Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850

by Peter L. Reich*

Frank Soulé in *The Annals of San Francisco* described that city in 1855 as wearily to the eye, for there was “no public park or garden...not even a circus, oval, open terrace, broad avenue, or any ornamental line of street or building, or verdant space of any kind.” By 1871, reforming journalist Henry George saw that much of the city’s land that had been public under Mexican rule had been sold, benefitting “a few millionaires” at the expense of “the citizen of San Francisco who needs a home.” These examples of the loss of land that had belonged to a “pueblo,” or municipality in Spanish and Mexican California, are related to the larger problems of land ownership concentration and lack of public recreation opportunities following the 1846 American takeover. This study will explore how California judges privatized common city property and constructed a new notion of the authority of pueblos and their American successor cities, in order to alienate land and facilitate the economic development desired with the onset of the new regime.

Theorists of property and legal historians have pointed to the value of common areas to communities and the losses that occur when economic development forces a commons into the private realm. Refuting the “tragedy of the commons” theory that public property is inevitably depleted by overuse, Carol Rose considers the commons as a vital “social glue” that keeps communities cohesive through joint economic and recreational activities, and which traditional societies protected from exhaustion via strict use limitations. The European enclosure movements of the 17th

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5. Carol Rose, *Property and Persuasion* 124-25, 149 (1994). For specific examples of self-regulation (such as restrictions on grazing, planting, and leasing) by users of commons
and 18th centuries and the concomitant shift to private production disrupted most of these limitations and made it difficult to maintain community lands, both in rural and urban settings.6

This transformation in the post-Revolutionary United States has been described by legal scholars as a shift from property viewed as “propriety,” or a basis for social order and the public good, to property as “commodity,” or the satisfaction of individual preferences through market exchange.7 The commodification of American town commons had the effect of loosening town governments’ ability to control land uses, and thus their economic, political, and social authority.8 Early nineteenth-century Americans assumed, in the words of legal historian Willard Hurst, that as land became a tradeable commodity, “the normal destination of the public domain should be to come to rest in private hands.”9 Thus American cities as diverse as New York City and St. Louis rapidly sold off their commons and abdicated the management of economic development to the private sector.10

Historians of California have been slow to analyze municipal land sales, and the accompanying litigation, in the post-Conquest period. General histories of the American occupation and its aftermath focus on the loss of rural estates, or ranchos,11 and on interethnic conflict among Anglos, Californios, and Native Americans.12 More legally oriented works treat the federal land confirmation process,13 or mineral and water litigation.14 Some studies discuss the pueblo land litigation, at least in San


9. WILLARD HURST, LAW AND SOCIAL PROCESS IN UNITED STATES HISTORY 79 (1960).
Francisco, but either omit the key cases\textsuperscript{15} or fail to discuss the use of Hispanic law in the judicial opinions.\textsuperscript{16} Two compilations of pueblo land maps from Los Angeles and San Diego, respectively, are detailed but primarily descriptive.\textsuperscript{17} The neglect of the secondary literature to analyze Hispanic law use in the pueblo litigation has resulted in some scholars uncritically accepting the idea, set forth in judicial opinions, that the “public trust” doctrine had an Hispanic origin.\textsuperscript{18} This assumption begs the analytical question whether American judges were sincerely “struggling” with Hispanic legal concepts, as Christian Fritz has maintained,\textsuperscript{19} or whether they were merely manipulating it to serve specific policy goals.

This essay will attempt to evaluate California state judges’ utilization of Spanish and Mexican law in the key pueblo land cases. Previous studies of water and mineral law in southwestern state courts have demonstrated how judges deliberately distorted Hispanic law to facilitate natural resource monopolization.\textsuperscript{20} The published pueblo opinions and parties’ arguments in manuscript case files (from the California State Archives) allow analysis of the degree to which judges dutifully respected Spanish and Mexican property law under the 1848 Treaty of Guadalupe Hidalgo,\textsuperscript{21} and of the extent to which they misinterpreted Hispanic law through ignorance or by design. The latter two possibilities would not be out of keeping with the general nineteenth-century propensity to “invent traditions” as a way of justifying policy through an appeal to continuity,\textsuperscript{22} and specifically with the romantic views of Hispanic California which many Anglo immigrants to the new state imbibed.\textsuperscript{23} Evaluation of arguments referring

\begin{thebibliography}{9}
\bibitem{lotchin} ROGER W. LOTCHIN, SAN FRANCISCO, 1846-1856 143-49 (1974).
\bibitem{bakken} See Christian Fritz’s remarks in Gordon Bakken, et al, Western Legal History: Where Are We and Where Do We Go From Here?, 3 W. LEGAL HIST. 115, 141 (1990).
\bibitem{hobsbawm} Eric Hobsbawm, Introduction: Inventing Traditions, in THE INVENTION OF TRADITION 1-2, 8 (Eric Hobsbawm & Terence Ranger eds., 1983).
\bibitem{langum} David J. Langum, From Condemnation to Praise: Shifting Perspectives on Hispanic California, 61 CAL. HIST. 282 (1983).
\end{thebibliography}
to Hispanic law indicates whether judges used the prior legal tradition as mere "window dressing," as did Chancellor Kent in his habitually inaccurate citation of Roman law. 24 This will allow a better understanding of the role played by the California judiciary in facilitating the privatization of municipal land.

