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## Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a "Naked Knife"

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# CHICANA/CHICANO LAND TENURE IN THE AGRARIAN DOMAIN: ON THE EDGE OF A “NAKED KNIFE”†

Guadalupe T. Luna\*

*Neither sovereignty nor property rights could forestall American geopolitical expansion in the first half of the nineteenth century. The conflicts that resulted from this clash of doctrine with desire are perhaps most evident in the history of the Chicanas/Chicanos of Texas, California, and the Southwest, who sought to maintain their land and property, as guaranteed by the Treaty of Guadalupe Hidalgo, in the aftermath of the U.S.-Mexico War. Integrating an exploration of case law with political and social histories of the period, the Author explores the sociolegal significance of Chicana/Chicano land dispossession; exposes the racial, economic, and political motivations of the legislators, judges, and attorney’s involved; and demonstrates the internal incoherence of land grant doctrine. Focusing on the material relationship of the past to the present, the author seeks to establish linkages between the past roles of law and legal structures in dispossessing Chicanas/Chicanos of their land and their present roles in structuring Chicana/Chicano political and economic subordination in the agricultural sector. The author concludes that the study of Mexican land dispossession suggests both the need to expand the traditional approach to teaching property law as well as the importance of deploying the Treaty of Guadalupe Hidalgo and international law in the struggle for racial equity.*

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† United States v. Castillero, 67 U.S. (2 Black) 17, 102 (1862).

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## INTRODUCTION

*Law is not a water-tight compartment sealed or shut off from contact with the drama of life which unfolds before our eyes. It is in no sense a cloistered realm but a busy state in which events are held up to our vision and touch at our elbows.*<sup>1</sup>

As early as 1885, the federal courts evinced clear awareness of their dubious record in deciding disputes between Mexican land-owners and American settlers in the Southwest. In *United States v. San Jacinto Tin Company*,<sup>2</sup> the court poignantly addressed the subject as follows:

Those familiar with the notorious public history of land titles in this state need not be told that our people coming from the states east of the Rocky Mountains very generally denied the validity of Spanish grants . . . and, determining the rights of the holders for themselves, selected tracts of land wherever it suited their purpose, without regard to the claims and actual occupation of holders under Mexican grants . . . . Many of the older, best-authenticated, and most-desirable grants in the state were thus, more or less, covered by trespassing settlers. When the claims of Mexican grantees came to be presented for confirmation, these settlers aided the United States; the most formidable opposition usually

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1. *Wortham v. Walker*, 128 S.W.2d 1138, 1150 (Tex. 1939).

2. 23 F. 279 (C.C.D. Cal. 1885).

coming from them, first, to the confirmation of the grants, on every imaginable ground, of which the most frequent was fraud in some form at some stage of the proceedings. When confirmed, and the officers of the government came to the location, the contest became still more vigorous and acrimonious; the trespassing settlers, or adverse claimants . . . would seek to move the location . . . in opposition to confirmation . . . . Charges of fraud are easily made, and they were by no means sparingly made by incensed defeated parties, and these reckless charges by disappointed trespassing and opposing claimants, in many instances, as in this case, involved the officers of the government, as well as the claimants under the grant.<sup>3</sup>

This Article investigates the dispossession of Chicanas/Chicanos<sup>4</sup> from their property interests following the war between the United States and the Republic of Mexico ("U.S.-Mexico War").<sup>5</sup>

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3. 23 F. at 295–96.

4. "Mexican" nationals include citizens of Mexico. The term "Chicanas/Chicanos" refers to individuals of Mexican descent in the United States after the Conquest of the former Mexican Territories. The terms are used interchangeably with emphasis on "self-designations." See generally GENARO M. PADILLA, *MY HISTORY, NOT YOURS* (1993) (describing the importance of allowing people to name their own identity). For an alternative designation, see ANA CASTILLO, *MASSACRE OF THE DREAMERS 12* (1994), which employs the term "Xicanisma." Castillo encourages Xicanistas to "not only reclaim [their] indigenismo but also reinsert the forsaken feminine into [their] consciousness." *Id.* For information concerning the indigenous heritage of people of Mexican ancestry, see RICHARD GRISWOLD DEL CASTILLO & ARNOLDO DE LEÓN, *NORTH TO AZTLÁN, A HISTORY OF MEXICAN AMERICANS IN THE UNITED STATES* (1996). Griswold del Castillo and De León assert that the indigenous background of Mexicans derives from "the tribes and groups that populated America before Christopher Columbus's voyage. Along with most Mexicans, Chicanos are also Mestizos—a biological as well as cultural mixture of Indian and Spanish with some traces of African and Asian peoples." *Id.* at 7.

The Mexican period is distinguished from the Spanish governance of the provinces. See generally *Ely's Adm'r v. United States*, 171 U.S. 220, 228 (1898) (noting Mexico's declaration of independence from Spain on February 24, 1821).

5. The war between the two Republics began on May 13, 1846. Lisbeth Haas reports that "its immediate causes . . . stemmed from the United States' annexation of Texas." Lisbeth Haas, *War in California, 1846–1848*, in *CONTESTED EDEN, CALIFORNIA BEFORE THE GOLD RUSH* 331, 333 (Ramón A. Gutiérrez & Richard J. Orsi eds., 1998). Imperialism and the doctrine of Manifest Destiny encouraged westward expansion in the 19th century, see FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY* (1963), and it is well established that the United States long had coveted Mexico's northern provinces. See A. BROOKE CARUSO, *THE MEXICAN SPY COMPANY, UNITED STATES COVERT OPERATIONS IN MEXICO, 1845–1848*, at 5 (1991) (reporting that President Adams "made no less than three [unsuccessful] attempts to induce Mexico to sell [Texas] to the United States") After Mexico's refusals, President Andrew Jackson attempted to purchase key regions of Mexican territory; he also became the first American president to direct American continental acquisition

The admission, by at least one federal court,<sup>6</sup> of the widespread abuses that occurred during the nineteenth century suggests that one might reasonably expect to find some mention of them within traditional legal education in the contemporary period. Not only were these actions the type of "abuses" that often attract at least academic discussion, they also constituted the means by which private citizens gained title to vast amounts of rural property. Nevertheless, legal scholarship and classroom discussions are virtually silent on the matter.

This gap in legal history does not result from a lack of present relevance.<sup>7</sup> A fundamental issue in both property and agricultural law<sup>8</sup> involves the reconciliation of conflicts between the ownership rights of fee holders and certain governmental actions.<sup>9</sup> Academic

efforts toward the Mexican ports of Monterrey and San Francisco. *See id.* Because he sought to expand the United States to all Mexican territories, Andrew Jackson, whether in or out of office, proved a continuous threat to Mexico's security for the next 20 years. *See id.*

For an account of westward expansion into territory formerly belonging to Mexican landholders, see generally *Southern Pacific Railroad v. Brown*, 68 F. 333 (C.C.S.D. Cal. 1895), in which the court discussed land granted by the Mexican government and later awarded by the U.S. government to railroad companies. For another detailed discussion, see generally WILLIAM H. GOETZMANN, *WHEN THE EAGLE SCREAMED: THE ROMANTIC HORIZON IN AMERICAN DIPLOMACY, 1800-1860* (1966).

6. *See supra* note 2 and accompanying text.

7. For example, property law exposes students to chain of title issues. *Broome v. Lantz*, 294 P. 709 (Cal. 1930), presents a chain-of-title fact pattern of property once held under Mexican ownership. That case describes Isabel Yorba and her ranch, Guadaluasca, dating back to 1836. During her tenure as property owner, Yorba conveyed various parts of the ranch. Whether she conveyed her property under duress is a further point of interest. Finally, the gap in legal history obscures the extent to which property titles throughout the Southwest derive from the land grant periods. As the Supreme Court noted at the time, "[w]hen the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations [for granting public lands to individuals]. These two sovereignties are the spring heads of all land titles in California . . ." *United States v. Moreno*, 68 U.S. 400, 403 (1863).

8. Agricultural law encompasses the realm of federal and state regulatory structures that expedite food production in the United States and entry into foreign markets. *See* KEITH MEYER ET AL., *AGRICULTURAL LAW, CASES AND MATERIALS* (1985).

9. Students of property law conceptualize property rights as a "bundle of sticks." *Board of County Comm'rs v. Conder*, 927 P.2d 1339, 1352 (Colo. 1996) (Kourlis, J., dissenting); *see also* JOSEPH SINGER, *PROPERTY LAW, RULES, POLICIES AND PRACTICES* 3 (1994) ("Property rights concern relations among people regarding control of valued resources."). Anglo-American jurisprudence has a longstanding tradition, expressed in Constitutional and legislative provisions as well as court rulings, of protecting these bundles of sticks from overly intrusive governmental actions. For example, the Fifth Amendment to the U.S. Constitution provides in part: "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V., cl. 4. The Federal Takings Clause applies not only to the federal government but also to state governments by incorporation through the Due Process

inquiry also examines how those conflicts impact the country's natural resources. Notwithstanding the breadth of these fields of study, the literature generally excludes reference to Chicana/Chicano land dispossession.<sup>10</sup> This Article seeks to provide a partial remedy for that exclusion.<sup>11</sup>

Prior to the U.S.-Mexico War, the Mexican government awarded and recognized private and communally held<sup>12</sup> grants of

Clause of the Fourteenth Amendment. See, e.g., *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226, 236 (1897).

10. See, e.g., JESSE DUKEMINIER & JAMES KRIER, *PROPERTY* (3d ed. 1993) (extensively discussing property acquisition by discovery, capture, creation, find, adverse possession, and gift, but omitting the enormous history of property ownership and governmental actions as they affected Chicana/Chicano land disposition). Land use texts also fail to examine the historical underpinnings of land distribution law, which arose from land grant adjudication law. See, e.g., CHARLES M. HAAR & MICHAEL ALLAN WOLF, *LAND-USE PLANNING, A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND* (4th ed. 1989). These omissions result in an imprecise legal history and deprive students of the opportunity to address complex analytic exercises that stem from the difficult task of reconciling land grant adjudication with prior American legal principles.

Regarding the invisibility of Latinas/Latinos in law generally, see Berta E. Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Kevin Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993); Kevin R. Johnson, *Some Thoughts On The Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101 (1997); Juan F. Perea, *Los Olvidados: On the Making of Indivisible People*, 70 N.Y.U. L. REV. 965 (1995).

11. Although Chicana/Chicano dispossession touches on numerous compelling issues that require further scholarly investigations, space constraints permit the enumeration of only a few. For example, the jurisprudence from the annexation period encompasses federalism considerations. See, e.g., *United States v. Martinez*, 184 U.S. 441, 444 (1902) (questioning whether, after the private land claims court confirms a land grant, a court can without explanation "entertain a supplemental petition for the value of certain parcels disposed of and patented by the United States to third parties before the filing of the original petition"); *Gunn v. Bates*, 6 Cal. 263, 266 (1855) ("California is an independent sovereignty, and the Federal Courts have no right or power to interfere with the decisions of this Court.").

This review also omits discussion of water rights litigation. However, information on that litigation as it involved the former Mexican territories can generally be found in *Gutierrez v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545 (1903); *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894); *Miller v. Letzerich*, 49 S.W.2d 404 (Tex. 1932). These conflicts extend into the present. See Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre de Cristo/Rael Case*, 16 CHICANO-LATINO L. REV. 39 (1995).

12. *Empresario* grants entitled groups to live on large tracts of land. See Vernon B. Hill, *Spanish and Mexican Land Grants Between the Nueces and Rio Grande*, 5 S. TEX. L. REV. 47, 47 (1960). Communal living was valued because it permitted people living on semi-arid tracts to access scarce water resources. American courts, however, disallowed communal rights. See, e.g., *United States v. Sandoval*, 167 U.S. 278, 298 (1897). In rejecting these rights, United States courts failed to consider colonial American laws that permitted colonists to hold communal property. For a discussion

property throughout its territories.<sup>13</sup> After the Conquest,<sup>14</sup> the United States annexed the former Mexican territories through the Treaty of Guadalupe Hidalgo ("Treaty").<sup>15</sup> In establishing new national geographic borders,<sup>16</sup> the Treaty also obligated the United States to provide grantees in the annexed areas citizenship status and to protect their fee interests.<sup>17</sup> Notwithstanding the promises contained in the Treaty, grantees of Mexican descent and their successors in title experienced the loss of the very property interests the Treaty pledged to protect.<sup>18</sup>

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of such laws and practices, see EDWARD T. PRICE, *DIVIDING THE LAND, EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC* 29–48 (1995).

13. Rural Mexican estates of varying sizes included, for example, Rancho San Antonio, Canon de San Diego, and Rancho San Francisquito. See, e.g., *Chaves v. United States*, 168 U.S. 177 (1897) (San Antonio and San Diego); *United States v. Rodriguez*, 25 F. Cas. 821 (D.C.N.D. Cal. 1864) (No. 14,950) (San Francisquito).

14. For an account of the provocation between the countries as a factor leading to alienation, see RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO, A LEGACY OF CONFLICT* 83–86 (1990), which discussed hostilities in Texas and subsequent alienation. Other scholars assert that the alienation followed from the actions of the Mexican ruling elite who, by arguing for privatizing communal grants prior to annexation, set the stage for post-annexation partition actions under Anglo-American law. See Robert D. Shadow & Maria Rodríguez-Shadow, *From Repartición to Partition: A History of the Mora Land Grant, 1835–1916*, 70 N.M. HIST. REV. 257, 270 (1995).

15. Treaty of Peace, Friendship, Limits, and Settlement with the United States of America and the Republic of Mexico, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., art. IX, 9 Stat. 922, 930 [hereinafter Treaty of Guadalupe Hidalgo].

16. Treaty of Guadalupe Hidalgo, arts. V–VII, *supra* note 15, at 926–29. Cartographic errors in a map relied on in negotiating the Treaty engendered a "prolonged dispute that resulted in the Gadsden Treaty in 1854." GRISWOLD DEL CASTILLO, *supra* note 14, at 56; The Disturnell map was a "reprint of 1828 plagiarism of an 1826 reproduction of an 1822 publication titled Mapa de Los Estados Unidos de Méjico, published by H.S. Tanner, of Philidelphia." *Id.* see also HUNTER MILLER, *Treaty of Guadalupe Hidalgo, Documents 122–150: 1846–1852*, 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 207, 414–21 (1937). For an analysis of the geographical dispute in case law, see *Ainsa v. United States*, 161 U.S. 208 (1895) (adjudicating a land claim under the Gadsden Purchase). See also *Camou v. United States*, 171 U.S. 277, 287 (1898) (addressing a land dispute deriving from the Gadsden Treaty); *State v. Gallardo*, 135 S.W. 664, 670–71 (1911) (leaving boundary question for future determination between Texas and Mexico).

17. Treaty of Guadalupe Hidalgo, *supra* note 15, at 929–30.

18. For example, by the 1920s, the majority of grantees and their heirs in Texas had long ago been dispossessed of their property holdings. See Rodolfo O. de la Garza & Karl Schmitt, *Texas Land Grants & Chicano-Mexican Relations: A Case Study*, 21 LATIN AM. RES. REV. 123, 125 (1986). Grantees of Spanish descent also lost their property following the Conquest by the United States, but this Article focuses on governance of the Southwest in the Mexican period. Specifically, the Treaty of Guadalupe Hidalgo identifies those remaining after the Conquest as Mexicans. Treaty of Guadalupe Hidalgo, art. VIII, *supra* note 15, at 929 ("Mexicans are now established in territories previously belonging to Mexico . . .").

Scholars outside of legal academia have long investigated the issue of Chicana/Chicano property dispossession.<sup>19</sup> Three theories regarding the origins of Chicana/Chicano alienation from their property interests emerge from these scholars' work. Two of these theories attribute alienation to differences between Anglo-American and Mexican property law, while the third relies on cultural differences.

The first theory places responsibility for property dispossession on the substantive differences between United States common law and Mexican civil law.<sup>20</sup> Adherents of this theory contend "[n]ot so much that Americans ran roughshod over the legal rights of Mexican landowners [but rather] that different traditions of property rights came into conflict."<sup>21</sup> Such an argument is difficult to reconcile with the Treaty, international law, constitutional provisions, and subsequent congressional legislation obligating the United States to protect the property rights of those remaining in the annexed territories.<sup>22</sup> Thus, by relying on conflict between the different property traditions, the first theory does not completely explain Chicana/Chicano land alienation.<sup>23</sup>

19. See, e.g., HUBERT O. BRAYER, WILLIAM BLACKMORE, *THE NEW MEXICO LAND GRANTS OF NEW MEXICO AND COLORADO* (1949); MALCOLM EBRIGHT, *LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO* (1994); WILLIAM GREY, *A PICTURE OF PIONEER TIMES IN CALIFORNIA* (1881); William W. Morrow, *Spanish and Mexican Private Land Grants*, in *SPANISH AND MEXICAN LAND GRANTS* 1, 15 (Carlos E. Cortés et al. eds., 1974); Paul Gates, *The California Land Act of 1851*, 50 CAL. HIST. SOC'Y Q. 395 (1971).

20. "Civil law uses law codes as the main source of its rules, while Anglo-American common law . . . looks primarily to the decisions of judges for precedents to govern its jurisprudence." EBRIGHT, *LAND GRANTS*, *supra* note 19, at 69. Contrary to the English common law origins of U.S. law, Mexican law originated from the civil law of Spain. See *Manry v. Robison*, 56 S.W.2d 438, 442 (Tex. 1932) (contrasting American common law riparian rights with Roman civil law governing Spain and Mexico); *Miller v. Letzerich*, 49 S.W.2d 404, 407 (Tex. 1932) ("After the revolution by which Mexico gained her independence, the Spanish civil law prevailed in connection with the decrees and statutes of the supreme government of Mexico.").

21. DAVID GUTIERREZ, *WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY* 23 (1995); see also Gordon Morris Bakken, *Mexican and American Land Policy: A Conflict of Cultures*, 75 S. CAL. Q. 237 (1993) (describing the civil litigation process in Mexican California and its conciliation system). In some instances, the differences are difficult to discern. See, e.g., *Suñol v. Hepburn*, 1 Cal. 254 (1850) (similarly interpreting possession under common and civil law).

22. See discussion *infra* Part II. For a discussion of the role of a former sovereign's law in proving validity of a grant and American courts' disregard of testimony regarding official jurisdiction as a source of construction of that law by the antecedent government despite the lack of a practically available alternative, see Hans W. Baade, *The Historical Background of Texas Water Law, A Tribute to Jack Pope*, 18 ST. MARY'S L.J. 1, 21-23 (1986).

23. Indeed, in the southwestern United States, several Mexican and Spanish legal principles extend to the present. For example, the law of community property



A second theory argues that the procedural differences between the systems led to the loss of property. Characterizing Anglo-Saxon law approvingly as "exact, clear, and precise,"<sup>24</sup> while criticizing Mexican legal institutions as employing "loose and careless methods,"<sup>25</sup> proponents of this theory assert that "the defects in the Spanish and Mexican records and titles," rather than the unfair treatment of Mexican grantees, resulted in alienation.<sup>26</sup> American courts, however, did not always share this view. In *Davis v. California Powder Works*,<sup>27</sup> for example, the court declared that "[t]he Mexicans of the Spanish race, like their progenitors, were a formal people, and their officials were usually formal and careful in the administration of their public affairs."<sup>28</sup> Thus, the second theory does not adequately link Chicana/Chicano land dispossession to differences in procedural administration of the laws.

The last theory asserts that the cultural differences between the United States and Mexico produced dispossession of Mexican grantees' property interests.<sup>29</sup> This theory posits that "the original holders being Mexicans were improvident and really squandered [their land] for riotous living."<sup>30</sup> As one author has noted, while early

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remains in use. See SINGER, *supra* note 9, at 1078. For an account of the Spanish influence on Texan marital property law, see generally Hans W. Baade, *The Form of Marriage in Spanish and North America*, 61 CORNELL L. REV. 1 (1975).

24. Gates, *The California Land Act of 1851*, *supra* note 19, at 405 (1971); see Paul Gates, *Pre-Henry George Land Warfare in California*, in LAND AND LAW IN CALIFORNIA: ESSAYS ON LAND POLICY 186 (Richard S. Kirkendall ed., 1991) (discussing the "rigidity" of Anglo-Saxon law).

25. Morrow, *supra* note 19, at 15; see also *Sena v. United States*, 189 U.S. 233, 239 (1903) (favoring the U.S. government's interpretation of property boundaries due to the "loose manner" in which Spanish land grants were made).

26. Morrow, *supra* note 19, at 15; cf. WILLIAM W. ROBINSON, LAND IN CALIFORNIA 109 (1948) (discussing the typical lawyer's attitude that "condemnation of the whole procedure comes only from those not familiar with the situation").

Other scholars, providing only limited references to legal causes, assert that Mexican lands were lost because they were the spoils of war. See Harold Weiss, *The Texas Rangers Revisited: Old Themes and New Viewpoints*, 97 S.W. HIST. Q. 621 (1994). These discussions, however, fail to consider the extent to which the United States breached its contractual and fiduciary-like obligations to grantees of Mexican descent.

27. 24 P. 387, 388 (Cal. 1890).

28. *Id.* (internal quotation marks omitted) (quoting *White v. United States*, 68 U.S. 660, 680-81 (1863)).

29. See DOUGLAS MONROY, THROWN AMONG STRANGERS: THE MAKING OF A MEXICAN CULTURE IN FRONTIER CALIFORNIA 199 (1990) (discussing the "conflict of legal cultures").

30. U.S. INDUSTR. COMM'N, REPORT ON AGRICULTURE AND AGRICULTURAL LABOR, H.R. Doc. No. 57-1, at 952 (1901) (testimony of A.H. Naftzger, President and General Manager of Southern California Fruit Exchange). Those who adhered to this theory essentially viewed the land as wasted until American settlers arrived. Cf., e.g., *Luco v. United States*, 64 U.S. 515, 524 (1859) ("The influx of American settlers had, from the year 1849, given great value to these lands . . .").

Anglo-Americans pejoratively characterized the Mexican population as "indolent, ignorant, and backward, Americans of the late nineteenth century re-imagined the Californios as unhurried [and] untroubled."<sup>31</sup> This theory is grounded in part on the same demeaning ethnic stereotypes that shaped court decisions in the nineteenth and early twentieth centuries.<sup>32</sup> Moreover, evidence from historical texts demonstrates the industry of Mexican grantees' land use practices.<sup>33</sup> Cultural biases alone cannot justify any theory. The lack of evidentiary support further demonstrates that this theory fails as a sufficient explanation for Chicana/Chicano alienation.

Proponents of the above theories apparently ignore compelling legal evidence demonstrating that, in dealing with Mexican grantees' land, the United States failed to honor the Treaty of Guadalupe Hidalgo and violated American constitutional norms protecting against governmental intrusions on private property rights. By subjecting them to shifting legal norms, American courts subordinated Mexican grantees and their heirs as outsiders to the American legal system, thereby diminishing their status as citizens,<sup>34</sup>

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31. DAVID J. WEBER, *THE SPANISH FRONTIER IN NORTH AMERICA* 341 (1992) ("Anglo Americans controlled Texas and the writing of its history. They adopted the story line of their propagandists and added an additional twist—they portrayed themselves as heroic, a superior race of men . . ."). Several scholars discuss this revisionism. See, e.g., GREY, *supra* note 19, at 20–21 (noting that much of the history of the war is rewritten by Anglo-Americans, constituting an account "full of exaggeration, and so extravagant and absurd that it is not even amusing"); Rufus B. Sage, *Degenerate Inhabitants of New Mexico*, in *FOREIGNERS IN THEIR NATIVE LAND, HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 71, 71–75 (David Weber ed., 1973). For examples of these characterizations at the time, compare *United States v. Galbraith*, 63 U.S. (22 How.) 89, 92 (1859), in which the court said "The Californians are a simple, ignorant people," with THOMAS JEFFERSON FARNHAM, *TRAVELS IN THE CALIFORNIAS AND SCENES IN THE PACIFIC OCEAN* 139 (1844), *quoted in* ROSAURA SÁNCHEZ, *TELLING IDENTITIES, THE CALIFORNIO TESTIMONIOS* 30 (1995), who states "[i]n a word, the Californians are an imbecile, pusillanimous, race of men, and unfit to control the destinies of that beautiful country."

32. See, e.g., *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 439 (1865); *Luco v. United States*, 64 U.S. (23 How.) 515 (1859).

33. See Paul Horgan, *Life in New Mexico*, in *CHICANO: THE EVOLUTION OF A PEOPLE* 67, 67–68 (Renato Rosaldo et al. eds., 1973); Carey McWilliams, *The Heritage of the Southwest*, in *CHICANO, supra*, at 11–14; see also *infra* notes 108–113 and accompanying text.

34. See Guadalupe T. Luna, *The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford and the Complexities of Race*, U. MIAMI L. REV./TEX. HISPANIC L. REV. (forthcoming 1999); see also Guadalupe T. Luna, *Agricultural Underdogs and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 9 (1996) ("As soon as cheap labor from Europe was stopped, . . . American industry . . . turned to the Mexican supply. . . . The Mexican 'peon' (Indian or mixed-breed) is a poverty-stricken, ignorant, primitive creature, with strong muscles and with just enough brains to obey orders and produce profits under competent direction . . .") (quoting LOTHROP STODDARD, *RE-FORGING AMERICA: THE*

sacrificing basic principles of law, and ultimately privileging the dominant population.<sup>35</sup>

A principal goal of this Article is to provide a counter-hegemonic story to the exclusion of the history of the post-U.S.-Mexican War period from legal analysis and education. This omission facilitates a legal culture that subordinates Chicana/Chicano communities through restrictive laws.<sup>36</sup> Its exclusion also denies a more sophisticated understanding of race.<sup>37</sup> Not unlike the work of LatCrit theorists, this Article elaborates several linkages among our history, our communities, and legal norms, long denied by mainstream legal culture and scholarship.<sup>38</sup> By providing a counter-story, this Article presents an opportunity to examine the continuing subordination of Chicana/Chicano communities and its harmful effects, both of which derive from the period of land grant adjudication.

This Article also aims to introduce the case law of Chicana/Chicano land dispossession into legal education. Chicanas/Chicanos' status as outsiders and the extent of their land alienation encompass a wide range of issues, including ejectment, trespass law, adverse possession, quieting of title, and the takings doctrine.<sup>39</sup> Consideration

STORY OF OUR NATIONHOOD 214 (1927)); George A. Martinez, *The Legal Construction of Race: Mexican and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

35. The terms "dominant population," "Euro-American," and "European-American" refer to individuals of European descent. For a discussion of the legal identification of the dominant population, see *In re Camille*, 6 F. 256, 257 (C.C.D. Or. 1880), which defined the dominant population as "Europeans or white race."

36. See, e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-220, 110 Stat. 3009-546 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997) (vacating en banc judgment that struck down as overbroad and unconstitutional an article of Arizona's constitution that required state employees to speak only English); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1992) (holding that the University of Texas Law School's affirmative action policy violated the Fourteenth Amendment by discriminating against those of European descent).

37. See, e.g., Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996).

38. Environmental racism in contemporary communities of color constitutes an example of these denied linkages. See Gerald Torres, *Race, Class, Environmental Regulation, Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 841 (1992).

39. In addition, other authors specifically describe the use of violence in removing Chicanas/Chicanos from their land and property. See, e.g., RODOLFO ACUÑA, *OCCUPIED AMERICA: A HISTORY OF CHICANOS* 115 (3d ed. 1988) (arguing that through "nonfeasance law officers condoned the legal and physical abuse" of Mexican grantees and noting that grantees were killed after they acquired title to their property) (citing LEONARD PITT, *THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846-1890* 119 (1971)); see also ALFREDO MIRANDÉ,

of the diverse legal methods that expedited dispossession provides an invaluable opportunity for analytical study of the tension between private ownership rights and governmental actions.

As a means of establishing the legal framework necessary to develop a more precise understanding of the events of land dispossession, Part I provides a discussion of the historical procedures Mexico used to regulate land grants throughout its provinces.<sup>40</sup> Part II analyzes case law<sup>41</sup> to examine whether the United States met its obligations under the Treaty, which terminated the U.S.-Mexico War. This examination demonstrates that legal and governmental actors extended favorable legal "interpretations" to the dominant population, denied analogous interpretations to Mexican fee holders, and ultimately that favoritism expedited dispossession.<sup>42</sup>

Finally, Part III joins the past with the present and examines the link between lack of land tenure and poverty in the contemporary period. It demonstrates that rural Chicanas/Chicanos cannot acquire land<sup>43</sup> and that without property, they are unable to access the

GRINGO JUSTICE 3 (1987) (enumerating examples of violence against Mexicans after the Conquest).

40. For other legal perspectives on the dispossession of Chicanas/Chicanos, see Frederico M. Cheever, Comment, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 UCLA L. REV. 1364 (1986); Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039 (1985); Peter L. Reich, *The "Hispanic" Roots of Prior Appropriation in Arizona*, 27 ARIZ. ST. L.J. 649 (1995).

41. Further evidence of the treatment of Chicana/Chicano property interests can be found by examining land grant and deed records, census and church records, deposition papers, Board of Land Commissioners hearings, and federal legislation promulgated during the period. In addition, voluminous examples of these documents, legal briefs, motions, court opinions, surveys, and maps of land formerly held by grantees of Mexican descent are located in the Bancroft Library at the University of California at Berkeley.

42. The application of vague standards by American courts ultimately accomplished what political forces could not—an expedited dispossession of land from Chicanas/Chicanos. See George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555, 566-68 (1994) (referring to Mexican land grants); cf. H.L.A. HART, *THE CONCEPT OF LAW* 132 (1961) ("[I]n every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.").

43. See generally Arnolde De León & Kenneth L. Stewart, *Lost Dreams and Found Fortunes: Mexican and Anglo Immigrants in South Texas, 1850-1900*, 14 W. HIST. Q. 291 (1983); Richard Griswold del Castillo, *Myth and Reality: Chicano Economic Mobility in Los Angeles, 1850-1880*, 6 AZTLÁN 151 (1975) (examining the validity of economic upward mobility myths for Chicanas/Chicanos from 1850 to 1880). For data on the present condition of rural areas, see generally U.S. BUREAU OF THE CENSUS, *THE HISPANIC POPULATION OF THE U.S. SOUTHWEST BORDERLAND*, C3.196: P-23/17 (1992) [hereinafter *HISPANIC POPULATION OF U.S. SOUTHWEST*]; U.S. GEN. ACCOUNTING

privileges extended to property owners through government programs. Thus, they are guaranteed impoverished conditions.<sup>44</sup> To counter their marginalized existence, Part III suggests opening the public domain for distribution to Chicanas/Chicanos. Rather than calling for the wholesale distribution of the country's natural resources, Part III indicates that land transfers should be conditioned on sustainable, alternative forms of land use and agriculture. In addition to righting prior wrongs, this proposal therefore also provides a means of ameliorating the current *ad hoc* spoliation of the public domain.

### I. "THE GREAT AMERICAN LAND BUBBLE"<sup>45</sup>

It is a serious thing, for a branch of history, to lack a general treatment. It means there is no tradition, no received learning, no conventional wisdom. But tradition is needed: to define what is important and what is not, to guide students, researchers, other historians—and the general public.<sup>46</sup>

Omitting land alienation from legal history and education promotes Chicanas/Chicanos' status as outsiders and renders their history invisible. This omission fails to "break down simplistic nationalistic readings of the American past [in ways that might] enable us to acknowledge and learn to respect the substantial differences in historical experience of the ethnically diverse groups that make up contemporary American society."<sup>47</sup> Exclusion of this history contrib-

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OFFICE, GAO/RCED-93-40FS, RURAL DEVELOPMENT PROFILE OF RURAL AREAS (1993) [hereinafter DEVELOPMENT PROFILE OF RURAL AREAS].

The marginal economic status of present rural Chicanas/Chicanos promotes a culture in which individuals of Mexican descent are viewed as newcomers to the United States and "encouraged" to return to Mexico. See Elizabeth Martinez, *Go Back To Mexico?*, LAS VEGAS REV. J., Dec. 27, 1996, at 11B (responding to Bob Dornan supporters who, after Loretta Sánchez defeated the nine-term congressman, argued that Chicanas/Chicanos supporting Sánchez should return to Mexico).

44. See *infra* notes 482–89 and accompanying text.

45. AARON M. SAKOLSKI, *THE GREAT AMERICAN LAND BUBBLE* (1932) (describing the loss of public domain in the United States to land speculators, from pre-revolutionary times through the early twentieth century).

46. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 9 (1973) ("Without tradition, there is no framework, no skeleton, nothing to hang one's ideas on, nothing to attack and revise . . .").

47. EBRIGHT, *LAND GRANTS*, *supra* note 19, at 69. In employing a racial critique of the cases in which courts dispossessed Chicanas/Chicanos, this Article examines the relations among the various individuals and groups who sought control of the valuable resources belonging to Mexican grantees. See SINGER, *supra* note 9, at 20 ("Social relations approaches analyze property rights as relations among persons regarding control of valued resources."). Not unlike the work of LatCrit Scholars, this Article

utes, moreover, to a legal culture that facilitates legislation adversely impacting subordinated communities.<sup>48</sup> In addressing Chicana/Chicano property dispossession, therefore, this Article rejects simplistic norms while emphasizing the "substantial differences" comprising the country's legal history.

### A. Property and the Common Law

Students of property law examine fee-holder rights that purportedly function as "limits" on governmental actions.<sup>49</sup> Additionally, recent judicial rulings emphasize the tension between protecting private land ownership rights and protecting the country's natural resources.<sup>50</sup> These rulings suggest that the Supreme Court is returning to stronger support of private property rights deriving from the common law, as against state and local government.<sup>51</sup> Courts in the contemporary period, moreover, reason that the common law has long and consistently protected the nation's citizens from overly intrusive governmental actions. Yet this reasoning elides Chicana/Chicano history by failing to account for both the role of

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seeks to link law to the subordination of Chicana/Chicano communities. *See supra* notes 37–38.

48. *See, e.g., supra* note 36.

49. *See* Jennifer Nedelsky, *Law, Boundaries, and the Bounded Self*, 30 REPRESENTATIONS 162 (1991); *see also* DUKEMINIER & KRIER, *supra* note 10, at 1141.

50. *See, e.g.,* *Dolan v. City of Tigard*, 512 U.S. 374, 393 (1994) (holding that the city's public land dedication requirements were not sufficiently related to plaintiff's proposed development). *But see* *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (upholding Hawaii's Land Reform Act of 1967 as not violating the Fifth Amendment's "public use" requirement).

51. *See, e.g.,* *Lucas v. Southern Cal. Coastal Council*, 505 U.S. 1003, 1016–17 & n.7 (1992) (relying on the "rich tradition of protection at common law" for land to hold that an owner sacrificing "all economically beneficial use" of his property suffers a taking under the Fifth Amendment). For a discussion of the issue from the perspective of a state court, *see Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), in which the Michigan Supreme Court upheld the City of Detroit's use of eminent domain to acquire property.

The conflict between private property rights and governmental actions continues to generate extensive debate; space constraints, however, limit references to but a few investigations. *See, e.g.,* Daniel A. Crane, *A Poor Relation? Regulatory Takings After Dolan v. City of Tigard*, 63 U. CHI. L. REV. 199 (1996); Mark V. Hanrahan, *Dolan v. City of Tigard: Rough Proportionality as the Supreme Court's Next Step in Takings Jurisprudence*, 12 GA. ST. U. L. REV. 553 (1996); Sarah Long, *Tipping the Scales for the Private Property Owner*, 25 STETSON L. REV. 213 (1995).

common law actions by American settlers<sup>52</sup> and the role of the United States government in the process that led to land alienation.<sup>53</sup>

Although a conquered people,<sup>54</sup> Mexicans received the negotiated promises of the United States to protect their feeholder interests.<sup>55</sup> Nevertheless, the United States' need for greater public domain acreage competed with the promises made to those of Mexican descent.<sup>56</sup> Land was the Republic's greatest resource and its sole source of revenue, especially in the West where land was abundant and fertile.<sup>57</sup> The former Mexican territories, containing rich natural resources such as gold, silver, zinc, copper, oil, and uranium, offered

52. American settlers of the former Mexican territories ceded under the Treaty of Guadalupe Hidalgo, *supra* note 15, used actions of trespass and adverse possession to gain control of lands owned by Chicanas/Chicanos. See *infra* notes 404–12 and accompanying text.

53. Despite its promises in the Treaty, the United States undermined its obligation to protect Mexican grantees' property by enacting several pieces of legislation and pursuing an aggressive program of challenging the validity of grants. See *infra* Part II.

