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NATIVE AMERICANS AND CIVIC IDENTITY IN ALTA CALIFORNIA

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I. INTRODUCTION

One year after California successfully petitioned for statehood, news surfaced in the southern part of the state that a "shrewd Indian named Roane" was impersonating an American alcalde.[1] While this unauthorized assumption of administrative and perhaps judicial functions may or may not have proven lucrative for the purported office-holder, it reflected a level of contact between Indian[2] and Euro-American society sufficient to make the charade plausible. At a minimum, the would-be official must have been literate in English or Spanish, if not both, familiar with the structure of the Mexican and American[3] legal systems, and educated through tutelage or observation in the duties of an alcalde. The historical factors capable of generating Roane's apparent expertise also formed the basis for a specifically Californian social and legal order, a system of policies that differed from and conflicted with those developed in the eastern United States.

During the nineteenth century, three successive regimes purported to control "Alta California" and its native inhabitants. The first regime was Spanish, typified by organized missionary activity. While the United States removed eastern Indian tribes to large reservations isolated from white settlements and engaged in military action against them, the European conquerors on the Pacific coast adopted a far different approach to the indigenous residents. The first major European influence on the frontier province of Alta California was Franciscan missionizing activity, which in 1769 began in earnest. The Franciscans' stated goal was to

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1. *The Indian Law*, L.A. STAR, Aug. 16, 1851. An alcalde was a local official charged with preserving public order, a task extending to the apprehension of criminals, punishment of misdemeanors, and, for a small fee, resolution of disputes and registration of land grants.

2. The term "Indian," rather than "Native American," appears throughout this article to reflect contemporary usage and to achieve consistency with primary sources.

3. While the adjective "American" is properly claimed throughout the Western hemisphere, it is used in this article to refer to the United States, in accordance with both contemporary documents and common modern expression.

Christianize the Indians, a process that included European cultural and vocational training for those Indians who entered the mission system.

The second regime in Alta California came during the area's short-lived tenure as a Mexican province. Native-born descendants of the Spanish invaders included the territory in their newly-formed Mexican state in 1821, and shortly thereafter they began disassembling the mission system. The mission Indians, however, did not return to their former tribes; rather, they became independent citizens of the Mexican state, in some cases benefiting from the distribution of mission lands. The "Anglos," or United States citizens who settled in California during the period of Mexican rule, and mission Indians thus became accustomed to economic and social interaction with one another according to Mexican legal norms and conditions, including the alcalde system.

The third regime began with the cession of California to the United States in 1848. This act, along with the subsequent discovery of gold in the region, precipitated a sudden increase in Anglo immigrants whose primary contact with Indians had been in the east or during overland migration. These new conquerors of the territory, together with Federal Indian Commissioners sent from Washington, D.C., expressed support for state and federal laws which would have removed mission and tribal Indians alike to large reservations distant from Anglo settlement or mining operations. In response, the established Anglo residents joined with the "Californios," or former Mexican citizens of primarily Spanish descent, to promulgate statutes which implicitly recognized the complex interactions between some members of Anglo, Californio, and Indian society, as well as Indian exercise of some small degree of economic power. The resulting state constitution and laws fell short of granting state citizenship and suffrage to the detribalized Indians, but it ostensibly protected Indians against removal from their privately-held lands.

These Californian legal compromises remained at odds with federal policy, which eventually proved ineffective and was modified in accordance with the existing social forms of the state. It is entirely plausible, then, that a mission Indian like Roane could have had the facility to impersonate an American alcalde convincingly in some areas of post-Mexican California without raising immediate suspicion. It is nevertheless to be expected that certain California citizens considered such an imposter to be in violation of the federal Indian laws and even a threat to the existing legal order.[4]

During both California's brief period as a United States territory and its first decade of statehood, discussion of the legal status of Indians

4. *See The Indian Law, supra* note 1.

divided residents of the state. On one side were those who wished to perpetuate the forms of interaction established under Spanish and Mexican rule, on the other those who would have preferred disestablishment and isolation of all Indians. A significant portion of the related legal action addressed Indian rights with respect to real property, which was traditionally at the disposal of the conquering sovereign. In the case of California, certain Indian rights to land were protected by state law, despite federal policy and the contrary wishes of a portion of the citizenry. Examination of the legal processes which offered some protection to mission Indian property rights may thus illuminate both the social process inherent in defining the "legitimate" population of the state and the impact of such legal constructions upon the state's own political identity.

This article examines this history and traces its impact on the development of society in Alta California. Part II describes the current state of scholarship concerning the political and legal roles of the California mission Indians. Part III combines the disparate academic strands touching upon these detribalized Indians by examining the successive Spanish, Mexican, and American regimes as well as local responses to sovereign control. The impact of this California experience and subsequent reform movements on the United States' Indian policy as a whole appears in Part III. Finally, Part IV explores the socio-legal implications of California's civic formation and "self-fashioning"[5] around the presence and limited participation of the native inhabitants, concluding that incorporation of any rights-bearing "other" into the fabric of society is an inexorable step toward the formation of a truly heterogeneous polity.

II. HISTORIOGRAPHIC BACKGROUND

There exists no integrated historical dialogue concerning the legal status of Indians in California, and there is therefore little acknowledgement or assessment of the mission Indians' overall impact on California's civic identity. Instead, the topic is informed by three separate historiographic strands: regional history, legal history and Indian mission history. All three are subdivided according to the political periodization of the region, and none has explored the continuities between these epochs of California history. The following discussion seeks to sketch the broad contours of these three historiographic strands, briefly discussing major figures and movements in each. This overview will give

5. The term is adopted from STEPHEN GREENBLATT, RENAISSANCE SELF-FASHIONING (1980).

the reader a sense of the connections between the various periods, to which the rest of the article is devoted.

A. REGIONAL HISTORIOGRAPHY

The first dominant strain in California regional history was established by its patriarch, Hubert H. Bancroft, a prolific author and the motivational and financial force behind collection of both documentary and oral histories in the late nineteenth century. Bancroft and his followers contributed much to current knowledge about the field, but they tended to view the Spanish and Mexican periods as static and the Californios as superstitious and childlike in contrast to the industrious Anglos who followed.[6] This initial historiographical stage was soon replaced by others that sought a fuller view of the region's various racial groups.

The next major period came in the 1920s, when Herbert Eugene Bolton suggested a new direction for the field and sparked interest in the Spanish period by studying Alta California in the context of other border areas of New Spain.[7] By focusing on the Spanish motives for settlement of the region, including encroachment by Russian fur traders and renewed missionary interest in the Indians,[8] Bolton paved the way for later scholars to address early racial and ethnic interactions.[9] These scholars also attacked the myth that the Spanish period was socially and economically uneventful by chronicling such topics as social mobility[10] and the controversy regarding settlement patterns in California.[11]

Scholars of the brief Mexican period of California history have also seemed eager to correct Bancroft's early image of stasis and lack of organization. David J. Weber, for example, has argued that California and other frontier provinces mirrored changes occurring in central Mexico, including the development of representative institutions of government, replacement of the Spanish mercantile economic system with a modified laissez-faire economy, and pronouncements of racial equality.[12] New routes of commerce and increased Anglo immigration

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6. *See, e.g.*, HUBERT H. BANCROFT, CALIFORNIA PASTORAL (1888); CHARLES E. CHAPMAN, HISTORY OF CALIFORNIA: THE SPANISH PERIOD (1921).