Along with the mission and the military presidio (fort), the pueblo, or civil municipality, was a Spanish and later Mexican institutional instrument for the colonization of the northern frontier. 25 The pueblo’s form derived from Spanish Renaissance planning traditions, which allocated conveniently located space for the benefit of the community, intermixed with a variety of residential and agricultural lots. 26 Towns in the north of New Spain and Mexico were usually laid out around a central plaza faced by official and church buildings, with surrounding lots distributed to the colonists, and private fields, common lands, and other municipal property placed on the fringes. 27 Some pueblos had an elaborate municipal government, including an ayuntamiento or cabildo (town council), alcalde (mayor), and alcaldes ordinarios (judges), while smaller, less formal settlements had an abbreviated system. 28 In California, three pueblos were established during the Spanish regime: San José (1777), Los Angeles (1781), and Branciforte (1797); others were initiated under Mexican rule, including Santa Barbara (1826), Monterey (1827), San Diego, Santa Cruz, San Luis Rey, San Rafael, and San Antonio (all during the 1830s). 29 The missions of San Juan Bautista, San Juan Capistrano, San Luis Obispo, and Sonoma were converted to pueblos by the Mexican secularization law of 1833. 30 In 1834, Mexican governor José Figueroa authorized the election of an ayuntamiento at Yerba Buena, a village on the current site of San Francisco, 31 although the question whether that city had ever been an official pueblo would be debated and litigated for years.

Formal Spanish and Mexican law for the organization of pueblos had developed for more than three hundred years before the Americans arrived and had become fairly specific. According to the Laws of the Indies, promulgated in 1513 and 1523 before being reorganized comprehensively by Philip II in 1573, 32 towns included a sufficient number of solares (residential lots) at the center, around which were placed the

28. Cruz, supra note 26, at 144-64.
30. Id. at 270.
32. Crouch, supra note 26, at 2.
ejidos (commons) for various public uses, while beyond lay dehesas y tierras de pasto (grazing areas), and propios (municipal grounds) which could be leased to obtain revenue. Propios were most likely not intended to be sold; in sixteenth-century Spain municipal councils could be sued by individual citizens or officials for alienating these lands.

Regulations for the founding of pueblos in Spanish and Mexican California incorporated the Laws of the Indies and added conditions with which settlers had to comply in order to maintain ownership of their lots. Spanish governor Felipe de Neve’s Reglamento para el gobierno de la provincia de Californias (1781) required solares to be entailed in perpetuity upon descendants, and barred any encumbrances on pain of deprivation of the property. These restrictions effectively limited each settler to ownership of just one lot. Furthermore, settlers had to construct and live in their houses, dig zanjías (irrigation ditches), and plant trees along their boundaries. Some additions to pueblo procedures were initiated under Mexican rule, such as Governor José Figueroa’s decree of 1834, which elaborated on the rules regarding propios, stating that towns could rent them or give them at public auction for senso enfitéutico (long-term lease).

Town government on the Hispanic California frontier was shaped by custom as much if not more than by formal legal rules and doctrines. In Mexican-period Los Angeles, for example, the ayuntamiento as a whole, rather than the alcalde acting alone, was responsible for granting land within the pueblo boundaries. This tended to put at least some limitation on favoritism. The ayuntamiento used its discretion in enforcing the conditions of lot ownership by confiscating unimproved property. It also decided when to uphold pueblo common rights, such as passage over private land and orchards to reach waterways. The purpose of pueblo orga-


34. VASSBERG, supra note 5, at 24-25.

35. FELIPE DE NEVE, REGLAMENTO PARA EL GOBIERNO DE LA PROVINCIA DE CALIFORNIA, titul 14, articulos 7, 9 (1781); Francis F. Guest, Municipal Government in Spanish California, 46 CAL. HIST. Q. 307, 308 (1967).


37. José Figueroa, Plan de propios y arbitrios...August 8, 1834, Archives of California, State Papers. Missions and Colonization, v. II (original in Bancroft Library). According to the nineteenth-century Spanish legal authority Esciriche, “censo enfitéutico” was an annual rent for property leased permanently or for a long term, but without any transfer of ownership. JOAQUIN ESCRICHIE, DICCIONARIO RAZONADO DE LEGISLACION CIVIL, PENAL, COMERCIAL Y FORENSE 106-07 (1837). It has no exact equivalent in Anglo-American common law.


40. Id. at 81-82.

41. Id. at 82.
nization was the promotion of political stability, so the preservation of community use rights and dispute resolution by consensus were more important than individual private property interests.

When the American political system was installed in 1846, land speculators and settlers pressured the new authorities to privatize the communal aspects of the Hispanic land system. The desire to commodify the land was not surprising in the context of the massive speculation and investment that had taken place elsewhere in the early nineteenth-century United States, often resulting in the concentration of land ownership in a few hands. California’s territorial Secretary of State Henry W. Halleck observed this process repeating itself, with “the mania for land speculations” resulting in many “irregular proceedings” by local officials attempting to respond to the demand for lots. San Francisco attorney Henry Haight considered that many sales by the American alcaldes and ayuntamiento (now the Town Council) were “of dubious legality,” particularly the public auction of lots, which was never “contemplated or authorized by the Mexican Laws.”