54. See, e.g., *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 480 (1865).

55. See Treaty of Guadalupe Hidalgo, *supra* note 15, at 217–18. In addition to these contractual guarantees, the Constitution protected grantees as citizens. The United States also assumed a trustee status that further required it to protect the legal interests of the Mexican population. See, e.g., *Cornelius v. Kessel*, 128 U.S. 456, 460–61 (1888) (“[I]n a loose and general sense the United States, pending issuance of a patent under other land grant acts, has been referred to as a trustee of lands to be patented.”); see also *Payne v. New Mexico*, 255 U.S. 367 (1921) (holding that a claimant to public land who met all requirements for perfecting his claim acquires rights against the government because he holds equitable title in the land); *Orchard v. Alexander*, 157 U.S. 372 (1895) (declaring that the government must provide justice for all claimants in land grants); *Rodriguez v. United States*, 68 U.S. (1 Wall.) 582, 588 (1863), cited in *Shelley v. Hurwitz*, 92 P.2d 660 (Cal. Dist. Ct. App. 1934) (declaring that the Treaty and international law obligated the United States to protect all private rights previously acquired).

56. “Public domain” means public lands subject to sale and disposition under the general land laws. See *Newhall v. Sanger*, 92 U.S. 761, 763 (1875). For general discussions of the public domain in both the United States and Mexico, see *United States v. McLaughlin*, 127 U.S. 428 (1888), and *Hornsby v. United States*, 77 U.S. (10 Wall.) 224 (1869).

57. See FRIEDMAN, *supra* note 46, at 202. The country also needed land to connect its eastern boundaries with the West. See *id.* In keeping with this goal, approximately 32,000,000 acres in Texas alone accrued to railroads. See THOMAS LLOYD MILLER, *THE PUBLIC LANDS OF TEXAS, 1519–1970* 139 (1972). The displacement of Chicana/Chicano property for railroads and adjacent canals falls outside the scope of this Article. For further information about the role of railroads and its connection to land losses, see, for example, *Gonzales v. Ross*, 120 U.S. 605 (1887), which involved a trespass action by a Mexican grantee's heirs against a railroad company in connection with 11 leagues of Texas land.

tremendous wealth.<sup>58</sup> Timber and access to rivers and springs<sup>59</sup> also added value to the territories.<sup>60</sup>

To the detriment of Mexican grantees, the public land question "touched every other national issue—fiscal policy, veterans' benefits, and the spread or containment of slavery, population diffusion, and the political strength of factions and regions."<sup>61</sup> Demands for compensation by those who were volunteers in the Conquest of Mexico<sup>62</sup> and pressure from squatters and settlers seeking land necessitated the availability of large amounts of the public domain.<sup>63</sup> Land fever and its legal results conflicted with the property and other rights of grantees. Thus, grantees of Mexican descent witnessed their newly so-called adopted country itself challenging their status as feeholders.<sup>64</sup>

In resolving land conflicts, moreover, American courts ruled against Mexican landholders by employing conflicting legal principles that violated the United States Constitution and the Treaty. This

58. See ACUÑA, *supra* note 39, at 20; FRIEDMAN, *supra* note 46, at 203. Battles for control over mineral rights produced extensive litigation. See, e.g., *United States v. Castillero*, 67 U.S. (2 Black) 17 (1862) (adjudicating a chain-of-title controversy over ownership of mine discovered in 1845). Litigation encompassing mineral rights requires further scholarly investigations that cannot be covered here.

59. See, e.g., *United States v. Rocha*, 76 U.S. (9 Wall.) 639, 639 (1869) (describing a plot of land deemed valuable because of its large asphaltum spring).

60. Chicanas/Chicanos were deprived access to these valuable resources, particularly in areas once comprising communal tracts. See, e.g., *Sanchez v. Taylor*, 377 F.2d 733, 736–37 (10th Cir. 1967) (invalidating the grazing rights of descendants of settlers who held these rights before the Treaty of Guadalupe Hidalgo); MARIO T. GARCÍA, *DESERT IMMIGRANTS: THE MEXICANS OF EL PASO, 1880–1920*, 156–57 (1981) (discussing El Paso government officials' attempts to prevent Mexicans from using salt beds that had long been used for domestic and export purposes). The unfavorable outcomes of other cases provide additional evidence of the deprivation of natural resources suffered by Chicanas/Chicanos. A chain-of-title search in each case revealed that Mexican grantees originally owned the land in question. See, e.g., *Schwarz v. State*, 703 S.W.2d 187 (Tex. 1986) (determining ownership of coal and lignite between surface owners and State); *Maufrais v. State*, 180 S.W.2d 144, 144 (Tex. 1944) (involving the State's request to enjoin Maufrais from mining, excavating, and "disturbing sand and gravel from" the riverbed).

61. FRIEDMAN, *supra* note 46, at 202–03.

62. See BENJAMIN HORACE HIBBARD, *A HISTORY OF THE PUBLIC LAND POLICIES* 116–35 (1924).

63. Congress responded with legislation favorable to the squatters' demands. See *infra* notes 414–16 and accompanying text. On the nature of squatter politics, see Christian G. Fritz, *Politics and the Courts: The Struggle over Land in San Francisco, 1846–1866*, 26 SANTA CLARA L. REV. 127, 135–37 (1986); Donald J. Pisani, *Squatter Law in California, 1850–1856*, 25 W. HIST. Q. 277, 285 (1994). Until ownership status was established, Mexican-owned property should have remained off-limits to squatters.

64. The United States, for example, appealed a number of confirmed decisions that conferred tracts to their Mexican title holders, as discussed in this Article. See, e.g., *United States v. Guerrero*, 26 F. Cas. 52 (N.D. Cal. 1855) (No. 15,269); *United States v. Cazares*, 25 F. Cas. 352 (N.D. Cal. 1855) (No. 14,761); *United States v. Bernal*, 24 F. Cas. 1123 (N.D. Cal. 1855) (No. 14,581).



approach yielded consistent results, despite its *ad hoc* nature. Several courts' rulings benefited the dominant population; other highly questionable holdings permitted Mexican property to accrue to the public domain. By adding land to the public domain, courts facilitated distribution to members of the dominant population. By this method, "[o]nce land was surveyed, it was disposed of. . . . A whole continent was sold or given away—to veterans, settlers, squatters, railroads, states, colleges, speculators, and land companies."<sup>65</sup>

Beyond such court decisions, the United States created an arsenal of legal techniques to allow third parties to challenge Mexican landholders' rights where the United States either did not or could not file suit directly.<sup>66</sup> These private rights of action also permitted challengers to prosecute Mexican landholders in the name of the United States upon the payment of a \$1,000 bond, even in situations where the government held no adverse interest in the land in question.<sup>67</sup> By requiring grantees to defend their property from suits brought by third parties as well as those prosecuted by the government, the United States breached its treaty obligations to protect grantees' pre-existing property rights and denied them the security against governmental action required by the Constitution.<sup>68</sup> Defending their property rights against this multiplicity of legal assaults exhausted grantees' economic resources, ultimately reducing their estates by also forcing them to alienate portions of their land in exchange for representation and court costs provided to

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65. FRIEDMAN, *supra* note 46, at 203.

66. See *infra* notes 190–94 and accompanying text.

67. See, e.g., *United States v. Throckmorton*, 98 U.S. 61, 70 (1878); *United States v. San Jacinto Tin Co.*, 23 F. 279, 290 (C.C.D. Cal. 1885); see also *Sena v. United States*, 189 U.S. 233, 233 (1903) (reporting that the original petition was amended to allow American Turquoise Company and "one McNulty" to join with the United States in challenging a Mexican grantee). These actions caused protracted delays in securing confirmed status.

State governments also took actions that undermined Chicana/Chicano legal claims. For example, the Texas constitution provided that "no claim or right to land which issued prior to November 13, 1835, shall ever hereafter be used in evidence in any courts of the state unless recorded in the country in which the land is situated." TEX. CONST. art. XIII, § 4 (repealed 1876). Before Texas adopted this provision, failure to record a claim did not render such claims inadmissible. Courts later held that the provision violated the U.S. Constitution, but not before it had induced hardship and delays. See, e.g., *Texas Mex. Ry. v. Locke*, 12 S.W. 80 (Tex. 1889).

68. See U.S. CONST., amend. V. Under the Constitution, treaties also constitute the "supreme Law of the Land." U.S. CONST., art. VI, cl. 2. Therefore, the Treaty should have provided grantees of Mexican descent with protection from governmental action, even outside the regime of the Fifth Amendment. See *Ely's Adm'r v. United States*, 171 U.S. 220, 237 (1898) ("Sustaining the validity of the grant to the extent of the land paid for is but carrying out the spirit of the treaty, the obligations of international justice and the duties imposed by the act creating the Court of Private Land Claims.").

defend their title to the whole.<sup>69</sup> Attorney-initiated partition actions, in turn, further expedited the loss of land, where grantees had pledged their interest as collateral.<sup>70</sup>

While Chicanas/Chicanos lost their land in litigation, Congress created public laws that subsidized rural enterprises and their fee-holders.<sup>71</sup> The new holders, including the United States, thereafter leveraged their acquired holdings to produce yet more wealth via "commerce, industry, mining, [and] agriculture."<sup>72</sup> The consequences of these public subsidies extend into the present, as public law continues greatly to enhance the economic standing of the agricultural sector.<sup>73</sup>

### B. Historical Framework

Mexico permitted land grants to individuals (including women, Native Americans, and foreign nationals)<sup>74</sup> and to groups that established communal forms of property (*empresarios*). The grants were subject to the grantee's performance of certain conditions<sup>75</sup> or in

69. See *infra* Part II.B.2.b.ii. Attorneys and Land Grants.

70. See *infra* notes 442–53 and accompanying text.

71. See *infra* notes 413–17 and accompanying text.

72. ACUÑA, *supra* note 39, at 12, 20.

73. The present size of the rural economy illustrates this point. In 1992, the agricultural sector contributed \$85.6 billion to the U.S. economy. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-104FS, U.S. AGRIC.: STATUS OF THE FARM SECTOR 6–7 (1995) [hereinafter STATUS OF THE FARM SECTOR]. Furthermore, if the definition of the agricultural sector includes inputs such as fertilizer, seeds, and machinery as well as outputs that channel into other economic sectors, the agricultural sector added \$1.1 trillion to the 1992 gross domestic product. See *id.* This is significant in light of the fact that the gross domestic product, in that year, totaled \$6 trillion. See *id.*

74. See Translation of the Decree of the Mexican Congress Respecting Colonization, Aug. 18, 1824, art. I (repealed 1836), reprinted in Ferris v. Coover, 10 Cal. 589, 634 (1858) [hereinafter Translation Respecting Colonization]. For a discussion of a Mexican governor's authority to grant land to foreign nationals for agricultural endeavors, see *United States v. Cambuston*, 25 F. Cas. 266, 273 (C.C.D. Cal. 1859) (No. 14,713).

75. See Translation of the General Rules and Regulations for the Colonization of Territories of the Republic of Mexico, Nov. 21, 1828, reprinted in Ferris, 10 Cal. at 635–36 [hereinafter Translation of the Rules] (requiring cultivation and settlement of property; time constraints; colonization of families on *empresario* grants; and proof of performance to the municipal authority). For case law references to conditions attached to a grantee's award, see *United States v. De Haro*, 72 U.S. (5 Wall.) 599, 625 (1856), which stated that the grantee could neither sell nor alienate the property, nor obstruct roads, and he was required to cultivate cattle and occupy the property within a year or he would lose his right to the provisional grant. See also *Fuentes v. United States*, 63 U.S. (22 How.) 443 (1859). The Grant in *Fuentes* involved the following conditions:

1. That he should enclose it without prejudice to the crossways, roads, and uses; he shall have the exclusive enjoyment of it, and apply it to such use and culture as may best suit his views.

consideration of governmental service.<sup>76</sup> Grants to foreign nationals were specially conditioned upon the grantee's adherence to Mexican law.<sup>77</sup> Other grants derived from marriage, donation,<sup>78</sup> or direct purchase.<sup>79</sup>

Once in possession of Mexican land, foreign nationals enjoyed a considerable measure of financial success.<sup>80</sup> For example, the holder of the Rio Ojotska land grant in California gleaned at least \$10,000 from his business enterprise and used the funds to erect a mill, build a blacksmith shop, raise cattle, and employ fifty to sixty workers.<sup>81</sup>

Marriages with Mexican women brought additional benefits for foreign nationals. Under Mexican law women could inherit property and also petition for grants.<sup>82</sup> Therefore, marriage to a Mexican

2. That he should apply to the proper judge for judicial possession of the same, by whom the boundaries shall be marked out, and along which landmarks should be placed to designate its limits, and that fruit and forest trees shall be planted on the land.
3. That the land given should contain eleven leagues for large cattle, as is designated by a map said to be attached to the expediente. The land is to be surveyed according to the ordinance; and should there be an overplus, it was to inure to the benefit of the nation.

*Id.* at 450.

76. See Shadow & Rodríguez-Shadow, *supra* note 14, at 266. Settlers favored traditional communal grants because they permitted access to natural resources and facilitated commodities production and the raising of livestock. See *id.*

77. See Translation Respecting Colonization, art. I, *supra* note 74.; ROBINSON, *supra* note 26, at 60.

78. See United States v. Ortega, 27 F. Cas. 358 (N.D. Cal. 1856) (No. 15,970) (involving the bequest of a tract to Maria Clara Ortega and Maria Isabel Clara Ortega from their father who had resided on his San Ysidro grant since 1809).

79. See, e.g., Ainsa v. United States, 184 U.S. 639, 640 (1902) (stating that "the Mexican government, December 28, 1836, sold and conveyed land to Juan, Rafael and Ignacio Elias Gonzales in consideration of \$142.50 and other valuable considerations").

80. American settlers, both inside and outside the territories, benefited economically from Mexican law. One historian observes that, "[s]tarting in the 1820s, hide and tallow traders from New England regularly tied up their ships in California harbors to acquire leather for shoe factories and tallow to make candles. For these they traded textiles, articles of apparel, hardware, and notions." VICTOR WESTPHALL, MERCEDES REALES: HISPANIC LAND GRANTS OF THE UPPER RIO GRANDE REGION 69 (1983); see also Dalton v. United States, 63 U.S. (22 How.) 436 (1859); McKinney v. Saviego, 59 U.S. (18 How.) 235 (1855); United States v. Reading, 27 F. Cas. 716 (N.D. Cal. 1853) (No. 16,127), *aff'd*, 59 U.S. (18 How.) 1 (1855); ROXANNE DUNBAR ORTIZ, ROOTS OF RESISTANCE, LAND TENURE IN NEW MEXICO, 1680-1980 at 68-75 (1980) (demonstrating that foreign nationals who settled in the New Mexico territories sustained economic gains). Indeed, "[m]ost of the merchants in Alta California were foreigners." SANCHEZ, *supra* note 31, at 175.

81. See United States v. Cooper, 25 F. Cas. 626, 626 (N.D. Cal. 1855) (No. 14,862).

82. Janet Lecompte, *The Independent Women of Hispanic New Mexico, 1821-1846*, 12 W. HIST. Q. 24 (1981). Mexico's Colonization Law of 1836 also required foreign nationals seeking grants to naturalize or marry Mexican women. See United States v. Cambuston, 25 F. Cas. 266, 270 (1857).

woman owning property facilitated acquiring acreage beyond limitations allowed individual grantees.<sup>83</sup> Such marriages also enhanced the material success of foreign nationals by facilitating access to a wide network of established familial relationships.<sup>84</sup>

Although foreign nationals benefited from their land grants, those grants produced dire consequences for the Mexican Republic. For example, one Swiss native, John Augustus Sutter, held a considerable position in his area as a result of his grant—"a combination of feudal lord and alcalde."<sup>85</sup> Yet, he recruited volunteers to help in the invasion of Mexico<sup>86</sup> and his settlement<sup>87</sup> served as a site of anti-Mexican activity leading up to the war.<sup>88</sup>

83. The Mexican Colonization Law of 1824 limited individual grantees to grants of 11 leagues. *United States v. McLaughlin*, 127 U.S. 428, 449 (1888); see also EBRIGHT, *LAND GRANTS*, *supra* note 19, at 39. The law of community property in the Mexican province of California became the law of the State of California through Article XI, § 14 of the first Constitution of California and Act of April 17, 1850, defining the rights of husband and wife. See Guadalupe T. Luna, "This Land Belongs to Me!": *Chicanas and the Treaty of Guadalupe Hidalgo*, 3 HARV. LATINO L. REV. (forthcoming 1999).

84. For a description of the role of women during this period, see Antonia I. Castañeda, *Presidarias y Pobladoras: The Journey North and Life in Frontier California*, in CHICANA CRITICAL ISSUES 73, 73-93 (Norma Alarcón et al. eds., 1993); JUAN GOMEZ-QUINONES, *ROOTS OF CHICANO POLITICS, 1600-1940*, at 61-65 (1994); SÁNCHEZ, *supra* note 31, at 57.

85. ROBINSON, *supra* note 26, at 60-61. An *alcalde* is "a chief magistrate in charge of a district; a regional governmental post combining judicial, administrative, and tax-collecting duties; subordinate to the gobernador (governor) of the region." ANTONIO MARIA OSIO, *THE HISTORY OF ALTA CALIFORNIA, A MEMOIR OF MEXICAN CALIFORNIA* 343 (1996).

Sutter was a notorious figure in the history of California. See, e.g., RICHARD DILLON, *FOOL'S GOLD: THE DECLINE AND FALL OF CAPTAIN JOHN SUTTER OF CALIFORNIA* 15-16 (1967). At one point the Mexican Republic, in recognizing the potential threat Sutter presented, sent Andres Castillero to negotiate with him to purchase his fort and surrounding land. Although purportedly offered \$100,000 for the property, Sutter refused. See *Ferris v. Coover*, 10 Cal. 589, 640 (1858).

86. For a discussion of Sutter's role in the political disturbances that "agitated the country" in 1845, see *United States v. Reading*, 27 F. Cas. 716, 716 (N.D. Cal. 1853) (No. 16,127), *aff'd*, 59 U.S. (18 How.) 1 (1855). American courts later used Sutter's subversive activity against the Mexican government as an excuse for allowing him to expand his land holdings at the expense of Mexican grantees. See *infra* notes 256-61 and accompanying text.

87. Sutter's tract was described as a "privately owned fortress overlooking the Sacramento and American rivers [that] had some of the physical aspects of a pueblo." ROBINSON, *supra* note 26, at 60-61.

88. See Pisani, *supra* note 63, at 278; ROBINSON, *supra* note 26, at 114. By 1844, several hundred Americans resided in the lower Sacramento Valley. See WESTPHALL, MERCEDES REALES, *supra* note 80, at 69.

## 1. Land Grant Procedure

A series of colonization laws required persons seeking a land grant to specify in a written petition the requested site and its boundaries.<sup>89</sup> To ensure proper processing, petitioners also consulted either a district prefect or another local office where the land was situated.<sup>90</sup> These requirements verified the accuracy of the petitioner's account of places and events and also ensured that the requested grant would not injure third persons or the public.<sup>91</sup> In addition to conducting surveys, government officials also identified the boundaries of proposed tracts by referencing natural landmarks and the boundaries of other established grants. Rivers, "rocks,"<sup>92</sup> and mountains therefore

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89. See Translation Respecting Colonization *supra* note 74, art. II, (requiring "a petition, expressing [the petitioner's] name, country, profession, the number, description, religion, and other circumstances of the families, or persons, with whom he wishes to colonize, describing as distinctly as possible, by means of a map, the land asked for"); see also *Ferris v. Coover*, 10 Cal. 589, 593 (1858) (citing the Translation of the Rules, *supra* note 75). For example, one petition reads:

To his Excellency the Governor:

I, Juan B. Alvarado, colonel of the auxiliary militia of this department, to your Excellency, with due respect, do represent, that being actually the owner . . . of a very small tract of land, which is not sufficient to support the cattle with which it is stocked . . . and being desirous of increasing it, at the same time to contribute to the spreading of the agriculture and industry of the country, I solicit your Excellency, according to the colonization laws, to be pleased to grant me ten sitios de ganado mayor (ten square leagues) of land.

*Fremont v. United States*, 58 U.S. (17 How.) 542, 543 (1854); see also *Hayes v. United States*, 170 U.S. 637, 642 (1898) (map showing extent and boundaries filed with petition); *Chaves v. United States*, 168 U.S. 177, 190 (1897) (involving a petition describing claim as "adjoining the boundaries of the land belonging to the Indians of the Town of Jemez"); *Cervantes v. United States*, 5 F. Cas. 380 (N.D. Cal. 1855) (No. 2560); *State v. Balli*, 190 S.W.2d 71 (Tex. 1944); *Sheldon v. Milmo*, 36 S.W. 413 (Tex. 1896).

90. Case law provides additional descriptions of the land grant process. See, e.g., *United States v. McLaughlin*, 127 U.S. 428, 448 (1887) (identifying three types of Mexican grants: grants defined by specific boundaries; grants within larger grants; and grants of land known by a certain name); *Hornsby v. United States*, 77 U.S. (10 Wall.) 224 (1869) (reiterating Mexican procedures used in granting land).

91. See Translation Respecting Colonization *supra* note 74. Article III recites in relevant part: "The Governor shall proceed, immediately [to investigate] whether the petition embraces the requisite conditions . . . both as regards the land and the candidate . . . or, if preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant . . ." *Id.*; see *United States v. Ritchie*, 58 U.S. (17 How.) 525 (1854); *United States v. Suñol*, 27 F. Cas. 1367 (N.D. Cal. 1855) (No. 16,421); *Ferris v. Coover*, 10 Cal. 589, 593 (1858).

92. The Spanish word "pena" is translated to mean "rock" by some American courts. The English word "rock" may denote a stone, which is easily moved. By contrast, the Spanish term "pena" refers to a rock outcropping or boulder, which is not easily moved. Thus, usage of the word "rock" promoted incorrect references of

helped define the boundaries of a petitioner's land grant.<sup>93</sup> Adjoining and surrounding *ranchos* deterred encroachment by proposed petitions, serving as a check against geographical conflicts.<sup>94</sup> Receiving a land grant also involved the ceremony of seisin, not unlike property transfers under the common law.<sup>95</sup> Once possessed of a tract, grantees could neither encumber nor transfer their property without the consent of the Mexican government.<sup>96</sup>

In addition to the formal process, Mexican officials customarily looked to actual events and intent, rather than to the specific letter of Mexico's colonization laws, when issuing grants.<sup>97</sup> In such situations,

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boundaries defined under the Mexican system. Such incorrect references facilitated easy challenges to the land titles of Mexican grantees. Unless otherwise indicated by citation, all Spanish-to-English translations are those of the Author.

93. See *United States v. Castro*, 65 U.S. 346, 347 (1860) (involving grant with natural boundary demarcations). This use of natural landmarks stemmed, in part, from the Mexican practice of relying on a region's ecosystem to ensure self-sufficiency, particularly in areas of scarce natural resources. See Juan Estevan Arrellano, *La Querencia: La Raza Bioregionalism*, 72 N.M. HIST. REV. 31, 32 (1997) (discussing the concept and origin of bioregionalism as employed by the Spaniards).

94. See *Fuentes v. United States*, 63 U.S. (22 How.) 443, 450 (1859); *De Arguello v. United States*, 59 U.S. (18 How.) 539, 541-44 (1855); *Dodge v. Perez*, 7 F. Cas. 794, 796 (C.C.D. Cal. 1872) (No. 3953) (reporting on Rancho San Jose and adjoining creeks as "well-defined natural boundaries").

95. This ceremony symbolized the "act or delivery of juridical possession." *Castro*, 65 U.S. (24 How.) at 347 ("He shall request the judge of that district to give him the juridical possession . . . who shall mark out the boundaries with the respective landmarks . . ."). Malcolm Ebright provides a description of one such ceremony during Spanish governance of California:

I took them by the hand, I conducted them over said lands, they pulled up grass, threw stones to the four cardinal points, and we all said together three times, 'long live the king, our lord, whom may God preserve!' as evidence of true possession, which they received quietly and peaceably without any opposition . . .

EBRIGHT, *LAND GRANTS*, *supra* note 19, at 24. After Mexico gained its independence from Spanish rule, the ceremony was amended to replace "long live the king" with "long live the president and the Mexican nation." *Id.* at 24 n.52; see also *United States v. Sandoval*, 167 U.S. 278, 286 (1897) (discussing seisin under Spanish law). For examples of seisin and its historical value, see DUKEMINIER & KRIER, *supra* note 10, at 194-95; CORNELIUS J. MOYNIHAN, *INTRODUCTION TO THE LAW OF REAL PROPERTY* 98-101 (1988).

96. See *General Rules and Regulations for the Colonization of Territories of the Republic of Mexico*, cited in *Cessna v. United States*, 169 U.S. 165, 168 (1898); Ferris v. Coover, 10 Cal. 589, 635 (1858).

97. MALCOLM EBRIGHT, *TIERRA AMARILLA GRANT, A HISTORY OF CHICANERY* 28 n.74 (1980) ("The concern is not so much what the law books say, as what actually happened. If a grant was recognized by a former government this would be of greater significance than the fulfillment of all the formal requirements."). Ebright also notes that under the Mexican legal system, customary law played a more significant role in the land grant process than under Anglo-American law. *Id.* Consequently, although custom and practice were recognized in some areas of

the Republic granted title unless injury resulted to third parties or the proposed grantee failed to perform certain conditions.<sup>98</sup> Alternatively, petitioners could denounce the tract.<sup>99</sup> Reliance on customs and practices also arose in part because of communication difficulties between grantees and officials in Mexico City.<sup>100</sup> Accordingly, even before formal processing of the grant, Mexico permitted provisional occupancy on the proposed tract.

Absent any adverse or contrary information, the documents were collected into one package, known as an "*expediente*,"<sup>101</sup> and forwarded to the governor of the region, who then advised the departmental assembly (legislative body) of the award.<sup>102</sup> Next, the

Anglo-American law, they were largely disregarded in the grant confirmation process. *See id.*

98. *See United States v. Carrillo*, 25 F. Cas. 312 (C.C.N.D. Cal. 1855) (No. 14,737) (reporting that grantees were permitted to sow their land and build a house before completion of petition process). While differences in the significance of possession exist under civil and common law, courts from the relevant period recognized that those differences could be insignificant. *See, e.g.,* *Suñol v. Hepburn*, 1 Cal. 254 (1850).

99. *See Nunez v. United States*, 18 F. Cas. 487, 490 (D.C. Cal. 1856) (No. 10,379), for an example of a denounced tract. The decision in *Allen v. West Lumber Company*, 244 S.W. 499, 501 (1922), provides an analysis of the medieval Spanish doctrine recognizing that title to real estate could be lost by abandonment, its application under Mexican law, and an example of a court's inability to reconcile the concept with the common law. *See also Fuentes v. United States*, 63 U.S. 443, 446-47, 460 (1859).

100. *See United States v. Rocha*, 76 U.S. (9 Wall.) 639, 643 (1869). The Court reports that, at times, "however, when the lands were situated and the parties lived at a great distance from the seat of government, the preliminary proceedings were begun before a prefect, who made the usual reference for report, received the same, and then transmitted all the papers to the governor for his action." *Id.* "Monterey, the seat of government, was over four hundred miles from Los Angeles." *Id.* at 642. For a discussion of Mexican custom and practice in the award of grants, see EBRIGHT, *TIERRA AMARILLA*, *supra* note 97, at 28 n.74 ("In practice, few grants were revoked by the Spanish or Mexican governments except for failure to occupy the land, and then usually on the petition of an individual or group of settlers wanting to use the land.").

101. At times the *expedientes* were stitched together. *See United States v. Cambuston*, 25 F. Cas. 266, 267 (C.C.D. Cal. 1859) (No. 14,713). Many cases provide examples of *expedientes*. *See, e.g.,* *United States v. Elder*, 177 U.S. 104, 112-13 (1900); *Cessna*, 169 U.S. at 170-73; *Romero v. United States*, 68 U.S. (1 Wall.) 721, 733 (1863); *United States v. Castro*, 65 U.S. (24 How.) 346, 349 (1860); *Bouldin v. Phelps*, 30 F. 547, 550-51 (N.D. Cal. 1887); *United States v. Guerrero*, 26 F. Cas. 52, 52-53 (N.D. Cal. 1855) (No. 15,269); *State v. Balli*, 190 S.W.2d 71, 73 (Tex. 1944).

102. The practice of forwarding the governor's decision was not regarded as an absolute requirement. *See Hornsby v. United States*, 77 U.S. (10 Wall.) 224, 229-30 (1869) (discussing governors' duties and noting that want of approval by the departmental assembly does not affect the validity of a grant). In *Cambuston*, the court reported on the nature of the custom and the governor's relationship with the general assembly:

The loose and informal mode of conducting business, the small value of the lands, the infrequency of the meetings of the assembly, and

assembly forwarded the information to Mexico City and sometimes provided copies to petitioners.<sup>103</sup> The Mexican government preserved the *expedientes* among its archives, forming records of the grant proceedings. Mexico also kept a log of the grants, the *Toma de Razon*, enumerating the names of grantees, the lands granted, and the dates of each award.<sup>104</sup>

Mexico's award of land grants for multiple reasons resulted in varied tract sizes. The earliest grants, during both the Spanish and Mexican periods, were awarded for the performance of military obligations or "meritorious service."<sup>105</sup> For example, the first land grants in Alta California belonged to veterans of the Spanish army of

other causes, soon led the governors to depart from the strict course of procedure with respect to concessions of land which [Governor] Figueroa had observed; and the practice grew up of issuing the final document[], or title paper, immediately upon the making of the decree of concession.

25 F. Cas. at 274.

103. See, e.g., *United States v. Bolton*, 64 U.S. (23 How.) 341, 350 (1859) (reviewing the administrative steps followed when processing a grant). For examples of the language used in grants, see *Cessna v. United States*, 169 U.S. 165 (1898) and *Chaves v. United States*, 168 U.S. 177 (1897).

104. See, e.g., *Cambuston*, 25 F. Cas. at 267; *United States v. Castro*, 25 F. Cas. 329, 329 (N.D. Cal. 1859) (No. 14,753). In California, more than 800 land grants existed prior to annexation. See Gates, *The California Land Act of 1851*, *supra* note 24, at 402. For a detailed review of the grant process, see *United States v. Fossat*, 25 F. Cas. 1166 (N.D. Cal. 1862) (No. 15,140).

105. See *De Arguello v. United States*, 59 U.S. (18 How.) 539, 540 (1855). Don Jose Dario Arguello, as one of the "founders of [Mexico], and . . . commandanté of the Presidio at San Francisco," was granted "a tract called 'las Pulgas.'" *Id.*; see also *Executors and Heirs of Augustin de Yturbe v. United States*, 63 U.S. (22 How.) 290, 291 (1859) (explaining that "in recompense for his high merit in having achieved the independence of his country," President Yturbe, in 1822, received a grant of 20 leagues of land located in Texas).

The process of awarding land tracts in exchange for conscription and "meritorious service" was not unknown in the United States. In August of 1776, for example, Congress offered land to deserters from the British army with a special bonus to officers who could induce soldiers to desert with them; subsequent legislation extended additional land grant awards. See HIBBARD, *supra* note 62, at 32 n.1. In *Fremont v. United States*, 58 U.S. (17 How.) 542 (1854), the court noted:

The State of North Carolina, in 1780, passed an act reserving a certain tract of country to be appropriated to its officers and soldiers; and in 1782 . . . proceeded to enact that 25,000 acres of land [in that tract] should be allotted for and given to Major-General Nathaniel Greene . . . as a mark of the high sense the State entertained of the extraordinary services of that brave and gallant officer.

*Id.* at 559 (citing *Rutherford v. Greene's Heirs*, 15 U.S. (2 Wheat.) 195, 196 (1817)). The U.S. government offered land bounties to volunteer soldiers who assisted in the invasion of the Mexican Republic. For an examination of Anglo-American land grants for military service, see HIBBARD, *supra* note 62, at 116.



occupation.<sup>106</sup> Other petitioners received tracts in consideration for escorting a government official or friar, or for settling an area while engaging in agricultural enterprises.<sup>107</sup>

## 2. Grantees, Contractual Performance, and Land Use

Contrary to some court observations, grant awards consisted of conveyances of title for consideration, such as monetary payments or services rendered to the government.<sup>108</sup> Settling and cultivating a proposed tract also provided adequate consideration for a grant.<sup>109</sup> Thus, mutuality of agreement served as the basis for the land grant process.

In general, Mexican grantees fulfilled their contractual promises according to the dictates of the Republic's colonization laws. Historical accounts document their productivity in planting, cultivating, and harvesting wheat, barley, cotton, tobacco, fruits, corn, wheat, beans, and other crops.<sup>110</sup> Indeed, the high crop yield led one reporter to characterize a region of the territories as "[t]he Nile of the

106. See ROBINSON, *supra* note 26, at 93–94. These particular tracts were awarded around 1784. See *id.* at 52.

107. See *Newhall v. Sanger*, 92 U.S. 761, 763 (1875) (stating that "[i]t had been the practice of Mexico to grant large tracts to individuals, sometimes as a reward for meritorious public services, but generally with a view to invite emigration and promote the settlement of her vacant territory"). For a discussion of the many reasons American settlers opposed grants of larger-sized tracts, see Gates, *The California Land Act of 1851*, *supra* note 24, providing a discussion of the increased demand for land following American control of California. See also Bakken, *supra* note 21, at 249 ("In California's early years, many saw these large land holdings as a social evil . . . [and criticized what was deemed] land monopoly."). For a discussion of the concentration of land in the hands of large landowners in the contemporary period and a proposal to remedy that problem while restoring Chicanas/Chicanos to the land, see *infra* notes 490–526 and accompanying text.

108. See, e.g., *State v. Gallardo*, 135 S.W. 664, 667 (Tex. Civ. App. 1911) (describing payment of \$210 on behalf of 96 inhabitants).

109. The Mexican and Spanish government awarded grants with an awareness of the ecosystems around them. "[E]ach grant contained all of the ecosystems vital to the maintenance of traditional Hispanic subsistence patterns as these had evolved in the Southwest. Thus, each conformed to the stipulations for types of land (e.g., agricultural, grazing, etc. [sic]) . . ." Marianne L. Stoller, *Grants of Desperation, Lands of Speculation, Mexican Period Land Grants in Colorado*, 19 J. W. 22, 25 (1980). Such grants allowed grantees to engage in agricultural enterprises. See *id.*

110. See *Teschmacher v. United States*, 23 F. Cas. 862, 865 (N.D. Cal. 1855) (No. 13,843) (corn, watermelons, and beans), *aff'd*, 59 U.S. (18 How.) 1 (1855); *Chabolla v. United States*, 5 F. Cas. 387, 388 (N.D. Cal. 1855) (No. 2566) (wheat and barley); Refugio Rochin, *Hispanic Americans in the Rural Economy: Conditions, Issues, Probable Future Adjustments*, in NAT'L RURAL STUD. COMM. 62 (1992) (discussing how barley and other agrarian commodities ensured the viability of communities).

West."<sup>111</sup> Grantees also raised cattle and horses bearing their brands<sup>112</sup> and implemented extensive irrigation systems that presently remain in use.<sup>113</sup> Finally, several Mexican grantees engaged in profitable export and trade. Artisans and missions pursued commercial activity.<sup>114</sup> Travelers and merchants during their journeys from Kansas City, Missouri and cities farther east provided accounts as to the nature of Mexican enterprises.<sup>115</sup>

Notwithstanding the consideration grantees provided through payment or performance of services, following the U.S.-Mexican War, American courts characterized many of the grants as gratuitous

111. J.J. Vernon, *Field Crops in the Mesilla Valley*, in BUREAU OF IMMIGRATION OF THE TERRITORY OF NEW MEXICO, REPORT OF DOÑA ANA COUNTY 32 (Albert J. Fountain ed., 1882). Vernon investigated the Mesilla Valley, a portion of the Rio Grande valley comprising 110,000 acres in New Mexico, with approximately 35,000 acres under cultivation. *See id.*

This fertile territory, once conquered, provided a valuable asset to American growers, an asset that has added immeasurably to the economic status of such farmers. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/T-RCED-95-133, FARM PROGRAMS, DISTRIBUTION OF USDA INCOME SUPPORT PAYMENTS (1995). Public law in the agricultural sector and international markets continue to enhance the economic status of farmers in this region. *See, e.g.*, North American Free Trade Agreement, 19 U.S.C. § 3301 (1994).

112. *See Chabolla*, 5 F. Cas. at 388 (observing that cattle and horses bore grantee's brand).

113. More information regarding irrigation systems can be found in New Mexico law governing irrigation systems from the Spanish and Mexican period and their use in the present. *See, e.g.*, N.M. CONST. art. XVI (irrigation and water rights); N.M. STAT. ANN. § 3-53-3 (Michie 1978) (irrigation and regulation of public acequias); N.M. STAT. ANN. § 73-2-12 (Michie 1978 & Supp. 1997) (elections of officers of community ditches).

