original state constitution, drafted in Monterey in 1849." Ira Reiner & George Glenn Size, *The Law Through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights*, 23 Pac. L. J. 1183, 1185 (1992).

and a legal order to maintain it."[153] The Constitution's preamble states, "We, the People of California, grateful to Almighty God for our freedom, in order to secure its blessings, do establish this Constitution."[154] Besides expressing a belief in a transcendent order, the preamble appeals to the need for "a minimum of freedom and security," which Unger believes drives the liberal compromise.[155] This was certainly not lost on the people.[156]

The Hispanic delegates, and the population they represented, were probably wary of the new Constitution.[157] They were accustomed to a bureaucratic system and had little to do with most of the provisions in

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153 David, *supra* note 104, at 712.

154 Cal. Const. of 1849, Preamble.

155 Unger, *supra* note 3, at 75-76. The convention's "Address to the People of California" reflected this element when they wrote:

> It cannot be denied, that a difference of opinion was entertained in the Convention, as to the policy and expediency of several measures embodied in the Constitution; but looking to the great interests of the State of California, the peace, happiness, and prosperity of the whole people, individual opinions were freely surrendered to the will of the majority, and with one voice we respectfully but earnestly recommend to our fellow-citizens, the adoption of the Constitution we have the honor to submit.

Browne, *supra* note 63, at 474.

156 The *Placer Times* promoted the Constitution to its readers, noting:

> It is liberal in its protections of the rights of conscience; it is enlightened in its provisions for the spread of education: it is free from in exclusion of slavery; it is republican in its assertion of the inherent political power of the people; it is democratic in its prohibition of banking; and it is in keeping with the progressive spirit age by making all officers of the government elective. We say, then, to those who desire to see public order, public rights, and public justice established upon the sure foundation of a written "Magna Carta" — "Stand by the Constitution."

Placer Times (Sacramento, CA), November 3, 1849, as quoted in the Alta California (San Francisco, CA), November 20, 1849.

157 Bancroft writes, "These native delegates were averse to the change about to be made. They feared that because they were large land-owners they would have the burden of supporting the new government laid upon their shoulders, and naturally feared other innovations painful to their feelings because opposed to the habits of thought. These very apprehensions forced them to become the representatives of their class, in order to avert as much as possible the evils they foreboded." Bancroft, *supra* note 85, at 284-285.

the 1849 Constitution. The delegates to the convention recognized the possibility that Hispanics would see the new Constitution as an alien institution. They therefore drew special attention to this minority population in their "Address to the People of California":

> It is to be remembered, moreover, that a considerable portion of our fellow-citizens are natives of Old Spain, Californians, and those who have voluntarily relinquished the rights of Mexicans to enjoy those of American citizens. Long accustomed to a different form of government, regarding the rights of person and of property as interwoven with ancient usages and time-honored customs, they may not at once see the advantages of the proposed new government, or yield an immediate approval of new laws, however salutary their provisions, or conducive to the general welfare. But it is confidently believed, when the government as now proposed, shall have gone into successful operation, when each department thereof shall move on harmoniously in its appropriate and respective sphere, when laws based on the eternal laws of equity and justice shall be established, when every citizen of California, shall find himself secure in life, liberty and property — all will unite in the cordial support of institutions, which are not only the pride and boast of every true-hearted citizen of the Union, but have gone forth, a guiding light to every people groping through the gloom of religious superstition or political fanaticism . . . .[158]

The Americans outnumbered the Hispanic population in striking measure. Yet, as demonstrated above, the Americans understood that the Hispanic population and their political contentment held the key to the legitimacy of the new government. One wonders how this view might have been different if the Hispanic population were not in control of so much real estate. Recognition of their holdings by the United States prevented the American delegates from simply ignoring Hispanic interests. While much of the Hispanics' land-based security would be eroded in the next fifty years by the federal Land Commission and the courts,[159]

158 Browne, *supra* note 63, at 474-475.

159 Robinson, *supra* note 101, at 91-110.

it was an essential feature of the *status quo* that catalyzed the creation of a society based on the rule of law in California.

Another important feature of the liberal state is that it be erected in a way that "prevent[s] any class of persons from imposing a dictatorship on all other classes."[160] In other words, in the liberal state, the government must be limited. The 1849 Constitution of the State of California reflects a theory of limited government by granting civil liberties to citizens and by separating the powers of government into separate branches. The Constitution expresses the theory that "Government is instituted for the protection, security, and benefit of the people, and they have the right to reform the same, whenever the public order may require it."[161] Unger observes that the liberal state also requires that the laws be applied uniformly.[162] This notion is incorporated in the 1849 California Constitution in Article I, Section 11, which provides that "all laws of a general nature shall have a uniform operation."[163]

In the end, the 1849 Constitution of the State of California established for the first time a liberal state in California. From that point on, the rule of law has prevailed. Vestiges of the bureaucratic stage, especially in the form of the *alcaldes*, would no longer be formally recognized in the law. The pluralism that led to the calling of the constitutional convention would continue as California became more populous and its people engaged in ever more diverse professions and activities. The year 1849 should forever be remembered as California's "liberal moment," when California attained that rare status as a liberal society.

III. WHAT DOES IT ALL MEAN?

California has a short history, but a long *legal* history. We must now give meaning to that legal history. An understanding of California's legal history as a progression in a cycle (which is the path taken by this article) is meaningless without placing it in a structure that gives it overarching

160 *Id.* at 69-70.