The military governor of California, Stephen Watts Kearny, authorized the sale of certain San Francisco lots as early as March 10, 1847, and Alcalde Edwin Bryant ordered a public auction to be held the following June 29. Although it was clear that these “beach and water lots” (waterfront and tideland areas) had been reserved by the Mexican government for public purposes, opinion in favor of their sale was strong, with one editorial writer rationalizing that “Mexican policy in relation to seaport towns differing very widely from ours, it has been deemed advisable to sell...and appropriate the proceeds to municipal purposes.” Several months later the Town Council moved another step away from Hispanic law when it abrogated all conditions in deeds and titles, making clear that no lot would be forfeited due to the owner’s failure to improve it. The Council went even further by ratifying an alcalde’s grants of more than one lot each to various individuals. Endorsing the removal of these conditions, the California Star maintained that “[a]lcaldes always had the power to remove the conditions or renew the deeds at pleasure,” despite

46. Henry H. Haight to Fletcher M. Haight, July 17, 1850 (original in Huntington Library).
47. CAL. STAR, Mar. 20, 1847, at 3.
49. Id.
the reality that the legislative abolition of a condition was a far cry from the discretionary non-enforcement that had been Mexican ayuntamientos’ practice. Much of the motivation for the Town Council’s actions can be found in the notice for a new public auction in December, 1847, when it ordered the sale of “a sufficient amount of property...to meet all the appropriations made by the Council.”

The 1847 lot sales in the face of Hispanic legal requirements was just the beginning of San Francisco’s massive divestment of the public domain and facilitation of private land monopoly. Between June, 1846 and March, 1848, the city’s population multiplied by five, but the number of lots granted increased more than thirteen times. By the end of the 1850’s, fewer than five percent of San Francisco’s male labor force owned more than three-quarters of the property. In the words of Henry George, “the heritage of all the people of San Francisco has been divided among a few hundred.”

Other California cities experienced a similar triage of pueblo land following the Conquest. Writing from Monterey in early 1847, expatriate Englishman William Robert Garner observed that “[t]he demand for landed property...has increased beyond credulity.” The pressure on the town council was so great that it could barely set aside land for public uses such as a jail, cemetery, and town square. Several years later Monterey’s mayor had to exhort the city council to try to sell lots to actual settlers, who would improve the property for the general benefit, rather than to speculators who were buying and selling continually at auction. These sales apparently did the city little good financially, for by 1859 a bankrupt Monterey was forced to sell its entire tract of pueblo lands to Delos Ashley and David Jacks, in order to settle its indebtedness to the former for obtaining the city’s title confirmation before the U.S. Land Commission.

As in San Francisco and Monterey, many of the pueblo lands in Los Angeles were sold during the 1850s in a series of auctions, as well as by outright grants, or “donations.” City Surveyor Henry Hancock recom-

55. WILLIAM ISSEL & ROBERT CHERNY, SAN FRANCISCO, 1865-1932 16 (1986).
56. GEORGE, supra note 2, at 47.
57. Letter of March 5, 1847, in WILLIAM ROBERT GARNER, LETTERS FROM CALIFORNIA 198 (Donald Munro Craig, ed. 1970).
58. Id. at 199. For documentation of Monterey’s rapid spatial expansion, due to land acquisition by Anglo-American immigrants, see Mary Tucey & David Hornbeck, Anglo Immigration and the Hispanic Town: A Study of Urban Change in Monterey, California, 1835-1850, 13 SOC. SCI. J., April 1976, at 1, 4-6.
59. Philip Roach to Common Council of Monterey, April 27, 1850 (original in Monterey Papers, Huntington Library).
60. Instrument of Conveyance...between the City of Monterey...and Delos Ashley and David Jacks, February 9, 1859 (original in David Jacks Collection, Stanford University Library Special Collections Department).
61. Council Minutes, Los Angeles City Archives, v. 4 at 894 (February 23, 1850) (auction of fifty lots authorized); An Ordinance Concerning the Municipal Lands, Los Angeles
mended to the Council in 1854 that at least some of the land be reserved for a “public square...academy grounds...College grounds, public or City garden and pleasure grounds,” and a “City common and general parade ground.” 62 Most significantly, Hancock proposed that only alternate city lots be sold. 63 Apparently not in a temper to restrain growth, the Council did not respond to these suggestions, which might have resulted in vastly greater provision for convenient public space. 64 As a consequence, by the turn of the century “most of the magnificent patrimony that the city of Los Angeles inherited from the old Spanish pueblo was frittered away,” in the words of one local historian. 65 Only “refuse real estate” without water access was left to be allocated for parks. 66

According to the City of San Diego’s land title attorney in the 1920s, city officials had disposed of the pueblo property over the years “like a card give-away game.” 67 Indeed, during the 1850s the city had been embroiled in litigation with individuals claiming the city hall, courthouse, and public school under alcalde grants. 68 Like so many other California municipalities, San Diego ultimately could show very little fiscal gain for the loss of its estate. 69 While some more remote towns, such as San Juan Capistrano, preserved their urban cores of public land and stable residential dwellings somewhat longer than the larger cities, by the turn of the century these too had succumbed to the pressures of speculative investment and heavily capitalized agriculture. 70