7. *See generally* HERBERT E. BOLTON, THE SPANISH BORDERLANDS: A CHRONICLE OF OLD FLORIDA AND THE SOUTHWEST (1921).

8. *Id.* at 258-59.

9. *See, e.g.*, Juan B. Olaechea Labayen, *Categoria Socio-politica y Professional de los Mestizos Hispano-Indianos*, 32 REVISTA INTERNACIONAL DE SOCIOLOGIA (REV. INT'L SOC.) 55, 55-82 (1973); Gloria E. Miranda, *Racial and Cultural Dimensions in Gente de Razón Status in Spanish and Mexican California*, 70 S. CAL. Q. 265, 265-78 (1988).

10. L. N. McAlister, *Social Structure and Social Change in New Spain*, 43 HISPANIC AM. HIST. REV. 349, 365-66 (1963).

11. *See generally* OAKAH L. JONES, LOS PAISANOS: SPANISH SETTLERS ON THE NORTHERN FRONTIER OF NEW SPAIN (1979).

12. *See generally* DAVID J. WEBER, THE MEXICAN FRONTIER, 1821-1846 (1982).

also promoted economic realignment away from Mexico and toward the United States.[13] Both Weber and George Harwood Phillips described the destabilizing influence of the unconverted Indians of the interior, who maintained an independent culture and frequently conducted raids against the ranches of Hispanic "pobladores."[14] Also indicative of nascent interest in the Mexican period is the recent republication of the contemporary memoir of Antonio Maria Osio, which he refused to sell to Bancroft in hopes of finding a wider and perhaps more sympathetic audience.[15]

As the Mexican period of California's history gave way to the United States period, the dominant story became one of rapid development and population expansion, propelled at its onset by the gold rush. At least one historian has addressed the continued presence of the Californio population during this period of rapid expansion, though with perhaps too much emphasis on the stability of land ownership and usage in the pre-American period and the disruption caused by new residents.[16] Similarly, another scholar has chronicled the continued survival of a small portion of the Indian population through the nineteenth century and its adaptation to changing circumstances in California.[17] This regional historiography, running from the static, nineteenth century views of Bancroft to modern treatments of the state's development, constitutes the first strand in the history of Indians' legal status in California.

B. LEGAL HISTORIOGRAPHY

The second major historiographical strand is the legal history of California, characterized by the clash between the traditional civil law system and the new common law system of the United States. An article included in the first volume of case reports for the new state described the previous system for the benefit of members of the bar,[18] while a report by the California Senate Committee on the Judiciary considered

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13. *Id.*; *see also* John A. Hawgood, *The Pattern of Yankee Infiltration in Mexican Alta California 1821-1846*, 27 PAC. HIST. REV. 27 (1958).

14. *See generally* George HARWOOD PHILLIPS, INDIANS AND INTRUDERS IN CENTRAL CALIFORNIA, 1769-1849 (1993).

15. *See generally* ANTONIO MARIA OSIO, THE HISTORY OF ALTA CALIFORNIA: A MEMOIR OF MEXICAN CALIFORNIA (Rose M. Beebe & Robert M. Senkewicz trans., 1996).

16. *See generally* LEONARD PITT, THE DECLINE OF THE CALIFORNIOS (1966); *see also* Tomas Almaguer, Class, Race, and Capitalist Development: The Social Transformation of a Southern California County, 1848-1903 (1979) (unpublished Ph.D. dissertation, University of California (Berkeley)) (on file with author).

17. *See generally* ALBERT L. HURTADO, INDIAN SURVIVAL ON THE CALIFORNIA FRONTIER (1988).

18. R.A. Wilson, *The Alcalde System of California*, 1 Cal. 559, 559-79 (1850).

and rejected a proposal to continue in force the Spanish civil law system rather than adopting Anglo-American common law, as the state chose.[19] Apart from this brief mention, however, the debate about adoption of a legal system remained at an academic level and assumed the need to choose one legal system rather than allow for creation of a hybrid.[20]

This disjointed, periodized view of California's legal development found its first modern voice in Woodrow James Hansen, who characterized the Spanish and Mexican law as suited to maintenance of order and a sense of community but inadequate to the commercial needs of independent-minded Anglo immigrants.[21] This thesis was repeated by David J. Langum, who noted that American expatriates arriving in California during the Mexican period avoided, to the greatest extent possible, making use of local law in their business enterprises.[22] Similarly, Gordon Morris Bakken has noted that while California quickly joined the stream of American law, "the [California Supreme] Court often cited California's peculiar circumstances in arriving at decision."[23]

A different perspective on this caricature of California legal history has come from more textured descriptions of Spanish, Mexican, and American law. Charles Cutter, for example, has noted the legal diversity in various areas of New Spain and analyzed the process of adapting formal law to relatively unsettled areas.[24] Richard R. Powell undertook a similarly extensive description of California law, even attempting to incorporate pre-existing Indian tribal law.[25] As a result of these studies of the legal systems of the various regimes in California, scholars have concluded that some fragments of civil law penetrated the 1850 common-law barrier, at least in the area of property law.[26] These studies, however, tended to treat the continued validity of earlier rights to land as an historical anomaly, not the result of a negotiation process among old

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19. California Senate Committee on the Judiciary, *Report on Civil and Common Law*, 1 Cal. 588, 588-604 (1850) [hereinafter *Report on Civil and Common Laws*].

20. For an example of the operation of this principle in the Supreme Court of California, see Suñol v. Hepburn, 1 Cal. 254, 259 (1850).

21. *See generally* WOODROW JAMES HANSEN, THE SEARCH FOR AUTHORITY IN CALIFORNIA (1960).

22. *See generally* DAVID J. LANGUM, LAW AND COMMUNITY ON THE MEXICAN CALIFORNIA FRONTIER: ANGLO-AMERICAN EXPATRIATES AND THE CLASH OF LEGAL TRADITIONS, 1821-1846 (1987).

23. GORDON MORRIS BAKKEN, THE DEVELOPMENT OF LAW IN FRONTIER CALIFORNIA: CIVIL LAW AND SOCIETY, 1850-1890, at 112 (1985).

24. *See generally* CHARLES CUTTER, THE LEGAL CULTURE OF NORTHERN NEW SPAIN, 1700-1810 (1995).

25. *See generally* RICHARD R. POWELL, COMPROMISES OF CONFLICTING CLAIMS: A CENTURY OF CALIFORNIA LAW, 1760-1860 (1977).

26. *See* Gordon Morris Bakken, *Mexican and American Land Policy: A Conflict of Cultures*, 75 S. CAL. Q. 237, 237-38 (1993); Iris H.W. Engstrand, *California Ranchos: Their Hispanic Heritage*, 67 S. CAL. Q. 281, 281-90 (1985); Iris H.W. Engstrand, *The Legal Heritage of Spanish California*, 75 S. CAL. Q. 235 (1993); Myra Ellen Jenkins, *Spanish Land Grants in the Tewa Area*, 47 N.M. HIST. REV. 113 (1972).

and new citizens of California. Thus, this second strand of the history of Indians' legal status in California is, like the first strand, an incomplete account.