161 Cal. Const. of 1849, art. I § 2.

162 Unger, *supra* note 3, at 80.

163 Cal. Const. of 1849, art. I § 11.

significance. To this end, it is worthwhile to consider Unger's cycle of legal history as a theoretical framework for describing the progression of human freedom and its reflection in the relationship between the forms of law and society.[164] In this progression, the liberal stage is the one in which human freedom flourishes most. This would be one reason to celebrate the 1849 California Constitution — it was the moment California entered the liberal stage, and human freedom in society was realized to a degree greater than any known before. This interpretation also gives meaning to the plurality of interests that characterized the state in 1849 and which characterizes California today.

But, this view celebrates the singularity of a moment and ignores the span of the history that preceded it and that proceeds from it. This article has described California's legal history according to a particular theory from its earliest origins and has ended the historical description with the 1849 Constitution. To understand the importance of California's legal history as part of a process in which the 1849 California Constitution is an important moment, a look to the future gives California's "liberal moment" its greatest significance.

In addition to the three stages previously described, Unger describes a fourth stage known as the post-liberal stage. While a fuller discussion of the post-liberal stage is beyond the scope of this article, its main characteristics are the overt intervention of government in areas previously regarded as beyond the proper reach of state action and the gradual merging of state and society and of public with private.[165] This first characteristic, described by Unger as the "welfare function," is most visible where the state engages in overt redistribution, regulation, and planning.[166] The second characteristic is found when the state ceases to be the "neutral guardian of the social order" and when "private organizations are increasingly recognized and treated as entities with the kind of power that traditional doctrine viewed as a prerogative of government."[167] This

164 Unger, *supra* note 3, at 47.
165 *Id.* at 192-193.
166 *Id.* at 193
167 *Id.*

second characteristic is related to the first and is described by Unger as the "corporatist tendency."

But, it is what happens beyond the stages in Unger's cycle that gives meaning to the entire span of any society's legal history. Unger provides that "there are two main ways in which one can interpret the significance for law of the tendencies at work in modern, and particularly, in post-liberal society."[168] The first interpretation is that of a genuine cycle, or a closed circle, which "would present the entire history of law as one of movement toward a certain point, followed by a return to the origin."[169] Whether a society in the liberal stage reverts back on its own to previous stages or follows the post-liberal pattern of instituting a welfare function that undermines the uniformity of the laws and culturing a corporatist tendency that abrogates the autonomy of the government, the necessary result would be the decline of the rule of law.[170] In other words, society can lose its grip on the rule of law ideal and slip backward or "slip forward" by allowing the post-liberal tendencies to erode the rule of law. And, in any decline of the rule of law, the greatest loss to the individual and society is incurred — the destruction of individual freedom.[171]

Unger posits a different possibility for society that is less dire. Here we must view the cycle of legal history as an upward spiral which returns to its starting point but at a higher level compared to the previous iteration of the cycle. The essence of this view is "to see and to treat each form of social life as a creation rather than as a fate" with each stage refining the relationships between the individual and the state and between the individual and others.[172] This possibility would entail the decline of the rule of law as would the first possibility, but the decline would not be so ominous for individual freedom because such freedom will "survive the disintegration of public and positive law and be reconciled with a sense of an immanent order in society."[173] This possibility is optimistic. It argues that society and law can develop so as to preserve individual

168 *Id*. at 238.
169 Unger, *supra* note 3, at 238.
170 *Id*. at 238-239.
171 *Id*. at 238.
172 *Id*. at 239.
173 Id.

freedom and to harmonize it with societal concerns and to lessen the need for a legal apparatus to sustain this balance.[174] The eventual outcome of this form of historical-legal progression is a society that is more free yet requires less government.

While Unger admits that neither possibility now can be proved true or false,[175] it is also possible that neither possibility may occur at all. In which direction are *we* headed? In seeking to answer this question, we can see that California's 1849 Constitution marks a truly significant moment. In that moment California achieved the rare status of a liberal society with a foundation built on a rule of law. As we look back upon the moment, we should ask ourselves whether the challenges that have faced California since then have created a legal history that suggests one of the possible futures laid out above. If so, we must evaluate whether that is the direction in which we choose to go. For it is, ultimately, our choice.

CONCLUSION

In its relatively short history, California experienced a diversity of law and government possibly unmatched in American history. It was once part of a kingdom, ruled by dynasties of Spanish, Austrian, and French origin. It was first settled by zealous missionaries supported by hardened Spanish frontiersmen. Later, under Mexico, California experienced a time of tumult where factions within the state waged wars across the land. During this time, the Mexican government experienced first federalism and then centralism. A sure government in California was always in doubt.

While the Californians and Mexicans fought to decide their future, the Americans did not wait. They came to California seeking fortune and a new beginning, integrating into the local culture and society. With the American conquest, the stage was set for a new liberal state. After a convention that unified the Hispanic and Anglo-American elements in the state, a constitution was ratified that established a rule of law that has persevered to today.

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174 Unger, *supra* note 3, at 239.

175 *Id*. at 238.

The particular legal history of California is not merely interesting. When one steps back and looks to understand what the total sum of it all means, one sees that its significance is as a progression of events leading to the institution of the rule of law. First, in the Iberian Peninsula, where the people and ideas that would arrive in California were born, there initially existed a society based on customary law. In time, this society evolved into a bureaucratic stage that would extend its reach into the New World and eventually to California. The bureaucratic stage persisted until 1849, when it was peacefully and swiftly replaced by the rule of law. With that, California existed thereafter as a liberal society. And this is the true significance of California's "liberal moment." ✯