The American judges faced with resolving conflicting demands for land following the conquest did so within a context of knowledge that many of the municipal land sales were inconsistent with the Hispanic laws they were required to enforce under the Guadalupe Hidalgo Treaty’s property-protection provision. In the first place, public officials, attorneys and jurists had access to a number of legal codes and treaties that had been in use during the Mexican period. Edwin Bryant, Alcalde of San Francisco in 1847, had a copy of the Recopilación de leyes de las Indias (a version of the Laws of the Indies) and a pamphlet defining the powers of various

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62. Henry Hancock to the President, Mayor, and Common Council of the City of Los Angeles, July 28, 1854 (original in Los Angeles City Archives).
63. Id.
64. HARLOW, LOS ANGELES, supra note 17, at 64-65 (describing the geographical context of Hancock’s surveys and proposals).
66. Id.
68. The Mayor and Common Council of the City of San Diego vs. Joshua H. Bean and Cave J. Coutts, Bill in Equity to Cancel pretended and fraudulent title papers and for Injunction, August 20, 1850 (original in Coutts Collection, Huntington Library).
69. HOPKINS, supra note 67, at 261.
70. HAAS, supra note 12, at 76, 91-92.
judicial officers.\textsuperscript{71} Monterey Alcalde Walter Colton had copies of the standard nineteenth-century Mexican code compilations by Alvarez and Febredo.\textsuperscript{72} Additional versions of the Laws of the Indies, and Mariano Galvan’s \textit{Ordenanzas de Tierras y Aguas} (Mexican land-granting decrees, regulations, and procedures) (1844) were found in various alcaldes’ collections.\textsuperscript{73} Many of these works, including Joaquín Escriche’s \textit{Diccionario razonado de legislación} (1837), were contained in the law libraries of prominent attorneys litigating land cases, such as Gregory Yale and the Halleck, Peachy, and Billings firm.\textsuperscript{74} It was also clear that custom as much as codes and doctrine had governed Hispanic jurisprudence.\textsuperscript{75}

Furthermore, once American municipal land sales began, observers and participants alike knew that Hispanic law was being ignored. At first, some lot purchasers used straw buyers (such as their clerks) to avoid the one-lot-per-person limitation, a procedure Lieutenant William Tecumseh Sherman noted was favored by his fellow military officers.\textsuperscript{76} But shortly the public auctions of town lots, grants by alcaldes and justices of the peace, and water lot auctions and sales were occurring so rapidly that attorney Henry Haight realized that none were “authorized by or in conformity with law.”\textsuperscript{77} Territorial officials such as Governor Richard Mason and Secretary of State Henry Halleck had to remind alcaldes continually that they had no right, acting without the \textit{ayuntamiento} or council, to dispose of pueblo lands themselves, but such remonstrances had little practical effect.\textsuperscript{78}

Ultimately the overriding policy of economic development won out over adherence to the Guadalupe Hidalgo treaty. Although Governor Mason, in the words of his aide Sherman, “did not believe the titles given by the alcaldes worth a cent,” he did very little to block the sales because “they aided to settle the towns and public lands.”\textsuperscript{79} Anglo-American

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\textsuperscript{71} Edwin Bryant, \textit{What I Saw in California} 436 (1849). Legal historian David Langum also saw these works listed on an 1845 court inventory from Monterey. David J. Langum, \textit{Law and Community on the Mexican California Frontier} 125 (1987). \\
\textsuperscript{72} Walter Colton, \textit{Three Years in California} 249 (1850). \\
\textsuperscript{74} Gregory Yale, List of Law Books, July 1856 (original in UCLA Department of Special Collections); James Wainwright & Co., \textit{Catalogue of a Valuable Law Library, Containing Three Thousand Volumes, Being the Entire Law Library of Messrs. Halleck, Peachy & Billings} 15-16 (1861). \\
\textsuperscript{75} Bryant, supra note 71, at 436 (referring to the Mexican practice of administering the law “in accordance with natural right and justice”). \\
\textsuperscript{76} William T. Sherman, \textit{Recollections of California} 1846-1861 23 (1945). \\
\textsuperscript{77} Henry H. Haight to Fletcher M. Haight, July 17, 1850 (original in Huntington Library). \\
\textsuperscript{79} Sherman, supra note 76, at 52.
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mythology about the Spanish and Mexican regimes may also have played a justificatory role, for Monterey’s Alcalde Colton considered that his office carried with it “an absolute disposal of questions affecting property.”

Despite their probable knowledge that many pueblo land sales were invalid, lawyers and even judges invested in lots, indicating where they stood as to the confirmation of questionable transactions. San Francisco attorney John McCrackan, who bought land near the former Mission Dolores, noted that “every lawyer in town” was “a grantee and consequently interested in having [the grants] sustained.” Notwithstanding his earlier misgivings, Henry Haight also purchased land, specifically water lots. According to at least one (albeit interested) observer, San Francisco surveyor Milo Hoadley, even California Supreme Court Justice Solomon Heydenfeldt, who participated in deciding several of the pueblo cases, was speculating in lots. Others were more circumspect; attorney Harvey S. Brown considered that “no American Alcalde had any right or power to make grants of [pueblo] lands and that the titles were absolutely worthless,” so he “never invested a dollar in an American Alcalde title, though [he] could have bought for a nominal sum large parcels of land.” This exception tends to prove the rule, for the California bar’s lack of concern that Hispanic law was being flouted, and investment in the outcome of the pueblo land disputes, would shape the direction of the ensuing litigation.