C. INDIAN MISSION HISTORIOGRAPHY

The third and final strand is that associated with the missions and mission system. The history of Indian-European relations in California inevitably revolves around the role of the missions. The earliest accounts of missionary activity are the annual reports of the missionaries themselves, followed shortly thereafter by quasi-hagiographies of prominent missionary fathers. There are also more recent, similar attempts to justify the mission system and to attribute some of its harmful effects to other sources.[27]

Later scholars were more critical of the missions. For example, Sherburne F. Cook used demographic studies to establish a correlation between Indian population decline, high mortality rates and the expansion of the missions.[28] This evidence has been corroborated by later demographic studies[29] and strengthened by archaeological evidence that after 1810 the missions shifted focus from active conversion efforts to pure economic exploitation of the Indians.[30] A corollary to these revelations has been research seeking to determine why many California Indians, given their substantial independence and the scant resources devoted to subjugating them,[31] voluntarily entered the mission labor force. Early answers to this question named the missionaries' offers of food and pageantry,[32] while more recent work has suggested additional reasons, including beliefs about the spirit world, the need for political and military allies and the possibility of upward mobility for low-status Indians.[33]

Whatever the apparent advantages and actual effects of the California missions, their tenure was short-lived. The young Mexican gov-

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27. *See, e.g.*, Francis F. Guest, *Municipal Government in Spanish California*, 46 CAL. HIST. SOC'Y Q. 328 (1967).

28. *See generally* SHERBURNE F. COOK, THE CONFLICT BETWEEN THE CALIFORNIA INDIAN AND WHITE CIVILIZATION (University of California Press 1976) (1943).

29. *See generally* SHERBURNE F. COOK & WOODROW BORAH, ESSAYS IN POPULATION HISTORY: MEXICO AND THE CARIBBEAN (1979).

30. PAUL FARNSWORTH & ROBERT H. JACKSON, CULTURAL, ECONOMIC, AND DEMOGRAPHIC CHANGE IN THE MISSIONS OF ALTA CALIFORNIA: THE CASE OF NUESTRA SEÑORA DE LA SOLEDAD, IN THE NEW LATIN AMERICAN MISSION HISTORY 109-29 (Erick Langer & Robert H. Jackson eds., 1995).

31. PHILLIPS, *supra* note 14.

32. David Lavender, *Building a New World: The White Man's Mighty Effort to Civilize the First Californians*, 8 AM. W., Nov. 1971, at 36, 38.

33. ROBERT H. JACKSON & EDWARD CASTILLO, INDIANS, FRANCISCANS, AND SPANISH COLONIZATION: THE IMPACT OF THE MISSION SYSTEM ON CALIFORNIA INDIANS 108 (1995).

ernment passed measures providing for gradual secularization of the missions and transformation of the Indians into independent farmers.[34] These measures were supplanted by an 1833 law requiring full, immediate secularization, an action which left the ownership status of the mission lands open to debate.[35] For the most part, the former mission Indians were absorbed as peasant labor on the large ranchos,[36] though some received title to the lands upon which they lived.[37] Indian ownership of property, however, was not consistently recognized, and many holdings were ultimately ceded to the government through treaties.[38] Thus, the historiography of the missions is, like the other two strands, incomplete.

Although each is informative in its own right, the regional, legal and Indian mission historiography of California do not reach far enough to address the social factors which contributed to continuity and change in the legal treatment of Indians. The regional history has concerned itself primarily with characterization of the politically dominant Euro-American group in each period; legal history has focused upon the nature of legal systems before and after statehood; and Indian mission history has described the role of the missions in assigning a status to Indians within the broader society.

III. SPANISH, MEXICAN, AND CALIFORNIAN CULTURAL NEGOTIATION

As the foregoing discussion demonstrates, California's major historiographic strands fail to paint a complete picture of the history of the legal status of Indians. A few excellent studies of the legal status of Indians do exist at the intellectual macro-level[39] and at the political micro-level.[40] However, none has focused upon the role of cultural negotiation in the construction of a legal system reflective of social reality. The following discussion combines the disparate academic strands touching upon these detribalized Indians by examining the

34. C. Alan Hutchinson, *The Mexican Government and the Mission Indians of Upper California, 1821-1835*, 21 AMERICAS 335, 335-62 (1964).

35. *Id.*

36. Lavender, *supra* note 32, at 61.

37. LISBETH HAAS, CONQUESTS AND HISTORICAL IDENTITIES IN CALIFORNIA, 1769-1936, at 58-60 (1995); HURTADO, *supra* note 17, at 126-29.

38. *See supra* note 37.

39. *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990).

40. *See generally* WOODROW BORAH, JUSTICE BY INSURANCE: THE GENERAL INDIAN COURT OF COLONIAL MEXICO AND THE LEGAL AIDES OF THE HALF-REAL (1983).

successive Spanish, Mexican and American regimes and local responses to sovereign control.

A. SPANISH MISSIONIZING

When the Franciscans began missionary activity in Alta California in 1769, approximately 300,000 Indians lived in small semi-sedentary and nonsedentary bands throughout the province. By the end of Spanish rule in 1821, that number had dropped to approximately 200,000, some 25,000 of whom had settled in the missions.[41] A description of Spanish activity among the California Indians must therefore acknowledge at the outset that the formation of a culturally distinct, European-influenced group of mission Indians took place against a background of disease, malnutrition and violence which led to a drastic reduction of the total Indian population.[42]

The activity of the missionaries in California was hardly an amateur undertaking, carrying with it the weight of two and one-half centuries of controversy, theology and experience. The goals of Spanish missionizing were at least twofold, combining a spiritual imperative with royal economic demands. From the earliest decades of Spanish activity in the New World, attempts to cover economic exploitation of the Indians with a cloak of religious responsibility and benevolence aroused the ire of clerics such as Bartolomé de las Casas and Franciscus de Victoria.[43] The form of slavery embraced by the Spanish,[44] however, created a lasting association between conversion of the Indians to Christianity and their organization into a docile labor force.

The California Indians who voluntarily entered the missions, then, were directed by the missionaries in nearly all aspects of their daily lives. While the Indians retained some aspects of their former cultural identities, all tribal associations were terminated. In place of their former habits, the mission Indians adopted Roman Catholic religious practices and received gender-specific vocational training ranging from sewing and weaving for women to blacksmithing, carpentry and animal husbandry for men, as well as some Spanish language and literacy training. At the same time, they suffered from the effects of malnutrition, high

41. HURTADO, *supra* note 17, at 1. Given the absence of census data, all figures regarding pre-contact populations are educated guesses and thus subject to challenge. *See generally* WILLIAM M. DENEVAN, THE NATIVE POPULATION OF THE AMERICAS IN 1492 (1976); DAVID HENIGE, NUMBERS FROM NOWHERE (1998).

42. *See generally* JACKSON & CASTILLO, *supra* note 33.

43. WILLIAMS, *supra* note 39, at 93-108.

44. *See generally* LESLEY BYRD SIMPSON, THE ENCOMIENDA IN NEW SPAIN: FORCED NATIVE LABOR IN THE SPANISH COLONIES, 1492-1550 (1929).

infant mortality rates, the same European diseases that attacked their tribal counterparts, and corporal punishment at the hands of the Franciscans. While the processes of acculturation met with varied degrees of success and encountered some resistance among the mission inhabitants, within a generation those processes had created a group with a new and distinct cultural identity, an identity they retained even after the mission system ended.[45]

B. MEXICAN FORMAL EQUALITY

Following California's mission period was a brief tenure as the northernmost frontier province of the independent republic of Mexico, a tenure which featured extensive social restructuring. Abolition of Spain's race-conscious legal order led, among other things, to abolition of the mission system and the end of religious guardianship of the Indians. Therefore, unlike their tribal counterparts, some portion of the mission Indians were able to transform the knowledge of European culture acquired under Franciscan tutelage into the conscious exercise of citizenship rights.

