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California Without Law:

1846 Through 1850**

Forty years ago, Professor Jerold Auerbach observed that "the notion of justice without law seems preposterous, if not terrifying. A legal void is especially alarming to Americans, who belong to the most legalistic and litigious society in the world."[1]

But for those living in California between 1846 and 1850 – before it became a state – that was somewhat the situation. How they responded, and how the government at the time (such as it was) dealt with their concerns is a lesson in the role of law in society and of the desire for institutions that can secure orderly justice.

That period also sheds light on how different legal systems function in different cultures. As Professor Auerbach said, "How people dispute is, after all, a function of how (and whether) they relate…[A society may decide] to define a disputant as an adversary, and to struggle until there is a clear winner and loser; or alternatively, to resolve conflict in a way that will preserve, rather than destroy a relationship."[2] That difference was thrown into stark relief as one legal culture transitioned to another.

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[1] Jerold S. Auerbach, *Justice Without Law?* (Oxford, New York, Toronto, and Melbourne: Oxford University Press, 1983), 3.

[2] Ibid., 8-9.

ALTA CALIFORNIA

Mexico broke away from Spain in 1821. It sought to establish a government that would be effective over an enormous territory, including Alta California – comprising the lands of present-day California, Arizona, and New Mexico, and parts of Colorado, Nevada, Utah and Wyoming.[3]

Communication between Mexico City and Alta California was difficult and time-consuming. Transportation was tedious at best.

Over time, especially beginning in the 1830s, those persons of Spanish ancestry who were born in Alta California began identifying themselves as "Californios" – as distinguished from "Mexicans."[4]

Some government existed in Alta California, but it was unstable. Between 1829 and 1845, there were at least twelve disputes among Californio factions. Often the battles were fought over whether the government should be seated in Northern California or Southern California: Monterey or Los Angeles.[5]

As early as 1831, Alta California's representative in the Mexican Chamber of Deputies (Carlos Antonio Carrillo) told that body that a justice system run from Mexico City would not work in Alta California.[6]

Not surprisingly, conflicts emerged among the Mexican government, territorial governors, Californios, and the Catholic Church. For example, in 1833 the California missions were secularized.[7] The Church lost tens of thousands of acres to government insiders and other grantees. There followed years of conflicting orders and counter-orders and even armed threats.[8]

In 1837, in an effort to tame some of the disorder, the Mexican Congress passed laws to establish a system of courts throughout the country – including Alta California.[9] But, as Governor Carrillo feared, those tribunals were not

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[3] *See* https://guides.loc.gov/treaty-guadalupe-hidalgo

[4] Leonard Pitt, *The Decline of the Californios* (Berkeley, Los Angeles, and London: University of California Press, 1998), 5-7.

[5] Michael Gonzalez, "War and the Making of History: The Case of Mexican California, 1821-1846," *California History* 86, no. 2 (2009): 10.

[6] Carlos Antonio Carrillo, "Speech…Requesting the Establishment of Adequate Courts for the Administration of Justice." In *The Coming of Justice to California*, edited by John Galvin, 49-60. San Francisco: John Howell – Books, 1963.

[7] Hubert H. Bancroft, "History of California, vol. 4, 1840-1845," *The Works of Hubert Howe Bancroft*, vol. 21 (Boston: Elibron Classics, 2004) 42 et seq.

[8] *See, e.g.*, Leonard Pitt, supra note 4, at 7 ("Unquestionably, the chief reform of the Mexican era was secularization of the missions. . . . [S]ecularization cut the last cord still linking California to its Spanish 'mother.' It upset class relations, altered ideology, and shifted . . . enormous wealth.").

[9] Judicial Act of May 23, 1837. See David J. Langum, Sr., *Law and Community on the Mexican California Frontier*, 2nd ed. (Los Californianos *Antepasados*, Vol. XIII) (San Diego: Vanard Liithographers, 2006) 35 and Leon R. Yankwich, "Social Attitudes as Reflected in Early California Law," *Hastings Law Journal* 10, no. 3 (1959), 251-52 citing 1 Cal. 559 (1851). (Not all versions of 1 *California Reports* contain that text.)

easily adaptable to Alta California, and to a considerable extent, those courts were not even established. Instead, each town was governed by an alcalde: a role combining judicial, legislative, and executive responsibilities.

At the time, Alta California was largely populated by Indians, plus Spanish, Mexicans, and Californios. Even before the Gold Rush, settlers from the United States, England, Ireland, Scotland, France, Germany, Peru and elsewhere also lived there.

There was considerable discussion among these residents about the inevitability of Alta California's conquest by a foreign power.[10] The American consul, Thomas Larkin, speculated that even the Californios might wish to separate from Mexico.[11]

There is a report that some of the leading figures of Monterey, including prominent Californios, Americans, an Englishman, and a Scotsman, met in late March or early April 1846 to discuss *which* country should occupy Alta California; some favoring England; some the United States.[12]

Those discussions became moot with the outbreak of the Mexican War on April 25, 1846. More accurately, given the lack of communication in those days, the war started in Alta California on July 2, 1846, when three ships from the United States Navy's Pacific Squadron sailed into Monterey harbor and occupied the town.