Against this background, the first cases involving land grants and sales within former Spanish and Mexican pueblos approached the state supreme court in the early 1850s. Although all of the major cities in California would obtain federal confirmations and patents for their pueblo lands by the 1880s, the parallel state litigation over the validity of municipal conveyances of those lands has continued through the present day. The question of whether a particular municipality was entitled to its land was far simpler than the complex issues raised by city conveyances to private individuals, often under debatable circumstances.

One of the first cases the California Supreme Court decided was Ladd v. Stevenson and Parker (1850), which only indirectly involved pueblo lands, but had broad implications for alcalde power. In Ladd, an American alcalde evicted the resident of a San Francisco lot from
possession, without notice, on the application of two claimants to the title, who argued that the alcalde had unlimited power to grant a writ of ejectment. The court, however, cited a number of Mexican authorities, including Febrero and Escriche, to the effect that an alcalde could not exercise any judicial function acting alone. This view was completely consistent with the Mexican customary law that the alcalde only executed the ayuntamiento's decisions in land matters.

The justices squarely confronted the question of an alcalde's power to grant pueblo land in Woodworth v. Fulton (1850). In Woodworth, a naval officer claimed a San Francisco lot under an 1847 grant from the alcalde, but had not fulfilled the deed conditions of building and fencing the lot, and now sought to eject a resident holding an 1849 grant from a justice of the peace. Citing records in the Mexican San Francisco archives, the later grant holder maintained that the deed conditions were general requirements imposed on all pueblos making grants, and could not be dispensed with. The prior grantee argued for a broad view of alcalde discretion, but referred only to the general American proclamations authorizing lot sales, rather than to the specific Mexican documents on land-granting authority. The court held that alcaldes had no power under Hispanic law to convey pueblo land, and that there was at least some doubt whether Yerba Buena/San Francisco had ever been an official pueblo having any title to land which could be conveyed.

Ladd and Woodworth demonstrated that it was possible for the California Supreme Court to take Hispanic law seriously. But this limited view of municipal authority was not to last. By the end of 1852, the justices who had decided Woodworth, Nathaniel Bennett (1849-51), Henry A. Lyons (1849-52), and Serranus C. Hastings (1850-52), had all left the court, to be replaced by Hugh C. Murray (1851-57), Solomon Heydenfeldt (1852-57), and Alexander Wells (1852-54). The new personnel on the court would move pueblo land jurisprudence in a different direction.

In Cohas v. Raisin (1853) the seller of an 1847 alcalde grant sued the buyer on the latter's unpaid note. The parties' arguments were sparse, focusing on whether the seller had breached warranty of title, and omitted any discussion of Hispanic law. This vacuum provided an opportunity for Solomon Heydenfeldt, a creative judicial thinker who would later

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87. Defendants' Answer, Ladd.
88. 1 Cal. at 21.
89. Chávez, supra note 39; Halleck to Esquer, supra note 78.
90. 1 Cal. 295 (1850).
91. 1 Cal. at 296.
92. Appellants' Points, Woodworth.
93. 1 Cal. at 297.
94. 1 Cal. at 307-08.
96. 3 Cal. 443 (1853).
97. Brief of Appellant; Answer, Cohas.
invent the prior appropriation doctrine of water ownership, to jump into the breach.98 Writing for the majority, Heydenfeldt overruled Woodworth, holding that San Francisco had definitely been a pueblo, that it had title to the land within its boundaries, and crucially, that alcalde grants could be presumed to be within the ayuntamiento’s authority.99 The seller of the lot therefore had title and had not breached his warranty.100

Heydenfeldt sprinkled the Cohas opinion with a number of citations to Spanish and Mexican law, but they did not support his key conclusions. He asserted that according to certain “laws and decrees,” Hispanic municipal authorities were allowed to alienate city land “for the good of the towns,” but he never specified what “laws and decrees” he was referenc-
ing.101 Heydenfeldt’s most important ruling, that alcalde grants were presumed to be acting within ayuntamiento authority, was similarly undocumented.102 In fact, this point was directly contradicted by Halleck and Mason’s public orders, stating that Hispanic precedent prohibited alcaldes from disposing of pueblo lands themselves.103

Some critics of the Cohas decision claimed it was the product of corruption, because Heydenfeldt was speculating in San Francisco lots.104 Others, including the “best lawyers of the city,” according to one report, simply considered it bad law, because they believed “that there never was a pueblo” at San Francisco with the power to grant land.105 Supporters of the holding, like the Daily Alta California, hailed it for inaugurating an era of “certainty and permanency in the matter of land titles.”106 Whatever the justices’ goals at this point, Cohas signalled their willingness to use Hispanic law as “window dressing” without linking it to the specific results they wished to reach.107