Even before they won the Mexican revolution and gained full independence from Spain, the rebels attacked the validity of predicating civil rights on racial distinctions.[46] The rebels' 1821 Plan of Iguala stated: "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of the monarchy, with a right to be employed in any post, according to their merits and virtues."[47] The first Mexican Congress later detailed the scope of the Plan's commitment to racial equality in a series of acts that proscribed inclusion of racial designations in public or private documents and protected property rights without regard to race.[48]

A logical corollary to the elimination of legal distinctions on the basis of race among Mexicans was the dismantling of the mission system, which was primarily directed at educating and controlling a particular racial group, as it supported the position of the organized religion as a source of authority independent of the revolutionary government. The process of secularizing the missions began shortly after independence and was hastened by legislation in 1833 ordering the immediate dissolu-

45. JACKSON & CASTILLO, *supra* note 33, at 31-39.

46. For a description of the role of race in northern New Spain, see CLAUDIO LOMNITZ-ADLER, EXITS FROM THE LABYRINTH: CULTURE AND IDEOLOGY IN THE MEXICAN NATIONAL SPACE 261-81 (1992).

47. Chauncey Shafter Goodrich, *The Legal Status of the California Indian*, 14 CAL. L. REV. 81, 88 (1926) (quoting *Plan of Iguala*, Feb. 4, 1821).

48. *Id.*

tion of the system and the distribution of mission lands.[49] Through this process, some of the emancipated[50] mission Indians became landowners and electors, although others suffered from the loss of their source of economic support.[51]

During this period of Mexican control, Anglo expansionism brought a steady stream of immigrants to California, culminating in the United States government itself invading the territory in 1846.[52] Mexico quickly ceded the frontier province to the United States, protecting the rights of its Indian and other citizens through the Treaty of Guadalupe Hidalgo. This treaty provided that the Mexican residents of California had one year in which to choose to retain their former citizenship and stated that they would otherwise:

> be incorporated into the Union of the United States and be admitted at the proper time (to be judged by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the meantime shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction.[53]

This noble but toothless document notably failed to reference the lack of legal distinction among citizens on the basis of race, an omission that would later adversely affect the degree and manner of incorporation of the mission Indians into the new polity.

Rapid changes in the political order, social structure and racial composition of Alta California thus extended formal legal equality to the Indians. Just as a number of the mission Indians began to exercise the advantages of this formal equality coupled with some knowledge of European culture and the benefits of land ownership, however, the American acquisition of California forced a renegotiation of their status.

C. CALIFORNIAN NEGOTIATION

California after 1848 accepted the task of redefining itself with reference to its new metropole, Washington, D.C., while incorporating

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49. JACKSON & CASTILLO, *supra* note 33, at 87-106.

50. The legal use of the term "emancipated" to describe the former mission Indians implied an analogy to the termination of guardianship of minors, rather than to the freeing of slaves.

51. JACKSON AND CASTILLO, *supra* note 33, at 87-106; Goodrich, *supra* note 47, at 88.

52. Wilson, *supra* note 18, at 575.

53. Treaty of Peace, Friendship, Limits, and Settlement, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

some elements of its previous forms of government. Chief among the issues facing the leaders of the new United States territory were the creation of a constitution, the choice of a system of state law, and the allocation of real property among the residents of the state, including Indians. The result was a kind of hybrid of procedural inequality and limited substantive rights, a hybrid which gave California a unique proto-pluralist identity rooted in its Spanish and Mexican past.

1. *Citizenship and Suffrage*

At the Monterey constitutional convention in 1849, one of the most hotly-contested issues was the composition of the California citizenry and electorate, particularly with respect to the inclusion of Indians. While some delegates noted that Mexico had made no political distinctions on the basis of race, most of those in favor of Indian suffrage sought this privilege on behalf of assimilated landholders only, a number that one delegate placed at approximately 200 persons.[54] Various legal constructions were suggested, including the qualification as electors of "civilized Indians," "descendants of Indians," and "Indians taxed as landholders."[55] None of these limitations proved acceptable to the opponents of Indian suffrage, who charged racial inferiority and feared that entire tribes could be made nominal landholders and marched to the polls in support of a particular candidate.

Some confusion as to the definitions of "Indian" and "white" existed on both sides of the question, moreover, as some opponents of Indian suffrage conceded that "white" men might have Indian blood. The absurdity of the discussion was highlighted when one Californio delegate requested definition of the term "white," noting that many former Mexican citizens had skin much darker than that of recent Anglo immigrants. He was quickly informed that the expression referred to race, not skin tone. When less ambiguous fractional definitions according to bloodline were suggested, however, delegates dismissed them as difficult to enforce.[56] It appears, then, that legal confusion stemmed from the fact that racial designations in the territory were somewhat fluid, and that they were as dependent upon cultural identity as they were upon heritage.

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54. J. ROSS BROWNE, REPORT ON THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 307 (1850). This number represents an extremely small portion of the California population, estimated in its petition for statehood at 26,000 on January 1, 1849, and at 107,069 on January 1, 1850. *Id.* app. at xxiii.

55. *Id.* at 61-73.

56. *Id.*

Among the sources of authority invoked by the delegates to the convention were the Treaty of Guadalupe Hidalgo, which did not recognize any racial distinctions among the former Mexican residents of California,[57] and the United States Constitution, which excluded "Indians not taxed" from proportional representation in Congress.[58] Certain delegates believed that the language of the treaty required admission to the California electorate of all previously enfranchised Mexican males who had become United States citizens, as the Constitution designated of a treaty as the supreme law of the land.[59] Delegates opposed to the enfranchisement of Indians pointed out that citizenship, even if granted by the treaty, did not guarantee admission to the California electorate.[60] Others advanced the opinion that state sovereignty itself would be threatened if the federal government could, through treaty provisions, prescribe the composition of the state electorate. The restricted electorates of Texas and Louisiana, demographically and historically similar regions, were offered as evidence that the United States intended no such intrusion upon state prerogatives.[61]

In addition, the delegates brought to the convention general opinions formed by previous contact with Indians, either as established residents of California with exposure to the mission Indians or as recent arrivals with fresh memories of Indians in the East or during overland migration.[62] These recent arrivals to California may also have been influenced by the national political parties' stance on issues related to Indians, though party positions were not referenced at the convention. Jacksonian Democrats had engineered removal of Indians westward in the interests of "manifest destiny," a doctrine that would also justify displacement of mixed-blood descendants of the Spanish conquerors

57. *Id.*

58. U.S. CONST. art. I, § 3.

59. U.S. CONST. art. 6, § 2.

60. BROWNE, *supra* note 54, at 62. Delegates to the constitutional convention did not seriously debate whether the Treaty of Guadalupe Hidalgo had actually granted citizenship to those Mexicans who did not choose to retain their foreign allegiance, or whether the language of the treaty rendered such individuals merely former Mexican citizens who had elected to become United States citizens at such time as the United States Congress judged proper. Instead, most delegates apparently presumed that Congress would act quickly to naturalize those individuals, perhaps upon admission of California to statehood. Congress did not do so, however, and 20 years later the California Supreme Court was asked to decide whether one of the original delegates to the convention, Pablo Noriego de la Guerra, was a United States citizen and therefore entitled to serve as a judge. Perhaps in order to avoid confusion and to rectify the omission of the United States Congress, the California Supreme Court decided that the treaty was correctly construed to have granted citizenship directly to those former Mexicans who so elected. *See* Kimberly v. De la Guerra, 40 Cal. 311, 340 (1870).