MEXICO-U.S. WAR

The Mexico-U.S. War in 1846 and '47 was the capstone of Manifest Destiny. The U.S. acquired half a million square miles—330 million acres— including Pacific ports and land that eventually produced billions of dollars in crops, livestock, gold, and silver. The U.S. also acquired a territory ruled by Mexican law, and a growing American population that was dissatisfied with what it considered to be the absence of the rule of law.

The seeds of war – and the clash of legal systems -- were sown in the 1820s, as thousands of Americans migrated into the then-Mexican territory of Texas. Initially, Mexico welcomed them, hoping that Americans would fight alongside Mexican Texans against Native tribes. The Americans, however, had

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[10] Hubert H. Bancroft, "History of California, vol. 4, 1840-1845," *The Works of Hubert Howe Bancroft*, vol. 22 (Boston: Elibron Classics, 2004) 416-417; quoting Manuel Castenares, Deputy for Alta California to the Chamber of Deputies, 1844.

[11] Thomas O. Larkin, Letter dated May 21, 1846, in *The Larkin Papers*, ed. George P. Hammond (Berkeley: University of California Press, 1955), 4:385-386.

[12] William Swasey, *The Early Days and Men of California* (Oakland: Pacific Press Publishing Company, 1891), 57-58.

different priorities; they brought slaves, grew cotton, and had little loyalty to Mexico. Mexico began to view American immigration as a threat. In 1829, Mexico partially outlawed slavery.[13] The following year, it capped American immigration into Texas and re-imposed taxes and tariffs on the immigrants.

In 1835, Texans—mostly Americans—revolted and in 1836, established an independent republic.[14]

Many Texans wished to have the U.S. annex Texas as a state, but two obstacles appeared. First, Mexico refused to recognize Texas' independence and opposed U.S. annexation. Second, many Americans opposed admitting Texas as a slave state.

Texas was an issue in the presidential election of 1844. The Democrats nominated James Polk, a slave-owning Tennessean and an outspoken proponent of annexation. He won the November election.

Even before Polk took office, Congress agreed to admit Texas as a state, effective December 1845.[15] Mexico refused to recognize the U.S.'s annexation of Texas, especially with the U.S. proposing that the boundary be as far south as the Rio Grande – adding thousands of square miles to Texas. Mexico severed diplomatic relations with the U.S. and began to talk of war.

Polk tried to negotiate with Mexico to acquire some of its northern territory. Many Americans viewed that as an effort to extend slavery westward and opposed the effort.

In 1845, Polk sent a State Department official to Mexico City to offer $25 million (or even $30 million) in exchange for Mexico's (1) recognition of the Texas annexation -- with the Rio Grande as the boundary, and (2) sale of then-Mexican California and the New Mexico territory. Mexico's government denied the U.S. official an audience.[16]

President Polk saw that denial as an insult. In 1846, U.S. Army troops marched south into the disputed section of Texas. U.S. troops were on the northern bank of the Rio Grande — south of the border claimed by Mexico. There, in April 1846, Mexico fired on and killed American soldiers.[17]

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[13] Alwyn Barr, *Black Texans: A History of African Americans in Texas*, 1528–1995 (Norman, Oklahoma: University of Oklahoma Press, 2nd ed.,1996), at 14.

[14] *E.g.,* William Davis, *Lone Star Rising* (College Station, Texas: Texas A&M University Press, 2006), at 282.

[15] *See, e.g.*, Frederick Merk, *History of the Westward Movement* (New York, New York: Knopf, 1978), at 286; Michael Holt, *The Fate of Their Country: Politicians, Slavery Extension, and the Coming of the Civil War* (New York, New York: Hill & Wang, 2005), at 215.

[16] *See, e.g.*, https://www.archives.gov/education/lessons/lincoln-resolutions

[17] *E.g.,* K. Jack Bauer, *Zachary Taylor: Soldier, Planter, Statesman of the Old Southwest* (Baton Rouge, Louisiana: Louisiana State University Press, 1993), at 149.

Polk requested a declaration of war against Mexico, and Congress obliged him in May 1846.

The ensuing war did not last long and in January 1847, the Treaty of Cahuenga ended the part of the military conflict in Alta California. The Mexicans disarmed and recognized U.S. authority pending a comprehensive treaty.[18]

Polk appointed the number two official in the State Department - Nicholas Trist - to negotiate that comprehensive treaty. Trist was a politically connected lawyer who had married one of Thomas Jefferson's granddaughters and had been Andrew Jackson's White House secretary.[19]

Polk's written instructions to Trist included non-negotiable terms: Mexico must recognize the Rio Grande as Texas's boundary and must cede all of the New Mexico territory and "Upper California." In exchange, Polk authorized Trist to pay Mexico up to $20 million. Armed with these instructions -- plus two pistols — Trist arrived in U.S.-occupied Mexico City in September 1847.