114. Missions cultivated extensive gardens, orchards, tropical fruit trees, plums, bananas, oranges, olives, figs, corn, beans, chilies, cotton, and nuts. *See* J.F. MUNRO FRASER, HISTORY OF MARIN COUNTY, CALIFORNIA 33 (1880). The missions and enterprises traded fruits and vegetables with, and exported leather and cotton goods to, European countries. *See id.* For example, during the Russian occupation of Fort Ross in California, missions traded with Russians. *See id.*

115. *See* Sterling Evans, *Eastward Ho! The Mexican Freighting and Commerce Experience Along the Santa Fe Trail*, 19 KAN. HIST. 242-61 (1996-97). Physician Josiah Gregg, who recorded his 1831 trip along the Santa Fe Trail, describes an encounter in El Paso, Texas, with a group of Mexican citizens who were transporting fresh fruit, dried fruit, and wine to "distant markets." *See* JOSIAH GREGG, THE COMMERCE OF THE PRAIRIES 303 (1844); *see also* Susan Shelby Magoffin, DOWN THE SANTA FE TRAIL AND INTO MEXICO (Stella M. Drumm ed., 1926) (detailing commerce from Santa Fe, south to Chihuahua). Martha Menchaca similarly reports on the clearing of roads in Santa Paula, California. *See* MARTHA MENCHACA, THE MEXICAN OUTSIDERS, A COMMUNITY HISTORY OF MARGINALIZATION AND DISCRIMINATION IN CALIFORNIA xvi (1995). Menchaca also notes that the community "planted citrus orchards, established a sheep herding business, and constructed humble adobe homes and chapels." *Id.* The region remains an exceedingly profitable center of trade. *See generally* THE INST. FOR MFG. AND MATERIALS MANAGEMENT, PASO DEL NORTE REG. ECON. SOCIOECONOMIC PROFILE (1992); THE INST. FOR MFG. AND MATERIALS MANAGEMENT, SOUTHWEST BORDER INFRASTRUCTURE INITIATIVE (1992).

awards.<sup>116</sup> To the detriment of grantees, these rulings advanced a legal culture that facilitated alienation. The decisions also conflicted with both the promises of the United States under the Treaty and the constitutional protections of private property.

### 3. American Conquest

The United States officially declared war against Mexico on May 13, 1846,<sup>117</sup> an action that derived from the United States' annexation of Texas and its hunger for Mexican lands stretching to the Bay of San Francisco.<sup>118</sup> Before the United States invaded the Mexican provinces, Mexico effectuated various measures to curtail foreign immigration.<sup>119</sup> Nevertheless, Americans continued to enter the country.<sup>120</sup> As early as 1842—well before any formal declaration of war—both Euro-Americans and the United States government were encroaching on Mexico's political sovereignty over its territory.<sup>121</sup> To counter Mexico's assertions of authority over its public domain, American settlers promoted myths that they were under

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116. See, e.g., *De Arguello v. United States*, 59 U.S. (18 How.) 539, 547–48 (1855) (“The statute books of Mexico abound in acts offering every inducement to Mexican families to settle on the frontiers; proffering gratuitous grants of land and of agricultural implements—expenses of their voyage—maintenance for a year—and leave to import certain articles free of duty.”); *New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 735–36 (1836) (“We dispose of our public lands by sale; but Spain has uniformly bestowed her domain in reward for meritorious services, or to encourage some enterprise deemed of public utility.”).

By contrast, Spanish and Mexican accounts record the transfers to grantees as consideration for military duty, transporting friars, and land purchases and sales. See Arrellano, *supra* note 93, at 32 (quoting from *RECOPILACIÓN DE LEYES DE LOS REYNOS DE LAS INDIAS*, VOL. 2, BOOK 4, TIT. 5, LAW 1). As to the nature of Mexican law, see *Manry v. Robison*, 56 S.W.2d 438 (Tex. 1932) (applying Mexican law to settle land dispute).

117. Haas, *CONTESTED EDEN*, *supra* note 5, at 333.

118. See THOMAS R. HIETALA, *MANIFEST DESIGN, ANXIOUS AGRANDISEMENT IN LATE JACKSONIAN AMERICA* 154–56 (1988). For one court's interpretation of the war, see *Palmer v. United States*, 18 F. Cas. 1047 (D. Cal. 1857) (No. 10,697).

119. In 1830, for example, “the Mexican government enacted a decree forbidding entrance to Mexico from the north without a Mexican passport, forbidding the introduction of slaves into Mexico, and from a practical point of view, forbidding all American colonization in Texas.” CARUSO, *supra* note 5, at 5.

120. *Id.* at 6.

121. See Haas, *CONTESTED EDEN*, *supra* note 5, at 334–41 (describing a variety of hostile actions taken by U.S. citizens and officials). As Caruso notes, “these people were illegal aliens and had no rights, [thus] it was in their best interest to push for a change in government. The only way they could establish their position was to provoke a revolution.” CARUSO, *supra* note 5, at 6.

siege by the Mexican government.<sup>122</sup> These myths served as the primary "justification" for the attack on Mexican authorities.<sup>123</sup>

In California, the hostilities began at dawn on June 6, 1846, when John Fremont and a group of American riflemen arrested General Mariano Vallejo, the military commander and director of colonization in California Alta.<sup>124</sup> Vallejo had long extended hospitality to American and European settlers, and the events that transpired that night caught him by surprise.<sup>125</sup> His arrest, identified as the Bear Flag Rebellion,<sup>126</sup> precipitated a formal declaration of war

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122. In California "rumors of Mexican and Indian attacks against Americans were flying through the American settlements." CARUSO, *supra* note 5, at 124. Lisbeth Haas reports that

Californio forces had already been fighting against Americans to re-take the Sonoma area from a group of settlers instigated by U.S. Army officer John C. Fremont, who had illegally imprisoned Californio officials, seized governmental and private property, occupied Sonoma and its surroundings, and declared California the "Bear Flag Republic," independent of Mexico.

Haas, *CONTESTED EDEN*, *supra* note 5, at 333. Fremont was in California Alta illegally without permission from the Mexican government to allow him to return after the government had ordered his departure. See CARUSO, *supra* note 5, at 124. Fremont, nonetheless, attacked Indian settlements and engendered the support of the American settlers. See *id.* at 125.

123. The same myths supported American legal reasoning that either advocated or allowed the use of force in expediting the Conquest of Mexico. See *Morehead v. United States*, 17 F. Cas. 729, 734 (N.D. Cal. 1859) (No. 9792) (accepting the government's argument that "American settlers in the Sacramento valley were a small band, menaced with extermination or expulsion from the country, and driven to rely upon each other for protection"); see also PADILLA, *supra* note 4, at 53 ("By nearly all accounts, the Bear Flag Revolt, which opened the U.S. Conquest of California, was an unnecessary provocation of comic proportions. At least the American narrative versions are funny. For Californios . . . of course the Bear Flag incident was not at all humorous."). Whatever the reasoning of the American military and courts, it is important to remember that American settlers were in a foreign country, Mexico, and therefore subject to that country's rules and regulations. See *Translation Respecting Colonization*, *supra* note 74. Additionally, the United States also coveted the West and sought to connect the eastern boundaries with the West. See *supra* text accompanying note 118.

124. See PITT, *supra* note 39, at 27. As a previous owner of vast territories in San Francisco, Sonoma, and Napa Valley, General Vallejo assisted in the formation of California and also served as mayor of Sonoma. See *id.* at 78. For examples of litigation that affected Vallejo's property, see *United States v. Vallejo*, 66 U.S. (1 Black) 541 (1861); *United States v. Vallejo*, 28 F. Cas. 356 (N.D. Cal. 1859) (No. 16,605); *United States v. Vallejo*, 28 F. Cas. 356 (N.D. Cal. 1859) (No. 16,606); *Vallejo v. United States*, 27 F. Cas. 925 (N.D. Cal. 1856) (No. 16,818); and *Vallejo v. United States*, 27 F. Cas. 926 (N.D. Cal. 1856) (No. 16,819). The American military and legal actions ultimately impoverished Vallejo. See PADILLA, *supra* note 4, at 77 (describing Vallejo's interpretation of events leading to the alienation of his property interests).

125. See PITT, *supra* note 39, at 27.

126. See *id.* In *Fremont v. United States*, the Court reports that:

by the United States against the Mexican Republic.<sup>127</sup> Despite the U.S. government's expectation that the war would be brief,<sup>128</sup> the conflict lasted until June 30, 1848, ending with the signing of the Treaty of Guadalupe Hidalgo.

Notwithstanding this historical record, American legal opinions characterized the Conquest as a defensive action. For example, Chief Justice Taney stated:

[T]he genius and character of our institutions are peaceful, and the power to declare war was not conferred upon Congress for the purposes of aggression or aggrandizement, but to enable the general government to vindicate by arms, if it should become necessary, its own rights and the rights of its citizens. A war, therefore, declared by congress can never be presumed to be waged for the purpose of conquest or the acquisition of territory.<sup>129</sup>

Chief Justice Taney's reasoning reveals the belief that the United States was merely vindicating the pre-ordained rights of the

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[C]ivil war broke out in the province, which ended by the expulsion of the Mexican troops; and Colonal Fremont entered California at the head of an American force, in 1846, and the country was entirely subdued, and under the military government of the United States, in the beginning of 1847, and continued to be so held until it was finally ceded to the United States under the Treaty of Guadalupe Hidalgo.

58 U.S. (17 How.) 542, 562 (1854). Additional judicial interpretations of the California conflict abound. See, e.g., *Hornsby v. United States*, 77 U.S. (10 Wall.) 224, 239 (1869) (declaring that the authority and jurisdiction of Mexican officials in California terminated on July 7, 1846, when the United States "took possession of Monterey, an important town of California . . . and within a few weeks afterwards occupied the principal portions of the country"); *United States v. Pico*, 19 F. Cas. 595, 596 (D. Cal. 1857) (No. 11,130) (designating July 7, 1846, the date the United States captured Monterey, as the moment of actual Conquest of California). For summaries of the Conquest in Texas, see *Kenedy Pasture Co. v. State*, 231 S.W. 683 (Tex. 1921), *State v. Sais*, 47 Tex. 307 (1877), and *State v. Gallardo*, 135 S.W. 664 (Tex. Civ. App. 1911). For an account of the invasion of New Mexico, see *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177 (1857).

127. Mexico's refusal to sell the territories also generated hostile American reactions. For example, President Polk declared that "[i]f Mexico would not sell . . . the desired territory would be taken by force." CARUSO, *supra* note 5, at 43. "The term 'To conquer a peace' was coined to express Polk's policy. He wanted war with Mexico in order for the Mexicans to hand over their land as part of the peace treaty." *Id.*

128. See HIETALA, *supra* note 118, at 155.

129. *Fleming v. Page*, 50 U.S. (1 How.) 603, 614 (1850). Notwithstanding Chief Justice Taney's declaration, other courts characterized the conflict as a "Conquest." See, e.g., *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 480 (1865) ("our conquest of California"); *United States v. Moreno*, 68 U.S. (1 Wall.) 400, 404 (1863); *Pico v. United States*, 19 F. Cas. 590, 591 (D. Cal. 1855) (No. 11,127) ("the rights of a conquered people").

Americans involved in the Bear Flag Rebellion,<sup>130</sup> an approach that conveniently renders irrelevant the rebels' actual intentions. The Court's characterization notwithstanding, this forgotten war<sup>131</sup> involved the invasion, Conquest, and acquisition of "a colony two and a half times as large as France" by the United States.<sup>132</sup> Within the Mexican provinces, the United States also inherited a substantial Mexican population holding estates and agricultural enterprises of differing sizes.<sup>133</sup>

#### 4. Treaty of Guadalupe Hidalgo

Entered into force on July 4, 1848, the Treaty formally ended the war between the United States and Mexico.<sup>134</sup> By its design and intent, the Treaty established a legal relationship with those remaining

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130. See discussion *supra* note 123.

131. Lisbeth Haas reports that with few exceptions "historians have poorly portrayed Californios' guerrilla-type tactics of war that involved surprise attack and quick retreat, or they have argued that Californios were too politically divided to effectively resist. Yet it took hundreds of troops under Stockton, Fremont, Kearny, Gillespie, and Mervine to reestablish American control of southern California from late September 1846 to early January 1847." Haas, *CONTESTED EDEN*, *supra* note 5, at 331.

[H]istorians in general have yet to produce a literature that investigates in a sustained manner the strategies Californio leaders and citizens developed to thwart the American takeover and that examines their goals and objectives in waging a resistance that lasted for six months and enabled them to reoccupy for a time Los Angeles, Santa Barbara, and San Diego. In most war accounts Californios are invisible, or their involvement and commitment, ideas, and intentions are dismissed.

*Id.* at 333.

132. ACUÑA, *supra* note 39, at 20. Outside the legal venue, the circumstances underlying the Conquest of formerly Mexican property are well documented. See generally GLORIA ANZALDUA, *BORDERLANDS, LA FRONTERA, THE NEW MESTIZA* (1987); MARIO BARRERA, *RACE AND CLASS IN THE SOUTHWEST: A THEORY OF RACIAL INEQUALITY* (1979) (discussing the Conquest and colonization of Mexico); GRISWOLD DEL CASTILLO, *supra* note 14. The cost to the United States also included tremendous human losses during the Conquest. "The Mexican War was the deadliest war the United States ever fought. The number of deaths was staggering: 110 out of every thousand participants died of disease, accident, or wounds." RICHARD BRUCE WINDERS, *MR. POLK'S ARMY, THE AMERICAN MILITARY EXPERIENCE IN THE MEXICAN WAR* 139 (1997). For a historical presentation of the Chicana/Chicano presence outside the Southwest, see Dennis Nodín Valdés, *Betabeleros: The Formation of an Agricultural Proletariat in the Midwest, 1897-1930*, 30 *LAB. HIST.* 536 (1989); Dennis Nodín Valdés, *The New Northern Borderlands: An Overview of Midwestern Chicano History*, 2 *PERSP. IN MEX. AM. STUD.* 1 (1989).

133. See CAREY MCWILLIAMS, *NORTH FROM MEXICO: THE SPANISH-SPEAKING PEOPLE OF THE UNITED STATES* 52 (1949).

134. Treaty of Guadalupe Hidalgo, *supra* note 15, at 922.

in the annexed territories. In decreeing the Treaty's purpose, its drafters<sup>135</sup> provided that the two countries were "animated by a sincere desire to put an end to the calamities of the war . . . and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits . . . and assure the concord, harmony and mutual confidence, wherein the two peoples should live, as good neighbors."<sup>136</sup> On this basis, the Treaty was deemed mutually beneficial. It is well established that the Treaty was not negotiated in good faith, but rather, was imposed on the Mexican Republic.<sup>137</sup> Nonetheless, the Treaty and governing legal principles protected grantees' property rights.<sup>138</sup>

Article VIII of the Treaty extended citizenship status to Mexican grantees electing to remain in the annexed territories. The Article provides that: "Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States."<sup>139</sup> In either case, the

135. As to the nature of the negotiations between the two republics, see Jack Northrup, *The Trist Mission*, 3 J. MEX. AM. HIST. 13 (1973). Northrup notes the Euro-American exasperation with Mexican delegates who "disput[ed] about the wording of a few articles" but contends that Euro-American negotiators failed to "comprehend the values and standards of their Latin counterparts." *Id.* at 21.

Mexican negotiators included Jose Joaquin de Herrera, Jose Bernardo Couto, Brigadier General Ignacio de Mora y Villamil, and Miguel Atristain; the delegate for the United States was Nicholas Trist. MILLER, *supra* note 16, at 279–80. See generally *Trist v. Child*, 88 U.S. (21 Wall.) 441 (1874) (adjudicating dispute over payment owed Trist for his role in the treaty's negotiations).

136. Treaty of Guadalupe Hidalgo, *supra* note 15, at 922. Provisions of the Treaty enumerated in this Article at times include their Spanish version because throughout the land grant adjudication process, Spanish documents were misread and misinterpreted, or key provisions were omitted with adverse consequences for Mexican grantees. In Spanish, the covenant provides:

En el nombre de Dios Todo-Poderoso:

Los Estados Unidos Mexicanos y los Estados-Unidos de América, animados de un sincero deseo de poner término a las calamidades de la guerra que desgraciadamente existe entre ambas repúblicas, y de establecer sobre bases solidas relaciones de paz y buena amistad que procuren reciprocas ventajas a los Ciudadanos de uno y otro pays, y afianzen la concordia, armonia y mutúa seguridad en que deben vivir, como buenos vecinos . . . .

*Id.*

137. See, e.g., GRISWOLD DEL CASTILLO, *supra* note 14, at 21, 42 (stating that financial and political pressures partly induced Mexico to agree to the Treaty). Griswold del Castillo asserts: "With an arrogance born of superior military, economic, and industrial power, the United States virtually dictated the terms of settlement." *Id.* at xii.

138. Treaty of Guadalupe Hidalgo art. VIII, *supra* note 15, at 929. For a discussion of the protection of fully vested property rights, see *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177 (1857).

139. Treaty of Guadalupe Hidalgo, *supra* note 15, at 929.

Treaty clearly encompassed legal rights specific to protecting their property interests. Indeed, Article VIII specifically addressed the issue of property rights by providing protection to both established and non-established grantees:

In the said territories, property of every kind, now belonging to Mexicans, not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it, guarantees equally ample as if the same belonged to citizens of the United States.<sup>140</sup>

Thus, through Article VIII, the Treaty expressly entrusted the United States with the obligation to respect and protect the property interests of grantees remaining in the annexed territories.

Additional evidence of the obligation negotiated and adopted by the United States to protect Mexican property interests is illustrated in Article IX, which further elaborates the principle of these covenants:

The Mexicans . . . shall be incorporated into the Union of the United States and be admitted, at the proper time . . . to the enjoyment of all the rights of citizens of the United States according to the principles of the Constitution; and in the mean time shall be maintained and protected in the free enjoyment of their liberty and

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140. *Id.* In Spanish, the provision reads:

Las propiedades de todo género existentes en los expresados territorios, y que pertenecen ahora á Mexicanos no establecidos en ellos, serán respetadas inviolablemente. Sus actuales dueños, los herederos de estos, y los Mexicanos que en lo venidero puedan adquirir por contrato las indicadas propiedades, disfrutarán respecto de ellas tan amplia garantía, como si perteneciesen á ciudadanos de los Estados Unidos.

*Id.*

Furthermore, the Protocol of May 26, 1848, which interpreted the treaty, declared first that the grants of land made by Mexico in the territories "preserve the legal value which they may possess, and the grantees may cause their legitimate (titles) to be acknowledged before the American tribunals," and second that "[c]onformably to the law of the United States, legitimate titles to every description of property, personal and real, existing in the ceded territories are those which were legitimate titles under the Mexican law in California . . . up to the 13th of May, 1846 . . ." S. DOC. NO. 357, at 1119–20, reprinted in MILLER, *supra* note 16, at 381.

Other provisions defined boundaries and exempted tariffs on goods. See Treaty of Guadalupe Hidalgo, *supra* note 15, at 936–37.



property, and secured in the free exercise of their religion without restriction.<sup>141</sup>

The provisions of both Articles VIII and IX clearly guaranteed constitutional as well as other protections to the country's citizens of Mexican descent.<sup>142</sup> As the supreme law of the land, the Treaty specifically required the application of constitutional mandates protective of property rights.

#### 5. Senate Amendments and the Undermining of the Treaty Negotiations

The Treaty's negotiators—both Mexican and American—drafted Articles IX and X of the Treaty. Article IX's language, as quoted above, reveals the intent of the negotiators to ensure the protection of the legal rights of Mexicans remaining in the territories. Article X's language reveals similar motivations; however, the Senate removed it at the behest of the Executive during the Treaty's ratification proceedings.<sup>143</sup> By removing Article X, the United States robbed the Treaty of its integrity.

Article X provides:

All grants of land made by the Mexican Government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, shall be respected as valid, to the same extent that the same grants would

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141. Treaty of Guadalupe Hidalgo, *supra* note 15, at 930. The Spanish translation provides:

Los Mexicanos que, en los territorios antedichos . . . segun lo estipulado en el artículo precedente, serán incorporados en la Union de los Estados Unidos, y se admitiran en tiempo oportuno . . . al goce de todos los derechos de ciudadanos de los Estados Unidos conforme a los principios de la constitucion y entretanto serán mantenidos y protegidos en el goce de su libertad y propiedad, y asegurados en el libre ejercicio de su religion sin restriccion alguna.

*Id.*

142. At the time of the signing of the Treaty, the United States government possessed the clear authority to ensure the protections of federal constitutional and statutory law. U.S. CONST. art. VI., cl. 2. Nonetheless, constitutional provisions recognizing treaty law as the supreme law of the land should have also protected grantees of Mexican descent. *See United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

143. *See infra* notes 148–51 and accompanying text.

be valid, if the said territories had remained within the limits of Mexico.<sup>144</sup>

As negotiated, the covenant would have protected the property rights of grantees and allowed additional time for the perfection of grants.<sup>145</sup> The provision allowed Mexican grantees whose performance of grant conditions was interrupted by the conflict over Texan independence or the U.S.-Mexico War to complete the performance of those conditions.<sup>146</sup> That provision led one Court to declare:

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144. Treaty of Guadalupe Hidalgo, art. X, reprinted in MILLER, *supra* note 16, at 242-43. The Spanish translation provides:

Todas las concesiones de tierra hechas por el Gobierno mexicano, o por las autoridades competentes en territorios que pertenecieron antes de Mexico y quedan para lo futuro dentro de los límites de los Estado-Unidos seran respetadas como validas, con la misma extension con que lo serian si los indicados territorios permanecieran dentro de los límites de México.

*Id.* at 242.

145. See *Cessna v. United States*, 169 U.S. 165, 186 (1898) (noting that in addition to protecting complete grants, "Article 10 . . . proposed to give grantees . . . further time to perform the conditions."); Geoffrey P. Mawn, *A Land-Grant Guarantee: The Treaty of Guadalupe Hidalgo or the Protocol of Queretaro?*, 14 J.W. 52 (1975); MILLER, *supra* note 16, at 262-67; WESTPHALL, MERCEDES REALES *supra* note 80, at 74-75. For a more complete historical examination of Article X, see EBRIGHT, LAND GRANTS, *supra* note 19, at 28. For an examination of Article X in case law, see *Blue v. McKay*, 136 F. Supp. 315 (D.D.C. 1955). For additional discussion of the striking impact of Article X on the Mexican population, see *infra* notes 207-08 and accompanying text.

146. The provision provided as follows:

grantees . . . put in possession thereof, who, by reason of the [war and the events leading thereto], may have been prevented from fulfilling all the conditions of their grants, shall be under the obligation to fulfill the said conditions within the periods limited in the same respectively . . . .

MILLER, *supra* note 16, at 242-43. The Spanish provision states:

Pero los concesionarios de tierras en Tejas, que hubieren tomado posesion de ellas, y que por razon de tierras en Tejas, que hubieren tomado posesion de ellas, y que por razon de las circunstancias del pays desde que comenzaron las desavenencias entre el Gobierno mexicano y Tejas, hayan estado impedidos de llenar todas las condiciones de sus concesiones, tendran la obligacion de cumplir las mismas condiciones, dentro de los plazos senalados en aquellas respectivamente . . . .

La anterior estipulacion respect de los concesionarios de tierras en Tejas, se extiende a todos los concessionarios de tierras en los indicados territorios fuera de Tejas, que hubieren tomado posesion de dichas concesiones; y por falta de cumplimiento de las condiciones de alguna de aquellas dentro del nuevo plazo que empieza a correr el dia del canage . . . .

*Id.* at 242-43.

That article not only contemplated binding this government to respect all grants which would have been recognized as valid by the government of Mexico if no cession had been made, but also proposed to give to grantees who had failed to perform the conditions of their grants, and whose failure to perform might be deemed to have avoided the grants, further time to perform the conditions.<sup>147</sup>

The provision embodied an agreement between the Mexican and American negotiators that the war would not disturb the property-holding status of Mexican grantees.

In submitting the Treaty to the Senate, however, President James Polk lobbied to strike Article X on two grounds:

[First] no instructions given to Trist contemplated or authorized its insertion. [Second, t]he public lands within the limits of Texas belonged to that state, and this government has no power to dispose of them, or to change the condition of grants already made. All valid titles to lands within the other territories ceded to the United States will remain unaffected to the change of sovereignty. . . .<sup>148</sup>

Polk's objections centered on the covenant's text regarding extensions of time in Texas for the performance of interrupted conditions.<sup>149</sup>

In the end, the Senate adopted President Polk's interpretation,<sup>150</sup> despite Mexico's objections,<sup>151</sup> taking the position that grantees'

147. *Cessna*, 169 U.S. at 174.

148. MILLER, *supra* note 16, at 248.

149. See *id.* at 247. Miller enumerates Polk's several grounds for rejection of Article X including, *inter alia*, that he had recalled Trist from Mexico because "his continued presense [sic] with the Army could be productive of no good, but might do much harm by encouraging the delusive hopes and false impressions of the Mexicans." *Id.* Although Trist received notification of his recall, he ignored the President's order. Ironically, with regard to the submitted Treaty, the President stated:

conforming, as it does, substantially, on the main questions of boundary and indemnity, to the terms which our Commissioner; when he left the United States in April . . . was authorized to offer; and animated, as I am, by the spirit which has governed all my official conduct towards Mexico, I have felt it my duty to submit it to the Senate for their consideration, with a view towards ratification.

*Id.* at 247-48.

150. See MILLER *supra* note 16, at 246-59. Miller reports that the Senate vote to reject Article X was unanimous, while the final vote on ratification was 38 to 14 in favor, with nine votes not counted. See *id.* at 251-52. There is one likely additional impetus behind the removal of Article X: the desire to evade unfavorable precedent concerning land grant adjudication. In *United States v. Percheman*, 32 U.S. (7 Pet.) 51

status as citizens afforded them adequate protection under constitutional norms.<sup>152</sup> This change altered the substance of the agreement

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(1833), the Court addressed a claim for land in Florida that concerned an article of a treaty between the United States and Spain. Just as in the Mexican territories, petitioners in Florida submitted their claims to a board of commissioners to determine their validity. *Id.* at 55. In *Percheman*, the parties disputed the proper interpretation of a treaty provision. On the one hand, the Spanish terms provided that "*quedran ratificadas y reconocidas a las personas que estan en posesión de ellas . . .*" *Id.* On the other, Percheman's attorney asserted that *quedran* had been mistranslated such that the passage read "[land grants] shall be ratified," instead of "[land grants] remain ratified." See *Id.* at 68. For a more extensive discussion on the variances between the Spanish and English terms at issue in *Percheman*, see EBRIGHT, LAND GRANTS, *supra* note 19, at 32.

Justice Marshall recognized that both the Spanish and English versions of the treaty must be considered in determining the validity of a later grant. Marshall wrote that "[t]here is a difference between the English and the Spanish versions of the eighth article. Both are equally originals, but surely the justice and liberality of the United States will extend to the claimants the full benefit of either." *Percheman*, 32 U.S. (7 Pet.) at 68. The Court also recognized the rights of private property in a Conquest. Finally, the Court stated that negotiations leading to the drafting of a treaty must also be considered: "In attempting to ascertain the true meaning of the parties . . . we are not confined to the language of the treaty; we may look into the negotiations which preceded it." *Id.* Thus, the Court's holding in *Percheman*, if applied to grants in the territories, would not have allowed Euro-Americans such broad inroads into Mexican lands.

As Malcolm Ebright asserts, "the language of Article 8 of the Florida treaty was quite similar to Article 10 of the Treaty of Guadalupe Hidalgo." EBRIGHT, LAND GRANTS, *supra* note 19, at 32. Thus, Justice Marshall's ruling likely would have required American courts to recognize the Spanish text of the Treaty of Guadalupe Hidalgo in conjunction with its English counterpart. Such recognition would have protected Mexican property interests. Disregarding the Spanish text facilitated incorrect interpretations of the relevant language. Malcolm Ebright argues "it is likely that the United States did not want to be fettered with the liberal precedent of *Percheman*'s construction of Article 8 of the Florida treaty in the Guadalupe Hidalgo treaty." *Id.* at 32. Thus, to avoid the effect of this precedent in the territories, Congress removed Article X from the Treaty of Guadalupe Hidalgo.

151. To alleviate the concerns of Mexican officials over the removal of Article X, U.S. emissaries responded with a Statement of Protocol on May 26, 1848:

The American government by suppressing the Xth article of the Treaty . . . did not in any way intend to annul the grants of lands made by Mexico in the ceded territories. These grants . . . preserve the legal value which they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.

Protocol of Querétaro, May 26, 1848, reprinted in MILLER, *supra* note 16, at 380; ACUÑA, *supra* note 39, at 19-20; see *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 555 (5th Cir. 1946) (noting that "inviolably respected" as used in the Treaty of Guadalupe Hidalgo constitutes a "covenant").

152. See ACUÑA, *supra* note 39, at 19; EBRIGHT, LAND GRANTS, *supra* note 19, at 29; MILLER, *supra* note 57, at 246, 289.

with Mexico, and although the Senate can modify a treaty, changing the substantive terms breaches the signers' original intent.<sup>153</sup>

This substantive change to the Treaty precipitated further legislation by allowing for the interpretation that the Treaty was not self-executing.<sup>154</sup> As a result, new laws arose that exceeded the dictates of the Treaty by requiring "each and every person claiming lands" to submit to new and more stringent legal tests.<sup>155</sup> These changes ultimately allowed courts to impose questionable legal obligations at both the federal and state level, jeopardizing the rights of the country's earliest Chicana/Chicano population. This legislation and its effects on the Chicana/Chicano community are examined in Part II, below.

### *C. Mexican Law and Native Americans*

Before considering land grant adjudication and its consequences for Mexican grantees, this section examines the relationship between Native Americans and the Mexican Republic. Although the Conquest of the Native American population is complex and a full treatment of the subject lies beyond the scope of this Article, understanding three important points provides useful context for complete comprehension of the material that follows.

In contrast to Anglo-American law, Mexican law recognized Native Americans as Mexican citizens.<sup>156</sup> Therefore, the Treaty's covenants, which protected Mexican citizens, extended to the indigenous population residing in pueblos or former mission lands.<sup>157</sup>

153. See Carlos Manuel Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 704–05 (1995).

154. *Id.* at 701–02 (describing the difference between self-executing and non-self executing treaties as turning on the question of whether the agreement requires legislative implementation).

155. An Act to Ascertain and Settle the Private Land Claims in the State of California, Ch. 41, 9 Stat. 631 (1851) [hereinafter California Land Act].

156. See LISBETH HAAS, CONQUESTS AND HISTORICAL IDENTITIES IN CALIFORNIA, 1769–1936 33 (1995) ("In 1826, all Indians were made full and equal citizens under the law . . ."). For an account of a challenge to the citizenship status of Native Americans outside the land grant context, see *Anderson v. Mathews*, 163 P. 901, 902 (Cal. 1917), which described a refusal by a county clerk to register a Native American to vote.

157. For example, Article XI provides:

[T]he sacredness of this obligation shall never be lost sight of by the said Government, when providing for the removal of the Indians from any portion of the said territories, or for it's [sic] being settled by citizens of the United States; but on the contrary special care shall then be taken not to place its Indian occupants under the necessity of seeking new homes, by committing those invasions which the United States have solemnly obliged themselves to restrain.

In addition, as a condition of every grant, Mexico required that no injury occur to the resident Native American population.<sup>158</sup> Finally, Mexico's secularization laws gave "former neophytes the right to claim a share of mission land" in communal forms.<sup>159</sup> Thus, Mexican law clearly endeavored to provide Native Americans with a greater measure of protection than they had under the Anglo-American system.<sup>160</sup>

By contrast, American legal actors held varying beliefs regarding Native Americans, and legal principles were constrained by the cultural bias of their interpreters. For example, one litigant argued that

Pocahontas, the Indian princess, whose descendants have held and now hold places of honor and profit, and large estates, real and personal; and let us not forget the virtues of Pocahontas, her courageous acts and noble darings in the cause of humanity, which have made her character illustrious, and her portrait worthy of a niche in the capital of the United States of America.<sup>161</sup>

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Treaty of Guadalupe Hidalgo, *supra* note 15, at 932; *see also* United States v. Candelaria, 271 U.S. 432, 442 (1926) (analyzing relationship of indigenous population to Spain and Mexico); Indians of Cal. v. United States, 98 Ct. Cl. 583 (1942); Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201 (1996) (discussing the relationship of the indigenous population to the treaty).

158. Case law reports on the language of conditions obligating grantees. *See, e.g.,* Chaves v. United States, 168 U.S. 177, 178-79 (1897) ("I grant . . . the cultivation and working of the land . . . provided that no prejudice results to the Indians and residents settled in that vicinity."). For additional case law interpreting Mexican rights *vis à vis* claims of Native American ownership, *see* United States v. Suñol, 27 F. Cas. 1367 (N.D. Ca. 1855) (No. 16, 421) and *Suñol v. Hepburn*, 1 Cal. 254, 255 (1850).

159. MONROY, *supra* note 29, at 126. Monroy also asserts that the various decrees and laws guaranteeing Indian entitlements were paid little attention because of the intermittent political confusion that prevailed in California and the interior of Mexico. *See id.* For case law treatment, *see* United States v. Conway, 175 U.S. 60, 61 (1899), which discussed a petition to confirm a land grant to a group of Native Americans. Communal sharing of natural resources, particularly in areas where water remained in scarce supply, constituted an essential element of a grant. *See, e.g.,* Pueblo of Zita v. United States, 168 U.S. 198, 198-99 (1897) (discussing Pueblos' petition for 382,849 acres).

160. While the incomplete legal record has frustrated analysis of the specific nature of Native American property ownership under the Mexican government, Anglo-American case law provides some evidence of Native American ownership and defense of pueblo lands in the Mexican territories. *See, e.g.,* Barker v. Harvey, 181 U.S. 481, 482 (1901) (adjudicating Mission Indians' claim of a right of permanent occupancy in former Mexican Lands ceded to the United States under the treaty); United States v. Candelaria, 16 F.2d 559 (8th Cir. 1926) (involving a 1769 grant deriving from the Spanish period of control in Valencia, New Mexico).

161. United States v. Ritchie, 58 U.S. (17 How.) 525, 530 (1854) (statement of the case). For a current analysis of the role and myth of Pocahontas as having rejected her native background, *see* WOMEN & POWER IN NATIVE NORTH AMERICA 6 (Laura F.

Most Native Americans did not benefit from such adulation of "royalty," as innumerable legal rulings included or relied upon odious and demeaning stereotypes of the indigenous population.<sup>162</sup> These harmful characterizations accordingly cast Native Americans as neither deserving nor entitled to the protection of the law.

A long established record demonstrates the means by which the United States extensively challenged indigenous titles, questioning whether Native Americans were Mexican citizens, whether they could possess and sell land,<sup>163</sup> whether pueblo grants were

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Klein & Lillian A. Ackerman eds., 1995) (arguing that the "good Native" woman cannot be perceived as truly Native and that for the princess "to be 'good,' she must defy her own people, exile herself from them, become white and perhaps suffer death"); Rayna Green, *The Pocahontas Perplex, The Image of Indian Woman in American Culture*, in *UNEQUAL SISTERS* 15 (Ellen C. Dubois & Vicki L. Ruiz eds., 1990).

162. The judiciary's biased and racist characterization of the nation's indigenous population is well-established. See, e.g., *Luco v. United States*, 64 U.S. (23 How.) 515, 521-22 (1859) (emphasizing importance of protecting settlers from "barbarous tribes"); *Ritchie*, 58 U.S. (17 How.) at 540 (describing Indians' "degraded condition . . . and ignorance generally). Further, judicial treatment disregarded Native Americans' historical presence, which is difficult to reconcile with labeling the indigenous population as "aliens and foreigners," notwithstanding that Euro-Americans entered the country, more recently, as immigrants. See *Dred Scott v. Sandford*, 60 U.S. 393, 419-20 (1856). Several cases provide general treatment of Native Americans within the context of the Treaty of Guadalupe Hidalgo. See *United States v. Coronado Beach Co.*, 274 F. 230, 232-33 (S.D. Cal. 1919) (declaring that "the military posts in the territory were on the seacoast; and it would be strange policy indeed which would isolate the posts, intended for the protection of settlers, and compel them to dwell; among the savages without protection"); *Hayt v. United States*, 38 Ct. Cl. 455, 455 (1903) (involving the Utah Indians and analyzing whether territory annexed by the United States was recognized as "Indian country"); *De Baca v. United States*, 37 Ct. Cl. 482, 482 (1901) (involving the Navajo Indians and deciding whether child of Spanish parents born in New Mexico in 1809 was by birth an American citizen).

163. See *Ritchie*, 58 U.S. (17 How.) at 540 (rejecting the U.S. Attorney General's arguments that the Native American grantee was not a Mexican citizen and could not "take, hold, and convey" land).

Mexican law regarded Native Americans as possessors rather than occupants of their property interests. See Mexican Congressional Act of Sept. 17, 1822, *cited in id.* at 538-39; Klein, *supra* note 157, 26 N.M. L. REV. 201 (1996). Thus, in the territories they could buy and sell lands. See *Ritchie*, 58, U.S. (17 How.) at 540; see also *Arenas v. United States*, 322 U.S. 419, 427 (1944) (holding that "[u]nder the Treaty of Guadalupe Hidalgo [Mission Indians'] ancestral lands and their governance passed from Mexico to the United States"). In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), however, the Court held that under U.S. common law, Native Americans possessed the right of occupancy but not ownership status. The conflict between Mexican recognition of Native American citizenship and U.S. failure to do so presented settlers with additional opportunities to challenge Native American property rights.