61. BROWNE, *supra* note 54, at 61-73.

62. *See* JOHN PHILLIP REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL (1980); JOHN D. UNRUH, JR., THE PLAINS ACROSS: THE OVERLAND EMIGRANTS AND THE TRANS-MISSISSIPPI WEST, 1840-60 (1979).

and their "Jesuitical" influences.[63] Although many Whigs had opposed westward expansion and denounced as immoral the removal of Indians from their lands, they were equally opposed to the dilution of Anglo-Saxon Protestant society with former Mexican citizens.[64] Only the nascent Republican party might have advanced a different view of Indian rights,[65] but this influence at the time of the California constitutional convention would have been negligible.

The suffrage debate ultimately centered around a proposed amendment which would have added to Anglo voters those Indians who had been citizens of Mexico and were taxed as owners of real estate while specifically excepting all residents of African descent. In the final vote, the delegates split along racial and residential lines, with twenty-one long-term Anglo residents of the territory, foreigners and Californios voting in favor of the amendment, while twenty-two more recent Anglo immigrants to California voted against it.[66] The median period of residence in California for those voting in favor of the amendment was eleven years; the median period for those voting against was slightly over one year, with a much greater concentration of delegates from the less-developed northern part of the territory.[67] Thus, on the basis of a vote by recent arrivals, several of whom would not have met their own six-month residency requirement for voting in general elections, even Indians who had voted for delegates to the convention lost their status as electors. As a weak concession, the constitution did permit a two-thirds majority of the legislature to restore Indian voting rights in special cases, but this provision remained largely dormant.[68] The earliest discussion of Indians under the new California regime had recognized their previous

63. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 205, 235-37 (1997). The Democrats' concern was misplaced, as the persons in question had been proselytized by Franciscan missionaries.

64. *Id.* at 206, 235-37.

65. *Id.* at 212.

66. Goodrich, *supra* note 47, at 89-91 (quoting BROWNE, *supra* note 54).

67. *See* BROWNE, *supra* note 54, at 478-79.

The "yea" votes, with years of residence in California in parentheses, were as follows: Carillo (53 years, "toda la vida"), Covarrubias (40 years, life), De la Guerra (36 years, life), Dimmick (3 years), Dominguez (46 years, life), Foster (3 years), Gilbert (2 1/2 years), Hill (1 year, 5 months), Halleck (3 years), Hollingsworth (3 years), Larkin (16 years), Lippit (2 years, 7 months), Ord (8 months), Pedrorena (12 years), Rodriguez (36 years, life), Reid (16 years), Shannon (3 years), Stearns (20 years), Sansevaine (11 years), Tefft (4 months), and Vallejo (42 years, life). BROWNE, *supra* note 54, at 478-79.

The "nay" votes were as follows: Aram (3 years), Botts (16 months), Brown (3 years), Crosby (7 months), Gwin (4 months), Hanks (10 years), Hoppe (3 years), Hobson (5 months), Hastings (6 years), Jones (about 4 months), Lippincott (3 1/2 years), Moore (1 year), McCarver (1 year), McDougal (7 months), Norton (1 year), Price (4 years), Sutter (10 years), Sherwood (4 months), Steuart (1 year), Vermeule (3 1/2 years), Walker (13 months), and Wozencraft (4 months). BROWNE, *supra* note 54, at 478-79.

68. BROWNE, *supra* note 54, at 341.

exercise of civil rights, but it failed to incorporate those rights into the revised legal order. The result, therefore, was a kind of hybrid, a result further reinforced by the states' choice of a legal system and method of land distribution.

2. *Choice of Legal Systems*

Even after adopting a constitution, California continued to debate the utility of replacing its former political structure with a new order and, shortly after admission to statehood in 1850, focused its inquiry on the legal system itself. The legal systems in New Spain and Mexico were both based on the civil law framework common to continental Europe, while the United States government operated according to the British common law tradition. California's choice was not foreordained by the common law structure of the United States government, however, since a federal system can accommodate a divergent choice of state law.[69]

The first California legislature received a recommendation from the San Francisco Bar Association favoring adoption of the common law, a brief document quickly followed by a petition signed by seventeen dissenting members of the bar urging retention of the civil law.[70] The minority petition contrasted the common law's protection of feudal "landed interest" and failure to guarantee personal rights with the alleged moral superiority of the civil law, noting:

> Many of the undersigned have been educated in the school of the Common Law and are not unmindful of the fact that the adoption of the Civil Law will require from them time and labor to familiarize themselves with its principles and its simple rules of practice, a task reserved of them, at all events, in order to investigate properly and decide upon the vast interests which have already become vested under it . . . .[71]

Moving from academic to pragmatic attempts at persuasion, the dissenting attorneys fastened immediately upon the importance of previously vested property interests to the legal business of the new state. The petition suggested that a significant legal clientele would pursue vast land claims, and that all responsible and successful members of the bar would necessarily familiarize themselves with the relevant Mexican

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69. For example, Louisiana's retention upon statehood of its civil law system, reflecting both Spanish and French heritage, remains in force today.

70. A photostat of the original handwritten petition appears in POWELL, *supra* note 25, at app. D.

71. *See* POWELL, *supra* note 25, at app. D.

jurisprudence.[72] Finally, the seventeen members of the bar appealed to the Legislature's sense of social responsibility:

> Something, too, is due to the rights of the people who became a part of the American union, by the acquisition of California. Whatever may be said of the smallness of their number, or the degree of their social or moral culture, still the civil law has for centuries formed a part of their well understood customs; and the more depressed their condition, the more should an intelligent legislature guard against such changes as shall compel them either to submit to the expense of employing legal counsel in the most common transactions of business, or submit themselves as an unresisting prey to dishonest schemes.[73]

While the signatories neither revealed the number of years that they had lived and practiced law in California nor indicated Mexican heritage, the sensitivity of the petition to pre-existing culture in California mirrored that of the minority of delegates who had voted in favor of enshrining Indian rights in the state constitution.

In response to the petition, the California Senate Committee on the Judiciary prepared a "Report on Civil and Common Law" for the legislature as a whole.[74] After noting that the signatories to the petition in favor of civil law represented less than twenty percent of the lawyers practicing in San Francisco, the report attacked the general character and origins of the civil law. The tone of cultural bias set by this introduction extended to the report's discussion of the two systems' treatment of mercantile transactions, commerce, and manufacturing, as well as their alleged effects upon the nations governed by each system:

> In the one, you perceive the activity, the throng, the tumult of business life—in the other, the stagnation of an inconsiderable and waning trade; in the one, the boldness, the impetuosity, the invention of advancing knowledge and civilization—in the other, feebleness of intellect, timidity of spirit, and the subserviency of slaves; in the one, the strength and freshness of manhood—in the other, the weakness of incipient decay.[75]

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72. The legal profession generally became aware of the growth potential of real property litigation in California, as apparent in the advertisement of one Charles Sexton, a Washington, D.C. attorney, who in "claims before the Court of Commissioners under our treaty with Mexico, is prepared to give his full attention, and to California land title cases coming up in the United States Supreme Court on Appeal." In conjunction with his legal services, Mr. Sexton also offered recent maps of the states and territories. *Los Angeles County Indians*, L.A. STAR, July 21, 1852.

73. POWELL, *supra* note 25, at app. D.

74. *Report on Civil and Common Law*, *supra* note 19.

75. *Report on Civil and Common Law*, *supra* note 19, at 598.