There, Trist faced myriad problems. U.S. commanding general Winfield Scott, known as Old Fuss and Feathers, initially resisted Trist, claiming that he (Scott) had the authority to negotiate a treaty on behalf of the U.S. Worse, the U.S. invasion had strengthened Mexico's intransigence, and simultaneously, so weakened Mexico's government that it was unclear who had authority to negotiate on its behalf.

Even after General Scott relented, other U.S. generals continued to squabble over control of Mexico's future. For example, some were part of an "All Mexico" movement, urging the annexation of the entirety of Mexico. Even some Mexicans agreed, hoping that the U.S. could impose order on war-borne chaos. Other U.S. leaders urged that no annexation beyond Texas occur, lest it (1) be morally condemned as European-style conquest and (2) intensify the ongoing slavery debate.

Trist was finally able to begin negotiations with the Mexicans (sometimes using a British diplomat as a go-between). Perhaps as a tactic, Trist apparently raised the possibility of setting the Texas boundary north of the Rio Grande. In any event, negotiations slowed, at least partly owing to the Mexican government's disorder.

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[18] *E.g.,* Dale Walker, *Bear Flag Rising: The Conquest of California 1846* (New York, New York: Forge Books, 1999), at 239-46.

[19] *See, e.g.,* Amy Greenberg, A Wicked War: *Polk, Clay, Lincoln, and the 1846 U.S. Invasion of Mexico* (New York, New York: Knopf Doubleday Publishing Group, 2012), at 92-93.

President Polk grew frustrated with the delays and with Trist's apparent disregard of his instructions that the Rio Grande boundary was non-negotiable. So, in October 1847, Secretary of State (and future President) James Buchanan recalled Trist to Washington, D.C. and ordered him to discontinue negotiations. He no longer had any lawful authority to negotiate.

Trist notified the Mexicans of his recall, but delayed his actual departure until a replacement arrived and a military escort could accompany Trist back to Veracruz.

While waiting, he changed his mind and decided to resume negotiations. He thought he could negotiate a treaty comporting with Polk's instructions and that the U.S. Senate, faced with a *fait accompli*, would have little choice but to ratify the treaty.

Trist's strategy depended on speed. The arrival of the new U.S. negotiator would undo his progress and might even reignite war. Trist informed his Mexican counterparts of his recall, and they shared his concerns. Accordingly, secret negotiations began in January 1848, in the Mexico City suburb of Guadalupe Hidalgo.

Upon learning of Trist's defiance, Polk ordered Trist to leave Mexico immediately and cut off all Trist's compensation, including expenses. Once again, Trist refused to heed his superiors' instructions.

On February 2, 1848, Trist and the Mexicans agreed to the Treaty of Guadalupe Hidalgo.[20] It included all of Polk's non-negotiable terms: setting the Texas boundary at the Rio Grande and Mexico's ceding Upper California and the New Mexico territory. Mexico even agreed to a $15 million payment, less than the $20 million originally authorized by Polk.

Trist's strategy proved correct: The U.S. Senate — sensing Americans' growing discontent with the war that had lasted longer and cost more lives than anticipated (keep in mind that both Henry Clay and a young congressman whose name was Abraham Lincoln had opposed the war)— ratified the treaty with minor changes. The Treaty's provisions included:

- Under Treaty Article V, Mexico lost over half of its territory, and the U.S. gained California, Arizona, and New Mexico, and parts of Colorado, Nevada, Utah, and Wyoming. Texas's southern boundary was fixed at the Rio Grande.

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[20] *See generally* https://www.archives.gov/education/lessons/guadalupe-hidalgo.

- Under Article VIII, Mexicans living in now-U.S. territory—such as California—had the option of becoming U.S. citizens. Property owners had guarantees to their property "equally ample as if the same belonged to citizens of the United States."
- Under Article IX, Mexicans in now-U.S. territory were to enjoy "all the rights of citizens of the United States, according to the principles of the Constitution . . . ."[21]

All from a Treaty that Trist lacked authority to negotiate or sign.

THE INTERREGNUM

As noted, the Treaty of Guadalupe Hidalgo offered U.S. citizenship to all Mexicans who remained in Alta California after the war. They could look forward to all the rights of Americans once Congress ratified the Treaty. But, in the "meantime," the rights of the Americans – and, indeed, everyone in California — were murky at best.

In one sense, the law was crystal clear. This was a time when kings and countries were warring and conquering territories on a regular basis. So, it was important to know what law governed a conquered province.

International law left no doubt. All law regarding the commerce and general conduct of the population of the conquered territory remained in force until the conqueror changed it. Only the people's sovereign and their relation to that sovereign changed.