For an analysis of tribal rights and the legal treatment of Native Americans, see JO CARILLO, *READINGS IN AMERICAN INDIAN LAW, RECALLING THE RHYTHM OF SURVIVAL* (1998); VINE DELORIA JR. & CLIFFORD M. LITTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* (1983); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

valid,<sup>164</sup> and whether natural resources could be communally shared.<sup>165</sup> Ironically, after native land was taken and conveyed to third parties or municipalities, the new fee-holders then asserted "rights" of succession deriving from original granting language and ancient pueblo rights in order to gain access to the area's natural resources.<sup>166</sup>

Like Mexican grantees, Native Americans of the past witnessed land loss resulting from breaches of treaty obligations and failure to recognize cultural and religious practices including communal ownership of land.<sup>167</sup> Present day indigenous communities continue to face threats to their environment, religious rituals, and customs and practices.<sup>168</sup> Both groups simultaneously remain subject to poverty and exclusion from the benefits of American agricultural policy imposed by the shared history of land dispossession.<sup>169</sup> The next section examines the mechanisms by which the United States government and private individuals deprived former Mexican citizens living in the annexed territories of their land and economic well-being.

164. See *Barker*, 181 U.S. at 499 (holding that *servidumbres* did not encompass Mission Indians' rights to general occupation and use of granted property).

165. See, e.g., *Los Angeles Farming Milling Co. v. City of Los Angeles*, 217 U.S. 217, 218 (1910) (adjudicating claim of ownership over riparian rights); *Devine v. City of Los Angeles*, 202 U.S. 313, 314 (1906) (adjudicating riparian rights claimed by the city); *Hooker v. Los Angeles*, 188 U.S. 314, 319 (1903) (involving a successor of ancient pueblo rights). This area of study is well-documented but beyond the scope of this Article. For a discussion of the relevant issues, see, for example, *United States v. Alcea Band of Tillamooks*, 329 U.S. 40 (1946), which involved compensation for taking of land, and *MONROY*, *supra* note 29, at 194, which discusses the breakdown of traditional forms of social organizations.

166. See *supra* notes 159–60.

167. See *United States v. Sandoval*, 167 U.S. 278 (1897) (noting antecedent government retained title to communal property).

168. See, e.g., Noah Sachs, *The Mescalero Apache Indians and Monitored Retrievable Storage of Spent Nuclear Fuel*, 36 NAT. RESOURCES J. 641 (1996); Linda Fantin, *Woman's Goal: Keep Nuclear Waste off Indian Reservations*, SALT LAKE TRIB., Aug. 17, 1997, at B3; Dion Hayes, *Mojave Desert Indians Fighting To Stop Dump*, CHI. TRIB., Mar. 22, 1998, at 3.

169. According to the court in *United States v. Abeyta*, 632 F. Supp. 1301, 1304 (1986):

The Treaty memorializes a pledge to the Mexican nation that the United States would honor the rights of Indians living in the ceded territory at the time the treaty was executed. As such, it is a treaty of the United States securing the rights of [N]ative Americans, and it is to be construed according to the special principles controlling interpretation of Indian treaties.

Other current litigation involves Spanish land grants and, in one instance, a tribe seeking a return of native land. See Doug Johnson, *New Mexico Pueblo Fights to Keep its Ancestral Prize Lawsuit: Tribe Believes its 1748 Spanish Land Grant Gives It Title to the Highest Ridge on Sandia*, L.A. TIMES, Apr. 20, 1997, at B1.



## II. THE LAND GRANT EXPERIENCE

Regard of the law for private property is so great . . . that it will not authorize the least violation of it, not even for the general good of the whole community.<sup>170</sup>

The desire for natural resources and land fueled the actions of the dominant population seeking access to the natural resources in the former Mexican provinces.<sup>171</sup> It is no secret that gold, timber, and other valuable natural resources were prominent considerations in the challenges to Mexican claims of ownership. In *Peralta v. United States*,<sup>172</sup> the Court noted that the territories were “new, and rich in mineral wealth, and attracted settlers, whose industry and enterprise produced an unparalleled state of prosperity.”<sup>173</sup> The Court further declared: “The enhanced value given to the whole surface of the country by the discovery of gold, made it necessary to ascertain and

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170. JOHN H. CLOUGH, PROPERTY, ILLUSIONS OF “OWNERSHIP”: THE PROCESS OF CIVIL GOVERNMENT 29–30 n.4 (1984) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES \*139). Blackstone’s reasoning apparently was suitable for early Euro-American settlers but not for the early Chicana/Chicano population.

171. Various authors attest to the geographical topography and environmental diversity of Mexico’s territories—the land coveted by the United States. For example:

California had environmental diversity and richness unparalleled anywhere in the world. The state’s geographic undulations encompass the lowest and the highest points in the conterminous United States. Spanning more than ten degrees of latitude and extending over one hundred million acres, California is a bridge between cool-temperate, foggy, dimly lit rain forests and open, parched, hot, sun-bathed sub-tropical deserts. This astounding array of California vegetation exists in close juxtaposition, spilling and swirling in patterns created by elevation, climate, soil, and bedrock.

M. Kat Anderson et al., *A World of Balance and Plenty*, in *CONTESTED EDEN*, *supra* note 5, at 12; see also WARREN A. BECK & YNEZ D. HAASE, *HISTORICAL ATLAS OF CALIFORNIA* 8–10 (1974) (describing California’s diverse topography, soil, rainfall, native vegetation, and fauna). Finally, the California economy during the Spanish and Mexican periods shows that “Indians, Franciscans, soldiers, settlers, and traders engaged in modes of exchange and production that reflected local and national strategies of economic development.” Steven W. Hackel, *Land, Labor, and Production, The Colonial Economy of Spanish and Mexican California*, in *CONTESTED EDEN*, *supra* note 5, at 111–12. The economy also sustained “intensive agriculture, cattle ranching, artisan crafts, and foreign commerce.” *Id.* This is in marked contrast to legal and historical accounts that emphasize American contributions. See, e.g., *Luco v. United States*, 64 U.S. (23 How.) 515, 524 (1859) (“The influx of American settlers had, from the year 1849, given great value to the lands, had placed them in worth, as they were in extent, on an equality with a principality . . .”).

172. 70 U.S. (3 Wall.) 434 (1865).

173. *Id.* at 439; see also *Leo Sheep Co. v. United States*, 440 U.S. 668, 669–70 n.1 (1979) (stating that the territories were “a largely untapped resource” around the time of annexation).

settle all private land claims, so that the real estate belonging to individuals could be separated from the public domain."<sup>174</sup> The evidence ultimately shows that judicial concerns with settling private land claims, so as to meet the needs of American industry, did not similarly benefit Chicanas/Chicanos holding land grants.

Specifically, covetous settlers targeted the larger holdings of grantees, engaged in anti-Mexican hostilities, and pressured Congress for relief. According to one scholar, California Senator Gwinn "probably voiced the opinions of the average American who regarded California as a fabulous region that should be open to land-hungry Americans and who looked with suspicion upon the huge size of the California ranchos."<sup>175</sup>

### A. Land Act Legislation

Congress responded to this land hunger via the California Land Act of 1851.<sup>176</sup> In stark contrast to American obligations under the Treaty, Congress imposed upon grantees the burden of proving the validity of their claims of ownership.<sup>177</sup> Through the Act Congress established a Land Claims Commission to determine the validity of ownership of land grants.<sup>178</sup> According to the Court in *United States v. Coronado Beach Co.*,<sup>179</sup> "[t]he object of the creation of the special tribunal to settle private grants in California was to segregate them from the 'public domain' and thus open up a vast area of that domain in California to settlement under the homestead and preemption laws."<sup>180</sup> Indeed, the California Land Act required:

[t]hat each and every person claiming lands in California by virtue of any right or title derived from the

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174. *Peralta*, 70 U.S. (3 Wall.) at 438.

175. ROBINSON, *supra* note 26, at 99; *see also* MIRANDÉ, *supra* note 39, at 39 (contending that in introducing legislation, William Gwinn "openly admitted that his intent was to encourage squatters and force Mexicans off the land").

176. California Land Act, 9 Stat. 631 (1851).

177. Section Eight of the California Land Act provides:

That each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the [land] commissioners . . . together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims.

§ 8, 9 Stat. at 632.

178. *See United States v. Fossatt*, 62 U.S. (21 How.) 445, 447 (1858) (explaining that validity of claim to ownership means determining a claim's authenticity, legality, or interpretation).

179. 255 U.S. 472 (1921)

180. *Id.* at 478 (citing *Botiller v. Dominquez*, 130 U.S. 238, 249 (1889)).

Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board, together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims.<sup>181</sup>

Thereafter, "[t]he United States compelled the Mexican grantee willing or unwilling to present their titles for adjudication, or as an alternative, forfeit their lands to the public domain."<sup>182</sup> This requirement conflicted with the promises to protect the property of Mexican grantees in the Treaty.<sup>183</sup>

Legislation and judicial interpretation in land grant adjudication cut one level deeper into the protections of the Treaty by adopting a legal presumption that Mexican landowners did not hold clear title.<sup>184</sup> In interpreting the land acts, American courts held that grants were to be construed against the grantee, who had the burden of producing evidence "of such persuasive and preponderating force as to convince the court that the title is real, *and besides, possesses the*

181. California Land Act § 8. California adjudicated the largest number of cases under the land acts, but other legislation affected Colorado and Arizona when those territories came into existence. *See* *United States v. Sandoval*, 167 U.S. 278, 291 (1897).

The California Land Act was amended several times to accomplish its mandate. For example, the laws of January 18, 1854, and January 10, 1855, extended the time within which the Commission was to act. The Commission disbanded March 1, 1856, after five years. *See, e.g.*, Act of Jan. 10, 1855, 10 Stat. 603 (1855). Subsequent legislation permitted an extension of time to accommodate the claims of non-Mexican grantees to present their claims to the land commission. *See* Act of Mar. 3, 1854, 10 Stat. 268 (1854).

182. *United States v. San Jacinto Tin Co.*, 23 F. 279, 296 (C.C.D. Cal. 1885).

183. *See* Treaty of Guadalupe Hidalgo, art. VIII, *supra* note 15, at 929–30. In Spanish, the provision reads:

Las propiedades de todo género existentes en los expresados territorios, y que pertenecen ahora á Mexicanos no establecidos en ellos, serán respetadas inviolablemente. Sus actuales dueños, los herederos de estos, y los Mexicanos que en lo venidero puedan adquirir por contrato las indicadas propiedades, disfrutarán respecto de ellas tan amplia garantía, como si perteneciesen á ciudadanos de los Estados Unidos.

*Id.* By forcing grantees to prove the validity of their claims, even when they had performed all the conditions of the award, the California Land Act created a separate class of landowners and established legal presumptions that favored the United States. *See infra* notes 218–23 and accompanying text. Requiring grantees to defend their titles in a judicial setting also created opportunities for U. S. officials to erect further barriers to grantees' quiet enjoyment of their property, including lax custody of grant records and biased or incompetent interpretation and authentication of documents. *See infra* notes 226–45, 355–66 and accompanying text.

184. *See* *Botiller v. Dominguez*, 130 U.S. 238, 250 (1889); Sanford A. Mosk, *The Influence of Tradition on Agriculture in New Mexico*, 2 J. ECON. HIST. 34, 46 (Dec. 1942).

*legal attributes which the statute requires.*"<sup>185</sup> This presumption clearly contradicted the letter and spirit of the Treaty, which provided protection for grants according to Mexican law.

Failure to present a claim and demonstrate definitive proof of fee ownership within two years defaulted the land to the public domain.<sup>186</sup> Thus, instead of following established federal and international law, Mexican law, custom, and governmental records of land ownership, American officials required grantees to undertake an entirely new and burdensome process.

The fairness of the process was further strained by the creation of the Board of Commissioners as the primary forum for reviewing land claims. This structure raises fairness concerns in part because "[t]he board of commissioners was not a court, under the [C]onstitution, invested with judicial powers."<sup>187</sup> Additionally, the process increased the burden on grantees by expanding the number of tribunals to which appeals could be taken, to five.<sup>188</sup> This lengthened the

185. *United States v. Ortiz*, 176 U.S. 422, 425–26 (1900) (emphasis added).

186. California Land Act of 1851, § 13, 9 Stat. 631 (1851); *see also* *Swat v. United States*, 23 F. Cas. 521, 521 (D. Cal. 1857) (No. 13,690) (holding that where a claim is barred, the "land [at issue] must be deemed to be part of the public domain").

187. *United States v. Ritchie*, 58 U.S. (17 How.) 525, 533 (1854). *Ritchie* raises both separation of powers and federalism concerns. *Id.* Conflicts surfaced because federal district courts did not have complete jurisdiction over land grant adjudication until the Act of 1860 was passed. *See United States v. Rodriguez*, 25 F. Cas. 821 (D.C.N.D. Cal. 1864) (No. 14,950).

The Board of Land Commissioners was subject to the whims of political actors. Indeed, one historian has characterized the Board as "lame duck politicians, who were ignorant of both the Spanish language . . . and Mexican law . . ." Gomez, *supra* note 40, at 1069 (quoting PAUL GATES, *HISTORY OF PUBLIC LAND LAW DEVELOPMENT* 115 (1979)). Initially under Whig control, the Commissioners interpreted the California Land Act as mandated by the Treaty and looked to custom in recognizing the claims of many grantees. *See Bakken, supra* note 21, at 243. One year later, following a national election, Democrats took over and began demanding further verification of land claims. *See id.* at 243–44.

188. California Land Act § 9. While the hearings before the Board in California ended in 1856, appeals from that state continued for several years thereafter. The California Land Act itself provided for an appeal from the Board to the U.S. district court, and from the district court to the U.S. Supreme Court. California Land Act §§ 9, 10. Moreover,

[a]fter the admission of California to statehood, September 9, 1850, Congress adopted the Mexican Claims Act of March 3, 1851, 9 Stat. 631, which established a Board of Land Commissioners with the authority, upon petition of those claiming under Mexican or Spanish grants of land in the annexed territory, to pass upon the validity of the grants. . . . By § 12 of the Act of August 31, 1852, 10 Stat. 76, 99, the Attorney General was given authority over appeals from decisions of the Board . . . .

*United States v. O'Donnell*, 303 U.S. 501, 504–05 (1938).

litigation process, as confirmed landowners faced appeals by the United States and others using the name of the United States.<sup>189</sup>

Perhaps most significantly, the act failed to provide for final decisions to have the preclusive effect against third parties generally accorded to judgments regarding title to land.<sup>190</sup> Thus, even when the Commission confirmed title, its decision did not quiet title for grantees. Interested third parties could challenge Chicana/Chicano property holders upon payment of a \$1000 bond to the United States.<sup>191</sup>

Furthermore, confirmation of a grant obligated grantees to present a clear survey of their tract.<sup>192</sup> Failing adverse information or challenges by the United States or third parties to the accuracy of surveys, a claimant obtained a vested interest in the tract.<sup>193</sup> Thus, the survey process provided additional opportunities for those seeking Mexican property interests to challenge the grant. Once confirmed and surveyed, the General Land Office issued a land patent—an official declaration from the United States that the grantee had demonstrated the validity of a claim.<sup>194</sup>

In the former Mexican territories outside of California, the status of land grants remained in limbo until 1854, when Congress established the Office of Surveyor General to control jurisdiction

189. See, e.g., *United States v. Martinez*, 184 U.S. 441, 442 (1902) (questioning the validity of patents issued by the U.S. government prior to confirmation of Spanish land grants or related activity); *United States v. Pena*, 175 U.S. 500, 501 (1899) (challenging the validity of U.S. land grant patents); *United States v. Guerrero*, 26 F. Cas. 52, 52–53 (N.D. Cal. 1855) (No. 15,269) (affirming the validity of a land grant in San Francisco County).

190. Compare California Land Act § 15 (providing right of action for third parties), with RESTATEMENT (SECOND) OF JUDGMENTS § 6 cmt. b (1982) (noting that the application of *res judicata* to true *in rem* proceedings historically has meant that such judgments determined the rights of the claimant against both the opposing party and “all the world”). This longstanding common law rule was clearly within the scope of the protection for Mexican grantees under the Treaty and international law. See *State v. Gallardo*, 135 S.W. 664, 670–71 (1911).

191. See California Land Act, § 13, 9 Stat. 631 (1851) (“[T]he surveyor general of California . . . shall . . . cause all private claims which shall be finally confirmed to be accurately surveyed . . .”). The use of bonds allowed challengers to present actions against grantees in the name of the United States. See *Teschemacher v. United States*, 23 F. Cas. 862 (N.D. Cal. 1855) (No. 13,843), *aff’d*, 59 U.S. (18 How.) 1 (1855).

192. See California Land Act § 13.

193. See California Land Act §§ 13, 15.

194. See California Land Act § 13. In some actions, parties challenging successor rights asserted that the patent had the effect of a quitclaim deed. See *Shelley v. Hurwitz*, 92 P.2d 660 (Cal. Dist. Ct. App. 1939). The Treaty protected all existing property rights but neither created nor defined the rights. See *Los Angeles Farming & Milling Co. v. City of Los Angeles*, 217 U.S. 217, 236 (1910) (denying that property rights could be a basis for a writ of error because they are not of federal origin).

over New Mexico.<sup>195</sup> Subsequent legislation extended that jurisdiction into the territories of Arizona and Utah, and the states of Nevada, Colorado, and Wyoming. In New Mexico, the Surveyor General was authorized to "ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico."<sup>196</sup> The Surveyor General then made recommendations to Congress, which was ultimately responsible for determining whether the Mexican grant "represented an authentic ownership against the United States."<sup>197</sup> Again, the Surveyor General's commission confirmed only a minority of the Mexican grants claimed.<sup>198</sup>

Congress later prescribed "[t]hat it shall and may be lawful for any person . . . claiming lands within the [territories] by virtue of any such Spanish or Mexican grant . . . which have not been confirmed by act of congress [sic]. . . and which are not already

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195. Act to Establish the Offices of Surveyor-General of New Mexico, Kansas, and Nebraska, ch. 103, 10 Stat. 308 (1854). This second major form of land grant adjudication occurred in New Mexico when Congress, after initially reserving the power of land grant adjudication to itself, created the Court of Private Land Claims in 1891. See Act of Mar. 3, 1891, 26 Stat. 854 (1891). Judicial discussion of this history provides a useful reference. See *Hayes v. United States*, 170 U.S. 637 (1898) (concerning an appeal from the Court of Private Land Claims involving land in New Mexico that derived from an 1825 grant); *United States v. Sandoval*, 167 U.S. 278, 290 (1897) (referring to New Mexico and Arizona and noting that Congress "reserved to itself, prior to the passage of the act of March 3, 1891, creating the Court of Private Land Claims, the determination of such claims"). The Court of Private Land Claims existed for over 12 years. See RICHARD W. BRADFUTE, *THE COURT OF PRIVATE LAND CLAIMS, THE ADJUDICATION OF SPANISH AND MEXICAN LAND GRANT TITLES, 1891-1904*, at 215 (1975).

196. § 8, 10 Stat. at 309; *Shaw v. Kellogg*, 170 U.S. 312, 333 (1898); see also *supra* note 183.

197. BRADFUTE, *supra* note 195, at 6. The author states that of the 77,868,640 acres of land in New Mexico, the U.S. Attorney for the Court of Private Land Claims estimated that 34,053,340 acres were involved in claims presented before that court. See *id.* at 45. This figure does not include the acreage that Congress adjudicated itself prior to the Court's creation in 1891. See *id.*

198. Richard Bradfute estimates that in New Mexico:

[t]he court heard claims for 231 grants with a total acreage of 34,653,140, and 80 grants were confirmed for a total of 1,934,986 acres. In Arizona, 17 grants were claimed for 837,869 acres, and the court confirmed 8 of these for 116,639 acres, rejecting 721,139 acres.

*Id.* at 214-15. Bradfute, however, contradicts himself in considering whether the process was fair or biased. For example, his discussion of the number of confirmed claims before the Court of Private Land Claims in the New Mexico territory asserts the failure to demonstrate bias: "[T]he fact that the court confirmed only 30 percent of the claims filed before it, as compared with the 75 percent confirmation rate in California, did result in bias against grants, but no direct evidence of such bias exists." *Id.* at 214.

complete and perfect, in every such case to present a petition.”<sup>199</sup> Other sections of the Act required perfected title as of the date of Conquest<sup>200</sup> and provided for notice to interested parties.<sup>201</sup> Finally, as under the California Land Act, a grantee’s failure to present a claim within the proscribed period barred future confirmation of claims.<sup>202</sup>

Yet, even when grantees provided definitive proof of ownership before the Board, they remained subject to legal standards that improperly aided opposing parties. On appeal, the court could retry a claim on issues of fact or law and permit testimony beyond the immediate issue, including amending the record below.<sup>203</sup> In authorizing courts to rehear every question “as truth and justice may require,” the land acts essentially promoted land challenges against grantees of Mexican descent.<sup>204</sup> By placing Mexican landholders on the defensive at every stage of the process, these novel rules directly contradicted the pledges made by the United States to protect the

199. Act of Mar. 3, 1891, 26 Stat. 854 (1891).

200. See § 8, 26 Stat. at 857 (“[A]ny person or corporation claiming lands in any of the [territories] under a title . . . that was complete and perfect at the date when the United States acquired sovereignty . . . shall have the right . . . to apply to said court . . . for a confirmation of such title.”).

201. § 1, 26 Stat. at 854. The statute reads as follows:

The court . . . shall give notice of the times and places of the holding of such sessions by publication in both the English and Spanish language, in one newspaper published at the capital of such State or Territory, once a week for two successive weeks, the last of which publications shall be not less than thirty days next preceding the times of the holding of such sessions may be adjourned from time to time without such publication.

*Id.* The California Land Act also provided for public notice and permitted actions by those contesting the purported grant. California Land Act, §§ 5, 13, 9 Stat. 631 (1851).

202. Subsection 8 of Section 13 of the 1891 Act recites:

No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and in the manner stated in such concession, grant or other authority to acquire land.

26 Stat. 854 (1891).

203. The Court in *United States v. Chaves*, 159 U.S. 452 (1895), reports:

Upon any appeal the Supreme Court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open.

*Id.* at 455.

204. See *id.*

property of Mexican grantees, and thereby violated the Treaty's mandate.<sup>205</sup>

In addition, grantees confronted other broken promises. In the Protocol of Querétaro, the United States pledged "not [to] diminish in any way what was agreed upon . . . in favor of the inhabitants of the territories ceded by Mexico."<sup>206</sup> In the same Protocol, the United States vowed that

suppressing the Xth article . . . did not in any way intend to annul the grants of lands made by Mexico in the territories. These grants, notwithstanding the suppression of the article of the Treaty, preserve the legal value which they may possess; and the grantees may cause their legitimate titles to be acknowledged before the American tribunals.<sup>207</sup>

In direct contradiction to the terms of the Protocol, American courts presumed annulment of the grants and then assigned grantees the burden of proving and reproving the validity of their claims, at every level of the legal system. Thus, the United States broke promises upon promises by enacting laws and providing for challenges that undermined grants the Mexican government had or would have concluded were valid.

Initially, grant holders who had performed the conditions of their grants believed that they were exempt from presenting their claims for determination of validity.<sup>208</sup> They rested this belief on governing legislation that provided:

in deciding on the validity of any claim brought before them under the provisions of this act, [such claims] shall be governed by the Treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the

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205. See *United States v. Ortiz*, 176 U.S. 422 (1899); *Chavez v. United States*, 175 U.S. 552 (1899); *United States v. Pico*, 27 F. Cas. 532 (N.D. Cal. 1859) (No. 16,047); see also MILLER, *supra* note 16, at 380–406.

206. MILLER, *supra* note 16, at 381.

207. *Id.* at 381.

208. Cf. *Botiller v. Dominguez*, 130 U.S. 238, 255 (1889) (citing Counsel's argument that the California Land Act only applied to "imperfect, inchoate, and inequitable" titles rather than "complete and perfect" titles); *United States v. San Jacinto Tin Co.*, 23 F. 279, 296 (C.C.D. 1885) ("The United States compelled the Mexican grantees, willing or unwilling to present their titles for adjudication, or, as an alternative, forfeit their lands."). Initially, questions arose as to whether individuals holding land in fee status were obligated to comply with the legislation. See, e.g., *Ainsa v. United States*, 184 U.S. 639 (1902) (denying ownership and possession of a grant dating from 1836); *Fremont v. United States*, 58 U.S. (17 How.) 542, 572 (1854) (Catron, J. dissenting) ("Mexican claims had no standing in an ordinary court of justice . . .").



government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.<sup>209</sup>

Article VIII of the Treaty, moreover, promised to protect grantees' property interests. Consequently, if grantees had complied with all of the conditions attached to their awards under Mexican law, they should have been exempted from the confirmation process.

In *Phelan v. Poyoreno*,<sup>210</sup> one California court stated at length:

Mexicans who previous to the acquisition of California . . . had acquired from the governments of either Spain or Mexico, a perfect title to lands in California, and who chose to remain in [California] . . . were by the Treaty of Guadalupe Hidalgo protected in the ownership and enjoyment of their lands the same as though no change of sovereignty had occurred . . . [and they] were not compelled to submit them for confirmation to the board of commissioners . . . nor did they forfeit their lands by a failure to represent them to such board for confirmation, and that the titles thus vested may be asserted and maintained like other perfect titles in the courts of the country . . . which were perfect at the date of the treaty, could, if they so elected, present them to the commission for confirmation, but were not bound to do so.<sup>211</sup>

Thus, given Mexican law, the covenants made by the American government in the Treaty, and the clear position of the California court, Mexican grant holders had good reason for believing that they need not re-demonstrate the validity of their holdings to the new American tribunals.

Federal courts, however, took a different stance: namely, present the title or forfeit the land.<sup>212</sup> In *Botiller v. Dominguez*,<sup>213</sup> the Court addressed this issue and held that under the Land Act of 1851:

no title to land in California, under Spanish or Mexican grants, could have any validity unless submitted to and confirmed by the commission, or, if rejected by the

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209. California Land Act, Ch. 41, § 11, 9 Stat. 631 (1851).

210. 13 P. 681 (Cal. 1887)

211. *Id.* at 683 (citing *Minturn v. Brower*, 24 Cal. 644); *see also* *United States v. Circuit Judges*, 70 U.S. (3 Wall.) 673 (1865) (analyzing the 1851 Act and jurisdiction).

212. *See, e.g., United States v. San Jacinto Tin Co.*, 23 F. 279, 296 (C.C.D. 1885) ("The United States compelled the Mexican grantees, willing or unwilling to present their titles for adjudication, or as an alternative forfeit their lands.").

213. 130 U.S. 238 (1889).

commission, confirmed by the District or United States Supreme Court.<sup>214</sup>

Consequently *all* landowners in the territories, even if in possession since the earliest colonization years, were obligated to meet the dictates of the Land Acts or risk automatic forfeiture of their property.

### B. Mexican Grantees in Case Law

In *United States v. Fossatt*,<sup>215</sup> the Court declared that "[t]he United States did not appear in the courts as a contentious litigant; but as a great nation, acknowledging their obligation to recognise [sic] as valid every authentic title, and soliciting exact information to direct their executive Government to comply with that obligation."<sup>216</sup> The case law, however, reveals that the United States failed to perform its obligation to protect Mexican grantees and, accordingly, marginalized them within the new legal regime.

#### 1. Initial Disputes and Judgments

In the aggregate, grantees faced five types of legal challenges based on the following: (1) the possession of documents purporting to establish ownership; (2) the authority of Mexican officials to grant awards; (3) the ability to grant lands near coastal areas; (4) the existence of proper registration in Mexican archives; and (5) courts' general refusal to follow Mexican colonization law, or custom and practice, in requiring the performance of conditions attached to land grant awards. Grantees' experience litigating these claims demonstrates that court rulings produced erratic and arbitrary determinations that disregarded Mexican landowners' legal rights, while providing advantages to the non-Mexican population.<sup>217</sup>

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214. *Id.* at 255.

215. 62 U.S. (21 How.) 445, 450-51 (1858).

216. *Id.*

217. In addition to these legal advantages, settlers also effectuated challenges to grantees through violence both before and after the Conquest. Although in existence before the Conquest, the State of Texas officially recognized the Texas Rangers as an official law enforcement entity of the State. The Texas Rangers pressured Mexican landowners out of the use of their property and surrounding natural resources. See JULIAN SAMORA ET AL., GUNPOWDER JUSTICE: A REASSESSMENT OF THE TEXAS RANGERS 27-30, 41-42 (1979); see also GRISWOLD DEL CASTILLO, *supra* note 14, at 83 ("The Cortina Rebellion, in the Brownsville-Matamoros area in the 1850s and 1860s and the El Paso Salt War in the 1870s pitted entire communities against the Texas Rangers in a struggle for the land.").

*a. Mexican Law and Granting Papers*

In contrast to both the Treaty and general principles of property law, the United States required each and every grantee to demonstrate the validity of their claims of ownership as a legitimate and valid fee.<sup>218</sup> The absence of “proof of grants” in the form of complete *expedientes*, documents, or evidence in title registries triggered judicial presumptions against their validity.

One court reasoned:

Where the petition, and the other requirements following it, have not been registered in the proper office with the grant itself, a presumption arises against its genuineness, making it a proper subject of inquiry before that fact can be admitted. It is not to be taken as a matter of course, nor should slight testimony be allowed to remove the presumption. Both the kind and quantum of evidence must be regarded.<sup>219</sup>

Courts attempted to justify this presumption by maintaining that archival and other primary evidence worked to “guard against fraud.”<sup>220</sup> As one student of the process has noted,

[grantees were thus required to gather] all the papers they could to prove to the gentlemen of the board that they owned the land they had been living on for so many years. They looked into their leather trunks for original grants from Mexican governors. They called upon their friends and relatives to testify to long residence and to the number of their cattle. They went to Yankee lawyers for help. They sent to the Surveyor General’s Office in San Francisco for copies of the ar-

218. *United States v. San Jacinto Tin Co.*, 23 F. 279, 296 (C.C.D. 1885).

219. *Fuentes v. United States*, 63 U.S. (22 How.) 443, 454 (1854). Courts, and in some instances, the Board of Land Commissioners, required Mexican books of records pertaining to registration of grants. See *United States v. Cambuston*, 25 F. Cas. 266 (C.C.D. Cal. 1859) (No. 14,713). However, at least one court declined to give conclusive weight to such documents:

We do not regard the catalogue of grants as authoritative proof of grants enumerated in it, or as a conclusive exclusion of grants not so registered by Jimeno, which may be alleged to have been made whilst California was a part of the Mexican Republic, though they may bear date within the time to which that Index relates. But in this case, it may be referred to as an auxiliary memorandum made by Jimeno himself of his action upon the petition of West.

*United States v. West*, 63 U.S. (22 How.) 315, 317 (1859).

220. *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 440 (1865).

chives files relating to particular ranchos. They made journeys and drew upon their slender fund of cash.<sup>221</sup>

By demanding primary documents,<sup>222</sup> courts imposed extensive delays, exhausted the economic resources of grantees,<sup>223</sup> and effectively disallowed quieting title, thereby extending potential adverse consequences to a grantee's heirs.<sup>224</sup>

Some scholars have attempted to explain the absence of these documents as resulting from the "loose and careless methods" of Mexican officials;<sup>225</sup> however, contrary to such scholars' assertions, historical evidence in case law undermines such claims. Grantees who attempted to produce records and archival evidence encountered a number of barriers that precluded access to their documents.<sup>226</sup> Indeed, if any government was loose and careless with grant documents, it was that of the United States.<sup>227</sup>

First and foremost, during and after the Conquest, American governmental and military officials destroyed or ordered the destruction of land grant documents.<sup>228</sup> For example, in *United States v.*

221. ROBINSON, *supra* note 26, at 103.

222. See *Bergere v. United States*, 168 U.S. 66 (1897) (dismissing claim, in part, for failure to provide grant materials); *Neugent v. United States Dep't of Interior*, 640 F.2d 386 (D.C. Cir. 1981) (requesting land grant documents that remained "missing").

223. See *Bergere*, 168 U.S. at 66; *United States v. Auguisola*, 68 U.S. (1 Wall.) 352, 353-54 (1863) (upholding petitioner's claim and rejecting all 13 exceptions taken by the United States to the District Court's decision to approve the grant after rejection by Board); *Rodriguez v. United States*, 68 U.S. (1 Wall.) 582 (1863) (involving a continuing post-confirmation challenge to boundaries of the grant); *United States v. Bernal*, 24 F. Cas. 1123 (N.D. Cal. 1855) (No. 14,581) (noting that Carmen Bernal faced ongoing challenges based on allegations of fraud despite confirmation of her grant).

224. See *Sena v. United States*, 189 U.S. 233, 238-39 (1903) (discussing the heirs of original grantee, Jose de Leyba); *Yturbide v. United States*, 63 U.S. (22 How.) 290 (1859) (rejecting claim by Yturbide's heirs); *United States v. Sutherland*, 60 U.S. (19 How.) 363 (1856) (discussing minor children of Miguel de Pedorena).

225. Morrow, *supra* note 19, at 15.

226. Apart from the acts of either American officials or the Mexican government, disasters also hindered access to land grant documents. For example, several great fires in San Francisco destroyed a number of titles, records, and other evidence of the existence of the grants. See *Fuentes*, 63 U.S. (22 How.) at 451 (noting that "the great fire of the 3d and 4th May, 1851, occurred," destroying land grant books and other documents). It is curious that a "natural disaster" resulted on or near the location where the Board of Commissioners was hearing land grant claims in San Francisco.

227. In the 1950s, the government brought the Spanish Archives into the office of the Surveyor General in San Francisco. Transcripts were scattered in Washington, D.C., in the land office in Glendale, California, and in the Attorney General's Archives in Sacramento, California, among other places. All surviving records are now kept in the National Archives in Washington, D.C.

228. For example, the heirs of an original grantee in New Mexico asserted:

[I]n the year 1846, while the original documents of title were in existence in the town of Paso del Norte . . . where the heir resided, the place was occupied by the military forces of the United States, and

*Chaves*,<sup>229</sup> the petitioners, appealing on behalf of the United States, sought confirmation of a recognized land grant in Valencia County, New Mexico. Although one of the original grantees held duplicates of the granting documents until his death, the petitioners could not produce the duplicates because they had been stolen, destroyed, or lost by a third party.<sup>230</sup> The petitioners testified that the *original* documents “once in the custody of the defendant (the United States) after the solemnization of the Treaty of Guadalupe Hidalgo, were wrongfully and negligently destroyed or lost by the [United States].”<sup>231</sup>

The record reveals the veracity of the petitioner’s allegations. Territorial librarian Ira M. Bond, for example, testified that the governor directed him to sell grant documents as “waste paper.”<sup>232</sup> Bond “sold and disposed of the old records, supposing them to be of no value.”<sup>233</sup> Although Bond later recovered “most of them,” upon external criticism of the governor’s actions, he nonetheless failed to recover all of the discarded documents, including those of the petitioner. The American registry of Mexican grants in the office of the territorial Surveyor General was similarly “fragmentary and defective.”<sup>234</sup>

Although the petitioners in *Chaves* ultimately succeeded in their claim, the case illustrates the extent to which United States government officials bear responsibility for the dispossession of Mexican grantees. Similar accounts of grant-related document destruction throughout the territories appear in other cases.<sup>235</sup> The range of these

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the original documents of title and the official registry where they were recorded were destroyed by the American forces . . . .

United States v. Pendell, 185 U.S. 189, 190 (1902). Historians attest to the long memory this type of destruction engendered in the communities in which it occurred. See Shadow & Rodríguez-Shadow, *supra* note 14, at 292 n.11.

229. 159 U.S. 452, 453 (1895). Mexican Governor Francisco Sarricino “granted the tract to Juan Chaves and about 60 Others, and to the town of Cubero” in 1833. *Id.* The petitioners alleged that the “chief alcalde of that jurisdiction did, during the same year, put them in possession.” *Id.*

230. *Id.* at 454.

231. *Id.* at 462.

232. *Id.*

233. *Id.* at 463.

234. *Id.*

235. See, e.g., Hayes v. State, 100 S.W. 912, 913 (Tex. 1907) (chronicling the destruction of documents in 1864). Because of the war, the Mexican departmental assembly dissolved and thus could not complete its assigned tasks with respect to the record keeping of land grants. See MacKay v. Armstrong, 19 S.W. 159, 163 (Tex. 1892) (citing depositions of Pedro Bustamante, Martine de J. Sanchez, and Pable Levin). These depositions report “that the public archives of the state of Tamaulipas were kept at the said city of Victoria, and that in the year 1864 said archives were all destroyed by an armed force of guerrillas under command of Col. Dupin.” *Id.*

accounts demonstrates that far from being the result of "loose and careless" methods of Mexican authorities, the loss of grant documents also resulted from American officials' bald orders to discard the documents.<sup>236</sup>

In addition to those who engaged in outright destruction of documents, other officials systematically destroyed, misplaced, or "lost" Spanish books that enumerated titles.<sup>237</sup> For example, in *United States v. Cambuston*,<sup>238</sup> John Fremont, one of California's first senators and an instigator of the Mexican Conquest, testified that he had lost granting documents in his possession.<sup>239</sup> Such haphazard methods of "protecting" land grant documents allowed interested parties to alter or destroy the *expedientes* and other archival evidence.<sup>240</sup>

Moreover, American officials held land documents under poor conditions. For example, various California Alta documents were "found lying on the floor" of the public offices housing the documents.<sup>241</sup> In *United States v. Knight's Administrator*<sup>242</sup> the Court reported that:

All the real records of land titles are known to have been in the Secretary's office at Los Angeles when the country was taken by the American army. But Captain Halleck lets us know that he and Mr. Hartnell and General Kearney mingled with them a large quantity of other papers found in the custom-house at Monterey, and that their bulk was further swelled by private contributions. It is notorious, too, that many false papers

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236. *Chaves*, 159 U.S. at 452.