Having thus dismissed the ability of the civil law to nurture a productive society or to protect the rights of former residents more effectively than the common law, the Committee on the Judiciary turned to examples of other former civil law jurisdictions. The report applauded Texas and Florida, which adopted the common law, and distinguished Louisiana's successful retention of the civil law on the basis of that state's pattern of immigration. Unlike the explosive Anglo immigration to California during the gold rush, according to the report, the settlement of Louisiana was a gradual process that allowed the new arrivals to adapt to the existing civil law system.[76] The report further distinguished the case of Louisiana by denying that the civil law had ever been fully established in California, a remote Spanish and later Mexican border province, stating, "The first settlers of the United States brought with them from the mother country the Common Law, and established it in an uninhabited region. The emigrants to California have brought with them the same system, and have established it in a country almost equally unoccupied."[77]

After circumventing the former juridical existence of the Californio and Indian residents, the Committee concluded that any attempt to apply civil law in California would require the near-impossible eradication of an "existing" common law system:

> You might as well undertake to eradicate the American character, and plant the Mexican in its stead—to substitute the Catholic for the Protestant religion, by statute—to abolish the English language and sanction none but the Spanish, by legislative enactment; for the laws, not less than the character, religion, and language, constitute part and parcel of the American mind.[78]

The report's vehement dismissal of the civil law in favor of the common law was quickly adopted by the Legislature, creating a cultural barrier to assertion of legal rights by both Californios and Indians.

The banishment of the Mexican legal system from California was neither absolute nor immediate, however. An article in the first volume of California state case reports informed members of the bar that, while the Mexican "alcalde system" of justice and local administration had fallen into confusion during the brief Mexican-American war, "[w]ith

76. *Report on Civil and Common Law*, *supra* note 19, at 600-01.
77. *Report on Civil and Common Law*, *supra* note 19, at 601.
78. *Report on Civil and Common Law*, *supra* note 19, at 603-04.

the establishment of the American military government, the Alcalde system was restored. On every bar, and in every gulch, and ravine, where an American crowd was collected, there an American Alcalde was elected."[79] These American alcaldes imitated the actions of their Spanish and Mexican predecessors, informally resolving disputes and assigning land grants in exchange for a small fee, a system which the commentator describes as "inartificial and rude" but "wonderfully efficient."[80] The California Supreme Court legitimated the functions of the alcaldes and incorporated them into the official state legal system through the common-law mechanism of case law.[81] In addition, the court was frequently called upon to decide whether civil law applied to a particular case and, if so, to apply the appropriate civil law principles.[82] Thus, the prediction of the signatories to the petition in favor of civil law proved accurate, and both ordinary Anglo residents and members of the bar continued to employ some aspects of the civil law by preference and legal necessity for some time after California's adoption of the common law. This hybrid experience is similar to the state's adoption of a constitution, and continued in its decisions regarding property rights.

3. *Property Rights*

After California's choice of a legal system, perhaps the most immediate legal task facing the state was the adjudication of land claims. The task was complicated by the federal government's superior claim to jurisdiction, a claim that ultimately did not preclude the state government from influencing the distribution of real property and protection of property rights. Diffusion of juridical authority in this area proved advantageous to the mission Indians, at least at the appellate level, as it allowed greater scope for recognition of the pre-existing California social order.

Among all of the natural and human resources of a conquered territory, a new sovereign's most definite claim is to the land itself. Chief Justice John Marshall, writing for a unanimous United States Supreme Court, incorporated this Western legal principle as a tenet of American law:

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79. Wilson, *supra* note 18, at 577.

80. Wilson, *supra* note 18, at 577.

81. *See generally, e.g.*, Reynolds v. West, 1 Cal. 322 (1850) (describing functions of alcalde and affirming land grant); Woodworth v. Fulton, 1 Cal. 295 (1850), *overruled by* Cohas v. Rasin, 3 Cal. 443 (1853) (affirming land grant by alcalde during war years); Mena v. LeRoy, 1 Cal. 216 (1850) (recognizing alcaldes' power to act as judges of first instance).

82. *See, e.g.*, Suñol v. Hepburn, 1 Cal. 254 (1850).

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained, if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[83]

The original Spanish claim to sovereignty in California, and the passage of that claim by revolution to Mexico and by military invasion to the United States, thus enjoyed a formal validity under American law.

The United States, however, had voluntarily circumscribed its absolute authority over the new territory by agreeing to respect the land holdings of former Mexican citizens. Under the terms of the Treaty of Guadalupe Hidalgo, these residents of California were to be "maintained and protected in the free enjoyment of their liberty and property."[84] In order both to exercise the United States' right to control the territory and to honor the treaty obligation, Congress in 1851 created a Land Commission to review all claims of title derived from the Spanish or Mexican governments.[85] Decisions of the Commission could be appealed to the federal district courts and thence to the Supreme Court.[86] The land claims process was slow to begin and lengthy, generating multiple complaints from residents who feared it might take up to a quarter of a century to settle the distribution of real property rights in the new state.[87] These complaints and predictions ultimately proved too generous in their assessment of the efficiency of the federal government.[88]

While Congress was still in the process of creating land policy for the new state, California incorporated into its Indian legislation a prohibition against removal of Indians from lands that they occupied.[89] This

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83. Johnson v. McIntosh, 21 U.S. 543, 591 (1823). Robert A. Williams, Jr., provides an intellectual history of the "Doctrine of Discovery" in THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT. *See* WILLIAMS, *supra* note 39.

84. Treaty of Guadalupe Hidalgo, *supra* note 53, at art. IX, 9 Stat. 922, 930.

85. Act of Mar. 3, 1851, ch. 41, 9 Stat. 631.

86. *Id.* at 632-33.

87. *Land Commission*, L.A. STAR, Aug. 16, 1851; *The Land Commission*, L.A. STAR, Feb. 14, 1851; *The Settlement of our Land Titles*, DAILY ALTA CAL. (San Francisco, Cal.), Jan. 6, 1858, at 2.

88. *See, e.g.*, Botiller v. Dominguez, 130 U.S. 238 (1889).

89. Act for the Government and Protection of Indians, Apr. 22, 1850, COMPILED LAWS OF CALIFORNIA (1850-53), at 822. The statute states in relevant part:

> Persons and proprietors of lands on which indians are residing, shall permit such indians peaceably to reside on such lands, unmolested in the pursuit of their usual avocations for the maintenance of themselves and families: Provided, the white person or proprietor in possession of such lands may apply to a justice of the peace in the township where the indians reside, to set off to such indians a certain amount of land, and, on such

statute, which was applicable to mission Indians with settled residences, contrasted with the standard federal Indian policy of removal to reservations.[90] Instead, the terms of the statute reflected the Anglo understanding of Spanish colonial law, which recognized no land title in tribal Indians but allotted to the rest sufficient property for residential and agricultural purposes.[91] By codifying this existing social structure rather than encouraging the adoption of policies similar to those applied by the United States government in the eastern portion of the country, California provided some deterrence to extensive federal action.