The court took a further step in the 1857 case of Welch v. Sullivan,108 holding that not only had San Francisco been a Mexican pueblo whose land could be sold by alcaldes, but also that the municipal corporation could dispose of its property via execution sales.109 The case arose after the city was forced to sell thousands of acres of pueblo land to satisfy judgments owed various creditors, including one Peter Smith; hence the deeds resulting from the execution sales became known as Peter Smith deeds.110

98. See Irwin v. Phillips, 5 Cal. 140 (1855) (establishing the priority rule in California water law).
99. Id. at 452-53.
100. Id. at 446, 453.
101. 3 Cal. at 447.
102. 3 Cal. at 451.
103. See supra note 78.
104. See supra note 83 and accompanying text.
107. See supra note 24 and accompanying text (noting Watson’s view that Chancellor Kent used Roman law decoratively when it did not support his conclusions).
108. 8 Cal. 165 (1857).
109. 8 Cal. at 195-98.
110. See Fritz, supra note 16, at 184.
In *Welch*, a Peter Smith deed holder sued to eject the possessor of the lot in question. The possessor, represented by former state supreme court justice Nathaniel Bennett (author of the *Woodworth* opinion), argued from Mexican archival sources that pueblos had only limited land-granting power, which certainly did not include the right to sell town lands at execution. Bennett also referenced Governor Figueroa’s 1834 decree allowing pueblos to rent or lease *propios* (but impliedly not sell them). In response, the Smith deed holder merely argued the procedural regularity of the sale, and made no mention of Hispanic law.

Chief Justice Hugh C. Murray, writing for the majority, ignored Bennett’s evidence and simply upheld the execution sales, categorically holding that pueblos “had a right to dispose of certain lands within the pueblo limits, to defray municipal expenses.” The court asserted that this power could be found in “the foregoing quotations from the Laws of the Indies,” but although the opinion lists several published Hispanic sources, there is no citation lending support to this claim. The majority further argued that Congress’s 1851 California Land Act, set up to adjudicate Hispanic land rights, operated to give San Francisco a new tenure, which included execution sale rights regardless of the pueblo’s prerogatives under Mexican law. However, the legislative history of the Land Act clearly indicates that it was not intended “to confer titles, but to ascertain who is in possession of titles,” so Murray was obviously reaching to justify an expanded municipal jurisdiction.

Notwithstanding its difficulties in finding appropriate precedents, the *Welch* majority explicitly stated its policy goal: allowing the execution sales would aid the “industrious and fortunate” Smith deed holders as opposed to “idle and improvident” squatters who lacked any legitimate property rights. Giving San Francisco free rein to alienate its land added to its general fund and “laid the substantial foundations of a great city, which is yet destined to rival the marts of the world.” *Welch* placed Hispanic law in the service of a financially influential group of settlers and in support of the burgeoning West Coast market economy.

Perhaps sensing that it had overreached itself, the court retreated slightly in *Hart v. Burnett* (1860). As in *Welch*, a Smith deed holder sought to eject an individual in possession, who made the judicially

111. 8 Cal. at 166.
112. 8 Cal. at 185-86.
113. 8 Cal. at 177. See also Figueroa, supra note 37, and accompanying text.
115. 8 Cal. at 195.
116. Id.
117. 8 Cal. at 196-97.
119. 8 Cal. at 200-01.
120. 8 Cal. at 202.
121. 15 Cal. 530 (1860).
unpopular argument that San Francisco had no pueblo title, citing many Spanish and Mexican archival sources. The deed holder argued for the validity of execution sales, resting primarily on stare decisis as established by Cohas and Welch, and throwing in a few published Hispanic sources that had been used in those opinions.

This time, however, the court accepted neither party’s position, ruling that although the city owned its lands under the pueblo title, it held them “in trust for the public use” so that they could not be sold at execution to satisfy debts. Lots not dedicated to common use could still be granted or sold. Justice Joseph G. Baldwin, in his majority opinion, recognized that many Smith deed holders were speculators who had invested “but a trifling proportion of the value of the property bought,” and that it was bad public policy to reward them. In a strong dissent, Justice Warner W. Cope insisted on adhering to Cohas and Welch, arguing that all city sales, via execution or not, should be considered valid.

The majority obviously wished to retreat somewhat from Cohas and Welch, but did not cite any direct Hispanic legal authority that execution sales had been prohibited. Baldwin referenced the 1834 Figueroa decree and Escriche’s Diccionario, but neither source supported his position. The former authorized long-term leases given “at public auction,” and the latter merely described execution sale procedures rather than specified what types of property were subject to execution. The majority was thinking in overly rigid categories, for Spanish and Mexican pueblo property may have been neither public nor private in a common law sense; i.e., the long-term lease of propios was not a sale, but did prevent land from being used in common. Despite not finding any Hispanic precedent for the “public trust,” Baldwin still felt constrained to cite a number of Spanish and Mexican sources, perhaps because it was still considered necessary to legitimate land jurisprudence with a link to the local past.