237. In *United States v. Bale*, 24 F. Cas. 968 (N.D. Cal. 1855) (No. 14,504), claimants alleged that the "records of grant proceedings deposited in [the] alcalde's office [were] destroyed at [the] time [the] office [was] taken possession by [the] 'Bear Flag Party.'" *Id.* at 968. Even without documents, however, the claim was confirmed. *Id.*

238. 25 F. Cas. 266 (C.C.D. Cal. 1859) (No. 14,713). On August 13, 1846, Fremont took possession of the archives until September 8, 1846. Thereafter, until 1847, the records remained near Sacramento at Sutter's Fort, a "flea-infested" outpost. See NELSON BEECHER KEYES, *THE AMERICAN FRONTIER, OUR UNIQUE HERITAGE* 270-71 (1954).

239. There, the court was forced to recognize that "it is possible that some *expedientes* [sic] have been lost. Colonel Fremont appears to have removed several, which were lost in the mountains." *Cambuston*, 25 F. Cas. at 267.

240. See, e.g., *United States v. Galbraith*, 63 U.S. (22 How.) 89, 96 (1859) (describing the alteration of a deed).

241. See *United States v. Knight's Adm'r*, 66 U.S. (1 Black) 227, 230 (1861); see also *United States v. Castillero*, 67 U.S. (2 Black) 17, 119 (1862) (holding four different versions of the same title record to be fakes because they were without the valid original).

242. 66 U.S. (1 Black) 227 (1861).

were placed among them at different times by dishonest claimants, for their own fraudulent ends.<sup>243</sup>

In short, it was well known at the time that American officials left the grant records “in a condition where spoliations or loss of documents may have taken place.”<sup>244</sup> These officials also created chain-of-custody problems in determining the authenticity of documents and sometimes simply made the documents inaccessible.<sup>245</sup> Such conditions imposed further inequitable burdens on grantees, making it extremely difficult for them to meet the already inappropriately high evidentiary requirements to establish their claims.

Yet, even where a grantee possessed documents, courts established newer legal standards that hindered confirmation or disallowed precedent. For example, courts required recording of grants in *public* title books.

Written documentary evidence, no matter how formal and complete, or how well supported by the testimony of witnesses, will not suffice [to establish that a Mexican grant is valid] if it is obtained from private hands and there is nothing in the public records of the country to show that such evidence ever existed.<sup>246</sup>

Courts required, moreover, “that any copy of a grant document had to be made by one who had the authority by law to make such copies,”<sup>247</sup> even where a grantee had undisturbed and notorious possession for an extended period of time. Such requirements contradicted the promises of the Treaty because long-standing

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243. *Id.* at 237.

244. *Cambuston*, 25 F. Cas. at 267. Although non-Mexican claimants also faced charges of fraud in appropriate instances, such charges were easily directed to the Mexican grantee in spite of primary evidence showing undisturbed ownership and official grant of land. See *infra* notes 249–50, 263–64 and accompanying text.

245. Jeremiah S. Black was the U.S. Attorney General and, according to one author, kept Mexican grantees from obtaining copies of their granting papers. EXPLOITS OF THE ATTORNEY GENERAL IN CALIFORNIA, BY AN EARLY CALIFORNIAN 6–7 (1860) (“The archives, nailed up in boxes in Benecia, or scattered through the States, were inaccessible alike to claimants and the law agent of government.”). In at least one instance, Attorney General Black alleged that a claim concerning lost documents was fraudulent and spurious. See *Fuentes v. United States*, 63 U.S. (22 How.) 443, 448 (1859).

246. *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 440 (1865).

247. BRADFUTE, *supra* note 195, at 139 (rejecting grants in Cieneguilla, Conejos, El Rito, Sanguijuela, El Embudo, and Sitio de Navejo cases).

occupancy adequately supported a claim for title under Mexican law.<sup>248</sup>

The above described impediments to obtaining legal recognition of Mexican grantees' rights, combined with the private right of action available under the statutes, created a *de facto* license for others to challenge their titles. Thus, it is not surprising that squatters and other Euro-American challengers brought claims for land ownership against grantees of Mexican descent. For example, in *Peralta v. United States*,<sup>249</sup> Señora Peralta had long met her obligations under Mexican law to secure her land.<sup>250</sup> Nevertheless, the Court rejected the claim because she lacked certain documents, even though the Peralta family asserted that their disappearance resulted from fraud. The Court reasoned that Señora Peralta was at fault for her circumstances and denied a title that the Mexican government recognized as valid.<sup>251</sup>

Resistance to confirmation went to startling lengths. When Mexican granting officers attested to the validity of their signature on grants, or to the status of the property in relation to its grantee, courts still refused to confirm the grant. In rejecting the testimony of Mexican government officers, one court reasoned that:

owing to the weakness of memory with regard to the dates of grants signed by them, the testimony of the late officers . . . cannot be received to supply or contradict

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248. See *supra* notes 97–100. Cases also provide support: "The greater part of the Alameda Grant it is found, has been occupied in strips, from beyond the memory of men now living." *Montoya v. Gonzales*, 232 U.S. 375, 376 (1914).

249. 70 U.S. (3 Wall.) 434 (1865).

250. See John S. Hittell, *Mexican Land Claims in California, A Documentary History of the Mexican Americans*, HUTCHINGS' CAL. MAG. (1857), reprinted in *A DOCUMENTARY HISTORY OF THE MEXICAN AMERICANS* 199, 205 (Wayne Moquin & Charles Van Doren eds., 1971) ("The Peralta grant . . . was made in the last century, and has been in constant possession ever since, under a perfect title according to the Mexican law . . .").

251. See *Peralta*, 70 U.S. (3 Wall.) at 436. Specifically, the Court noted that "if the parties had used the proper diligence in procuring the issue of the grant and judicial measurement and formal possession, there might have been no difficulty in the case." *Id.* For an alternative view expressed in a case involving a non-Mexican grantee, see *United States v. Sutter*, 27 F. Cas. 1368, 1374 (N.D. Cal. 1861) (No. 16,424), which held that the existence of permanent buildings and other improvements was sufficient proof to protect a claim. The *Peralta* case is interesting because the Peralta family was one of the more established families in Alta California—not even their wealth and class standing saved the family's property. For example, Pitt reports that lawyers divested the Peralta family of its 19,000 acre property, Rancho San Antonio, with a then-estimated value of \$3 million. PITT, *supra* note 39, at 97 (citing *Peralta*, 70 U.S. (3 Wall.) 434 (1865)).



the public records, or establish a title of which there is no trace to be found in the public archives.<sup>252</sup>

At the same time, other courts relied on the hazy memories of non-Mexican officials to protect the interests of non-Mexican grantees.<sup>253</sup> This double-standard unfairly disadvantaged Mexican grantees, and added to the confusion and inconsistency of land grant case law.

Irreconcilable and shifting standards, moreover, governed the process. For example, when John Fremont presented his claim to *Mariposas*, a site of gold mines, he asserted that his granting papers were missing or lost.<sup>254</sup> Nevertheless, being known as an instigator of the Conquest, and as a former American soldier and spy, Fremont benefited from his status; the Court extended a privilege not applied to grantees of Mexican descent and permitted the use of parol evidence to establish the validity of his claim.<sup>255</sup> Thus, Fremont's failure to produce key documents did not disallow his claim to *Mariposas*.

John Sutter, another key figure in the Conquest, who supported the rights of squatters trespassing on Mexican land, also benefited from favorable exercises of judicial discretion. In *United States v. Sutter*,<sup>256</sup> the petitioner—who already possessed a fort used as a base for the Conquest of Mexico—sought “a grant of lands to be distributed amongst colonists whom he proposed to introduce.”<sup>257</sup> The California Land Act required grantees to follow Mexico's colonization law. Sutter's goal of enlarging his estate violated Mexico's colonization laws; thus, Sutter's application was limited to his original petition encompassing eleven square leagues.<sup>258</sup>

252. *Luco v. United States*, 15 F. Cas. 1080 (N.D. Cal. 1858) (No. 8594).

253. *See, e.g., United States v. Rose*, 27 F. Cas. 896, 897 (N.D. Cal. 1856) (No. 16,195) (reporting on Sutter's reexamination and noting that “[h]is recollection when making his last deposition seems more uncertain and confused than when his testimony was first taken”).

254. *See Fremont v. United States*, 58 U.S. (17 How.) 542, 551 (1854). The Fremont case is recognized as a critical case in land grant law. As one of the earliest claims processed through the Board of Land Commissioners and culminating with an appeal to the U. S. Supreme Court, it established the “standards” dictating the land grant adjudication process. *United States v. Cambuston*, 25 F. Cas. 266, 273 (C.C.D. Cal. 1859) (No. 14,713) (Note). *Mariposas* was ultimately held as a grant of 10 sitios “north of a river, within the Sierra Nevada in the east part of Merced, on the west.” *United States v. Cameron*, 21 P. 177, 178 (Cal. 1889) (citing *Fremont v. United States*, 58 U.S. (17 How.) 542 (1854)).

255. 58 U.S. (17 How.) at 565.

256. 27 F. Cas. 1368 (N.D. Cal. 1861) (No. 16,424). Sutter was involved in other grants challenges as well. *See United States v. Pico*, 19 F. Cas. 595 (D. Cal. 1857) (No. 11,130). At one time, Sutter also “was military commandant of the northern frontier of California, and charged with civil jurisdiction” in that region. *United States v. Reading*, 59 U.S. (18 How.) 1, 3 (1855).

257. *Sutter*, 27 F. Cas. at 1370.

258. Mexican law limited grants to 11 square leagues:

The purpose of land grant process in his case supposedly was to adjudicate the validity of claims and *not* grant further land under Mexican laws.<sup>259</sup> Furthermore, Sutter testified that his documents were "burnt and lost."<sup>260</sup> Notwithstanding the prescribed process and procedure, the Board reasoned that because Sutter had distributed lands, he "had thus conferred on the nation what was deemed an important service," and accordingly ruled in his favor.<sup>261</sup> Not only did Sutter lack grant documents, as required by past decisions, but neither the Treaty nor Mexican law recognized grants following an "important service" conferred on a foreign government.<sup>262</sup> Thus, by this ruling, the court created new law to validate an otherwise invalid claim.

These judicial double-standards extended even to those situations where Mexican grantees presented their grant documents, demonstrating that anti-Mexican bias riddled the confirmation process. In *Luco v. United States*,<sup>263</sup> Jose and Jose Maria Luco petitioned for confirmation of their claim and presented their documents. The United States challenged their ownership as fraudulent and the issue turned on the authenticity of the granting documents.<sup>264</sup>

In making its case, the United States referred to the claimant as "Don Pepe, the household jester of General Vallejo . . . living with the profusion and bounty of semi-barbaric pomp."<sup>265</sup> The Court additionally referred to the claimant as:

not actually a servant, yet a dependant of General Vallejo . . . gaining a precarious livelihood by making and mending clothes and tin ware, acting as alcalde, printer, gardener, surveyor, music teacher, and attending to a grocer and billiard table for Vallejo.<sup>266</sup>

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It shall not be permitted to unite, in the same hands, with the right of property, more than one league square of land, suitable for irrigation, four square leagues in superficies, of arable land, without the facilities of irrigation, and six square leagues in superficies, of grazing land.

Ferris v. Coover, 10 Cal. 589, 634 (1858) (quoting Translation Respecting Colonization, *supra* note 74, art. XII). The case reports that Sutter "was desirous [of] enlarging his enterprise." *Id.*

259. See California Land Act § 8, 9 Stat. 631, 632 (1851).

260. *Sutter*, 27 F. Cas. at 1368.

261. *Id.* at 1378.

262. See *supra* notes 74–77, 105–07, 140–42 and accompanying text.

263. 64 U.S. (23 How.) 515 (1859).

264. *Id.* at 523 (statement of the case).

265. *Id.*

266. *Id.* at 533.

Thus, although the grantee was esteemed enough by his neighbors to be chosen as *alcalde* and had established a remarkable range of talents, the Court decided that these facts provided adequate support for the government's challenge.<sup>267</sup>

Not even with the testimony of General Vallejo, former commander of colonization in California, would the court allow the Lucos' ownership of the claim. The testimony of the granting officer and other Mexican officials could not convince the Court of the merit of the grantee's claim.<sup>268</sup> Thus, allegations of fraud plagued Mexican grantees both with and without documents. While the Court earlier had claimed to require documents to protect against fraud,<sup>269</sup> when documents were provided, they too were challenged as fraudulent, providing another pretext for alienating Mexicans from their land.

The Court's treatment of Jose and Jose Maria Luco contrasted directly with its treatment of Thomas A. Larkin, the United States Consul to Monterey before the Conquest. In *United States v. Larkin*,<sup>270</sup> the petitioner sought a grant but had failed to perform the requirements under Mexican colonization laws.<sup>271</sup> Larkin's claim was especially suspicious because he allegedly employed privileged information concerning the Conquest to establish a claim to Mexican land.<sup>272</sup> No question of fraud was raised in the lower court, however.<sup>273</sup> Consequently, on appeal, the Supreme Court disallowed examination of the fraud claim, ultimately holding in Larkin's favor.<sup>274</sup>

This ruling prompted one dissenting Justice to observe that

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267. *Id.* at 534.

268. 63 U.S. (23 How.) at 541 (characterizing the former governor's testimony as a "formula of words on which . . . a conviction of perjury could never be sustained").

269. See *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 439 (1865). In discussing the rigidity of the rules underlying those decisions, the Court noted:

We are asked to relax the severity of those rules in this case, because it is alleged to be meritorious. Courts administer justice by fixed rules, which experience and wisdom have demonstrated are necessary in the investigation of truth. There will sometimes, in applying those rules to the various affairs of life, be cases of individual hardship; but this does not prove that the rules are unwise, or not the best that can be adopted . . . .

*Id.*

270. 59 U.S. (18 How.) 557 (1855).

271. *Id.* at 563 (holding that "[c]ircumstances may excuse [non-compliance with grant terms] even in cases where the condition is contained in the grant").

272. *Id.* at 565.

273. See *United States v. Larkin*, 26 F. Cas. 870 (1855) (No. 15,563).

274. *Larkin*, 59 U.S. (18 How.) at 562 ("[E]ven were we to entertain the question [that the grant is fictitious], we see nothing in the record to justify the imputation . . . .").

[t]his evidence merely shows that Larkin was laying the foundations for a claim upon the United States, and was wholly unconnected with the Mexican regulations. The evidence satisfies me that this claim was fabricated after the difficulties between the United States and Mexico had occurred, with a view to enable the American consul at Monterey to profit from it, in the event of the cession of the country to the United States.<sup>275</sup>

Thus, despite the availability of what would seem at least arguably probative evidence, neither Larkin's inside information nor his "fabricated claim" barred him from obtaining ownership status.

The decision in *United States v. Hancock*<sup>276</sup> provides another example of preferential judicial treatment of non-Mexicans despite allegations of fraud. *Hancock* involved allegations that the survey of an underlying tract delineated an

erroneous location [and] was fraudulently and intentionally made by one Henry Hancock, . . . who at the time of making such survey was a secret owner of an undivided half interest in the *rancho*, and was at the same time the agent of the other owners thereof, and by them intrusted with all matters concerning the location of the grant. . . .<sup>277</sup>

The court also noted an allegation

that said location was made for the purpose of defrauding the United States out of, and corruptly gaining for himself and his co-owners, some 26,000 acres more than they were by law entitled to; and that Hancock, by false and untruthful representations made to the United States Surveyor General for California, deceived that officer, and procured the final confirmation of the survey upon which the patent was founded.<sup>278</sup>

Nevertheless, the court summarily dismissed the allegations, basing its decision in large part on the reputation of "Col. Hays, so well known to the country 50 years ago as the famous Texas ranger and gallant soldier of the Mexican War."<sup>279</sup> The court declared that such a

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275. *Id.* at 565.

276. 30 F. 851 (1887) (hearing in equity).

277. *Id.* at 852.

278. *Id.*

279. *Id.* at 858. This Article does not assert that all Euro-American claimants whose claims were tainted by fraud succeeded in obtaining patents to their property. That many did, however, cannot be denied. For a particularly notable example, see

soldier would not have committed fraud during that war.<sup>280</sup> Thus, the Colonel's reputation as a "gallant soldier" substituted for an evidentiary standard of proof in the court's analysis.<sup>281</sup>

In *Morehead v. United States*,<sup>282</sup> the court confirmed the grant despite suspicious circumstances that raised a clear possibility that the grant to a non-Mexican was based on a fraudulent transaction:

After the best consideration I have been able to give this case, my opinion is that although there are some *suspicious or rather improbable circumstances* connected with the claim, yet on the whole the preponderance of proof is in favor of its genuineness, and that it ought to be confirmed.<sup>283</sup>

*Morehead* provides additional support for the conclusion that the Court's treatment of non-Mexicans was decidedly more favorable than its treatment of Jose and Maria Luco or Señora Peralta. The Court's bias in favor of Euro-Americans is made clearer by the lack of conclusiveness it accorded to its determinations of Mexican grants, which were subject only to challenge for fraud extrinsic to the decree or patent at issue.<sup>284</sup>

A further example is provided by *Howard v. Colquhoun*,<sup>285</sup> which involved an appeal concerning jury instructions for charges of fraud in the registration of a grant.<sup>286</sup> The circumstances of the case provoked the Texas Supreme Court to declare:

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WESTPHALL, MERCEDES REALES, *supra* note 80, at 36, which describes 58,627,456 acres of fraudulently claimed land in Arizona and New Mexico, including the notorious Peralta Reavis claim of 12,467,456 acres. For other examples of purported fraud, see BRADFUTE, *supra* note 195, at 127–28. Bradfute refers to alleged forgeries involving the grants of Rancho de Galvan, Bosque Grande, Roque Lobato, and Santa Teresa de Jesus, which were "detected" by Will M. Tipton, a purported expert on the Spanish language and documents. See *id.* at 62; see also WESTPHALL, MERCEDES REALES, *supra* at 249–50.

280. *Hancock*, 30 F. at 858.

281. The adverse relationship between Texas Rangers and grantees is well established. The Texas Rangers were primary agents in committing acts of violence against Mexican grantees. See *supra* note 217 and accompanying text.

282. 17 F. Cas. 729 (N.D. Cal. 1859) (No. 9792).

283. *Id.* at 738 (emphasis added). But cf. *Luco v. United States*, 15 F. Cas. 1080 (N.D. Cal. 1858) (No. 8594) (refusing to confirm grant absent clear proof of genuineness). The new legal regime required Mexican grantees to demonstrate the validity of their claims. During the survey requirement, courts exercised discretion in permitting excessive challenges against a confirmed grantee's tract on the basis of accusations alleging the original and confirmed title was in fact fraudulent. To the detriment of Mexican grantees, blanket charges would at times lead to dispossession or rejection of a claim. See cases cited *supra* note 223.

284. See *United States v. San Jacinto Tin Co.*, 23 F. 279, 280 (C.C.D. Cal. 1885).

285. 28 Tex. 134 (1866).

286. *Id.* at 141.

that at this late day, when all who took part in the scene have gone . . . and time has rendered it impossible to unfold the whole truth connected with . . . the grant, it is the duty of the jury and the court to hold that these discrepancies and apparent differences in the mechanical work and color of the ink used in the preparation of the [25 year old] grant were not the work of fraud and official dereliction. . . .<sup>287</sup>

The *Colquhoun* court expressed frustration with the number of late challenges based on fraud:

That fraud, the evidence of which rests in the memory of witnesses, can be established a quarter of a century after the grant has been issued by the proper authority . . . render[] the grant void and defeat[] the title in the hands of an innocent purchaser from the grantee. . . . [“M]en’s titles may be made to depend on the frail and treacherous memory of witnesses, or their own personal popularity, or freedom from popular prejudice.”<sup>288</sup>

The Texas court further quoted a previous case approvingly to the effect

[t]hat there certainly should be some period of time beyond which grants and patents should cease to be open to attacks in the hands of innocent *bona fide* holders. . . . [O]therwise there would be no security to paper titles. No one can purchase the fairest apparent title without taking the precaution to inquire into the circumstances of its emanation.<sup>289</sup>

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287. *Id.* at 148. The court noted:

It is as rational to infer that the differences in the handwriting and color of ink used in preparing the grant occurred in the regular line of the duties of the officers, and were as honestly and properly made, as it is to infer from them that they were the work of official misconduct and fraud. The mere manual labor of preparing the grant prior to the signature of the commissioner may have been done by a number of officials connected with the office, and in the proper discharge of their duties, and each one may have performed his part with different pens and with different colored ink.

*Id.*

288. *Id.* at 145–46 (alteration added) (quoting *Johnson v. Smith*, 21 Tex. 722, 730 (1858)).

289. *Id.* at 145 (alteration added) (internal quotation marks omitted) (quoting *Johnson*, 21 Tex. at 730).

Despite its disapproval of the sort of challenge presented, the Court left the purported claim intact.<sup>290</sup> While there is merit to closing the door against open-ended attacks at the expense of bona fide innocent holders, the Court failed to apply similar reasoning to claims against Mexican grantees.<sup>291</sup>

The Court's failure to apply doctrines governing challenges based on fraud equally to Mexican and non-Mexican grantees resulted in a serious jurisprudential problem. The language of the Court's opinion in *Peralta v. United States*<sup>292</sup> provides a compelling example of the difficulty posed by the mixture of decisions. In *Peralta*, the Court reasoned that "[t]he right of property, as every other valuable right, depends in great measure for its security on stability of judicial decisions."<sup>293</sup>

By contrast, jurisprudential instability followed from the discriminatory standards applied to Mexican grantees in cases where the legal requirement of possession of documentary records was an issue. In a number of instances, courts applying the California Land Act failed to disallow European and Euro-American claims involving suspicious circumstances.<sup>294</sup> Furthermore, challengers of Mexican grantees' titles continued to allege fraudulent transfers, even after the Board of Land Commissioners had confirmed the grant at issue.<sup>295</sup>

Case law demonstrates that courts generally confirmed non-Mexican grants where evidence suggested the possibility of fraud but, under similar circumstances, disallowed the claims of grantees of Mexican descent. One scholar estimates that between forty and sixty-seven percent of all homestead entries in New Mexico were fraudulent.<sup>296</sup> Commenting on this pattern, one author observed that "[i]n Texas . . . the words land and fraud were very nearly synony-

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290. See *id.* at 149 (affirming verdicts in the lower courts).

291. Compare this result with the outcome the Peralta family received in *Peralta v. United States*, 70 U.S. (3 Wall.) 434 (1865), where they similarly asserted fraud in the disappearance of their granting papers.

292. *Id.*

293. *Id.* at 439. For the Court's discussion of the rigidity of the rules underlying those decisions, see *supra* note 269.

294. See discussion *supra* notes 254–81 and accompanying text; see also *infra* notes 296–99 and accompanying text.

295. See, e.g., *United States v. Rico*, 27 F. Cas. 806 (1862) (grant confirmed but fraud alleged on appeal); *United States v. Bernal*, 24 F. Cas. 1123 (N.D. Cal. 1855) (No. 14,581) (noting ongoing challenges based on fraud despite confirmation of the grant). *Bernal* provides an example of the loose manner in which such charges were brought against Mexican grantees. *Id.*

296. See VICTOR WESTPHALL, *THE PUBLIC DOMAIN IN NEW MEXICO, 1854–1891*, at 65 (1965); see also HOWARD ROBERTS LAMAR, *THE FAR SOUTHWEST, 1846–1912*, at 149 (1966) (estimating fraud in approximately 90% of such grant claims by settlers coveting Mexican land); VICTOR WESTPHALL, *THOMAS BENTON CATRON AND HIS ERA* 34 (1973) (discussing the Catron era and Catron's role in the land grant process).

mous."<sup>297</sup> As one court observed: "charges of fraud are easily made, and they were by no means sparingly made by incensed defeated parties . . . these reckless charges by disappointed trespassing and opposing claimants, in many instances . . . involved the officers of the government, as well as the claimants under the grant."<sup>298</sup> Despite substantial questions regarding the validity of land claims during this period, the United States transferred tracts to the public domain, and thereafter to other parties, rather than returning them to their Mexican owners.<sup>299</sup>

### b. Challenges to Mexican Authority

Up to the time of the American Conquest, Mexican officials retained authority to grant lands in the Mexican territories.<sup>300</sup> Grantees nonetheless confronted challenges alleging that Mexican officials lacked authority to award the grants. In *Whitney v. United States*,<sup>301</sup> the Court rejected a claim encompassing 415,000 acres, reasoning in part that Governor Manuel Armijo lacked authority to award the grant.<sup>302</sup> Thus, notwithstanding the clear validity of Mexico's power

297. MILLER, *supra* note 57, at 32. In New Mexico, a number of grants also derived from the Spanish period. See, e.g., *United States v. Candelaria*, 16 F.2d 559 (8th Cir. 1926) (involving a 1769 grant deriving from the Spanish period of control in Valencia, New Mexico).

298. *United States v. San Jacinto Tin Co.*, 23 F. 279, 295-96 (C.C.D. Cal. 1885).

299. For example, the Carson National Forest once belonged to a Mexican grantee and many national forests are still expediting private gain and accumulation of wealth. See *infra* notes 404, 428, 430, 494.

300. The sovereign status of a nation permits it to distribute public lands. See, e.g., *State v. Gallardo*, 135 S.W. 664, 676-77 (Tex. Civ. App. 1911) (discussing Mexican authority to issue titles to land in its public domain).

301. 181 U.S. 104 (1901) (arising out of an 1845 grant to Antonio Sandoval of *La Estancia* in New Mexico).

302. See *id.* (holding that governors were not authorized to make a grant). The *Whitney* court was not alone in being faced with this argument; rather, challenges on such grounds were a constant feature of the land grant adjudication process. See, e.g., *Cessna v. United States*, 169 U.S. 165, 178 (1898) (considering whether an *ayuntamiento* (general council) had the power to grant tracts); *Peralta v. United States*, 60 U.S. (19 How.) 434, 446 (1865) (determining whether Mexican officers had power to make grants of land); *Luco v. United States*, 15 F. Cas. 1080 (N.D. Cal. 1858) (No. 8594) (determining authority of granting officers). Other challenges included jurisdictional disputes among and between various courts. For an additional example, see *United States v. Baca*, 184 U.S. 653 (1902). In *Baca*, Margarito Baca presented his claim for confirmation of ownership of a tract in Valencia County, New Mexico, called *San Jose del Encinal*. *Id.* at 653. Baca alleged that his land derived from Baltazar Baca in 1768 by order of the Spanish Governor and the Captain General of New Mexico. *Id.* at 654. The U.S. argued that the Court of Private Land Claims lacked jurisdiction to allow the claim. *Id.* at 659. For a discussion on the authority of a Mexican official to award a grant, see *Owen v. Presidio Mining Co.*, 61 F. 6 (1893), which discussed the *alcalde* of



to determine the distribution of its public domain, courts allowed challenges alleging that Mexican grants were *ultra vires*.

In allowing these challenges, courts adopted an attitude reminiscent of that in *United States v. Cambuston*.<sup>303</sup>

As the Mexican rule approached the period to its final subversion, when war with the United States was on all sides recognized as impending, and after the rising of the American settlers in the country, known as the "Bear Flag War," had occurred, the governor (Pio Pico) appears to have distributed grants with a lavishness that would justify the suspicion that he hoped to secure to his countrymen, by the pen, the lands he foresaw they were about to be deprived of by the sword.<sup>304</sup>

Despite the error underlying the *Cambuston* court's approach, its reasoning illuminates a crucial aspect of a legal culture that facilitated extensive challenges to the claims of Mexican grantees.

Other cases provide confirmation of the prevalence of this perception among American courts. For example, in *Palmer v. United States*,<sup>305</sup> the court refused to confirm land grants issued prior to the Conquest because the Mexican granting officials allegedly lacked the proper authority.<sup>306</sup> The *Palmer* court held "on general principles of public law, [that] grants made flagrante bello, when conquest has been set on foot, and actual occupation is imminent and inevitable, have no validity against the subsequent conqueror."<sup>307</sup>

This declaration might have some resonance had the United States, as "conqueror," not promised, as it did in the Treaty of Guadalupe Hidalgo, that it would accord full validity to such grants. By resting its decision on this reasoning, the *Palmer* court,<sup>308</sup> among others, ignored both applicable law and historical fact. First, general

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Presidio del Norte's authority and its impact upon the claim of Ernest Dale Owen and others.

303. 25 F. Cas. 266 (D. Cal. 1859) (No. 14,713).

304. *Id.* at 274 (Note).

305. 18 F. Cas. 1047 (D. Cal. 1857) (No. 10,697).

306. *Id.* at 1047; *accord* *United States v. Camou*, 184 U.S. 572, 573 (1902) (discussing whether a Mexican official lacked the authority to make grant of public land); *Chavez v. United States*, 175 U.S. 552 (1899) (holding that the territorial deputation had no authority to grant land); *United States v. Rocha*, 76 U.S. (9 Wall.) 639 (1869) (determining in part, Mexico's right to dispose of her public domain in California before the war).

307. *Palmer*, 18 F. Cas. at 1047; *cf.* *United States v. Larkin*, 59 U.S. (18 How.) 557, 565 (Campbell, J. dissenting) (arguing for denial of the grant because Larkin allegedly benefited from his status as U.S. Consul in Monterey, Mexico, by gaining favorable information prior to the Conquest).

308. *Palmer*, 18 F. Cas. at 1047.

principles of public law should not have governed the decision in this case. The Treaty was the functional equivalent of positive federal law under the United States Constitution's Supremacy Clause.<sup>309</sup> Next, Mexico retained its sovereign status until the time of the Conquest, under both international and domestic United States law.<sup>310</sup> Finally, as a sovereign state, Mexico could undeniably award grants, as it had not repealed its land laws prior to annexation.<sup>311</sup> *Palmer* illustrates the extent to which courts ignored relevant law and fact when refusing to give effect to grants where authorities allegedly lacked capacity. Such convenient avoidance of governing principles substantially disadvantaged Mexican claimants and augmented the United States' public domain.<sup>312</sup> As subsequent discussion demonstrates, courts and challengers used Mexican law to dispossess grantees of their land.

*c. Mexican Colonization Law and Conditions Subsequent*

Beyond regulating settlement of the region, a key provision of the colonization laws obligated grantees to cultivate their proposed tracts.<sup>313</sup> The Mexican Republic granted either provisional or fee ownership status to grant recipients depending upon their successful performance of this condition unless adverse relevant information was

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309. See *supra* note 142.

310. See *infra* Section II.B.2.b.iii; see also *State v. Gallardo*, 135 S.W. 664, 669 (Tex. Ct. App. 1911) ("[A] mere change in sovereignty, even in the absence of treaty stipulations for the protection of private rights, does not divest the vested property rights of individuals."). As the court in *Grant v. Jaramillo*, 28 P. 508 (1892), stated:

Titles which were perfect before the cession of the territory to the United States continued so afterwards, and were in no wise affected by the change in sovereignty. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject.

*Id.* at 510 (internal quotation marks omitted) (quoting *Dent v. Emmeger*, 81 U.S. 308, 312 (1871)).

311. *Palmer*, 18 F. Cas. at 1051.

312. *Id.*

313. See Translation Respecting Colonization, *supra* note 74, art. I. The article provides:

The Governors (Gefes politicos) of the territories are authorized (in compliance with the law of the General Congress, of the 18th of August, 1824, and under the conditions hereafter specified) to grant vacant lands, in their respective territories, to such contractors (empressarios) families, or private persons, whether Mexicans or foreigners, who may ask for them, for the purpose of cultivating and inhabiting them.

*Id.*; see also *supra* notes 109–15.

provided.<sup>314</sup> The existence of this requirement provided settlers with fodder for challenges alleging incomplete performance.<sup>315</sup> For example, in *Pico v. United States*,<sup>316</sup> the Board of Land Commissioners rejected Pico's claim for failure to strictly perform the conditions attached to his award.<sup>317</sup> Likewise, *Chabolla v. United States*<sup>318</sup> involved an appeal from the California Land Commission's 1855 rejection of the claim of Anastasio Chabolla for property held in ownership since January 1844.<sup>319</sup> The Chabolla family owned 300 head of cattle, forty to fifty horses with corrals, and land under cultivation.<sup>320</sup> Although Chabolla had resided on the property for ten years, the Board of Land Commissioners rejected his claim.<sup>321</sup> This adverse decision forced Chabolla (and, subsequently, his heirs) to pursue the matter through several appeals, spanning the remainder of his years and beyond, before a court ultimately confirmed the grant.<sup>322</sup> By comparison, lax "standards" favored the claims of the dominant population. *Fremont v. United States*<sup>323</sup> exemplifies the pref-

314. See *United States v. Rocha*, 76 U.S. (9 Wall.) 639, 639 (1869) (grantee claiming a grant awarded "provisionally"); *United States v. Moreno*, 68 U.S. (1 Wall.) 400, 401 (1863) (authorization of claimant Moreno to occupy land "provisionally"); *United States v. Carrillo*, 25 F. Cas. 312, 312 (C.C.N.D. Cal. 1855) (No. 14,737) (affirming decision of the board that claim was valid, partly based upon use of land by claimant).

315. For example, in *Whitney v. United States*, 181 U.S. 104, 106 (1901), the Court noted that, although title was reported as perfect by one surveyor general who recommended confirmation, Congress did not confirm the grant. When the claim was re-examined by another surveyor general, he recommended rejection. See also, e.g., *United States v. Bolton*, 64 U.S. (23 How.) 341, 353 (1859) (rejecting a grant to a mission priest); see also *Diaz v. United States*, 7 F. Cas. 642 (C.C.N.D. Cal. 1858) (No. 3878) (alleging absence of the *expediente* or conditions attached to claim, including testimony of a non-Mexican official asserting he "never saw the grant").

316. 19 F. Cas. 593 (C.C.D. Cal. 1856) (No. 11,128).

317. *Id.* at 594.

318. 5 F. Cas. 387 (N.D. Cal. 1855) (No. 2566).

319. *Id.* at 388 (appealing rejection of claim previously rejected by local authorities). Chabolla's claim was pursued by his heirs after he died in the midst of the appeals process. *Id.*

320. *Id.*

321. *Id.* at 387.

322. It is unknown how much of the land was saved. On this issue, other case law and scholarship discuss the lack of *res judicata* effect, violence, and losses from mortgage and tax liens that also resulted in land losses. See, e.g., *Mora v. Nunez*, 10 F. 634 (Tex. 1882) (action to recover Mission Rancho in San Fernando and involving delinquent taxes legislation). Non-legal scholarship has noted that taxes and forfeitures of deeds also resulted in land alienation, where grantees had borrowed against their property interests in order to defend their titles. See DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* 60 (1989). Finally, jurisdictional disputes between Congress and the Court also generated litigation. See, e.g., *Board of Trustees of the Sevilleta de la Joya Grant v. Board of Trustees of the Belen Land Grant*, 242 U.S. 595 (1916).

erential treatment that courts accorded Euro-American claimants. Fremont alleged that he was the successor to a tract that derived from a pre-war grant made to Juan Alvarado.<sup>324</sup> The geographic demarcation positioned the tract "within the limits of the Snow Mountain, (Sierra Nevada) and the rivers known by the names of the Chanchilles, of the Merced and San Joaquin, as his property."<sup>325</sup> Like other grantees, Alvarado had to meet certain conditions and receive approval by Mexican officials for his grant.<sup>326</sup> One specific covenant provided that "grantees were not permitted to sell, alienate nor mortgage the same, nor subject it to taxes, entail, or any other incumbrance."<sup>327</sup> Alvarado, however, undisputedly had alienated the land and therefore violated the conditions and colonization regulations. The Court, moreover, in applying the requirements of the California Land Act of 1851, was obligated both to determine the validity of land titles and, accordingly, to follow "the law of nations, [and] the laws, usages, and customs of the government from which the claim is derived."<sup>328</sup> Nonetheless, the Court did not inquire as to whether the transfer was invalid under Mexican law. Alvarado further had failed to perform other conditions attached to the grant: he neither took possession, resided on, nor cultivated the granted land during the required period.<sup>329</sup> Thus, Mexican law rendered Alvarado's claim void for breach of several conditions, leaving him nothing to convey.