The U.S. Supreme Court held as much in 1828 in an opinion by Chief Justice John Marshall.[22] The military governor of California, Bennett Riley, knew this rule well. In 1849, he ordered the printing of Mexican laws (translated into English); with the title "The Mexican Laws…as are supposed to be still in force and adapted to the present condition of California." The introduction to that volume cites Marshall's opinion as the reason for publishing Mexican laws.[23]

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[21] https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo.

[22] *American Insurance Company v. 356 Bales of Cotton*, 26 U.S. 511, 544 (1828).

[23] J. Halleck and W.E.P. Hartnell, *Translation and Digest of Such Portion of the Mexican Laws of March 20th and May 23rd, 1837, as are Supposed to be Still in Force and Adapted to the Present Condition of California; with an Introduction and Notes*, 1849, 3. https://books.google.com/books?id=WLsLAQAAIAAJ&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false

But there were two hitches. One, California was under military rule from the time of conquest until December 20, 1849. Congress had difficulty admitting California into the Union as a free state without admitting a slave state to match, and none was available. So, for those three years, Alta California remained under military rule. During that period, the military governor's orders could (and sometime did) supersede other law.

Two, as noted earlier, the Mexicans never really had implemented a complete court system in Alta California. Instead, it gave *alcaldes* power to run a community. So even though Mexican law continued, it was often difficult for the alcaldes (especially Americans in those posts) to determine what the law was. That was even the case for an American as learned as Stephen J. Field, whose judicial career began as alcalde of Marysville.[24]

And the *alcaldes* had great power indeed. Walter Colton, the alcalde of Monterey, explained the scope of his responsibility this way:

> [I have] duties similar to those of a mayor of one of our cities, without any of those judicial aids which he enjoys. It involves every breach of the peace, every case of crime, every business obligation, and every disputed land-title within a space of three hundred miles… Such an absolute disposal of questions affecting property and personal liberty, never ought to be confided to one man. 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.[25]

And the alcalde had more than just judicial powers. Colton explained that the alcalde,

> …is also the 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…and he must enforce, through his executive powers, the decisions and sentences which he has pronounced in his judicial capacity.[26]

He knew he was supposed to apply Mexican law, but, he noted, "in minor matters, the alcalde is himself the law." "Minor matters" included cases in which he (who did not speak Spanish) was unfamiliar with Mexican law.

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[24] Stephen J. Field, *Personal Reminiscences of Early Days in California with Other Sketches*, 1893. (https://archive.org/details/personalreminis00fielgoog/page/n4/mode/2up)

[25] Walter Colton, *Three Years in California* (Stanford: Stanford University Press, 1949) 55.

[26] Ibid., 230-231.

This did not sit well with the populace, particularly with Americans who were beginning to occupy Alta California. Indeed, the very first edition of *The California Star* newspaper, published in Yerba Buena (soon to be called San Francisco) on January 9, 1847, contained an article entitled, “The Laws of California.” In it, the author wrote,

> We hear the enquiry almost every hour during the day “WHAT LAWS ARE WE TO BE GOVERNED BY:” we have invariably told those who put the question to us, ‘if anybody asks you tell them you don’t know’ because…the same persons would be told at the Alcalde’s office or elsewhere that ‘no particular law is in force in Yerba Buena…and that all suits are now decided according to the Alcalde’s NOTIONS of justice, without regard to law or the established rules governing courts of equity.’ [W]e hoped that …the citizens [would be] secured and protected in all their rights by a scrupulous adherence on the part of the judges to the WRITTEN LAW of the Territory.”[27]

California pioneer Robert Semple, who would later preside over the 1849 Constitutional convention wrote, “we have alcaldes all over the country assuming the power of legislatures, issuing and promulgating their bandos, laws, orders, and oppressing the people.”[28]

A writer who called himself “Pacific” wrote in the January 22, 1848 *California Star*,

> “since the United States flag was hoisted over it, [California] has been in a sad state of disorganization; and particularly as regards the judiciary….[W]e have had no government at all during this period, unless the inefficient mongrel military rule exercised over us be termed such.”[29]

It would be easy to multiply examples of this sentiment. Nathaniel Bennett, one of the three men appointed to California’s newly created Supreme Court in 1850, put it in this nutshell:

> 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.[30]

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[27] “The Laws of California,” *The California Star,* January 9, 1847, 2. https://cdnc.ucr.edu/?a=d&d=CS18470109.2.14&srpos=1&e=------184-en--20--1--txt-txIN-California+Star-------

[28] “Council-Late Emigrants-Judiciary-Convention,” *The California Star* February 13, 1847, 2; attributed to Semple in Cardinal Goodwin, *The Establishment of State Government in California*, 63. https://babel.hathitrust.org/cgi/pt?id=uc1.$b99822&view=1up&seq=85;

[29] Letter to the editor, *The California Star*, January 22, 1848, 2. https://cdnc.ucr.edu/?a=d&d=CS18480122.2.3&e=------184-en--20-CS-1-byDA-txt-txIN-California+Star----1848---

[30] 1 California Reports, preface, vi (1850).