123. Respondents’ Brief at 11-12, Harr; 15 Cal. at 533-36.
124. 15 Cal. at 615-16.
125. 15 Cal. at 616.
126. 15 Cal. at 610.
127. 15 Cal. at 617.
128. 15 Cal. at 556-57, 596.
129. See Figueroa, supra note 37 (using the language “darse en senso enfitéutico en pública subasta”).
130. See JOAQUIN ESCRICHE, DICCIONARIO RAZONADO DE LEGISLACION 360-61 (1837) (describing procedures for “juicio ejecutivo”).
131. See Banner, supra note 10, at 64 (analyzing the commons in colonial St. Louis as falling within an intermediate category between public and private land). See also SARAH DEUTSCH, NO SEPARATE REFUGE: CULTURE, CLASS AND GENDER ON AN ANGLO-HISPANIC FRONTIER IN THE AMERICAN SOUTHWEST 15-16 (1987) (communal land system in Hispanic New Mexico balanced public and private uses in a manner opaque to most Anglos).
132. See C.C. GOODWIN, AS I REMEMBER THEM 18-19 (1913) (noting that Baldwin traveled to Mexico City to research the Harr opinion).
133. In the latter part of the Harr opinion, Baldwin cited several Louisiana cases wherein courts had barred the execution sales of public lands or buildings. See 15 Cal. at 594-95 (citing Police Jury v. Mitchel, 4 La. Ann. 84 (1849); Heirs of Villars v. Kennedy, 5 La. Ann.
Reactions to *Hart* fell into the camps that had been established over the past decade regarding the pueblo land issue. Justice Stephen Field, who had participated in the majority opinion with Cope, later defended the decision for rescuing valuable property from “the spoiler and speculator.” 134 Critics of the court, possibly representing the Smith deed holders, accused Baldwin and Field of taking bribes to render a favorable ruling. 135 In any event, the public trust limitation did not remain a permanent obstacle to cities’ sales of their pueblo lands.

In *White v. Moses* (1862), 136 the Court significantly narrowed *Hart*, holding that San Francisco could offer its pueblo lands for sale at auction as long as the city was doing so “to raise funds for the use of the town in [an] appropriate way,” rather than to satisfy debts. 137 Neither party nor the unanimous majority referenced any Hispanic legal sources, but the latter cited *Cohas* and *Welch* to the effect that alcaldes had unrestricted power to grant lots within the pueblo. 138 By greatly limiting the circumstances under which pueblo land sales would be barred, the Court effectively encouraged cities to raise money in this manner.

Only when debt payment per se was the occasion for land alienation did the Court intervene. By the mid-1860s, municipal land cases from outside San Francisco were being appealed, and in *Branham v. Mayor and Common Council of San José* (1864), 139 the justices held that San José could not mortgage its pueblo lands to pay its obligations. 140 Unlike the *Hart* court, the justices in *Branham* did not even make a pretense of analyzing Hispanic law. They merely announced that Baldwin’s *Hart* opinion was “a clear and explicit exposition of...the powers of municipal bodies under the Spanish and Mexican regime and of the tenure by which their lands were held, and must now be regarded as a finality upon those subjects.” 141 Apparently there was no more need to research and analyze Hispanic law,

725 (1850)). Having begun his legal career in Alabama and Mississippi, Baldwin may have been influenced by the Southern tradition of incorporating Roman and civil law analysis into common law jurisprudence. See Johnson, supra note 95, at 73-76 (detailing Baldwin’s early career and authorship of *Flash Times in Alabama and Mississippi* (1853)); see M.H. Hoeflich, Roman and Civil Law and the Development of Anglo-American Jurisprudence in the Nineteenth Century 50-73 (1997) (assessing the attraction of civil law to antebellum Southern attorneys). But Baldwin apparently did not consider Louisiana law, with its hybrid French and Spanish tradition, sufficient to support his opinion, for citations (however inapposite) to Spanish and Mexican codes, and to Hispanic California legislation and custom, had become common in 1850s California cases. See Reich, Western Courts, supra note 20, at 65-78.


135. Ex-Supreme Court Broker, The Gold Key Court or the Corruptions of a Majority of It 2-3 (approx. 1860) (original in Huntington Library).

136. 21 Cal. 34 (1862).

137. 21 Cal. at 42.

138. 21 Cal. at 40-41.

139. 24 Cal. 585 (1864).

140. 24 Cal. at 603.

141. Id.
because it had now become completely subsumed in prior cases.

Most of the time, the California Supreme Court expressly facilitated land alienation, and in no case so dramatically as in Monterey v. Jacks (1903), 142 when it upheld Monterey’s sale of its pueblo lands in their entirety. Scottish immigrant David Jacks made a fortune in land speculation in the Monterey area between his arrival in 1850 and his death in 1909. 143 His most ambitious acquisition was the 1859 purchase he made with his partner, Delos Ashley, of all the city’s pueblo lands. 144 The bankrupt city conveyed the tract to satisfy its debt to attorney Ashley for obtaining its title confirmation before the U.S. Land Commission. 145 By 1879 Jacks was so hated for his control of property in and around Monterey that visitor Robert Louis Stevenson would write that stagecoaches were regularly stopped by “disguised horsemen thirsting for [Jacks’s] blood.” 146

In 1903 the now solvent city attempted to invalidate the 1859 sale, arguing from Hispanic archival documents (published as part of San Francisco’s federal confirmation brief) 147 that municipal commons were inalienable, and that under Hart they certainly could not be sold to satisfy debts. 148 Jacks merely maintained that the sale had been procedurally regular. 149 But the justices considered that under Mexican rule, any “public trust” had been subject to the “control and disposition” of the Mexican government, so that the California legislature’s act of 1866 ratifying the pueblo land sale cured any defects in the conveyance. 150

The court failed to cite any Hispanic law or custom in support of its position, and of course there was no evidence in Hart that Spanish or Mexican governments had ever authorized a pueblo to alienate all of its pueblo lands. With Jacks, not only was Hispanic municipal land law completely ignored, but even Hart had been twisted to eviscerate its minimal limit on privatization.