The Court, nonetheless, confirmed Fremont's title despite the evidence showing Alvarado's "omission to take possession, to have the land surveyed, and to build a house on it, within the time limited in this condition."<sup>330</sup> In so holding, the Court privileged an

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323. 58 U.S. (17 How.) 542, 566 (1854). In contrast to the treatment afforded to Fremont's claim, Mexican grantees were required to demonstrate by a preponderance of the evidence, the validity of their asserted title. *See, e.g.,* United States v. Ortiz, 176 U.S. 422, 425-26 (1899) (requiring that the validity of a title be proved by preponderance of the evidence).

324. *Fremont*, 58 U.S. (17 How.) at 543. Alvarado purportedly received the grant in 1844 from the governor of Alta California, Manuel Micheltorena. *See id.*

325. *Id.* at 545.

326. *See id.*

327. *Id.* at 566.

328. *Id.* at 553 (citing California Land Act, § 2, 9 Stat. 631 (1851)).

329. *See id.* at 568 (Catron, J., dissenting); *cf. Feliz v. United States*, 8 F. Cas. 1130 (N.D. Cal. 1855) (No. 4720) (holding that conditions had been performed despite the Board of Land Commissioner's rejection of claim due to the grant's lack of proof as to its genuineness).

330. *Fremont*, 58 U.S. (17 How.) at 560. In dissent, one justice noted that "[the original grantee] never was a colonist . . . never did a single act under his contract to colonize and . . . could not have obtained a definite title from . . . the departmental assembly." *Id.* at 572 (Catron, J. dissenting). Nor had the land been surveyed. *See id.* at 573.

illegal claim by allowing less rigorous standards of proof concerning the production of extrinsic evidence<sup>331</sup> and failed to apply “the law of nations, the laws, usages, and customs of the government from which the claim is derived.”<sup>332</sup> The Court thus sidestepped Fremont’s failure to demonstrate either government approval or performance of requisite conditions.<sup>333</sup> Hence, Euro-American claimants benefited from a double standard that did not require them to meet the exacting, strictly interpreted conditions required of Mexicans.<sup>334</sup>

Courts that allowed Euro-American claimants to introduce not only direct evidence, but also what was essentially parol evidence into the land grant adjudication process, exceeded their authority by flouting the statutory standards and procedures.<sup>335</sup> Ironically, through such rulings the Court effectively annulled the stated purposes of the Land Acts and rejected Mexico’s colonization laws.<sup>336</sup> Unsurprisingly,

331. See also *Hornsby v. United States*, 77 U.S. (10 Wall.) 224, 238 (1869) (holding that approval of assembly was not a condition precedent to the vesting of title to California land granted by the Mexican government); *White v. United States*, 68 U.S. (1 Wall.) 660 (1863) (declining to state the reasons for the court’s decision); *United States v. Larkin*, 59 U.S. (18 How.) 557, 563 (1855) (reasoning that conditions on Mexican land grants were not mandatory); *Pico v. United States*, 19 F. Cas. 590 (D. Cal. 1855) (No. 11,127) (reversing the rejection of a claim due to nonperformance of conditions).

332. California Land Act, § 2, 9 Stat. 631 (1851).

333. *Fremont*, 58 U.S. (17 How.) at 560.

334. See also *Dalton v. United States*, 63 U.S. (22 How.) 436 (1859) (focusing restrictively on whether claimant was an American or Mexican citizen); *United States v. Sutter*, 27 F. Cas. 1368 (N.D. Cal. 1861) (No. 16,424) (distinguishing form of election in a case involving the transfer of portions of lands within the exterior limits of a grant to a third party); *Teschmacher v. United States*, 23 F. Cas. 862 (N.D. Cal. 1855) (No. 13,843) (involving charge of nonfulfillment of conditions subsequent), *aff’d*, 59 U.S. (18 How.) 1 (1855).

335. See *Peralta v. United States*, 70 U.S. (3 Wall.) 434, 440 (1865) (noting the “struggle . . . to induce the courts to fritter away the act of Congress, and substitute parol proof for record evidence”).

336. According to the court in *United States v. Cambuston*, 25 F. Cas. 266 (C.C.D. Cal. 1857) (No. 14,713):

The *Fremont* decision was critical to the land grant process because it was among the earliest of the cases decided by the United States district court on appeal from the board of commissioners. It was the first in which the Supreme Court announced the principles by which this class of cases was to be decided. It has, therefore, remained the most important and the leading case on this branch of the law, and has exercised a controlling influence on all subsequent decisions of this court.

*Id.* at 272. Compare the court’s reasoning in *Cambuston* with the following provision from Section 11 of the California Land Act:

That the commissioners . . . and the District and Supreme Courts, in deciding on the validity of any claim brought before them under the provisions of this Act, shall be governed by the treaty of Guadalupe

the ruling privileged Fremont by giving him title to "ten square leagues, within the limits of the Sierra Nevada, and the rivers known by the names of the Chowchillas, of the Merced and the San Joaquin."<sup>337</sup> This ruling made Fremont one of the largest landholders in California, with holdings "embracing mines of gold or silver."<sup>338</sup>

The Court's precedent-evading construction provoked another court to comment:

At the risk of exposing myself to the ridicule or censure of many, for what may be considered temerity on my part in questioning the soundness of these decisions, I cannot refrain from the opinion that in these cases the Supreme Court have taken a new departure, and entirely disregarded their previous decisions.<sup>339</sup>

Thus, the observation that the American judiciary's land grant opinions are inconsistent with its pre-existing principles is not novel.

Indeed, if the liberal *Fremont* decision was to be regarded as valid land-grant precedent, it should have protected Señora Peralta.<sup>340</sup> As previously discussed, by the time Señora Peralta asserted her claim under the new rules, she had long met her land-securing obligations under Mexican law.<sup>341</sup> The Court, nonetheless, denied her claim on the ground that she lacked certain documents, despite other clear evidence, including parol evidence, of her performance of conditions attached to her award. The Court declared only that Señora Peralta was at fault for her lack of documentary evidence and denied title where the Mexican government had discharged her of any further obligations.<sup>342</sup>

In permitting parol evidence in cases involving non-Mexicans, adjudicative bodies exceeded their authority and ignored statutorily prescribed standards for the land grant adjudication process and

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Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable.

§ 11, 9 Stat. 631 (1851).

337. *Fremont v. United States*, 25 F. Cas. 1214, 1214 (N.D. Cal. 1853) (No. 15,164), *rev'd*, 58 U.S. (17 How.) 542 (1854).

338. *Fremont*, 58 U.S. (17 How.) at 565 (reporting that "[w]e are here called on to award a patent for a floating claim of fifty thousand arpens of land in the gold region of California").

339. *Gunn v. Bates*, 6 Cal. 263, 269 (1855), *quoted in* Pisani, *supra* note 63, at 298.

340. *Peralta*, 70 U.S. (3 Wall.) at 434.

341. *See supra* note 248 and accompanying text.

342. *See* Hittell, *supra* note 250.

procedures.<sup>343</sup> In the process, the courts created a land claims jurisprudence that lacked either standards or uniformity. The courts' disregard for legal principles and their questionable logic in these cases resulted in shifting and elusive standards of proof that provide critical evidence of a bias in favor of non-Mexican grantees.<sup>344</sup>

*United States v. Reading*<sup>345</sup> offers further compelling evidence of the different approaches courts adopted when adjudicating claims by Euro-American claimants as opposed to claims by Mexican grantees. Although a Mexican national, Reading assisted Sutter in the political disturbances that agitated Mexico during the Conquest. Reading had failed to obtain confirmation from the departmental assembly, according to the dictates of his award.<sup>346</sup> The court, nonetheless, disregarded Mexican law and reasoned:

Even if the conditions of the grant be construed to require the personal residence of the grantee on the land, the excuses shown by him for his omission to do so, are such as should in equity be received. In the 1845 he was unexpectedly called upon to perform public duties which he had no right to decline, and the reasons for his neglect in 1846, are certainly such as should receive the favorable consideration of this government.<sup>347</sup>

Importantly, Reading's participation in the political disturbances between 1845 and 1848 and his actions in the war against his adopted country constituted treason against Mexico. The California Land Act of 1851 required courts to look to the law of Mexico in determining the validity of grants.<sup>348</sup> While it is questionable whether the United States government would have refused to approve a grant in the face of Reading's assistance in the Conquest, Mexican authorities would not likely have countenanced his actions.

The court, nonetheless, distinguished Reading's non-performance in holding that "the grant of the governor, although unconfirmed by

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343. Cf. *Peralta*, 70 U.S. (3 Wall.) at 438 (observing that in "fritter[ing] away the act of Congress, courts thereafter substituted parol proof for record evidence").

344. See *Fremont*, 25 F. Cas. at 1215.

345. 27 F. Cas. 716 (N.D. Cal. 1853) (No. 16,127), *aff'd*, 59 U.S. (18 How.) 1 (1855).

346. *Id.* at 716.

347. *Id.* at 716-17.

348. California Land Act, ch. 41, 9 Stat. 631 (1851). Thus, the Court should have looked to Mexican law on treason to determine the validity of Reading's claim. Although it remains questionable that a United States court would deny the claim of a foreign national who aided the United States in war against Mexico, the purpose of this discussion is to demonstrate that both statute and precedent obliged the Court to do so, and that it was not equally willing to flout the dictates of the governing authority for non-White Mexican grantees as it was for their Euro-American counterparts.

the departmental assembly, vested in the grantee a present and immediate interest."<sup>349</sup> Under either the correct legal standard or the standard applied to Mexican grantees, the court should have denied Reading's claim. Thus, the process for deciding Euro-American claims was extremely lax compared to the court's process for the claims of Mexican grantees.

In addition to failing to apply the standards of Mexican law to Euro-American claimants, courts also demonstrated their bias against Mexican grantees by holding them to legal standards that did not exist under Mexican law, while rejecting Mexican grants for failure to perform such obligations. In practice, Mexican petitioners inconsistently forwarded final grant notices to the departmental assembly either because of communication difficulties within Mexico or because such forwarding was deemed a courtesy.<sup>350</sup> The failure to adhere to the literal conditions of the grant neither resulted in automatic forfeiture nor disallowed ownership status under Mexican law.<sup>351</sup> Absent adverse information concerning a specific tract, the government of Mexico recognized long-standing possession and residence as constituting ownership.<sup>352</sup>

Nonetheless, American courts, such as that in *Peralta*, held that a Mexican grantee's failure to obtain departmental assembly certification was a breach of Mexico's granting laws, even if the grantee had been in possession of the land for an extended period of time.<sup>353</sup>

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349. *United States v. Reading*, 27 F. Cas. 716, 716 (N.D. Cal. 1853) (No. 16,127), *aff'd*, 59 U.S. (18 How.) 1 (1855); *see also* *United States v. Payson*, 27 F. Cas. 477 (N.D. Cal. 1856) (No. 16,017) (confirming a claim by a non-Mexican grantee).

350. *See* *Chabolla v. United States*, 5 F. Cas. 387, 387-88 (N.D. Cal. 1855) (No. 2566) (grantees not penalized for failure to submit notices to the departmental assembly). The prior discussion of custom and practice in the land grant process may also be helpful here. *See* discussion *supra* notes 97-100. Primary documents available at the Bancroft library offer an opportunity to enrich our understanding of the land grant process, particularly involving custom and practice. *See, e.g.*, Deposition of Governor B. Alvarado on Behalf of Claimant Jose Estudillo, *Estudillo v. United States*, No. 256, The Secretary to the Board Acting as Interpreter, C-I, 23 Pt. II:1, Alvarado, Juan Bautista 1853-1854, S.F., (November 11, 1853), Case 256, Before U.S. Land Commissioners, Bancroft Library.

351. *See* *Bakken*, *supra* note 21, at 234-44; discussion *supra* notes 97-100; *see also* *Ames v. The Irvine Co.*, 55 Cal. Rptr. 180, 185-86 (1966) (citing *United States v. Bolten*, 64 U.S. (23 How.) 341, 350 (1838)).

352. *See supra* notes 97-100 and accompanying text.

353. *See, e.g.*, *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 489 (1865) (noting that all Mexican grants in colonization were made subject to the approval of the departmental assembly). For discussion of courts' duty to look at custom in adjudicating land claims, *see supra* note 314. *See also* *De Arguello v. United States*, 59 U.S. (18 How.) 539, 550 (1855) (Daniel, J., dissenting) (criticizing the Court's failure to acknowledge "the laws and institutions in force" at the time of acquisition, which it was authorized and bound to extend to the laws of the several states"); *United States v. Cervantes*, 25 F. Cas. 367, 368 (N.D. Cal. 1853) (No. 14,768) (analyzing what con-



What U.S. courts ignored is that the Republic possessed full discretion to determine the validity of grant awards, and even in “[t]he non-fulfillment of these conditions, Mexico was competent to overlook or to forgive” the failure and provide title in spite thereof.<sup>354</sup> Under this logic, Señora Peralta’s grant would have been affirmed as had been determined by the Mexican government.

#### *d. Granting Language and Grant Documents*

The Land Act of 1851 provided “[t]hat a secretary, skilled in the Spanish and English languages, shall be appointed by the said commissioners, whose duty it shall be to act as interpreter.”<sup>355</sup> Mexican granting documents were written in Spanish and required translation for use by American courts. The interpreters, however, were not always used. One United States Senator observed the persistent failure to employ interpreters and stated that adjudicating commissioners “know nothing of the Spanish language. I admit they ought to know it.”<sup>356</sup>

Even when interpreters were employed, deceptive or incompetent translations damaged the integrity of the adjudicative process and harmed grantees, particularly in defending the boundaries of their grants. For example, in *Ainsa v. United States*,<sup>357</sup> the government interpreter translated the term “*buena fee*” into “possessors in good faith,” rather than the more appropriate “owners.”<sup>358</sup> Translation diffi-

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stituted a definitively valid or complete title; namely, a concession by governor and approval by territorial deputation, or concession by the supreme government).

354. *Fremont v. United States*, 58 U.S. (17 How.) 542, 576 (1854) (Catron, J., dissenting). The Board of Land Commissioners initially implemented such a policy; however, the tide shifted when the Democrats took over a year later. See Bakken, *supra* note 21, at 244.

355. California Land Act of 1851, § 2, 9 Stat. 631 (1851).

356. Gates, *The California Land Act of 1851*, *supra* note 24, at 401 (quoting Senator John B. Weller).

357. 184 U.S. 639 (1902).

358. See *id.* at 646. The cases demonstrate the significance of a variety of Spanish terms to the determination of individual land grants. See, e.g., *Sena v. United States*, 189 U.S. 233, 235–36 (1903) (analyzing a land grant in terms of a “*fanega de maiz* . . . a measure of corn which will plant 8.82 acres”); *Ainsa*, 184 U.S. at 642 (discussing sale of 11 *sitios* and 12 *caballerias*); *Cessna v. United States*, 169 U.S. 165, 171 (1898) (“a straight line of five thousand varas shall be a league; a square, each of whose sides shall be one league, shall be called a sitio”); *United States v. Perot*, 98 U.S. 428, 430 (1878) (defining a standard *vara* of Mexico as “somewhat less than 33 1/3 inches”); *United States v. Auguisola*, 68 U.S. (1 Wall.) 352, 353 (1863) (involving claim of title based partly on a concession from the governor declaring original grantees to be “*proprietad del terreno blanado*” or “owner of the land”); *Suñol v. Hepburn*, 1 Cal. 254 (1850) (interpreting Spanish terms concerning possession of property). In addition, the court in *Lux v. Haggin* interpreted *bienes comunes* as “being those which, not being as to property of any, pertain to all as to their use—as the air, sea, and its beaches,”

culties were particularly significant and noticeable where confirmation hinged on the differences between United States and Mexican units of measurement and identification of geographical markers used to define boundaries under Mexican law. For example, most surveyors "did their work in English and the field notes had to be translated into Spanish, resulting in confusion as to bearing trees since errors were made in translating the names of the trees from English to Spanish."<sup>359</sup> Thus, interpreters' incompetence, when present, as well as their absence, frustrated the Land Acts' intent, damaged the record for appeals purposes, and imposed additional barriers to confirmation of Mexican grantees' titles.

Two of the most significant barriers for Mexican grantees developed around this language problem. First, the United States Attorney General's office advanced erroneous interpretations of land grant documents. The United States employed a non-Mexican official as a witness in the interpretation of land grant documents.<sup>360</sup> The Attorney General's special agent in the New Mexico Surveyor General's office was directed to examine petitions and title papers and determine, among other things, whether the documents and signatures were genuine.<sup>361</sup> While a non-Mexican officer may have become well-versed in Mexican law, the agent relied on a text compiled by the United States Attorney.

In determining the validity of a claim, the courts used the text compiled by United States Attorney for the Court of Private Land Claims, Matthew Givens Reynolds. The Reynolds text constituted a second language-based barrier to grantees because it contained various errors and misrepresented Mexican law on at least two specific points. First, it failed to include reference to laws "making custom applicable to a particular situation or laws defining custom."<sup>362</sup> The compilation further did not discuss "the important subject of the rules of evidence and presumptions under Spanish and Mexican law."<sup>363</sup> These omissions support the notion that the text employed "substantial bias, both in the selection of the laws included and in

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and *bienes publicos* as "those which as to property pertain to a people or nation, and, as to all the individuals of the . . . rivers, shores, ports, and public roads." 10 P. 674, 707-08 (Cal. 1886).

359. Hill, *supra* note 12, at 50.

360. See BRADFUTE, *supra* note 195, at 61-62 (describing William Tipton's role as "the primary source of evidence in attempts to prove that a grant document or signature had been forged"); United States v. Ortiz, 176 U.S. 422, 428 (1899) (explaining Tipton's role in defending claims on behalf of the United States as an employee of the Department of Justice). Prior to the Department of Justice, Tipton was employed in the office of surveyor general in New Mexico. *Id.*

361. BRADFUTE, *supra* note 195, at 61-62.

362. EBRIGHT, LAND GRANTS, *supra* note 19, at 135.

363. *Id.*

the summary of those laws in the prefatory 'historical sketch.'<sup>364</sup> In spite, or perhaps because of this fact, according to one scholar, the "book became the primary authority for both the Court of Private Land claims and the Supreme Court of the United States on Spanish and Mexican law."<sup>365</sup>

By adopting Reynold's text as the "definitive statement of Spanish and Mexican law," the courts adopted its biases thereby privileging the government and challengers with yet another substantial edge over land grant claimants.<sup>366</sup> The absence of interpreters, the mistranslation of Spanish terms and Mexican law, and a judicial bias in favor of the United States created insurmountable hurdles for many Mexican grantees. Control over the meaning of language provided the government with the opportunity to buttress interpretations that might otherwise appear logically tenuous. Interpretations that ultimately worked to the severe detriment of Mexican grantees.

No longer under Mexican rule, grantees encountered shifting legal interpretations that undermined their rights, negotiated for and recognized as "inviolably respected" under the Treaty.<sup>367</sup> Although Article VIII provided that grantees, their heirs, and "all Mexicans who may hereafter acquire said property by contract, shall enjoy" their property not unlike other citizens of the United States,<sup>368</sup> grantees witnessed the reverse in application. Rather, in addition to repeated direct challenges to their property titles, grantees also faced collateral attacks by private parties seeking to dispossess them of their land.

## 2. Collateral Attack

Confirmation of a grant neither terminated the land grant adjudication process nor quieted title. By contrast, confirmation necessitated a survey attesting to the accuracy of a claimed site.<sup>369</sup>

364. For an example of how this bias disallowed a valid grant see EBRIGHT, LAND GRANTS, *supra* note 19, at 127. In his analysis of both the Embudo Grant and the Court of Private Land Claims, Ebright asserts that the Grant's rejection "was one of the most unjust decisions rendered by that tribunal in its thirteen-year history." *Id.*

365. *Id.* For an example of the Supreme Court's use of the Reynolds text, see *United States v. Chaves*, 159 U.S. 452, 458 (1895).

366. EBRIGHT, LAND GRANTS, *supra* note 19, at 136.

367. Treaty of Guadalupe Hidalgo, art. VII, *supra* note 15, at 929.

368. *Id.*

369. Section 13 of the California Land Act required that:

a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation, and a plat or survey of the said land, duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private

Although facially innocuous, the survey requirement did not proscribe rehearing of the grant's validity,<sup>370</sup> thereby providing a mechanism for interested parties to challenge confirmed and pending grants by charging imprecise boundary demarcations.<sup>371</sup> These charges artificially prolonged litigation and produced a second cluster of challenges to the land titles of Mexican grantees.

*a. Ecosystems and Boundaries*

In the United States, a grid system delineates property boundaries<sup>372</sup> and emphasizes property as an economic commodity.<sup>373</sup> The Anglo-American grid system makes land into precisely measurable parcels, easily located on a map.<sup>374</sup> The Mexican Republic, in addition to surveying tracts, also determined property lines by referencing natural landmarks, watersheds, and ecosystems unique to

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claims which shall be finally confirmed to be accurately surveyed, and to furnish plats of the same.

California Land Act of 1851, ch. 41, § 13, 9 Stat. 631, 633 (1851).

370. § 13. The Act provided:

[t]hat if the title . . . to such lands shall be contested by any other person, it shall and may be lawful for such person to present a petition to the district judge . . . plainly and distinctly setting forth his title thereto, and praying the said judge to hear and determine the same.

*Id.*; see also Act To Establish a Court of Private Land Claims and To Provide for the Settlement of Private Land Claims in Certain States and Territories, ch. 539, § 10, 26 Stat. 854, 858 (1891) (requiring survey of confirmed tract and notice to third parties).

371. See, e.g., *United States v. Ortiz*, 176 U.S. 422, 425–26 (1899) (requiring preponderance of evidence in demonstrating validity of an asserted title); BRADFUTE, *supra* note 195, at 192–93 (observing procedural rules granting an associate justice the power to permit an appeal and the U.S. attorney a definite period of time to appeal) (citing *United States v. Pena*, 175 U.S. 500 (1899)). Bradfute notes that “[i]f any justice of the Court of Private Land Claims believed that the [attorney’s] reasons for the failure to report the case as provided by law were sufficient, he could allow an appeal.” *Id.* at 192. This appeal process facilitated availability, a venue for land challengers and kept Mexican landowners on the defensive against possible appeals at the various levels.

372. See Ordinance for Ascertaining the Mode of Disposing of Lands in the Western Territory (May 20, 1785), reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789 375, 375–76 (John C. Fitzpatrick ed., Library of Congress 1933) (ordering, for example, surveyors to “divide the said territory into townships of six miles square, by lines running due north and south, and others crossing these at right angles . . . and [allowing] each surveyor [to be] paid at the rate of two dollars for every mile” that he runs).

373. See DUNBAR ORTIZ, *supra* note 80, at 97 (grid system permits “the parcel of land, or its produce and resources, to be brought efficiently to market for exchange”).

374. See *id.*

the geographical landscapes.<sup>375</sup> The Mexican system viewed property less as an economic commodity and more as a communal resource.<sup>376</sup>

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375. See, e.g., *United States v. Baca*, 184 U.S. 653, 655 (1902) (involving grant “bounded on the east by a tableland; [] extend[ing] westward five thousand Castilian varas to a sharp-pointed black hill; on the north . . . bounded by the Cebolleta mountain; on the south . . . bounded by some white bluffs, at whose base runs the Zuñi road”); *Rodriguez*, 68 U.S. (1 Wall.) 582 (1863) (involving a grant bounded by the Arroyo de Butono and the Pacific Ocean); *Fuentes v. United States*, 63 U.S. (22 How.) 443, 450 (1859) (stating that land grant was “within the ex-mission of San Jose, bounded on the north by the locality called the Warm Springs, on the south by Palos, on the west by the peak of the hill of the ranchos Tulgencio Higuera and Chrysostom Galenda, and on the east by the adjoining mountains”); *De Arguello v. United States*, 59 U.S. (18 How.) 539, 541 (1855) (involving grant “from the creek of San Matteo to the Creek of San Francisquito and from the esthero (estuary or bay) to the sierra, or mountains”); see also *Lerma v. Stevenson*, 40 F. 356, 357 (C.C.W.D. Tex. 1889) (“That the ‘Sierra Blanca,’ ‘Eagle Peak,’ and ‘Hot Springs’ are natural calls, also stone monuments; these three natural calls being corners, and known notoriously as such corners.”); *State v. Balli*, 190 S.W.2d 71 (Tex. 1944) (involving a dispute over Padre Island, Texas); *Denny v. Cotton*, 22 S.W. 122, 125 (Tex. 1893) (analyzing boundary of Rio Grande as a boundary and applying law of accretion and alluvion).

The method of using the natural resources and markers as reference points to describe land is called bioregionalism. See Arrellano, *supra* note 93, at 31–37 (giving examples of bioregionalism and its ancient Spanish origins). This philosophy is used in both the common law and civil law. For example, the Rio Grande defines the country’s southern border in the Texas Region. Exemplifying bioregionalism, one grant enumerates that “[t]he tract [known as] Mariposas, to the extent of ten square leagues, within the limits of the Sierra Nevada, and the rivers known by the names of the Chowchillas, of the Merced, and the San Joaquin.” *Fremont v. United States*, 25 F. Cas. 1214, 1214 (N.D. Cal. 1853) (No. 15,164) (quoting Land Grant from Juan B. Alvarado to John C. Fremont (Feb. 29, 1844)).

To contrast an example of a piece of land marked by non-Mexican boundaries, see *Shaw v. Kellogg*, 170 U.S. 312, 324 (1898), which illustrates a survey of a grant in the San Luis Valley of Colorado.

376. DUNBAR ORTIZ, *supra* note 80, at 97. Ortiz notes that Indian land use practice, Roman civil law, Spanish customary and civil law, and Mexican and colonial policy emphasize the “use value production for subsistence and not exchange value for the market.” *Id.* The communal purpose behind Mexican and Spanish grant policies are also recognized in case law. For example, in *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994) the court noted that

the Rito Seco lands shall remain uncultivated for the use of the residents of San Luis, San Pablo and the Vallejos, and . . . the Rito Seco waters are hereby distributed among the said inhabitants of the town of San Luis, and those on the other side of the Vega . . . . The regulations as to roads shall be also observed so as to allow every one to have access to his farm lands. Also, in using the water, care shall be taken not to cause damage to any one. All the inhabitants shall have the use of pasture, wood, water, and timber and the mills that have been erected shall remain where they are, not interfering with the rights of others.

*Id.* at 1213. Likewise, the court in *Corporation of San Felipe de Austin v. State*, 229 S.W. 845, 846 (Tex. 1921) noted that

The United States and American entrepreneurs used grid-based logic to challenge natural boundary references.<sup>377</sup> Reliance on ecological markers was neither awkward<sup>378</sup> nor unreliable<sup>379</sup> in recording

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[t]he appropriation of large areas for grazing and timber purposes . . . was common in the creation of the early Texas towns chartered by the Spanish and Mexican governments. Those lands were as fully impressed with a public use and devoted to a public purpose as are the parks and public grounds of the cities of this time. It was . . . as valuable to the people of those towns as are the public grounds of present-day municipalities to their inhabitants.

*Id.* As an example of a communal property law, Mexican colonization law provided that "[r]ivers, harbors, and public highways belong to all persons in common." *Heard v. Town of Refugio*, 103 S.W.2d 728, 733 (Tex. 1937). The primary purpose of the law was to prevent monopolization of the water front and the water, so that the waters could serve as many people as possible. *Id.* at 733; *see also* *State v. Valmont Plantations*, 346 S.W.2d 853, 869 (Tex. Civ. App. 1961) (noting that Mexican law "did not recognize a system of riparian irrigation rights to river waters").

Communal rights and responsibilities such as these served an important purpose by enabling a greater number of settlers to access surrounding natural resources in areas where primary farming or ranching activities took place or in areas of scarce water supplies. *See* *Shadow & Rodríguez-Shadow*, *supra* note 14, at 16 (farming or ranching).

Moreover, an irrigating ditch or canal that became the property of the community helped to form distinct *acequia* societies (water ditches) that continue today. *See* N.M. STAT. ANN. § 73-9-9 *et seq.* (governing the maintenance of *acequías*); *see also* *Garcia & Howland*, *supra* note 11, at 40 (discussion of *acequías*' value to the community). Communal property remains a dominant feature of western lands. For a historical discussion of water rights in Texas, *see* generally *Baade, Water Law*, *supra* note 22. For further analysis and illustrations of the land use system under Mexican colonial policy in New Mexico, *see* *Gomez*, *supra* note 40, at 1047-59.

377. *See, e.g.,* *Ely's Adm'r v. United States*, 171 U.S. 220, 238 (1898) (involving challenge to the "[r]ude methods of measurement" relied upon in measuring tracts); *United States v. Graham*, 26 F. Cas. 7, 10 (N.D. Cal. 1859) (No. 15,246) (involving dispute over the use of natural resources as survey points of reference); *United States v. Peralta*, 27 F. Cas. 502 (N.D. Cal. 1856) (No. 16,032) (involving the modification of imprecise boundaries).

378. Although the land that referred to adjoining ranches was oddly shaped, natural resources and other geographical boundaries were recognized as sufficient or well-established boundaries. For example, one court noted that a certain grant's "boundaries appear to be indicated with tolerable certainty, and it is presumed that by means of it no practical difficulty will be found by the surveyor in laying off to the claimant his land." *United States v. Wilson*, 28 F. Cas. 724, 724 (C.C.N.D. Cal. 1855) (No. 16,735); *accord* *Gutierrez v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545 (1903); *United States v. Martinez*, 184 U.S. 441 (1902); *United States v. Moreno*, 68 U.S. (1 Wall.) 400 (1863); *Rodriguez*, 68 U.S. (1 Wall.) at 582; *United States v. San Jacinto Tin Co.*, 23 F. 279 (C.C.D. Cal. 1885); *Espinosa v. United States*, 8 F. Cas. 782 (C.C.D. Cal. 1873) (No. 4529); *cf. Pheland v. Poyoreno*, 13 P. 681, 684 (Cal. 1887) (holding description of "property as 'the lands known by the name of 'Paso de Bartolo Viejo,'" was sufficient, if the land was known and could be identified by its name).

379. Importantly, Mexico employed land surveyors to demarcate boundaries where necessary. *See, e.g.,* *State v. Gallardo*, 135 S.W. 664 (Tex. Civ. App. 1911) (discussing Mexican surveyors Santiago Longoria and Josefa Bernardo Gomez).

landholdings, and indeed, Anglo-American law also referred to natural boundary markers.<sup>380</sup> Nonetheless, courts upheld these challenges, and Mexican grantees did not receive protection from references in their grant documents to well-known geographical points or adjoining ranches.<sup>381</sup> Consequently, the recognition of the value of public use was largely disregarded in land grant adjudication law.

This result is especially troubling in light of the decision by a Federal district court in *Armijo v. United States*.<sup>382</sup> There, one party argued that a "survey d[id] not locate the land in a compact form."<sup>383</sup> For various reasons, the court declared that "compactness of form must depend, in many instances, upon a variety of circumstances . . . such as the character of the country, its division into different parcels by mountains, rivers, and lakes, and sometimes by the relation of the tract to neighboring grants."<sup>384</sup> Hence, it was known to the federal courts in California that references to natural boundaries and other tracts played an important role in determining property lines. Finally, holders of tracts within larger tracts, known as "floats," also generated extensive litigation.<sup>385</sup> Because floats encompassed specific amounts of land situated within larger tracts, they directly conflicted with strict grid-based delineation and gave rise to challenges alleging imprecision in survey demarcation.<sup>386</sup>

Had other courts considered the variety of circumstances discussed by the *Armijo* court, they generally would have been required to uphold the rights of Mexican grantees. Instead, grantees faced court orders requiring additional surveys that, at times, resulted in irretrievable loss of their property interests. Although the courts' insistence on precise demarcations purportedly served to protect the

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380. "From the seventeenth century on, Americans had used metes and bounds descriptions to set out the boundaries of their property. They described boundaries by reference to natural monuments such as rivers, trees, or rocks . . ." Bakken, *supra* note 21, at 238–39. Hence, Mexican references to "hills, mountains, stones, trees, rivers, Indian Villages, and the boundaries of other grants . . . were not alien to America." *Id.* at 238.

381. See *Ainsa v. United States*, 184 U.S. 639 (1902) (rejecting grant referring to natural objects and denying confirmation of land surplus); accord *United States v. Vallejo*, 28 F. Cas. 356 (N.D. Cal. 1859) (No. 16,606); see also, e.g., *United States v. Sanchez*, 27 F. Cas. 948 (N.D. Cal. 1856) (No. 16,017) (considering appeal by United States in boundary dispute on a confirmed claim); *Mesa v. United States*, 17 F. Cas. 160 (D. Cal. 1855) (No. 9491) (involving an appeal of a boundary-based rejection of claim involving approximately half a league of land in Santa Clara).

382. 1 F. Cas. 1129 (C.C.D.C. 1857) (No. 536).

383. *Id.* at 1130.

384. *Id.*

385. On the nature of floats, see *United States v. McLaughlin*, 127 U.S. 428, 448 (1888), where the Court defined floats as "grants of a certain quantity of land to be located within the limits of a larger area." Accord *Southern Pac. R.R. Co. v. Brown*, 68 F. 333, 335–36 (C.C.S.D. Cal. 1895).

386. See *McLaughlin*, 127 U.S. at 448–49.

United States from false or fraudulent claims, the possibility of boundary challenges tainted the integrity of the survey process.<sup>387</sup>

Still other non-Mexican land claimants derived further ammunition against Mexican landholders from "*mas o menos*" ("more or less") delineations in the grantee's *diseño* (map).<sup>388</sup> Although both American<sup>389</sup> and Mexican law had long recognized the validity of such boundaries, American courts responded to these challenges by requiring Mexican grants to contain strictly phrased boundaries. For example, in *United States v. Fossatt*, the Court "reject[ed] the words 'a little more or less,' as having no meaning . . . the claim of the grantee is valid [only] for the quantity clearly expressed."<sup>390</sup> The court in *United States v. Castro* stated that *mas o menos* boundaries "fail[] to afford any intelligible indication whatever as to the limits of the tract intended to be granted."<sup>391</sup> Based on such rationales, courts rejected *mas o menos* demarcations and either reordered surveys or confirmed smaller tracts that contradicted the original grant language.<sup>392</sup>

387. See EBRIGHT, LAND GRANTS, *supra* note 19, at 40–42. For example, in *United States ex rel. Castro v. Hendricks*, 26 F. Cas. 262 (C.C.D.C. 1858) (No. 15,347a), the land commissioner allegedly failed to release the petitioner's confirmed tract and thereby violated "the plain ministerial duty imposed on him." *Id.* at 262.

388. See *United States v. Camou*, 184 U.S. 572, 572 (1902) (involving a challenge based on inability to locate tract with precision); *United States v. D'Aguires*, 68 U.S. (1 Wall.) 311, 313 (1863) (discussing whether petition requesting "five leagues, more or less, would confine the grant to a [certain, requested] surplus containing but five leagues, or whether grant would carry the entire 'surplus' . . . though that surplus contained eleven"); *United States v. Peralta*, 27 F. Cas. 502 (N.D. Cal. 1856) (No. 16,031) (alleging an imprecise boundary demarcations that conflict with the grant); *Mesa v. United States*, 17 F. Cas. 160 (D.C. 1855) (No. 9491).

*Diseños* varied in size. For example, Robinson provides *diseños* of Rancho San Jose de Buenos Ayers, ROBINSON, *supra* note 26, at 47, and of Canada de los Nogales, *id.* at 104, which are both in Los Angeles County. For an example of a *diseño* in case law, see *Shaw v. Kellogg*, 170 U.S. 312, 324 (1898).

389. As noted above, American titles also referenced natural boundaries. Such references often resorted to "more or less" in boundary demarcation. See Bakken, *supra* note 21, at 238–40. The term "more or less" is also used in Anglo-American jurisprudence. See, e.g., *Hardy's Case*, 9 Ct. Cl. 244, 245–46 (1873) (using the term in reference to contract law).

390. *United States v. Fossatt*, 61 U.S. (20 How.) 413, 427 (1857).

391. *United States v. Castro*, 25 F. Cas. 329, 330 (N.D. Cal. 1859) (No. 14,753) (involving dispute over size of tract granted to original grantee). *But see supra* text accompanying note 389.

Although the genuineness of the grant in *Castro* was not in dispute, the claimant took less than what was asserted because of the court's difficulty in determining the boundaries indicated by the evidentiary materials. See *Castro*, 25 F. Cas. at 331 (No. 14,753).

392. See *United States v. Rodriguez*, 27 F. Cas. 883 (N.D. Cal. 1855) (No. 16,184) (affirming repeated survey of grantee's land that diminished its size); *accord* *Dodge v. Perez*, 7 F. Cas. 794 (C.C.D. Cal. 1872) (No. 3953) (confirming the grant in general but excluding certain portions of land).