California, however, did not stop with recognition of Indian rights to occupancy of land. Rather, it went on to confirm Indian capacity actually to hold legal title to land. In the case of *Suñol v. Hepburn*,[92] the California Supreme Court addressed the validity of a restraint against alienation included in a Mexican land grant to an emancipated Indian named Roberto.[93] The justices disagreed as to whether the elimination of racial distinctions among Mexican citizens according to the Plan of Iguala also eliminated the justification for such restraints against alienation, ostensibly intended to protect Indian landowners against loss of their property to unscrupulous Europeans. While the majority voted to uphold the restriction, Chief Justice Hastings wrote in dissent:

> It appears evident that to be a citizen, enjoying equal rights with other citizens of the [Mexican] Republic, the Indian must enjoy the right to alienate his property without restraint—the right to think and act for himself. It is a matter of history that some of the wealthiest citizens of this state, at the present time, are either Indians of full or half blood. They are men of wealth, intelligence, and education, and yet by the *Plan of Iguala*, as well as by the principles of the Republican

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> application, the justice shall set off a sufficient amount of land for the necessary wants of such indians, including the site of their village or residence, if they so prefer it; and in no case shall such selection be made to the prejudice of such indians, nor shall they be forced to abandon their homes or villages where they have resided for a number of years; and either party feeling themselves aggrieved, can appeal to the county court from the decision of the justice: and then divided, a record shall be made of the lands so set off in the court so dividing them, and the indians shall be permitted to remain thereon until otherwise provided for.

Id.

90. William H. Ellison, *The Federal Indian Policy in California, 1846-1860*, 9 MISS. VALLEY HIST. REV. 37, 37-38 (1922).

91. *See generally* WILLIAM CAREY JONES, REPORT ON THE SUBJECT OF LAND TITLES IN CALIFORNIA: MADE IN PURSUANCE OF INSTRUCTIONS FROM THE SECRETARY OF STATE AND THE SECRETARY OF THE INTERIOR (1850).

92. 1 Cal. 254 (1850).

93. Suñol v. Hepburn, 1 Cal. 254, 256 (1850). According to the court, the restraint against alienation stated, "No podra venderle, enagenarle, hipotecarle, ni imponer censo, vinculo, fianza, hipoteca, ni otro gravamen alguno." ["You will not be able to sell it, alienate it, mortgage it, nor impose a lien, entailment, bond, mortgage, or any other encumberance."] *Id.*

> Institutions of Mexico, they have no superior social rights to the Indian Roberto, nor any higher legal privileges.[94]

Significantly, neither the majority nor the dissent in *Suñol* challenged the right of an Indian to continue to hold title to land in the newly-constituted state of California. In *United States v. Ritchie*,[95] the United States Supreme Court followed the state's example and confirmed the historical loophole that had resulted in ownership of property by the mission Indians and former Mexican citizens:

> Solano, the grantee in this case, was a civilized Indian, was a principal chief of his race on the frontiers of California, held a captain's commission in the Mexican army, and is spoken of by the witnesses as a brave and meritorious officer. Our conclusion is, that he was one of the citizens of the Mexican government at the time of the grant to him, and that, as such, he was competent to take, hold, and convey real property, the same as any other citizen of the republic.[96]

Thus, although neither the California Legislature nor the United States Congress offered citizenship to the mission Indians as anticipated by the Treaty of Guadalupe Hidalgo, first the state and then the federal courts recognized that the Indians' status as former Mexican citizens entitled them to continued protection of their land holdings.

The effect of the statutory and judicial provisions that California employed in the protection of social continuity and Indian property rights was likely enhanced by the federal government's limited and ill-considered involvement in the distant state. Scant federal resources were allocated to Indian affairs, and Indian agents were confronted not only with the task of providing for both mission and tribal Indians but also with preventing tribal Indian raids.[97] Federal commissioners were charged with the additional duty of negotiating treaties for the removal of tribal Indians to reservations. Anglo immigrant interests in California, eager to prevent tribal occupation of potentially desirable public lands, blocked ratification of some eighteen treaties presented to the United States Senate in 1852.[98] As the tribal Indian signatories had relinquished their lands in good faith compliance with the unratified treaties, the

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94. *Id.* at 293.

95. 58 U.S. 525 (1854).

96. United States v. Ritchie, 58 U.S. 525, 540 (1854).

97. *The Indians Again*, L.A. STAR, Mar. 24, 1860. *See also* FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 381-92 (1984); Ellison *supra* note 90, at 39-40.

98. Goodrich, *supra* note 47, at 95-97.

federal agents faced a still less tenable situation, with ever fewer financial resources and no authority to re-establish the Indians on suitable territory.[99] Even a typically pro-federal Anglo newspaper, editorializing about a similar failure to honor treaty obligations in Washington and Oregon later in the decade, criticized the U.S. government:

> We are not particularly favorable to Indians. They are a poor set of beings at the best, and so far as can be seen from their present condition and characters, and from what history says of them, it would be difficult to get up any particular enthusiasm on our part in their favor. But yet they are human, and have a right to live. They possessed the lands we covet, and the fact that we have negotiated treaties with them, is an acknowledgment on our part that they are entitled to their possession; therefore, on the ground of right, our course should be condemned.[100]

The federal government followed its abandonment of treaty negotiation with an attempt to establish a secular version of the mission system under military authority, with title to the reservation lands remaining with the United States.[101] This effort at Indian removal, too, proved an expensive failure.[102] Indeed, one state legislator suggested that California assume responsibility for the welfare of its own Indian residents with some financial assistance from the federal government, but the proposal was rejected as too expensive.[103] This series of inept efforts to exercise guardianship, combined with the effects of European disease and Anglo lawlessness, hastened the decline of the mission and tribal Indian population to a total of approximately 30,000 among several hundred thousand Anglos by the mid-1850s.[104] By the end of the decade, the newly-appointed Commissioner of Indian Affairs reported the lack of success of previous federal policies and recommended the assignment in severalty of small areas of land to tribal Indians.[105] Thus, the federal

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99. Goodrich, *supra* note 47, at 95-97.

100. *Oregon and Washington Indian Treaties*, DAILY ALTA CAL. (San Francisco, Cal.), Aug. 3, 1858, at 2. The editor of the newspaper, Edward Gilbert, was a delegate to the California constitutional convention and had voted in favor of limited Indian suffrage. Rockwell Dennis Hunt, *The Genesis of California's First Constitution (1846-49)* in 13 JOHNS HOPKINS U. STUD. HIST. & POL. SCI. 367, 398 (Herbert B. Adams ed., 1895).

101. PRUCHA, *supra* note 97, at 387-90.

102. PRUCHA, *supra* note 97, at 387-90.

103. *The Indians—What Shall be Done With Them?*, DAILY ALTA CAL. (San Francisco, Cal.), Feb. 26, 1860, at 4; *Legislation for the Indians*, L.A. STAR, Mar. 3, 1860.

104. HURTADO, *supra* note 17, at 1.

105. *Compendium of the Report of the Commissioner of Indian Affairs, 1859*, DAILY ALTA CAL. (San Francisco, Cal.), Feb. 1, 1860, at 1.

government concluded its experiments upon the tribal Indians of California by encouraging them to adopt a lifestyle similar to that already guaranteed by the state to the mission Indians: ownership of property coupled with freedom to leave their lands and interact socially and economically with the majority population at will.

While the long-term residents of the region failed to divert the Anglo immigrant hunger for property entirely away from previously claimed territory, some legal protection was nevertheless available to landholding mission Indians and, in a much smaller degree, to their tribal counterparts. Rather than bearing the stamp of a conquering power, the land policy negotiated among state and federal, legislative and judicial, resident and immigrant influences in the first decade of California statehood embodied the evolving nature of the society and its component groups.