Pueblo land sales continued to be upheld in cases involving cities throughout the state. Los Angeles’ conveyance of a portion of a public street was contested in the California Court of Appeal case of Dunlop v. O’Donnell (1935). 151 In Dunlop, an owner of a downtown lot whose title descended from the city sued to enjoin a plumbing contractor from excavating a tunnel under a portion of the street which the former claimed. 152 While the contractor cited the Siete Partidas (the medieval Spanish law

142. 73 P. 436 (1903).
143. See Arthur Eugene Bestor, Jr., David Jacks of Monterey and Lee L. Jacks His Daughter (1945) (summarizing Jacks’ career as a Monterey land speculator).
144. Instrument of Conveyance, supra note 60.
145. Id.
146. Robert Louis Stevenson, Travels and Essays 165 (1897).
148. Points and Authorities for Appellant at 6-7, 13-14, Jacks.
149. Points and Authorities for Respondent at 1-38, Jacks.
150. 73 P. at 439-41, 443.
151. 6 Cal. App. 2d 1 (1935).
152. 6 Cal. App. 2d at 3.
code) and argued that Mexican law reserved town lands for public use,\(^{153}\) the lot owner replied that Spanish and Mexican laws were irrelevant, having been superseded by the adoption of the common law in California and the 1866 U.S. patent of the city’s title.\(^{154}\) Without referring to any Hispanic law or custom, the Court of Appeal held that the land in question —although a portion of a public street—had not been so dedicated to public use as to prevent the city from conveying it.\(^{155}\) The opinion expressed no concern regarding this alienation of the public domain.

Commercial pressure on California cities to make their pueblo lands available persists, with courts often construing restrictions on private use very narrowly. For example, in *DeYoung v. City of San Diego* (1983),\(^{156}\) the California Court of Appeal refused a citizens’ group’s request to enjoin San Diego’s long-term lease of a portion of its pueblo lands. Omitting any discussion of Hispanic law or *Hart*, the appellate justices considered that a municipal charter provision prohibiting leases longer than fifteen years was intended only to exclude leases not ratified by the voters, because past practice allowed the electorate to bypass such limitations by majority vote.\(^{157}\) In San Diego, the pueblo lands had been leased over the years for petroleum exploration, shale mining, golf club facilities, hotels and restaurants.\(^{158}\) The recreational uses of pueblo land desired by the *DeYoung* plaintiffs were low on the list of the city’s and the court’s priorities.

This assessment of the California pueblo land cases demonstrates that the state courts turned from an initially strict construction of municipal land alienation authority in *Ladd* and *Woodworth* to a very loose interpretation of that power in *Cohas* and *Welch*, limited only slightly via the “public trust” obligation in *Hart*. Opinions after *Hart* either interpreted that decision as narrowly as possible (*White*) or distorted it to justify an opposite result (*Jacks*). More modern pueblo cases such as *Dunlop* and *DeYoung* have treated *Hart*, and certainly Hispanic law, as if they did not exist.

The evidence and arguments from Spanish and Mexican law in the case files and published opinions show clearly that California judges intentionally disregarded the prior, more communal legal tradition, and created a new regime of absolute municipal power to alienate land. At first they employed Hispanic law to justify results, but gradually abandoned it even as “window dressing.” This jurisprudential distortion and the consequent urban growth facilitated California’s shift from a relatively self-sufficient, rural ranching economy to a network of towns serving as trading centers for agricultural products.\(^{159}\)

153. Appellants’ Opening Brief at 23-25, *Dunlop*.
154. Respondents’ Brief at 36-40, *Dunlop*.
155. 6 Cal. App. 2d at 13.
156. 194 Cal. Rptr. 722 (1983).
157. 194 Cal. Rptr. at 727-29.
158. 194 Cal. Rptr. at 724, 727.
159. See Fritzsche, supra note 54, at 32-33.
The unfortunate part of this transformation was the privatization of the urban commons. Even when parks or other public areas were reserved, they were often asymmetrically located in portions of cities inaccessible to the majority of residents, as are San Francisco’s Golden Gate Park and Griffith Park in Los Angeles. Municipal leaders in both cities rejected more comprehensive plans to spread promenades and parks throughout their metropolitan areas.

Whether such impoverishment of public space necessarily accompanies urban economic development is one of the great unanswered questions of modern planning theory. Nor is it clear that the Spanish tradition of retaining centrally located and convenient land for the public benefit always results in more liveable communities; many modern Latin American capitals such as Mexico City have open space but are still blighted by uncontrolled industrialization. However, California judges reconstructed the Hispanic pueblo’s land powers to foreclose the use of land as Rose’s “social glue” of communities, and placed it directly in the service of commercial growth.


162. See Crouch, supra note 26, at 105-06.