The courts' focus on semantic precision is difficult to reconcile with prevailing American law. In *Hardy's* case,<sup>393</sup> the court recognized that where terms are imprecise, courts should give them their "plain, ordinary, and popular meaning," and adopt a "rational and just construction" that recognizes the words' customary usage.<sup>394</sup> In the land grant cases, however, courts clearly did not accord Mexican delineations their plain and ordinary meanings but rather allowed petty objections to boundary demarcations to cause protracted delays on both the federal and state levels.<sup>395</sup>

By comparison, non-Mexicans benefited from favorable rulings notwithstanding the imprecise boundary demarcations of their own grants. *United States v. Stevenson*,<sup>396</sup> involved a California land claim based on decidedly "rude and inexact" boundaries.<sup>397</sup> The *Stevenson* court, nonetheless, confirmed the claimant's petition on the basis of a title that purportedly described "the boundaries [with] some precision."<sup>398</sup> Similarly, in *Weber v. United States*,<sup>399</sup> the court allowed a non-Mexican claimant to retain the property at issue, despite an inexact survey.<sup>400</sup>

393. 9 Ct. Cl. 244 (1873)

394. *Id.* at 251.

395. See ROBERT J. ROSENBAUM, THE MEXICAN LAND GRANTS: A SETTING FOR LONG-TERM SKIRMISHING IN THE MEXICANO RESISTANCE IN THE SOUTHWEST 68–82 (1981); see also, e.g., *United States v. Martinez*, 184 U.S. 441 (1902) (involving an appeal filed by the U.S. more than six years after judgment entered against it for value of land claim); *United States v. Ortiz*, 176 U.S. 422, 448 (1899) (reversing the Court of Private Land Claims' decision to validate title); *United States v. Rodriguez*, 27 F. Cas. 883 (1856) (No. 16,184) (adjudicating appeal by United States without benefit of argument); *United States v. De Haro*, 25 F. Cas. 809, 809 (1862) (challenging post-confirmation survey); *Castro*, 25 F. Cas. 329 (disallowing confirmed status induced delay in seeking ownership of tract confirmed by the board of commissioners); *United States v. Bernal*, 24 F. Cas. 1148 (N.D. Cal. 1862) (No. 14,580) (challenging confirmed grant upon allegations of fraud).

396. 27 F. Cas. 1333 (N.D. Cal. 1856) (No. 16,397).

397. *Id.* at 1333.

398. *Id.*

399. *Weber v. United States*, 29 F. Cas. 527 (C.C.N.D. Cal. 1861) (No. 17,328).

400. *Id.* at 528 (upholding survey returned to court by the surveyor general and approved by him on January 23, 1860). The case law provides many other survey related examples. See, e.g., *Chavez v. De Bergere*, 231 U.S. 482 (1913) (action in ejectment and involving heirs deriving from Manuel A. Otero and Jesus M. Sena); *United States v. Berreyesa*, 64 U.S. (23 How.) 499 (1859) (declining to instruct district court to locate and survey tract despite confirmation of grant); *United States v. Galbraith*, 63 U.S. (22 How.) 89, 96 (1859) (involving a purportedly altered grant); *United States v. Fossatt*, 61 U.S. (21 How.) 413, 427 (1858) (disallowing recognition of term "mas o menos"); *United States v. Wilson*, 28 F. Cas. 724, 724 (C.C.N.D. Cal. 1855) (No. 16,735) (indicating that boundaries of tract "appear to be indicated with tolerable certainty . . . [if] no practical difficulty will be found by the surveyor in laying off to the claimant his land"); *United States v. Vallejo*, 28 F. Cas. 356 (N.D. Cal. 1859) (No. 16,605) (encompassing location and survey of a grant and jurisdiction of district court); *United States v. Castro*, 25 F. Cas. 331 (C.C.D. Cal. 1868) (No. 14,754) (holding

This disparity in the rules applied to Mexicans and non-Mexicans, under the same relevant facts and circumstances, demonstrates a clear lack of fairness. The refusal of American courts to follow Mexican law and afford equal treatment to grantees of Mexican descent frustrated the promises of the Treaty. Moreover, the rejections lacked fairness in that they involved Mexican grantees who either possessed confirmed tracts, had surveyed their tracts, or who occupied their property in notorious and undisturbed possession for many years. By allowing challenges to boundary demarcations, surveys, and explicit granting language, as well as the filing of exceptions, the courts prevented *res judicata* from governing the grant process and deprived Mexican grantees of the quiet title the process purported to provide.<sup>401</sup>

*b. Supplemental Legislative Actions*

In the United States, a Jeffersonian ideal attaches to the ownership of rural property.<sup>402</sup> After the U.S.-Mexico War, settlers, squatters,

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that the long-established and relied upon borders of land grants should not be re-evaluated); *Armijo v. United States*, 1 F. Cas. 1129 (C.C.D. Cal. 1857) (No. 536) (examining the claim of heirs of Jose F. Armijo for three leagues of land in Solano County and rejected by Land Commissioners with appeal focusing on boundary challenge); *Baltzley v. Lujan*, 212 P.2d 417 (N.M. 1949) (involving in part ejectment action against Ramon Vigil).

Although not directly involving a Mexican petitioner, *Walker v. Kenedy*, 127 S.W.2d 163 (1939), involves chain of title and deed issues resulting from an original grant to Antonio Rivas and deeds purportedly transferred by Mexican grantees. See also *Teschmacher v. United States*, 23 F. Cas. 862 (N.D. Cal. 1855) (No. 13,843) (involving land claim by original grantees Salvador Vallejo and Juan A. Vallejo), *aff'd*, 59 U.S. (18 How.) 1 (1855).

401. See, e.g., *Dominguez de Guyer v. Banning*, 167 U.S. 723, 724 (1897) (concerning an action in ejectment to recover possession of island); *Vallejo v. United States*, 28 F. Cas. 926, 926 (N.D. Cal. 1856) (No. 16,819) (describing burdensome procedural history in challenge to tract allegedly not segregated from public domain); *United States v. Rodriguez*, 25 F. Cas. 821 (N.D. Cal. 1864) (No. 14,950) (challenging confirmed grant after confirmed survey); *United States v. Garcia*, 25 F. Cas. 1242, 1243 (1870) (considering motion to set aside order confirming grant). But see *Weber*, 29 F. Cas. 527 (noting that an inexact survey that failed to match *diseño* still allowed confirmation).

402. For an elaboration of Thomas Jefferson's vision, see Jim Chen & Edward S. Adams, *Feudalism Unmodified: Discourses on Farms and Firms*, 45 DRAKE L. REV. 361 (1997). The authors assert that "agrarian commentators" invoke Jefferson's

romantic vision of yeoman farmers as the foundation of what we now call Jeffersonian democracy. . . . According to Jefferson's vision, if each farm could be a self-sustaining enterprise, and if a substantial portion of the populace could find gainful employment as independent farmers, the newborn country's political scene would never fall victim to the power-seeking schemes of massive economic concerns.

*Id.* at 387-88. The Jeffersonian "ideal" is a fundamental concept analyzed in agriculture and Jefferson's vision is commonly linked to farming promotion. See, e.g., Neil

and trespassers seeking property lobbied the Congress for land and legislation to ease their entry into rural enterprises. Their successes in the form of congressional legislation and agricultural policy came at the expense of Mexican ownership.

i. "Agrarian Cupidity"<sup>403</sup>

Demanding land, squatters, settlers, and veterans targeted the former Mexican provinces. Along the way, they "took with them a view long held on the frontier that it was one of the fundamental rights of Americans to enter upon the public lands, make improvements, create a farm, and eventually acquire ownership."<sup>404</sup> Their zeal caused one court to note that "individuals sought to appropriate by possession whatever land they deemed necessary for themselves."<sup>405</sup> Squatters sometimes went so far as to enclose Mexican property with barbed wire to bar owners from accessing their own land.<sup>406</sup>

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D. Hamilton, *Greening Our Garden: Public Policies to Support the New Agriculture*, 2 DRAKE J. AGRIC. LAW 357, 357, 367 (1997) (noting that "Thomas Jefferson and George Washington were proponents of agriculture and innovative farmers in their day," and describing Monticello as the source of Jefferson's inspiration). As one author recently stated, "the greatest service which can be rendered any country is to add a useful plant to its culture." Sara M. Dunn, Comment, *From Flav'r Sav'r to Environmental Saver? Biotechnology and the Future of Agriculture, International Trade, and the Environment*, 9 COLO. J. INT'L ENV'T'L L. & POL'Y, 145, 145 (1998) (internal quotation marks omitted) (quoting THE GARDEN AND FARM BOOKS OF THOMAS JEFFERSON 509 (Robert C. Baron, ed. 1987)).

403. GOETZMANN, *supra* note 5, at 23.

404. GATES, LAND AND LAW IN CALIFORNIA, *supra* note 187, at 5; *see also* United States v. Folsom, 25 F. Cas. 1134 (N.D. Cal. 1859) (No. 15,127) (concerning settlers seeking to intervene under the United States adversely to a Mexican land grant). The ability to graze livestock was also eliminated through squatter actions, fence laws, and the privatization of communal lands. *See generally* WELSEY CARR CALEF, PRIVATE GRAZING AND PUBLIC LANDS (1979) (providing an account of land use on public lands).

Access to the public domain extends into the present, although payment for that access does not reflect its true market value. Currently, adjoining ranchers pay a fee to the U.S. government for grazing on national forests and in the public domain. *See* Public Rangelands Improvement Act, 43 U.S.C. § 1905 (1996). The grazing fees do not reflect the market value of the land use but constitute a form of subsidy for ranchers who now envision their use as "property." *See* Karl Hess, Jr. & Jerry L. Holechek, *Where Babbitt Got Lost on the Range*, SALT LAKE TRIB., Mar. 3, 1995, at A7 (analyzing Babbitt's failed attempt to increase grazing fees so as to reflect the market value of the land usage).

405. *Wheeler v. Bolton*, 28 P. 558, 560 (Cal. 1891); *see also* United States v. San Jacinto Tin Co., 23 F. 279, 288 (C.C.D. Cal. 1885) (involving 16 years of litigation regarding the location of a grant).

406. *See, e.g.*, WALTER PRESCOTT WEBB, THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE (1935) (discussing barbed wire enclosures). For an account of fencing law under the common law, *see* *Buford v. Houtz*, 133 U.S. 320 (1890).

When Mexican grantees sought to defend their property against trespassers,<sup>407</sup> delays in the confirmation process enabled squatters to select parcels and commit a wide array of trespasses on the property of the grantees.<sup>408</sup> Squatters and settlers filed adverse possession actions and eviction proceedings against Chicana/Chicano landowners<sup>409</sup> and caused further harm when they employed violence against Chicanas/Chicanos who attempted to defend their lands.<sup>410</sup> This history demonstrates the nature of the tensions over land control, making evident settlers' disregard for constitutional norms and other legal principles that protect fee holders' rights. Hence, individuals from the dominant population trespassed upon lands belonging to Chicana/Chicano landowners and called upon courts to vindicate their actions, even though the courts were the judicial arm of the government charged under the Treaty with protecting the rights of Chicanas/Chicanos.

While staking their claims to Mexican properties, trespassers and entrepreneurs<sup>411</sup> lobbied Congress, "call[ing] upon such time-

407. See, e.g., *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986).

408. See *Wheeler*, 28 P. at 560; see also *Brownsville v. Cavazos*, 4 F. Cas. 460, 461 (E.D. Tex. 1876) (No. 2043) (involving an action for trespass); *Armijo v. United States*, 1 F. Cas. 1129, 1130 (C.C.D. Cal. 1857) (No. 536) (discussing the boundary dispute claim of Armijo's heirs); *United States v. Cameron*, 21 P. 177 (Cal. 1889) (analyzing the various types of land grants by Mexican governors in a case involving a Mexican defendant charged with unlawfully fencing public domain); *State v. Gallardo*, 166 S.W. 369 (Tex. 1914) (involving a trespass to try title against Jose L. Gallardo and others in possession for "40 or 50 years" in Hidalgo County, Texas). Preemption claims furthered the aims of trespassers. See, e.g., *United States v. Martinez*, 184 U.S. 441 (1902).

409. See, e.g., *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 557 (5th Cir. 1946).

410. See Appellant's Opening Brief at 7-8, *Donahue v. Gallavan*, 43 Cal. 573 (1870) (averring that jumpers and squatters were rampant and that "there was no resistance . . . because resistance to jumpers in those days meant blood"). Pleadings and other legal documentation from land grant challenges provides a rich resource for further academic inquiry into the impact on Chicana/Chicano life of American expansion into the former Mexican territories. The Bancroft Library at the University of California, Berkeley contains many such sources, including *inter alia* the following: Plaintiff's Brief, *Castro v. Tennant*, Supreme Court of Cal. (1869); Complaint, *Ramon v. Mulford*, (Cal. Dist. Court 3d Judicial District), (Jan. 30, 1857) BANC MSS C-I 23:II:10. For additional discussion of the violence that plagued Mexican grantees, see discussion *supra* note 217.

For a discussion of the impact of racism on nineteenth century Americans, see generally BARRERA, *supra* note 132 (1979); ARNOLDO DE LEÓN, *THEY CALLED THEM GREASERS, ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900* (1983); Alvin R. Sunseri, *Anglo Attitudes Toward Hispanos, 1846-1861*, 2 J. MEX. AM. HIST. 76 (1973) (discussing the mistreatment, abuse, and antagonism exhibited toward the Chicana/Chicano community). For an example of this form of racist treatment in the present, see Affidavit of Dennis Nodín Valdés, *Hernandez v. Stuyvesant*, (No. Civ. 93-887) (D.N.M. 1993) (on file with author).

411. Professor Montejano elaborates on the role of British and Eastern investment capital in commercializing Southern Texas ranch land. That investment expedited

worn legal principles as popular sovereignty, preemption and equal access to wealth to justify their actions."<sup>412</sup> This campaign brought aggressive pressure upon the legislature and courts to disregard confirmed Mexican rural enterprises and place them in the public domain for distribution to others.

Responding to the pressures and lobbying by settlers and squatters, Congress sought to ease entry into farming and industry in the country and enacted a wide range of public laws including the Homestead Act of 1862,<sup>413</sup> the Reclamation Act of 1888,<sup>414</sup> the Morrill Act,<sup>415</sup> and various preemption laws.<sup>416</sup> Those agricultural laws and policies, however, conflicted with the property rights of Mexican grantees.

Rather than protect the substantive property rights of Chicana/Chicano landowners in the contested areas, federal land policies favored the trespassers and treated Chicana/Chicano property as empty land.<sup>417</sup> "[O]utright confiscation and fraud" were methods often employed when Chicana/Chicano lands were "sold" to settlers during expansion hysteria.<sup>418</sup> In some instances,

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expansion and connections with domestic and global markets, which in turn accelerated land alienation. MONTEJANO, *supra* note 322, at 62–63.

412. Pisani, *supra* note 63, at 278.

413. See, e.g., The Homestead Act of 1862, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. §§ 301–308 (1988)) (providing 160 acre grants to settlers).

414. Reclamation Act of 1888, 25 Stat. 527 (1888). "There is no question that the Reclamation Act was designed to benefit people, not land." *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 292 (1958). The Act's purpose was to disallow land monopolies. See *Peterson v. U.S. Dept. of Interior*, 899 F.2d 799, 802 (9th Cir.).

415. Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. §§ 301–305, 307, 308 (1988)). The Morrill Act has expanded the wealth of the agricultural sector through sophisticated university research. An attempt to expand research efforts at land grant universities to include the rural poor has failed. In *California Agrarian Action Project v. Regents of the University of California*, 258 Cal. Rptr. 769 (1989), a panel of the California Court of Appeals rejected a claim brought by a project to "provide relief to the poor, distressed and disadvantaged people of rural California." *Id.* at 770 n.1. The project sought to enjoin research regarding agricultural mechanization projects that "favored the interests of large agricultural businesses to the detriment of the small family farmer." *Id.* at 770.

416. See, e.g., Act to Extend Preemption Rights to Certain Lands Therein Mentioned, ch. 143, 10 Stat. 244 (1853); Act to Provide for the Survey of the Public Lands in California, the Granting of Preemption Rights Therein, and for Other Purposes, ch. 145, 10 Stat. 244 (1853).

417. For a discussion as to the nature of favorable legislation allowing squatter sovereignty see Pisani, *supra* note 63, at 288, 292–304. The gold rush also induced accelerated, aggressive trespasser and squatter settlements. See *id.*; see also Newhall v. Sanger, 92 U.S. 761, 763 (1875) (describing the California Land Act of 1851 as a response to the difficulties presented by the "eager search for gold that prevailed soon after the acquisition of California").

418. MONTEJANO, *supra* note 322, at 50–53; cf. *Wheeler v. Bolton*, 28 P. 558, 560 (Cal. 1891) (discussing how Mexican land grants had been made for lands in California without defining boundaries or establishing their validity).

"neglected" rural holdings were given to squatters.<sup>419</sup> These actions required defensive suits against settlers, trespassers, and squatters, in which grantees faced the burden of demonstrating the validity of their claim.<sup>420</sup>

In addition to Congressional biases, the settlers also benefited from the judiciary's attitudes in their quest for land. In *Luco v. United States*,<sup>421</sup> the Court reveals its bias toward non-Mexican settlers as follows:

There is an interest which in this and many other California cases cannot be overlooked—the interest of bona fide settlers. The Government of the United States contests these cases for the benefit ultimately of that class. It acquires territory, not that it may become and remain a vast land owner, but that the acquired territory may be thrown open to its citizens, for their occupation in moderate quantity, in aid of a public policy. . . .<sup>422</sup>

In furtherance of this policy of throwing open the acquired territory to America's non-Mexican citizens, the opinion declares:

The rights of such men must be not only respected, but protected by a just Government. They are the people who have carried our laws, institutions, and all that make up an empire, into the wilderness, and subdued it to the purposes of civilization; who, to reach this spot where they were bidden by law, have tempted the dangers of two oceans, or traversed vast spaces of desert, cut off from their old homes by savage mountains and barbarous tribes. They are entitled to regard and protection.<sup>423</sup>

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419. See *Chabolla v. United States*, 5 F. Cas. 387, 387–88 (N.D. Cal. 1855) (No. 2566). In another case, the court noted that:

[t]he Californians are a simple, ignorant people. The Supreme Court of the State told them their titles would not support an action, either for the possession or the property; the squatters, who knew Spanish, kindly interpreted the judgment of the court; it merely took the land from the Californians, and gave it to them, the squatters.

*United States v. Galbraith*, 63 U.S. 89, 92 (1859).

420. *MONTEJANO*, *supra* note 322, at 51–53.

421. 64 U.S. (23 How.) 515 (1859).

422. *Id.* at 521.

423. *Id.*

Similarly, in adjudicating an action against settlers who sometimes had trespassed on Mexican land, the court in *Johnston v. Smith*,<sup>424</sup> expressed its preference for the settlers, declaring:

[w]ere we to decide that this practice was a fraud and unauthorized by the law, and the titles so issued void, we might disturb hundreds of the grants obtained by the early settlers, and deprive them of their lands, for which they had encountered all the peril, toil and privation, to which the early settlers were exposed.<sup>425</sup>

Thus, the *Johnston* court signaled that it would not be a source of protection for the rights of Mexican property owners in the face of challenges by members of the more favored dominant population.

Courts gave effect to this bias by disregarding Mexican owners' established, self-sufficient communities and pueblos and calling such land a wilderness. This form of misrepresentation permitted a legal culture that adhered to the interests of non-Mexicans and disallowed proper protection to those previously residing in the "wilderness" as required by the Treaty.

Finally, the courts undermined Chicana/Chicano rights and permitted land to accrue to the dominant population by ensuring that grantees lost communal rights in land or natural resources. First, various aspects of the land acts conflicted with each other or pre-war Mexican law.<sup>426</sup> Despite the clear command under the Treaty that Mexican law should have governed, courts resolved these conflicts so that grantees lost communal grazing rights and access to water or other natural resources.<sup>427</sup> In contrast to American licensing

424. 21 Tex. 722 (1858).

425. *Id.* at 727 (citing *Russell v. Randolph*, 11 Tex. 460, 467–68 (1854)).

426. For example, Section 18 of the New Mexico Land Act conflicts with the communal water rights of Mexican grantees. See *Act To Establish a Court of Private Land Claims and To Provide for the Settlement of Private Land Claims in Certain States and Territories*, ch. 539, § 18, 26 Stat. 854 (1891); see also *Gutierrez v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545, 545 (1903).

427. See *Sanchez v. Taylor*, 377 F.2d 733, 737 (10th Cir. 1967) ("[A]ny conflicting rights prior to the confirmatory Act of 1860 which might have arisen or existed by reason of the original grant from Mexico, considered in the light of Mexican law and the Treaty of Guadalupe-Hidalgo, were thereby extinguished."). David J. Weber provides an example of a grantee's reaction to alienation:

It is the conquered who are humbled before the conqueror asking for his protection, while enjoying what little their misfortune has left them . . . They are *foreigners in their own land*. . . They have been humiliated and insulted. They have been refused the privilege of taking water from their own wells.

DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND* vi (1973) (David Weber ed., 1973) (quoting Pablo de la Guerra, Speech to the California Senate (1856)).

agreements with ranchers who were permitted restricted use of the public domain,<sup>428</sup> Mexican law expressly gave grantees the use of communal land and did not require a licensor-licensee relationship.<sup>429</sup> Where courts denied access to common pastures and resources, they forced the demise of smaller agricultural and ranching enterprises that could no longer gather wood or pasture their flocks.<sup>430</sup> In other instances, extralegal forces pressured Mexican landholders to relinquish their communal and private property rights. In the El Paso Salt War, Anglo entrepreneurs used Texas Rangers to prohibit Mexicans from accessing salt beds that long had been acknowledged as a common resource.<sup>431</sup>

In summary, contrary to U.S. promises in the Treaty, federal land legislation and policies placed extensive burdens on Mexicans attempting to defend their property interests. Inconsistent judicial rulings compounded the problem by creating a lengthy process for quieting title while encouraging squatter and settler actions against Mexican landholders.<sup>432</sup>

## ii. Attorneys and Land Grants

The new legal requirements and the technicalities of the confirmation process forced Mexican grantees to rely on attorneys to assert and defend their claims, against either the United States or individual settlers. This situation had at least three substantially negative effects for the grantees. First, and most obvious, attorneys' fees for copying, filing motions, traveling to courts in distant areas, and appealing adverse judgments proved financially exhausting.<sup>433</sup>

428. See, e.g., CALEF, *supra* note 404; GEORGE CAMERON COGGINS & CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 535-38 (1993) (explaining that federal acquiescence in unrestricted use of the public domain for livestock grazing gradually assumed the status of a right). The value of access to the public domain continues to generate conflict in the present, along with control of the privilege, continues to generate conflict in the present.

429. See *Buford v. Houtz*, 133 U.S. 320, 326 (1890).

430. See *DUNBAR ORTIZ*, *supra* note 80, at 103 ("When the purchaser fenced the commons, as he had a right to do under Anglo-American land laws, the former users could no longer gather wood or pasture their flocks as they had done traditionally."). But see *United States v. Cameron*, 21 P. 177, 179 (Cal. 1889) (fencing in area of land of four sitios used for cattle grazing "was an unlawful inclosure [sic] of the public lands").

431. See *GRISWOLD DEL CASTILLO*, *supra* note 14, at 83.

432. The evidence includes court-ordered sheriff's sales, which settled tax arrearages and/or outstanding private debts. MONTEJANO, *supra* note 322, at 52-53. Such sales were of dubious quality because bids seemed intentionally low. *Id.*; see also *Chavez v. Bergere*, 231 U.S. 482 (1913) (former mission San Fernando Property sold to Don Eulogio de Cilis for \$14,000).

433. See MONTEJANO, *supra* note 322, at 53. For an example of legal fees associated with representing defendants, see *Cunningham v. Springer*, 204 U.S. 647 (1907), in which the defendant was Maxwell Land Grant company.



Communication difficulties and grantees' own long trips to San Francisco to present their claims before the Land Commissioners caused further distress.<sup>434</sup>

Second, in some instances attorneys hindered the interests of their clients by direct acts, omissions or conflicts. For example, in *United States v. Pacheco*,<sup>435</sup> the attorney who represented the claimants was "interested in, or represent[ed], the adjoining rancho of the San-Ramon."<sup>436</sup> Similarly, there were reports that "at least two federal attorneys were secretly interested in claims they were required to defend [and] a leading lawyer fraudulently altered a document."<sup>437</sup> These situations presented clear conflicts of interests. Such tactics led one author to state that

[v]olumes could be filled with accounts of the knavery, the double dealing, the cross purposes, the perjury, the lies, the bribery, the alterations and erasing, the suppressing and the destroying of papers, the various schemes and plots that for the sake of the almighty dollar have left their stain on the records of the [Texas] General Land Office. A class of land speculators, commonly called land sharks, unscrupulous and greedy, have left their trail in every department of this office, in the shape of titles destroyed, patents cancelled, homes demolished and torn away, forged transfers and lying affidavits.<sup>438</sup>

Still other attorneys harmed grantees by filing motions without briefs and otherwise providing inadequate representation for their clients.<sup>439</sup> In at least one intervenor action, for example, an attorney's

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434. Cf. GATES, LAND AND LAW IN CALIFORNIA, *supra* note 24, at 17 (asserting that costs were not the only basis for property loss).

435. 27 F. Cas. 393 (N.D. Cal. 1862) (No. 15,980).

436. *Id.* at 394.

437. GATES, LAND AND LAW IN CALIFORNIA, *supra* note 24, at 210 (citing *Fremont v. United States*, 58 U.S. (17 How.) 542 (1854)).

438. AARON M. SAKOLSKI, LAND TENURE AND LAND TAXATION IN AMERICA 148 (1957) (quoting ALFRED N. CHANDLER, LAND TITLE ORIGINS 453 (1945)). Such speculators sometimes operated in organized fashion. One such group was the Santa Fe Ring. See discussion, *infra* notes 446–49 and accompanying text. Historians contend that organizations like the Santa Fe Ring became so successful that lawyers eventually may have received as much as 80 percent of land grant property in lieu of fees. See BRADFUTE, *supra* note 195, at 3 (citing Howard R. Lamar, *Political Patterns in New Mexico and Utah Territories, 1850–1900*, 27 UTAH HIST. Q. 371, 371–72 (1960) (discussing land speculation rings)).

439. See, e.g., *Pico v. United States*, 19 F. Cas. 593, 593 (C.C.D. Cal. 1856) (No. 11,128) ("It is to be regretted that the point involved in this case was not debated by counsel, and that the court is obliged to arrive at a conclusion unassisted by arguments at the bar."). The Pico family was active in Mexican politics long before formal

motions even failed to follow even leniently interpreted legal standards.<sup>440</sup>

Third, attorneys targeted grantees for their personal gain. Attorneys representing grantees who lacked financial resources often agreed to exchange services for land—typically one-third, but at times up to one-half of the amount claimed.<sup>441</sup> These attorneys would file partition actions permitting them co-ownership status.<sup>442</sup> Then, rather than maintain a joint-owner relationship, the attorneys would force the sale of the property.<sup>443</sup> Other attorneys used their relationships with grantees to profit from land speculation groups.<sup>444</sup> For example, California attorneys William Carey Jones, Elisha Oscar Crosby, Henry Hittell, and Joseph Lancaster Brent acquired large holdings from their representation of land grant claimants.<sup>445</sup>

As one author has noted, "[o]ne of the most infamous collections of speculators, land grabbers, dishonest lawyers, and swindlers, was the Santa Fe Ring. During the 1880s this group

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annexation. For a review of Governor Pico's participation in California politics, see GOMEZ-QUINONES, *supra* note 84, at 109.

440. See *United States v. Peralta*, 99 F. 618, 623 (N.D. Cal. 1900). The motions were so poor that the court repeatedly remarked:

The pleadings upon this motion are peculiar in this:

That the petition of the intervenor does not state all the proceedings in the suit . . . instead of answering the petition and setting up all the facts . . . the petition does not state all of the steps that were taken by the court after the decree of 1859. It entirely ignores any reference to the proceedings of this court . . . and of the steps . . . which resulted in the issuance of a patent to the claimants in the original suit.

*Id.* at 623; see also *Whitney v. United States*, 181 U.S. 104 (1901) (discussing excessive delays in the confirmation and appellate process concerning a deed of gift conveyed by original grantee to his nephew); *Yturbide, v. United States*, 63 U.S. (22 How.) 290, 292 (1859) (appeal dismissed for failure of counsel to file notice within required six-month period).

441. See, e.g., ACUÑA, *supra* note 39, at 61 (noting that "[l]awyers and speculators 'had a field day using fees, intimidation, bribery, and fraud to realize great profit and enormous power'" (quoting ROSENBAUM, *supra* note 395, at 23); PITT, *supra* note 39, at 91 (describing the role of attorneys); ROBINSON, *supra* note 26, at 102 ("[Grantees] sometimes mortgaged their lands and their futures or conveyed 'undivided' interests to their attorneys.").

442. Several cases provide examples of partition litigation. See, e.g., *Montoya v. Gonzales*, 232 U.S. 375 (1914); *Leroy v. Doe*, 32 F. 516 (N.D. Cal. 1887); *Adams v. Hopkins*, 77 P. 712 (Cal. 1904); *Emeric v. Alvarado*, 27 P. 356 (Cal. 1891); *De Mares v. Gilpin*, 24 P. 568 (Colo. 1890); *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App. 1961); PITT, *supra* note 39, at 97.

443. See EBRIGHT, LAND GRANTS, *supra* note 19, at 151.

444. For discussions of the involvement of attorneys in the land grant period, see MIRANDÉ, *supra* note 39, at 47 and PITT, *supra* note 39, at 91–94.

445. See Charles A. Barker, *Elisha Oscar Crosby: A California Lawyer in the Eighteen-Fifties*, 27 CAL. HIST. SOC'Y Q. 133, 134–35 (1948), cited in PITT, *supra* note 39, at 91 n.17.

gained so much wealth and power that it was said to completely control the New Mexico economy and political system."<sup>446</sup> The ring included governors of New Mexico,<sup>447</sup> Surveyors General,<sup>448</sup> lawyers, "judges, politicians, businessmen and a sympathetic press" all of whom gathered a vast amount of land grant property.<sup>449</sup>

One primary leader of the group was a former United States Attorney General for New Mexico, Thomas B. Catron.<sup>450</sup> Catron purportedly acquired his *Tierra Amarilla* grant with forty-two deeds, but neglected to purchase the interests of most of the settlers whose

446. MIRANDÉ, *supra* note 39, at 46; *see also* EBRIGHT, *TIERRA AMARILLA*, *supra* note 97, at ix ("For with American occupancy came a horde of greedy land speculators, cattle and railroad companies, and unscrupulous lawyers eager to bend the land laws for their own gain.").

447. *See* EBRIGHT, *LAND GRANTS*, *supra* note 19, at 43 ("[N]early every governor of New Mexico from the late 1860s to 1885 was a member of the Santa Fe Ring.").

448. Out of the nine men to hold the position of Surveyor General, three were land grant speculators. *See* EBRIGHT, *TIERRA AMARILLA*, *supra* note 97, at 3 n.8.

[A] notorious example of corruption in the Surveyor General's office involved a survey of the Maxwell grant. This occurred under Atkinson by John T. Elkins and R.T. Marmon. John Elkins was the brother of Stephen who was not only a bondsman for the surveyors, but also was promoter for the grant.

*Id.* On the nature of the Maxwell Land Grant, *see Russell v. Maxwell Land Grant Co.*, 158 U.S. 253 (1895), which affirmed the grant of Maxwell Holding Company over a homesteaders' claim. *See also* DUNBAR ORTIZ, *supra* note 80, at 97; ROSENBAUM, *supra* note 395; Stoller, *supra* note 109, at 31. Dunbar Ortiz has noted that

The Maxwell Grant . . . [was] confirmed, in violation of the 1824 Mexican colonization law limiting grants to eleven square leagues and the 1842 law requiring approval of the Mexican national government. Later the Supreme Court was to validate the nearly two million acre Maxwell grant, using the argument that the Court could not overrule an act of Congress.

DUNBAR ORTIZ, *supra*; *see also* Colorado Fuel Co. v. Maxwell Land Grant Co., 43 P. 556 (Cal. 1896); JIM BERRY PEARSON, *THE MAXWELL LAND GRANT* 144-209 (1961) (describing the infamous role in Chicano history of the Maxwell Grant in depriving access to natural resources).

449. EBRIGHT, *LAND GRANTS*, *supra* note 19, at 43. The Ring included several lawyers, such as Stephen B. Elkins and Henry L. Waldo; federal judges, including Joseph G. Palen, Samuel B. Axtell, and L. Bradford Prince, also were members. *See* PITT, *supra* note 39, at 91. Probate Judge Robert H. Longwill also enjoyed membership status. *See id.*; *see also* WESTPHALL, *MERCEDES REALES*, *supra* note 80, at 233-35; MORRIS T. TAYLOR, *O.P. MCMAIN AND THE MAXWELL LAND GRANT CONFLICT* 48 (1979) (the newspaper was viewed "as the creature of the Santa Fe Ring").

450. *See* MIRANDÉ, *supra* note 39, at 46; GÓMEZ-QUINONES, *supra* note 84, at 241 ("Catron became the central figure in the so-called Santa Fe Ring, a network devoted to using politics to make money . . .").

deeds he had recorded as his own.<sup>451</sup> In spite of this "oversight," Catron secured a court decree establishing his ownership of the entire grant.<sup>452</sup> At various times, Catron also held interests in as many as thirty-four land grants comprising approximately two million acres in land holdings.<sup>453</sup>

Instead of proving that Anglo-American law was "clear and concise," as characterized by some scholars, the actions of American attorneys created a muddled legal mess. Moreover, the less-than-diligent or patently parasitic representation of Mexican grantees explains why litigation and other costs exhausted the financial resources of grantees.<sup>454</sup> In short, as with legislation and the grant confirmation process in general, lawyers helped create and then participated in a legal culture that rewarded counter-Mexican acts. In the process, these actors facilitated breaches of the Treaty in favor of third parties seeking Mexican land.

### iii. Treaty Rights

It is elementary that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved.<sup>455</sup>

With the Treaty of Guadalupe Hidalgo, the United States formally established a legal relationship with the population of Mexican descent. Although annexing the former Mexican provinces, the United States "acquired no right of the soil included in this grant; nothing but the political powers, jurisdiction, and sovereignty, under a special stipulation that the owners of property should be protected in the enjoyment thereof."<sup>456</sup> Treaties, like federal

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451. See EBRIGHT, *TIERRA AMARILLA*, *supra* note 97, at x, 25-26 (Catron obtained the court order without mention of the recorded *hijuelas* ("deeds")). The Tierra Amarilla Grant (prior to Catron's purchase) is an example of a communal grant.

452. *Id.* at x.

453. See WESTPHALL, *MERCEDES REALES*, *supra* note 80, at 233-34. Westphall further contends this is an approximation. "It is impossible to determine how much real property he owned at any one time, but it was probably at least two million acres." *Id.* at 234. For examples of litigation involving Catron's property interests, see *United States v. Ortiz*, 176 U.S. 422 (1899), where Catron appeared for claimants in an appeal of a grant of validity to their title. See also *Catron v. Board of Comm'rs*, 33 P. 513 (Cal. 1893).

454. Petition of Antonio Maria Pico, et al., to the Senate and House of Representatives of the United States (Feb. 21, 1859), *reprinted as Compelled to Sell, Little by Little by Little*, in DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND, HISTORICAL ROOTS OF THE MEXICAN AMERICANS* 195, 197 (1973).

455. *Miller v. Letzerich*, 49 S.W.2d 404, 407 (Tex. 1932).

456. *United States v. Ritchie*, 58 U.S. (17 How.) 525, 529 (1854).

law, are “the supreme Law of the Land” under the Constitution.<sup>457</sup> Treaties are deemed legal contracts between their signatories and The Constitution directs judges to give them effect.<sup>458</sup> In *Ely’s Administrator v. United States*<sup>459</sup> the Court verified that, notwithstanding the Conquest, Mexican grantees should have been protected “[i]n harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles; that which was good before should be good after. . . .”<sup>460</sup> Nonetheless, “that which was good before” did not protect grantees from shifting and elusive norms within the new legal regime.<sup>461</sup>

As provided under the Land Acts, five different laws obligated the United States to protect grantees and their property rights. In addition to the Treaty and the Constitution, Mexico’s colonization laws and its customary practices were to govern the land grant adjudication process, while international law and the laws of the United States would also protect grantees as citizens and forever foreign subjects.<sup>462</sup> Thus, the United States pledged to protect the rights of Mexican grantees in the grantees’ newly adopted nation.

457. Article VI, Clause 2 of the Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI, cl. 2; *see also* *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554, 556 (5th Cir. 1946) (“A treaty lawfully entered into stands on the same footing of supremacy as does the Constitution . . . of the United States.”); *Atocha’s Adm’r v. United States*, 8 Ct. Cl. 427 (1872) (using compensation fund created by the Treaty of Guadalupe Hidalgo to reimburse expelled American expatriate for property taken during Revolution of 1844).

458. U.S. CONST. art. VI, cl. 2. (“Judges in every State shall be bound thereby . . .”).

459. 171 U.S. 220 (1898).

460. *Id.* at 223.