These criticisms may have been a bit hyperbolic. There were trials before alcaldes, some with juries.[31] Both civil and criminal cases were heard. But the Mexican legal system in Alta California had been designed for pastoral communities which needed conciliation and harmony. That did not sit well with the Americans whose legal culture was different, which was adversarial. In addition, Americans' concept of limited government included a separation of legislative, executive, and judicial power and the guarantee of trial by jury.

And it was not just the literati who complained; the criticism was widespread. Mass meetings were held in many towns including San Francisco, San Jose, Santa Cruz, Monterey, Sacramento, and Sonoma.[32] The people's instinct for American-style government and what they regarded as a proper system of justice animated them. They chafed under Mexican-based alcalde rule and under U. S. military rule and clamored for the creation of a familiar civilian government.

1849 CONSTITUTIONAL CONVENTION

Against this background, in June 1849, U.S. military governor General Riley called for a convention to draft a constitution. Riley lacked express authority for such a call. Once again, a U.S. official was acting without legal authority to address a problem created by the absence of a clear system of laws.

There were important issues to be addressed: Riley's call left the convention free to decide for itself such fundamental questions as whether to seek admission to the U.S. as a state or a territory, what should be the state's or territory's boundaries, and whether to ban or permit slavery.

Pursuant to General Riley's call, 48 delegates were elected by district to convene on September 1, 1849, to write a California constitution.[34] The location was Monterey's Colton Hall, which still stands.

The delegates represented a cross-section of California's population, with the major exception of Native Americans, who were unrepresented. Most of the delegates were under 40 years old. Twenty-two were Americans from

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[31] Barry Goode, "The American Conquest of Alta California and the Instinct for Justice: The 'First' Jury Trial in California," *California History* 90, no. 2 (2013): 22-23.

[32] Cardinal Goodwin, *The Establishment of State Government in California, 1846-1850* (New York: Macmillan, 1914), 71-73. As to Sonoma, see Theodore Grivas, *Military Governments in California 1846-1850* (Glendale: The Arthur H. Clark Company, 1963), 201. See also Bancroft, "History of California, vol. VI 1848-1859," *The Works of Hubert Howe Bancroft, Vol. 23* p. 269-270 found at https://archive.org/details/histofcalif02bancroft/page/n9/mode/2up.

[33] *See, e.g.*, William Ellison, A Self-Governing Dominion: California 1949-1860 (Berkeley and Los Angeles, California: University of California Press, 1950), at 19-22.

[34] Id., at 25.

free states, 15 were from slave states, 7 were Californios, and 4 were born elsewhere.[35] The convention hired an interpreter for the Californios who spoke little or no English.

As for the delegates' backgrounds, a slim plurality—14—were lawyers, a dozen were farmers or ranchers, 8 were merchants or traders, 4 were military men, and the rest were of various other backgrounds, including one whose profession was described as "elegant leisure."[36] Interestingly, no delegates were described as miners, perhaps because miners were loath to leave their claims.

The delegates had little guidance, whether from General Riley or from their own materials. One delegate, William Gwin—a former New Orleans customhouse official who would become one of California's first two U.S. Senators—had copies of the Iowa and New York state constitutions, but no other materials were available.[37]

The convention delegates grappled with four open-ended, fundamental questions: (1) would California outlaw or permit slavery, (2) what would be California's eastern boundary, (3) would California seek admission as a single entity or as two or more entities, and (4) would California seek admission as a territory or a state?

Regarding the first question, the delegates voted for a declaration of rights, one of which was to outlaw slavery in California. Some delegates may have been morally opposed to slavery; others, however, may merely have wanted to protect miners from low-wage competition from slaves. In addition, while opposing slavery, the delegates harbored the racial and gender prejudices and mores of the era, as the draft constitution limited voting to "white male citizens."[38]

The second question—namely, California's eastern boundary—ignited lengthy debate. Some delegates wanted California to be as big as possible, that is, extending eastward through present-day Nevada, Utah, Arizona, and New Mexico. Eventually, a majority of delegates voted for a smaller state, with the eastern boundary just beyond the Sierra Nevada so as to include the then-known mineral wealth.

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[35] Id.

[36] J. Ross Browne, *Report of the Debates in the Convention of California on the Formation of the State Constitution in September and October, 1849* (Washington, D. C.: John T. Towers, 1850), at 478-79.

[37] *See* Ellison, supra note 33, at 27.

[38] *See, e.g.*, id. at 27-29.

A rationale for the smaller state was governability, especially the difficulty of transportation and communication across the Sierra during winter.[39] Another rationale for a smaller state was the national debate over slavery: Congress could more easily admit California as a free state if Congress retained free-versus-slave flexibility for the rest of the newly conquered territory.