As the foregoing discussion shows, the early legal treatment of Indians in the state of California, as apparent from the development of a definition of citizens and electors, choice of a legal system, and land policy, is perhaps best described as a hybrid of procedural inequality and limited substantive rights. While it was hardly a liberal democratic ideal, this negotiated solution gave California a proto-pluralist identity based in the Spanish and Mexican traditions of its past and distinct from the nation as a whole.

IV. AMERICAN EPILOGUE

The California experience eventually had an impact on the nation as a whole. Policy changes wrought by the federal government's failed attempts to segregate the California Indians soon began to exert an influence on the reform of national Indian policy. In 1871, Congress ceased to identify Indian tribes as independent nations with whom the United States could form treaties, though this did not invalidate any of the previously ratified treaty agreements.[106] This provision effectively precluded both the establishment of additional reservation lands and the removal of Indians to reservations. The Dawes Act in 1887 authorized the President to abolish existing reservations and divide the land among Indian residents.[107] It also bestowed citizenship upon all detribalized Indians born within the United States' territorial limits.[108]

106. 25 U.S.C. § 71 (1994).

107. 25 U.S.C. § 331 (1994).

108. Dawes Act, ch. 119, 24 Stat. 388, 390 (1887) (repealed 1940). The United States did not make a blanket designation of all Native Americans as citizens until 1924. Act of June 2, 1924, ch. 233, 43 Stat. 253.

Rather than confer any material benefit upon the mission Indians of California, as some reformers had hoped, the Indians' new status merely eliminated any fiduciary duty which the federal government had toward them as wards of the state.[109] Indeed, when the California Supreme Court moved in 1888 to protect the property rights of those mission Indians who held Mexican land grants but had never presented them for confirmation by the United States,[110] the United States Supreme Court invalidated such claims.[111] The latter decision predictably forced a change in state policy regarding Indian land claims.[112] Nevertheless, California's early recognition of the mission Indians as a distinct minority with protected individual rights affected the process of constructing an American polity.

V. SOCIO-LEGAL IMPLICATIONS

Ever since Chief Justice John Marshall reluctantly acknowledged that simple discovery of inhabited lands by a European power was a basis for asserting sovereign control,[113] the commonly-accepted history of Indian-U.S. relations has been one of Indian subordination in the form of removal, massacre or both. Law governing the Indians, by implication, was merely a tool of oppression. This tragic narrative is incomplete, however, without consideration of the more complex and historically-rooted social and legal relations that existed in western territories such as California.

As a frontier territory under each of three successive political regimes, California necessarily redefined its civic identity with reference to a distant capital and the changing population within its borders. The native residents of the region, easily identifiable as a distinct, non-European "other," bore particular scrutiny with respect to their place in society. The Spanish imported a long-standing legal metaphor of wardship to control the Indians, but they were able to incorporate only a small percentage of the native population into the paternalistic mission structure. That group of mission Indians, endowed through persistent contact with an understanding of the conquerors superior to that of their tribal counterparts, nevertheless became both the catalyst and the object of subsequent legal experimentation. In the Mexican period, the legal experiment took the form of a reaction to Spanish racial hierarchies and

109. *See* PRUCHA, *supra* note 97, at 640-43.
110. Byrne v. Alas, 16 P. 523 (Cal. 1888).
111. Botiller v. Dominguez, 130 U.S. 238 (1889).
112. *See generally* Harvey v. Baker, 58 P. 692 (Cal. 1899), *aff'd*, 181 U.S. 481 (1901).
113. *See* Johnson v. McIntosh, 21 U.S. 543, 591 (1823).

an embrace of Enlightenment ideals, a mixture which resulted in formal legal equality and economic participation for the mission Indians. The state of California was less revolutionary in its treatment of the mission Indians, but it still wrestled with the discontinuity between established federal policy and the anomalous existence of native peoples attempting to exercise civil and political rights. The historical formation of the mission Indians as a group, and the resulting legal recognition of that social reality, thus had a formative effect on the identity of the region.

Not only did the presence of the mission Indians carve a lasting feature into the model of California's identity as a state in a federal system, but the group's existence as part of that political identity also destabilized attempts at continued subjugation or oppression. Stephen Greenblatt has argued in another context that:

> [S]elf-fashioning occurs at the point of encounter between an authority and an alien, that what is produced in this encounter partakes of both the authority and the alien that is marked for attack, and hence that any achieved identity always contains within itself the signs of its own subversion or loss.[114]

Having once granted substantive legal rights in the form of land ownership to mission Indians, California could not diminish those rights without partially destroying its own legal system. Indeed, those first rights served as a fulcrum for increased recognition of the Indians as functioning members of the society. This experience undermines the theories of philosopher Michel Foucault, who argued that knowledge and power are usually assigned exclusively to the oppressor. In contrast, the experience of the California mission Indians demonstrated that knowledge of the conquering majority could be used to limit its power. Borrowing Foucault's metaphor, the Panoptican is ineffective when the subject is able to return the gaze of the guard.

The newly-admitted state of California's grant of limited substantive rights to the mission Indians in the first decade of statehood may have represented a preliminary, unconscious step toward the creation of an inclusive, deliberative democracy. According to philosopher Jürgen Habermas, the most basic positive requirement for the generation of legitimate law is an opportunity for all to participate in the discussion process.[115] Where the majority group does not voluntarily afford the

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114. GREENBLATT, *supra* note 5, at 9. Thus, in Foucault's terms, the Panopticon is ineffective when the subject is able to return the gaze of the guard. *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH (Alan Sheridan trans., 1978).

115. *See generally* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 123 (William Rehg trans., 1996).

minority that opportunity, some other route must become available. In the case of the mission Indians, the route to participation began not with revolution or violence, but with the simple legal right to own property and the state's self-characterization as accepting of the allocation of that right to a minority group. The first legal step toward a fully heterogeneous and participatory society, or even what David Hollinger terms a "postethnic" society, did not and does not guarantee a positive outcome.[116] The example of the California mission Indians does, however, illustrate one path to pluralism for a society "not only decorated with arms, but armed with laws."[117]

VI. CONCLUSION

The action of California law in the first decade of statehood was both a mirror and an instrument of the cultural negotiations that formed an operative concept of the legitimate population of the state and also of the state's identity within the federal system. Although both state and federal law defined Indians as an alien subgroup with less than full citizenship rights, California forced recognition of the ongoing social and economic interpenetration between the minority and the majority and therefore of the majority interest in protecting the minority according to the rule of law.

By incorporating a rights-bearing minority into its legal system rather than attempting to isolate it, California established reliance upon that subgroup as a necessary part of its own constructed identity as a heterogeneous polity. In so doing, the Anglo conquerors of the region formed a structure that would destroy their authority. The anglicized mission Indians left behind many of their traditions to join the new system and subsequently suffered poverty and discrimination, but the Anglos eventually lost their status and power as conquerors to become fellow-citizens. Thus, as California wove a select set of Indian inhabitants into Anglo civilization, the strength of the newly-created fabric depended upon the constant evolution, interaction, and autonomy of its threads.

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116. *See generally* DAVID A. HOLLINGER, POSTETHNIC AMERICA (1995).

117. JUSTINIAN'S INSTITUTES, at Prologue (Peter Birks & Grant McLeod trans., 1987). The newly-minted state of California was "armed with laws" in two senses: It employed the law as a tool to sculpt a *nomos* to fit its frontier narrative and demographic, and it enforced this objectively imperfect normative world through the violence of legal interpretation. These inseparable aspects of the law find their most eloquent expression in two essays by Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983), and *Violence and the Word*, 95 YALE L. J. 1601 (1986).