The third and fourth questions were how many entities would California be and would it be a state or territory. Those questions overlapped. The southern California delegates were approximately one-quarter of the convention's total, and initially, all voted against California seeking admission as a single state. Southern Californians' concerns included taxes and representation. In a single California, property taxes would fall disproportionately on southern California. Northern Californians typically did not have title to their mining claims, but the southern Californians owned ranchos that would be taxed. Southern Californians were concerned, too, that the newly populous north would dominate California's government. In other words, southern Californians feared that they would be paying the bills but without proportionate political power.

Southern California delegates therefore proposed dividing California at San Luis Obispo. The portion of California located north of San Luis Obispo's latitude would apply to be admitted as a state and would be responsible for financing its own government. The southern section would be admitted as a territory, with the federal government responsible for financing the territorial government.

However, the northern delegates were concerned that applying as two entities, one as a state and one as a territory, would signal conflict within California and would complicate and prolong the admission process in Washington, D. C. Eventually, delegates in Monterey compromised. California would seek admission as a single state, but each county would elect its own tax assessors, thereby giving southern counties some local control over property taxes.[40]

The convention completed its work in six weeks, on October 12, 1849. All 48 delegates signed the draft constitution.

The next step was to ask voters for their approval. Originally, 1,000 copies of the draft constitution were printed in English and 250 copies in Spanish so as to inform voters of the constitution's provisions. Later, more copies were printed.[41]

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[39] *See* id. at 33-34.

[40] *See* id. at 36-37.

[41] Id. at 41, 47-48.

In December 1849, voters overwhelmingly approved the constitution, 12,061 in favor and only 811 opposed.[42] That same month, the legislature was elected and met, despite the fact that California had yet to be admitted into the United States.[43]

At last, Alta California had some law recognizable to an American.

Still, it took until September of 1850 for the U. S. Congress to admit California as a state, and then only as part of the Compromise of 1850 – Henry Clay's final effort to stave off civil war while admitting a free state without admitting a slave state. Along with California's admission, that compromise included a strengthened Fugitive Slave Act and the organization of Utah and New Mexico as territories without deciding the slavery question there.[44]

In the meantime, California was still seeking to create a body of law amenable to its gold rush population.

THE CLASH OF CULTURES MADE MANIFEST: *VON SCHMIDT V. HUNTINGTON*

The uncertainties that plagued the legal system in California during the years from the American conquest to the adoption of California first constitution did not magically disappear upon ratification. Rather, as illustrated by an early case, California courts grappled with the clash of legal cultures – Mexican and American – and sometimes chose to disregard controlling authority to support the transition to the new system of law.

The case was *Von Schmidt v. Huntington*.[45] It is on page 55 of Volume 1 of California Reports; just the thirteenth case decided by the new Supreme Court. Indeed, the trial and Supreme Court decision all occurred before Congress admitted California as a state.

The case arose out of a gold rush dispute.[46] In 1849, a group of twenty-nine men in New York founded the New York Union Mining Company. They raised money for the company, agreed to travel to the gold fields via Panama,

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[42] Id. at 53.

[43] Id. at 56-57.

[44] *See generally* https://guides.loc.gov/compromise-1850.

[45] *Von Schmidt v. Huntington* (1850) 1 Cal. 55.

[46] A more complete description of the case and the events surrounding it can be found in: Barry Goode, "The California Supreme Court's First Mistake: *Von Schmidt v. Huntington* – and the Rise, Fall and Ultimate Rise of Alternative Dispute Resolution," *California Legal History* 17 (2022): 267. The history of the New York Union Mining Company and its eventual demise is taken from *Von Schmidt v. Huntington* (1850) 1 Cal. 55 and the Transcript from Records of Court of First Instance, California Supreme Court Case No. 26, filed April 15, 1850, California State Archive, Sacramento, California.

and then work together as a group in the gold country for four and a half years. But that's not how things played out.

The company crossed the isthmus to Panama City to catch a ship to San Francisco. But when they got there, thousands of forty-niners were already waiting for a ship. The problem was that many ships sailed to San Francisco, but few returned, because the crews deserted for the mining camps. Ships piled up in San Francisco harbor.

One historian explained how they managed the Panama mayhem—that is, the imbalance between many passengers and few ships:

> "By a combination of priority, lottery, bribery, trickery and ticket scalping, prefaced by mass meetings and committees of protest, the Americans on shore were screened and … [the] lucky persons selected."[47]

At least three members of the New York Union Mining Company succeeded in elbowing to the front of the line and got passage on an early ship to California. One of them was Julius von Schmidt. The three landed in San Francisco in June 1849. The rest of the company was stuck in Panama and did not arrive for another three months.

The three who got there early did not just sit around. They appear to have headed for the goldfields to seek their fortune.

When the rest of the company arrived, the three early arrivals refused to join their fellow New Yorkers. Not only would they not attend meetings of the company, but "they exerted their efforts to break up and disorganize [the company]…and openly declared that they no longer considered themselves members of the association."

A few days later, Peter Von Schmidt, the father of Julius, arrived. Although Peter was also a member of the New York Union Mining Company, he apparently sided with his son, and the majority accused him, too, of desertion.

Still, the company had brought a fair amount of equipment with them, including some "gold washing machines" invented by Peter Von Schmidt. The question arose as to who was entitled to that equipment or the proceeds of their sale.

That led, of course, to a lawsuit between the bulk of the New York Union Mining Company, who were plaintiffs, and the three early arrivals plus Peter Von Schmidt, who were defendants.

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[47] John Walton Caughy, *The California Gold Rush* (Berkeley and Los Angeles: University of California Press, 1975), 65-66.

The case first came before one of the more colorful characters of early California, Judge William B. Almond. He was born in Virginia, headed west with a fur trapping company, and then settled back in Missouri to practice law and enter politics. When he heard of the gold strike, he rushed to California arriving in late July 1849.[48] Just two and a half months later he was on the bench.[49]

> "He would often sit in his court on an old chair tilted back, with his feet perched, higher than his head, on a small mantel over the fireplace; and in that position, with a red shirt on and sometimes scraping the dirt from under his nails or paring his corns he would dispense justice."[50]

He could not be expected to know Mexican law. But that was a problem, for as noted, the law of a conquered province remains in full force and effect (as between private parties) unless and until the conquering government affirmatively replaces those laws.

Lest there be any doubt, the new California Constitution expressly provided for the continuation of Mexican law:

> …all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, until altered or repealed by the legislature shall continue…[51]

So Mexican law was still in effect. But one of the most important features of Mexican law – of alcalde government – was *"conciliacion"*, conciliation. In old Alta California, towns were small, community was important, and harmony was valued. So, whenever a civil dispute arose, Mexican law provided that no one could file suit without first engaging in mediation.

> Conciliation was "a fixed principle under the Mexican law, and in fact of the civil law from which it sprang… [A]lcaldes…were the ministers of conciliation."[52]

Pre-filing mediation was key to keeping the peace in a small, tight knit frontier community. And it worked. Between 85% and 90% of the civil cases

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[48] William McClung Paxton, *Annals of Platte County, Missouri: From Its Exploration Down to June 1, 1897; With Genealogies of its Notes Families, and Sketches of its Pioneers and Distinguished People* (Kansas City, Mo.: Hudson-Kimberly Publishing Company, 1897), 110, 289-290, https://archive.org/details/annalsofplatteco00paxt

[49] Goode, "The California Supreme Court's First Mistake" *supra*, 276, TAN 34.

[50] Theodore Henry Hittell, *History of California*, vol. II, book VII (San Francisco: Pacific Press Publishing House and Occidental Publishing Co.: 1885) 778, https://archive.org/details/historyofcalifor0002theo/page/778/mode/2up?q=Almond

[51] Constitution of the State of California, 1849, Schedule (following Art. XII), Sec. 1.

[52] Hittell, *supra note 50*, 777.

brought to the alcalde were resolved by conciliation.[53] (That's not surprising. Approximately 87.5% of all civil cases filed in California today settle before trial.)[54]

So, when Von Schmidt was sued by the New York Union Mining Company, he moved to dismiss the case on the ground that plaintiffs had not first sought conciliation – they did not engage in pre-filing mediation as required by Mexican law.

Judge Almond had a rule: no lawyer was allowed to argue for more than five minutes.[55] That was hardly time to explain to the man from Missouri the niceties of Mexican practice and procedure.

The Americans in Northern California had been inveighing against alcalde rule for three years. They wanted nothing to do with a Mexican system that tried to mediate disagreements and keep the peace. Judge Almond – an American through and through – had no doubts. He denied the motion and decided the case on its merits.

Von Schmidt *et al* appealed. Their attorney was John Dwinelle. He was quite prominent, fluent in Spanish, and learned in Mexican law. He had a lively political career and ultimately served on the founding Board of Regents of the University of California – which is why there is a Dwinelle Hall on the Berkeley campus.[56]

Dwinelle correctly explained Mexican law to the high court. And, the Supreme Court agreed with him – generally. It accepted the fact that Mexican law was generally applicable and acknowledged that Mexican law required pre-trial mediation. Justice Nathaniel Bennett 's opinion quoted extensively from Mexican law and acknowledged the value of that system of law,

> …Judges…shall discourage litigation, as far as in them lies, by using their endeavors to induce parties to compose their differences voluntarily and in a friendly manner… and by making use of persuasion, and all other means which their discretion shall dictate, to convince the parties

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[53] David J. Langum, Sr., *Law and Community*, 98 ("approached 90%"), 101 ("about 85%").

[54] Judicial Council of California, *2023 Court Statistics Report, Statewide Caseload Trends, 2012-13 Through 2021-22*, 61, https://www.courts.ca.gov/documents/2023-Court-Statistics-Report.pdf. (Data for Fiscal Year 2021-22.)

[55] Peter H. Burnett, *Recollections and Opinions of an Old Pioneer* (New York: D. Appleton & Company, 1880) 343-44. https://www.loc.gov/item/01006673.

[56] "The Late Mr. Dwinelle," *New York Times*, February 12, 1881, 8. https://timesmachine.nytimes.com/timesmachine/1881/02/12/issue.html. "Class of 1843: John Whipple Dwinelle," *Hamilton Literary Monthly*, May 1882, 365-66.

> of the benefit which will result to them from a composition of their differences, and the damage and expense inseparable from litigation, even when accompanied by success.[57]

So, Justice Bennett concluded, "This being the general rule, *conciliacion* was necessary under the Mexican statute in the case before us."[58]

But recall Justice Bennett's criticism of the "disorganized state" of the law prior to the adoption of the California Constitution.[59] He was no more satisfied with Mexican law than any other American.

So, he wrote in *Von Schmidt*,

> …since the acquisition of California by the Americans, the proceeding of *conciliacion* has, in all cases, been deemed a useless formality by the greater portion of the members of the bar, by the Courts, and by the people….[60]

Applying retroactively a statute passed by the new Legislature,[61] he deemed conciliation – which was at the heart of the Mexican system of justice – to be a "useless and dilatory formality" not affecting the very right and justice of the case.[62]

In short, it did not matter to the court that both Mexican and California law still required pre-filing mediation. What was important was that two legal systems clashed. Two value systems clashed. The conqueror's values and system were adopted.

Not content to decide just this case, Justice Bennett underscored the importance of the conqueror's value system,

> We have entered thus fully into an explanation of the doctrine of *conciliacion*, and given our view of it at length, in order that the profession may understand, that the objection for want of conciliatory measures is, so far as the Court is concerned, disposed of now, and as we sincerely hope, forever.[63]

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[57] *Von Schmidt v. Huntington*, 1 Cal. at 61.

[58] *Ibid.*

[59] 1 Cal. Reports, Preface, vi.

[60] *Von Schmidt v. Huntington*, 1 Cal. at 64.

[61] "The Supreme Court may reverse, affirm, or modify any judgment, order, or determination appealed from… and render such judgement as substantial justice shall require, without regard to formal or technical defects, errors or imperfections, not affecting the very right and justice of the case…". Stats. 1850, Ch. 23, § 26.

[62] *Von Schmidt v. Huntington,* 1 Cal. at 65.

[63] *Von Schmidt v. Huntington,* 1 Cal. at 66.

The court hoped to dispose of pre-*filing* mediation "forever." And, in fact, their view – and that of the bar was so fixed, that it disposed of court sponsored pre-*trial* mediation as well.

Forever is a long time. And, decades later, Justice Bennett's view was finally disregarded.

Beginning in the late 1930s, California took some tentative steps towards allowing mediation in family law courts. In 1939, it created a "children's court of conciliation."[64] In the 1970's, some of our larger urban courts began requiring mediation of child custody and visitation disputes[65], and in 1980, the legislature mandated that.[66]

The movement towards mediation gathered steam through the rest of the 20th century. In 1993, the Legislature declared: "It is in the public interest for mediation to be encouraged and used where appropriate by the courts."[67] And it said, rejecting *Von Schmidt*, "Mediation…can have the greatest benefit for the parties in a civil action when used early…"[68]

Effective 2006, the Standards of Judicial Administration were amended to read, "Superior courts should implement mediation programs for civil cases a part of their core operations."[69] Today, civil lawyers know that sooner or later their case will be mediated, often to a successful conclusion.

The value of the Mexican system – so decisively rejected by the Forty-Niners, finally found a place in our modern system of justice.

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[64] Stats. 1939, Ch. 737. See Family Code § 1800 et seq. which recodified what was originally Code of Civil Procedure § 1730 et seq.

[65] Michelle Deis, "California's Answer: Mandatory Mediation of Child Custody and Visitation Disputes," *Ohio State Journal on Dispute Resolution 1* (1985): 155-56, https://kb.osu.edu/bitstream/handle/1811/75845/OSJDR_V1N1_149.pdf.

[66] Stats. 1980, Ch. 48, § 5, adding Civil Code § 4607.

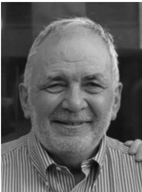
[67] Cal. Code of Civ. Pro. § 1775(c).

[68] Cal. Code of Civ. Pro. § 1775(d).

[69] Standards of Judicial Administration, Standard 10.70, effective January 1, 2006.

About the Authors

Judge Barry P. Goode (Ret.) was a judge on the Superior Court of Contra Costa County, California, where he served in several roles, eventually becoming presiding judge. He began his legal career as a special assistant to U.S. Senator Adlai E. Stevenson III of Illinois in 1972. In 1975, he joined the law firm of McCutchen, Doyle, Brown, and Enersen, and served there for 26 years, becoming a partner in 1980. In 2001, Governor Davis named him legal affairs secretary. He held that position until he was appointed to the bench in 2003. Judge Goode retired in 2018. He serves on the board of the California Supreme Court Historical Society.



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