461. *Id.*

462. *See, e.g.*, California Land Act of 1851, § 11, 9 Stat. 631, 633 (1851) (enumerating the Treaty, law of nations, Mexican law, custom and usage, principles of equity, and the decisions of the U. S. Supreme Court); *see also* *Knight v. United States Land Ass’n*, 142 U.S. 161, 184 (1891) (applying principles of international law as additional support for obligations under the Treaty of Guadalupe Hidalgo); *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 478 (1865) (describing land grant process and raising issues of notice in filing an appeal after “our Conquest of California”); *Yorba v. United States*, 68 U.S. (1 Wall.) 412, 414–19 (1863) (statement of the case) (argument of the United States); *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). In observing international law, the *Percheman* court reasoned that “[a] cession of territory is never understood to be a cession of the property belonging to its inhabitants. The king cedes that only which belonged to him; land he had previously granted, were not his to cede.” *Id.* at 86.

Instead, grantees faced prohibitive burdens of proof, shifting rules and standards that deviated from long-established American legal norms, and selective application of the law. Legal actors disregarded the fact that Mexican land was not part of the public domain, thereby promoting biased actions that ran counter to the express obligations of the Treaty.<sup>463</sup> By these means, the United States openly made available land that supposedly "had been so completely severed from the public domain of Mexico, so perfectly vested in the grantee by a legal title in fee, that no right of property in the land passed to the United States."<sup>464</sup> Courts enhanced the wealth of the dominant population by awarding it title to land that rightfully belonged to grantees or, more rarely, awarding invalid grants to non-Mexican petitioners that should have reverted to the public domain. Hence, the treatment of Mexican grantees violated not only the Treaty and the Constitution but also the pledges made by both President Polk and the Senate.<sup>465</sup>

The same dubious actions of the several branches of the American government also violated established principles of international law. Prior to the Treaty of Guadalupe Hidalgo, the Supreme Court in *United States v. Percheman*,<sup>466</sup> recognized the pre-existing legal status of lands colonized by acts of war:

It may not be unworthy of remark, that it is very unusual, even in cases of Conquest, for the conqueror to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; *that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled.* The people change their allegiance; but their relations to each other and their rights of property remain undisturbed.<sup>467</sup>

Similarly, the Court later declared:

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463. See *supra* Part II.

464. *United States v. Ritchie*, 58 U.S. (17 How.) 525, 529 (1854).

465. See discussion *supra* notes 148–52 and accompanying text.

466. 32 U.S. (7 Pet.) 51 (1833).

467. *Id.* at 86–87 (emphasis added); see also *United States v. Perot*, 98 U.S. 428, 430 (1878) ("The laws of Mexico . . . were the laws not of a foreign, but of an antecedent government. . . . [A]s to that portion of our territory, they are deemed domestic laws . . ."); *United States v. Moreno*, 68 U.S. (1 Wall.) 400, 404 (1863) (reasoning that private property rights were consecrated by the laws of nations).

By th[e] substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remain[] in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain.<sup>468</sup>

Notwithstanding the law of nations, legal actors annulled private property rights in applying the Treaty through the land grant process. Contrary to *Percheman*, the conqueror did more than displace the sovereign and assume dominion over the country. Either on behalf of its Euro-American citizens or itself, the United States displaced Mexican grantees and their heirs from their rightful property, thereby working injuries whose effects extend into the present.<sup>469</sup>

The actions under the new legal regime might have been somewhat more understandable had the land grant adjudication process presented Congress with a new endeavor.<sup>470</sup> However, the United States was already familiar with the issues involved in protecting the property of the residents of areas transferred to its control by treaty, having previously negotiated treaties with France and Spain.<sup>471</sup> A similar process in the territories of Louisiana and Florida also governed the award of land grants. In *Soulard v. United States*,<sup>472</sup> for example, the Court reports as follows:

In the treaty by which Louisiana was acquired, the United States stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property. The United States, as a just

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468. *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177 (1857); cf. *United States v. Auguisola*, 68 U.S. (1 Wall.) 352, 358 (1863) (stating that "the United States have never sought by their legislation to evade the obligation devolved upon them by the treaty of Guadalupe Hidalgo to protect the rights of property of the inhabitants of the ceded territory, or to discharge it in a narrow and illiberal manner").

469. See *infra* notes 479–89 and accompanying text.

470. For an example of the land grant adjudication process that protected persons remaining in newly acquired Spanish territories, see *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833). The decision in *Percheman* involved an 1815 petition by Sargeant Juan Percheman. There, the Court protected the property interests of land grantees. *Id.*

471. See EBRIGHT, LAND GRANTS, *supra* note 19, at 31. See also Treaty of Paris, April 30, 1803, reprinted in MILLER, 2 TREATIES, *supra* note 16, at 298–505; Treaty of Feb. 22, 1819, reprinted in MILLER, 3 TREATIES, *supra* note 16, at 3–64.

472. 29 U.S. (4 Pet.) 511 (1830).

nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.<sup>473</sup>

The long-established history of the land grant process in the Spanish provinces should have expedited confirmation for grantees in the Mexican provinces with little disruption of their rights.<sup>474</sup> Specifically, the language of the California Land Act of 1851, employed so detrimentally to grantees' interests, derived from earlier French and Spanish treaties.<sup>475</sup> Hence, the potential excuse and assertions of inexperience in the protection of property rights in a newly acquired territory fails to explain the dispossession of Chicanas/Chicanos in the Mexican provinces.

In failing to establish a land claims process that adequately protected the rights of grantees, the United States generally refused to acknowledge "that a Mexican grant while under judicial investigation was not public land open for disposal and sale, but was reserved territory within the meaning of the law."<sup>476</sup> Rather, shifting legal norms harmed grantees and established them as outsiders to Anglo-American law. This outsider status and its root causes remain the source of continued discontent among Chicanas/Chicanos today.

### III. CONTEMPORARY LAND USE AND CHICANA/CHICANO POVERTY IN THE AGRARIAN DOMAIN

Justice Holmes once declared: "This abstraction called the law . . . is a magic mirror [wherein] we see reflected, not only our own

473. *Id.* at 511-12 ("[T]he relations of the inhabitants of Louisiana to their government is not changed. The new government takes the place of that which has passed away.")

474. *See id.* at 86.

475. *See* MILLER, *supra* note 16, at 241 ("For Article 9, the Senate amendment was a new text, adapted from Article 3 of the Treaty for the Cession of Louisiana . . . which, indeed, was the basis of the first paragraph of the article as originally written. . . .").

Section 13 of the California Land Act reads as follows:

[S]aid surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana approved third March, one thousand eight hundred and thirty-one."

§ 13, 9 Stat. 631 (1851) (mirroring a provision in the Treaty for the Cession of Louisiana). For an account of the confirmation of land titles in Louisiana, see Harry L. Coles, Jr., *The Confirmation of Foreign Land Titles in Louisiana*, LA. HIST. Q., Oct. 1955, at 1.

476. *United States v. McLaughlin*, 127 U.S. 428, 454 (1888) (holding that, where a float had been granted, the United States could dispose of any specific tracts within the exterior limits of the grant, leaving a sufficient quantity to satisfy the float).



lives, but the lives of all men that have been!"<sup>477</sup> "Holmes believed that this 'magic mirror' offered historians an opportunity to explore the social choices and moral imperatives of previous generations."<sup>478</sup> While this Article argues that including Chicanas'/Chicanos' rural experience in legal education enriches our understanding of property law, this legal experience also provides a basis for understanding their current economic standing in the rural and agricultural sector.<sup>479</sup> The magic mirror now shows both that their dispossession was improper and that agricultural law is replicating the historical alienation of Chicanas/Chicanos from rural land and policies.

Insofar as legal practices and land use policies privileged the dominant population, the mirror shows that they also discriminatorily determined the distribution of power and benefits.<sup>480</sup> Not long ago, Reis Tijerina and the Alianza in New Mexico revived the land grant issue and exposed the consequences resulting from land grant dispossession.<sup>481</sup> Currently, discriminatory distribution of agricultural resources excludes Chicanas/Chicanos and invokes Reis Tijerina's claims for a return of long lost land grants.<sup>482</sup>

Under the federal regulatory framework, farmers in their regions vote on the determination of subsidy awards for their given

477. Kermit L. Hall, *The Magic Mirror Law in American History* 3 (1989) (quoting Oliver Wendell Holmes, Jr., *The Speeches of Oliver Wendell Holmes* 17 (1891)).

478. *Id.*

479. In rural areas Chicanas/Chicanos remain primarily as laborers without land tenure. *See generally* HISPANIC POPULATION OF U.S. SOUTHWEST, *supra* note 43. *See generally id.* Population figures, however, remain inexact because of the mobility of agricultural workers during census surveys. *See* Leslie A. Whitener, *A Statistical Portrait of Hired Farmworkers*, 2 MONTHLY LAB. REV. 49 (1994) (explaining that the nature of seasonal work ensures undercounting of field workers when workers are not employed on farms during the census-taking period).

480. *See supra* notes 217-99 for a discussion of this misappropriation.

481. *See generally* RICHARD GARDNER, *REIS TIJERINA AND THE NEW MEXICO LAND GRANT WAR OF 1967* (1970).

482. *See generally* HISPANIC POPULATION OF U.S. SOUTHWEST, *supra* note 43, (enumerating Chicana/Chicano population in the Southwest); DEVELOPMENT PROFILE OF RURAL AREAS, *supra* note 43 (analyzing impoverished rural areas). Chicanas/Chicanos have long struggled to be heard in various areas. *See* ROOTS AND RESISTANCE: THE EMERGENT WRITINGS OF TWENTY YEARS OF CHICANA FEMINIST STRUGGLE, HANDBOOK OF HISPANIC CULTURES IN THE UNITED STATES: SOCIOLOGY 175 (Nicolas Kanellos & Claudio Esteva-Fabregat eds., 1994). This required further litigation to ensure access to public accommodation, *see* Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 (Tex. Civ. App. 1944), and the franchise through elimination of poll taxes and literacy tests, *see* White v. Regester, 412 U.S. 755 (1983); GOMEZ-QUIÑONES, *supra* note 84; JOHN STAPLES SHOCKLEY, *CHICANO REVOLT IN A TEXAS TOWN* (1974). Other cases discuss Chicana/Chicano rights to education. *See* Westminster Sch. Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

areas.<sup>483</sup> At present, Chicanas/Chicanos comprise only 1.7% of rural landholders<sup>484</sup> and those without land can neither participate nor vote on agricultural committees. Land alienation impoverished them, requiring transformation from land owners to field workers.<sup>485</sup> Their labor as fieldworkers consequently renders them ineligible to participate in the distribution of the federal benefits that accrue to the agricultural sector.<sup>486</sup> Long trajectories deriving from the inability to own land diminish their political standing<sup>487</sup> and perpetuate discrimination in the administration of farm programs and agricultural policy.<sup>488</sup> Without capital or land Chicana/Chicano farmers cannot improve their circumstances in a sector where they are largely relegated to subservience for established landowners' personal gain, and where they do not even benefit from the protections required in other industries.<sup>489</sup>

483. See 7 C.F.R. §§ 7.1–7.38 (1995).

484. Because the Census identifies rural landowners as Latinas/Latinos, it is difficult to discern the exact number of Chicana/Chicano landowners holding land. See generally U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF AGRICULTURE, U.S. DATA CHARACTERISTICS OF OPERATOR AND TYPE OPERATED BY BLACK AND OTHER RACES, 1992, 1987, AND 1982 (1995). The national total of 12.4 million rural landowners is dominated by majority-status individuals. *Id.* During the 1982–87 period, the number of new farm entrants—those who began operations on their current farm within a given year of the studied period—averaged about 25,000 fewer people on an annual basis. See *id.* at 2–3. Note, however, that these estimates remain imprecise because of limitations in census data, which do not account for farmers entering and exiting between the census periods. See sources cited *supra* note 479. Recently, government officials have responded to the complaints of those long excluded from accessing public agricultural programs. See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-41, FARM PROGRAMS: EFFORTS TO ACHIEVE EQUITABLE TREATMENT OF MINORITY FARMERS (1997) (focusing on minority farmers and reviewing the Farm Service Agency's efforts to conduct farm programs in an equitable manner).

485. See J.J. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 LAND & WATER L. REV. 467, 507–12 (1973).

486. Under the federal regulatory framework, farmers in their regions vote on the determination of subsidy awards for their given areas. See 7 C.F.R. §§ 7.1–7.38 (1995).

487. From early in the formation of the United States, the legal rights of fee holders have permitted access to a wide array of governmental benefits. In the contemporary period, for example, special tax valuations are available to holders of rural enterprises. See, e.g., *Williamson v. Commissioner*, 974 F.2d 1525 (9th Cir. 1992) (holding that special use valuation protects agricultural enterprises and therefore permits the abeyance of estate taxes). The basis for the special use exemption is to keep land within the family claiming the exemption. See *id.* at 1527 (referring to the legislative history of legislation as promulgated "in the hope of protecting the family farm"). An ancient property doctrine recognizes these rights as a form of wealth. See SINGER, *supra* note 9, at 5 ("Property rights are the legal form of wealth.").

488. See U.S. GEN. ACCT. OFF., GAO/RCED-97-41, FARM PROGRAMS: EFFORTS TO ACHIEVE EQUITABLE TREATMENT OF MINORITY FARMERS 3–6 (1997) (describing the FHA's failure to promote farm programs in an equitable manner and noting the special treatment that non-minority farmers receive).

489. The plight of agricultural workers and their working conditions is beyond the scope of this Article. For a well-documented discussion, see DENNIS NODIN

The historical link between land and power is no secret. Paul Taylor writes that “[a] land policy means social control over one of the greatest instruments of production.”<sup>490</sup> Agriculture “occupies nearly two-thirds of the private land in the United States, 878 million acres.”<sup>491</sup> Yet, since the country’s earliest periods, property has remained “concentrated in very few hands.”<sup>492</sup> Examinations of the sector by Taylor and others demonstrate that public laws, including homestead laws,<sup>493</sup> grazing rights legislation,<sup>494</sup> and a vast array of labor legislation,<sup>495</sup> have long promoted access to the public domain and provided protection for private economic gain.<sup>496</sup> These and simi-

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VALDÉS, AL NORTE: AGRICULTURAL WORKERS IN THE GREAT LAKES REGION 1917–1970 (1991). Agricultural workers’ status contrasts with public law benefiting the economic status of some farm actors. *See, e.g.*, Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301–2305 (1967) (authorizing individual farm owners to join together to market their products); Clayton Act, 15 U.S.C. § 17 (1985) (recognizing the labor of farm owners). For an overview of the problems of employing field workers in light of conflicting laws, see generally PHILIP L. MARTIN, *HARVEST OF CONFUSION, MEXICAN WORKERS IN U.S. AGRICULTURE* (1988) (examining issues related to migrant farmworkers); David M. Saxowsky et al., *Employing Migrant Agricultural Workers: Overcoming the Challenge of Complying with Employment Laws*, 69 N. DAK. L. REV. 307 (1993).

490. Paul S. Taylor, *Public Policy and the Shaping of a Rural Society*, 20 S.D. L. REV. 475, 481 (1975).

491. Gene Wunderlich, *Agricultural Landownership and the Real Property Tax*, in *LAND OWNERSHIP AND TAXATION IN AMERICAN AGRICULTURE* 3, 3 (Wunderlich ed. 1993) (“ownership of agricultural land is unevenly distributed among 3 million owners” employing an ad hoc policy as to “who will use the land and how and when it will be used”). The author provides a detailed study on ownership, tenure, and taxation to analyze how “land is used, valued, transferred, and held in agriculture and the rural economy.” *Id.*

492. Thomas Jefferson wrote that “property of this country is absolutely concentrated in very few hands.” Letter to James Madison, October 28, 1785, in *BASIC WRITINGS OF THOMAS JEFFERSON* 161 (Philip S. Foner ed., 1944). Charles Geisler is one of many scholars linking the absence of land tenure with poverty. *See* Geisler, *infra* note 472; *see also* Wunderlich, *supra* note 491, at 4–5 (describing major American landholders and their holdings). Reis Tijerina and others have called for a return of misappropriated land to Chicanas/Chicanos. *See* GARDNER, *supra* note 481, at 30–47.

493. *See supra* notes 413–16.

494. *See* Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505 (1993–1994).

495. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 152(b) (1973) (denying farmworkers the right to organize and bargain collectively on the federal level); Mark Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); *see also* ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* 106 (1964) (referencing Carey McWilliams’s “Great Exception” model meaning that agribusiness is excepted from “common principles of social legislation” and “the basic tenets of free enterprise”).

496. The true economic value of land use is seen through its exploitation by private parties who access America’s natural resources without paying true market value for this privilege. *See generally* U.S. GEN. ACCOUNTING. OFFICE, GAO/RCED-

lar policies ensure the growth of large-scale rural enterprises, which threaten smaller owner-operators.<sup>497</sup> The growth of production contracts<sup>498</sup> and large-scale enterprises are vertically integrating agricultural enterprises while imposing costs to the diversity of the rural sector.<sup>499</sup> Within the agricultural industry, historical and present structural conditions result from the cultural biases of those responsible for determining property rights and agricultural policy, and preclude Chicanas/Chicanos from farm ownership.<sup>500</sup>

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97-16, U.S. FOREST SERVICE: FEES FOR RECREATION SPECIAL-USE PERMITS DO NOT REFLECT FAIR MARKET VALUE, (DEC. 20, 1996).

497. See Dennis Pollock, *Heritage of Family Farm Lost in Courts*, FRESNO BEE, July 28, 1996, at C1; James Walsh, *Agricultural Model or Menace? Corporate Farms Taking Hold in the Hog Industry*, STAR TRIB., Nov. 6, 1995, at A1. The agricultural census designates a farm as any place that sold or normally would have sold \$1000 or more of agricultural products during the census year. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1992 CENSUS OF AGRICULTURE 22 (1995). The agricultural census counted a total of 1.93 million farms in the U.S. in 1992, down from 2.09 million in 1987. *Id.*

498. Keith Haroldson explains contract farming:

Under the traditional livestock production process, the livestock owner fed and cared for the livestock throughout the growing period. Contract feeding arrangements split this process. Under contract feeding, a livestock owner enters into a care and feeding agreement with a production facility or feedlot owner. Typically, the feedlot owner will furnish facilities and labor in exchange for payment by the livestock owner for the livestock's care and feeding. Such payment is usually made after care and feeding is rendered. The parties often include specific terms indicting who will bear production costs such as feed, medication, and utilities.

Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 412 (1992); see also Chris Anderson, *Expert Sees Farms Without Farmers*, THE PANTAGRAPH, Jan. 11, 1995, at D1 (growth of agriculture as an industry promoting enterprises without farmers).

499. Vertical integration occurs "[w]hen a company involved in one phase of a business absorbs or joins a company involved in another phase in order to guarantee a supplier or a customer." Haroldson, *supra* note 498, at 410 (citing DAVID J. RACHMAN & MICHAEL H. MESCON, BUSINESS TODAY 37 (2d ed. 1979)). Professor Fred Morrison's description of vertical integration is one "in which individual farms would disappear or become mere operating units of large, integrated agribusinesses, which owned the means of production and controlled agriculture from the planting of the seed to the marketing of the processed product." Fred L. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 961, 992-97 (1976).

500. Every five years, since the New Deal, Congress promulgates a new farm bill that defines the agricultural agenda for the next five-year period. See *infra* note 523.

## A. A Potential Alternative

"Land is basic to the individual, community, the nation, and the world,"<sup>501</sup> and requires new forms of land ownership that equally distribute the social and political benefits attached to land ownership.<sup>502</sup> With holdings of 690 million acres or 30 percent of the existing area, the "principal landowner . . . in terms of area is the United States."<sup>503</sup> Several vast areas, previously comprising the former Mexican provinces, include national forests under the management of federal officials, who are leasing public lands to private interests for personal economic gain.<sup>504</sup> Redistribution of public land to rural Chicanas/Chicanos would arrest their continued alienation from the agrarian domain or rural landownership.<sup>505</sup>

A program of land redistribution presents additional beneficial effects. First, it raises the potential of easing Chicanas/Chicanos into the realm of rural politics and allows them access to the economic benefits stemming from federal legislation. Second, it provides access to agricultural laws and the policy-making process as a whole, thereby easing the ongoing impoverishment of rural Chicana/Chicanos. Third, redistribution would promote the independent status of individual agricultural operations, a long recognized goal in the agricultural sector.<sup>506</sup> Finally, a deliberately structured land use policy would operate as a check against the despoliation of the public domain.

The extra-legal coercion and legal slight-of-hand of the dispossession of Mexican grantees<sup>507</sup> allowed agricultural entrepreneurs to engage in widespread activities that caused "[e]cological destruction."<sup>508</sup> One author contends that heavy grazing, extensive cutting of timber, and draining of underground water increased with annexa-

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501. *Public Interest in the Use of Public Lands: An Overview*, in *PUBLIC INTEREST IN THE USE OF PRIVATE LANDS* 1, 1 (Benjamin C. Dysart III & Marion Clawson eds., 1989).

502. See TAYLOR, *supra* note 449, at 485. For a twentieth century urban focus, see *Poletown Neighborhood Council v. Detroit*, 304 N.W.2d 455 (Mich. 1981) (allowing the use of eminent domain power to transfer wealth from an ethnic neighborhood to General Motors).

503. Wunderlich, *supra* note 491, at 4.

504. See EBRIGHT, *LAND GRANTS*, *supra* note 19, at 171 (discussing the former Mexican land owners of the present-day Santa Fe National Forest); see also *infra* note 532.

505. Presently, Mexican landowners are attempting to receive compensation for their dispossession from their property interests. See, e.g., *Alliance of Descendants of Tex. Land Grants v. United States*, 27 Fed. Cl. 837 (1993) (holding that the applicable statute of limitations precluded a remedy).

506. See, e.g., *Farmland Protection Policy Act*, 7 U.S.C. §§ 4201-4209 (1988).

507. See *supra* Part II.

508. DUNBAR ORTIZ, *supra* note 80, at 106.

tion and induced soil erosion.<sup>509</sup> Flooding caused similar results by causing silt deposits and creating swamp-like conditions.

In addition, snow and rain runoff, which at one time provided the valley with essential moisture for planting, later cut erosion trenches some three hundred feet wide and thirty feet deep. "Shallow drainage depressions which had helped to spread runoff evenly were replaced by *arroyos*, which rather than spreading the runoff actually drained off river water, lowering the water table."<sup>510</sup> The total amount of irrigated land declined in the valley after 1880, from 125,000 acres to 50,000 acres in 1896.<sup>511</sup> Prior to 1880, the landscape of the Middle Rio Grande Valley was covered by grass from four to eight feet tall, but by the late nineteenth century, only patches of grass remained.<sup>512</sup> Intensified commercialization exacted greater demands on land and the process was repeated in other areas of the country with ramifications that continue.<sup>513</sup>

As Eric Freyfogle asserts,

Good land use is best understood as an art, tailored to the uniqueness of each place and sensitive to the possibilities and limits set by nature. One does not learn this kind of land use from a book or in a school. It arises often from experience, from the lessons learned over time.<sup>514</sup>

Chicanas/Chicanos come from a long history of *ejidos* (small farming communities)<sup>515</sup> and retain a history of employing alternative

509. For example, according to that author, draining of the watershed caused the "abandonment of a great deal of irrigable land in the Middle Rio Grande Valley." *Id.*

510. *Id.*

511. *Id.* (discussing the amount of land that actually was irrigated).

512. *Id.*

513. See, e.g., Gerald Torres, *Race, Class, and Environmental Regulation, Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 841 (1992) (discussing ecological destruction and environmental racism in areas where Chicanas/Chicanos reside). For analyses of the impact of the North American Free Trade Agreement (NAFTA) on the environment in the Southwest, see Theresa L. Byrd et al., *Variation in Environmental Risk Perceptions and Information Sources Among Three Communities in El Paso*, 8 RISK, HEALTH, SAFETY AND ENVIRONMENT 355 (1997) (discussing environmental problems and linkages with NAFTA); David W. Eaton, *NAFTA and the Environment: A Proposal For Free Trade In Hazardous Waste Between the United States and Mexico*, 27 ST. MARY'S L.J. 715, 717 (1996) (analyzing NAFTA and its influence on hazardous waste disposal); Elizabeth A. Ellis, *Bordering on Disaster: A New Attempt to Control the Transboundary Effects of Maquiladora Pollution*, 30 VAL. U. L. REV. 621, 626 (1996) (analyzing NAFTA's effects on environmental cooperation).

514. Eric, T. Freyfogle, *Ethics, Community, and Private Land*, 23 ECOLOGY L.Q. 631, 654 (1996).

515. For litigation involving an *ejido*, see *State v. Gallardo*, 135 S.W. 664, 667 (Tex. Civ. App. 1911), where the land in controversy was designated as "Los Ejidos de Reynosa."

agricultural techniques. Earlier rural enterprises demanded alternative forms of land use that included organic and sustainable forms of agriculture and were sensitive to the bioregions of a community.<sup>516</sup> If adherence to such practices were to be attached to grants as conditions subsequent, releasing federal land would promote sustainable agricultural practices.<sup>517</sup>

Effective distribution, nonetheless, depends on establishing land trusts to offset the enormous costs of initiating an agricultural enterprise. Access to the agrarian political process is consistent with the balance of power John Adams advocated:

The balance of power in a society accompanies the balance of property and land . . . . If the multitude is possessed of real estate, the multitude will have the balance of power and, in that case, the multitude will take care of the liberty, virtue, and interest of the multitude in all acts of government.<sup>518</sup>

Targeting newer forms of land use would enable economic growth to counter the decay of rural areas, protect rural areas targeted for development, provide a tax base, and permit access to agricultural committees in their given areas.<sup>519</sup> While these committees conceivably were not designed specifically to exclude Chicanas/Chicanos from participation, Chicanas/Chicanos' absence as landowners bars them from participating in defining the agricultural agenda.<sup>520</sup>

Preventing public law from concentrating land into the hands of a few requires redirecting agricultural law and policy to reflect the wide variety comprised within the nation's diverse history. The costs of current agricultural legislation, in protecting and increasing the existing wealth of corporate ownership, are not limited to the present, but also extend into the future. Available data demonstrates the consolidation of the country's natural resources in the hands of

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516. See Arrellano, *supra* note 93, at 32 (discussing bioregionalism and Mexican grantees).

517. A wealth of information concerning alternative forms of sustainable agriculture exists. See generally, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-42, CONSERVE RESERVE PROGRAM, ALTERNATIVE AVAILABLE FOR MANAGING ENVIRONMENTALLY SENSITIVE CROPLAND (1995); DEVON PEÑA, AGROECOLOGY OF A CHICANO FAMILY FARM (1997) (unpublished manuscript on file with the author).

518. Charles C. Geisler, *Land and Poverty in the United States, Insights and Oversight*, 71 LAND ECON. 16, 17 (1995) (quoting John Adams, 9 THE WORKS OF JOHN ADAMS 376-77 (C.F. Adams, ed. 1969)).

519. See 7 C.F.R. §§ 7.1-7.38 (1995). These implementing regulations provide details as to the eligibility and compliance of federal recipients.

520. If people do not own land in their areas they cannot sit on those committees and thus cannot vote. *Id.*

corporations and indicates likely implications of that phenomenon for domestic policy and international trade.<sup>521</sup> Oligopolistic control over the production of food suggests that independent agricultural operations are losing their autonomy to corporate agriculture, and raises critical questions as to who governs the country's natural resources.<sup>522</sup>

Every five years Congress enacts a new farm bill and, combined with the federal regulatory structure, purports to encourage diversity of small land ownership status.<sup>523</sup> The proposed process would not only redirect inquiries over whether land monopolies are replacing the individual owner-operator in the United States, but would also diversify the rural economy.

Presently, Holmes's magic mirror does not reveal detailed investigations promoting Chicanas/Chicanos as a focus of study, encourage legal academic inquiry, or yield more conscious policies to deter skewed land tenure. Agricultural economist, Lawrence Libby, argues that present agricultural law must critically consider the evolving data regarding the implications and future ramifications of the policies underlying larger growth of the sector.<sup>524</sup> Gene Wunderlich, moreover, asserts that "public and private interests should be examined as supporting dimensions of an integrated property system . . . [and] an effective, just, and efficient property system requires better, and possibly more accessible land informa-

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521. John H. Davis, who is credited with coining the term "agribusiness," defines it as the sum total of all operations involved in the manufacture and distribution of farm supplies; production operations on the farm; and the storage, processing, and distribution of farm commodities and items made from them. JOHN H. DAVIS & RAY GOLDBERG, A CONCEPT OF AGRIBUSINESS 2 (1957), cited in Jim Chen, *A Sober Second Look at Appellations of Origin: How the United States Will Crash France's Wine and Cheese Party*, 5 MINN. J. OF GLOBAL TRADE 29 n.31. (1996).

522. See Neil Hamilton, *Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources*, 28 TULSA L.J. 587 (1993); see also Harold F. Breimyer, *The New Deal and Its Legacy: Agricultural Philosophies and Policy in the New Deal*, 68 MINN. L. REV. 333 (1994) (describing how the New Deal's agricultural policies were designed within and have promoted a commercial conception of agricultural enterprise). In 1992 the farm sector accounted for \$85.6 billion of the Gross Domestic Product. STATUS OF THE FARM SECTOR, *supra* note 73, at 6-7; see also Donald B. Pedersen, *Introduction to the Agricultural Law Symposium*, 23 U.C. DAVIS L. REV. 401, 404 n.24 (1990) ("Agriculture has been and remains the nation's most significant industry with special needs and with its own set of interest groups.")

523. See, e.g., Federal Agricultural Improvement Act of 1996, H.R. Conf. Rep. No. 2854 (1996). During that time Congress hears testimony from farming advocates and others. The 1996 Farm Bill provides for a new three-year "Fund for Rural America." See 7 U.S.C. § 2240 (1996).

524. Lawrence Libby, Farmland Protection, Northern Illinois University, Environmental Law Conference, Mar. 27, 1997, DeKalb, Illinois (averring that the present lack of data relating the consequences of agricultural policies to their potential impact on the future encompasses risks that are too great to ignore).



tion.<sup>525</sup> Accordingly, this section advocates access to land for Chicanas/Chicanos who, without the land tenure from which they have long been excluded, are kept from obtaining public benefits extended to the agricultural sector.<sup>526</sup>

## CONCLUSION

The law knows no finer hour than when it cuts through formal concepts and transitory emotions to protect unpopular citizens against discrimination and persecution.<sup>527</sup>

From the time the Founders signed the United States Constitution to the present, considerations of race have governed the agricultural agenda and the resulting control of the nation's natural resources.<sup>528</sup> The counter-story presented here reveals that throughout most of American legal history, biased interpretations of the law created a system that dispossessed and disenfranchised individuals of Mexican background.<sup>529</sup> Moreover, Constitutional directives protecting

525. Wunderlich, *supra* note 491, at 3.

526. This Article does not recommend the wholesale distribution of land. Nor does it support access to public land without incentives to ensure sustainable development and/or alternative sustainable agricultural enterprises. For examples of the types of sustainable practices advocated, see generally DEVON PEÑA, CULTURAL LANDSCAPES AND BIODIVERSITY: THE ETHNOECOLOGY OF A WATERSHED COMMONS (1995).

527. *Falbo v. United States*, 329 U.S. 549, 561 (1944) (Murphy, J., dissenting).

528. Conquest ideology helps to explain how law was used as a tool to racialize grantees, marginalizing them in ways that continue to affect race relations today. As Immanuel Wallerstein has demonstrated, the ideology of the conqueror systematically facilitates and sustains inequality between conquering and subject peoples. Immanuel Wallerstein, *Culture as the Ideological Battleground of the Modern World-System*, in GLOBAL CULTURE, NATIONALISM, GLOBALIZATION AND MODERNITY, 31-55 (Mike Featherstone ed., 1990). In *Johnson v. M'Intosh*, 21 U.S. (8 Wheat) 543 (1823), for example, the Court held the doctrine of conquest permitted control over the country's natural resources. *M'Intosh*, 21 U.S. (8 Wheat.) at 574. In reaching its decision, the Court relied on a heavily racialized notion of "industry" that privileged the land use practices of Europeans over Native peoples. See *id.*; see also Joseph Singer, *Property and Sovereignty*, 86 N.W. U. L. REV. 1, 42 nn.167-68, 52 n.178 (1991) (discussing the use of the notion of conquest and racial hierarchy in the Court's decision making).

529. This Article introduced several key issues dominating land grant law. Yet other counter-stories involve whether or not the Treaty of Guadalupe Hidalgo applied to island and seacoast property. Commentators suggest that Mexico did not intend to transfer the property to the United States after the Conquest. See *United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (9th Cir. 1986). In *Ringrose*, the court discussed the status of coastal islands under the treaty in the following terms: "The California coastal islands are not explicitly mentioned. The absence of any specific reference in the treaty to the islands is explained by the fact that the treaty drafters were primarily concerned with the latitudinal boundary between the two countries."

property rights were held hostage to the whims of the interpreters of law. Alienated from their property, Chicanas/Chicanos were treated as foreigners and disallowed full citizenship status.<sup>530</sup> In the aggregate, their stories present complex analytical issues. The governmental practices involved in their dispossession played a significant role in determining their current economic status in ways that are difficult to reconcile with present understandings in property law.

This Article began with the observation that Chicanas/Chicanos have long held an invisible status within the study of law. While scholars outside of legal academia continue to ascribe the alienation of grantees from their property interests to various causes, land dispossession and its origins remain excluded from legal scholarship. By exploring the application of the Treaty of Guadalupe Hidalgo to the claims of Mexican land grantees, this Article urges continued study of Chicana/Chicano legal history to offset

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*Id.* at 643. The court relied on a historian's interpretation of the issue: "In the treaty, as a matter of fact, the territory ceded is not mentioned." J. N. Bowman, *The Question of Sovereignty over California's Off-Shore Islands*, 31 PAC. HIST. REV. 291, 295 (1962) quoted in *Ringrose*, 788 F.2d at 643. Bowman adds, however, that "[t]he territorial consequences were well understood at the time. . . . Neither the United States nor Mexico has ever contested [the inclusion of the islands as part of California]. . . . [T]here seems never to have been uncertainty of intent or understanding as to the side of the line on which they lay." Bowman, *supra*.

Yet, Mexico took a stance against cessation, arguing that the islands remained the territories of the Mexican Republic, while the United States argued the contrary. *Id.* at 291. The United States relied on a narrow interpretation of a Mexican law that required government approval for any colonization within 20 leagues of a national boundary or within 10 leagues of the seacoast: "There can not be colonized any lands comprehended within twenty leagues of the limits of any foreign nation, nor within ten leagues of the coasts, without the previous approbation of the General Supreme Executive power." Translation Respecting Colonization, art. IV, *supra* note 74. The United States did not consider island property conveyable to private parties because it was used for national defense purposes by Mexican authorities. See *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) (reporting that off-shore lands were used for defense purposes). The United States therefore claimed ownership of the disputed territory. This form of reasoning permitted challenges to the grantee seeking confirmation of land located near seacoasts. See *Dominguez de Guyer v. Banning*, 167 U.S. 723, 724 (1897) (action in ejectment to recover possession of Mormon Island "in the inner bay at San Pedro, Cal."); *United States v. Polack*, 27 F. Cas. 580 (N.D. Cal. 1857) (No. 16,061) (involving claim on Yerba Buena island in San Francisco Bay); *United States v. Limantour*, 26 F. Cas. 947 (N.D. Cal. 1858) (No. 15,601) (involving islands of Los Farallones, Alcatraz, and Yerba Buena). For examples of an *expediente* referencing island property of an original grantee, see *Bouldin v. Phelps*, 30 F. 547 (1887), which discusses the *expediente* of Victor Costra for land on an island. See also *United States v. Coronado Beach Co.*, 255 U.S. 472 (1921) (reporting that off-shore lands were used for defense purposes); *United States v. Polack*, 27 F. Cas. 580 (N.D. Cal. 1857) (No. 16,061) (claim by Joel S. Polack and others, tracing title to original grantor 1838 award to Juan Jose Castro of "islands on the coast in private ownership").

530. See WEBER, *supra* note 454, at 177-99; DE LEÓN, *supra* note 410, at 105; Nancy Cervantes et al., *Hate Unleashed: Los Angeles in the Aftermath of Proposition 187*, 17 CHICANO-LATINO L. REV. 1 (1995).

simplistic readings of the country's historical past,<sup>531</sup> promote greater intellectual exercise for students, and help diminish Chicanas'/Chicanos' subordinate legal status.

The Treaty remains a living document that prescribes a legal relationship with individuals of Mexican descent. As part of the federal law, it provides a means to remedy the long history of discrimination against Chicanas/Chicanos in the agricultural sector.<sup>532</sup> The task of the contemporary legislative and judicial actor is to use the Treaty to reverse past biases and unjust dispossession, and ensure equal application of the laws for the country's diverse citizens, so that the tragedies of this story remain part of the past.

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531. See FRIEDMAN, *supra* note 46, at 9.

532. As negotiated and written, the Treaty does not contain an ending date and, therefore, remains a living document. This fact is important to current litigation and those seeking to obtain some remedy for the unlawful taking of Chicana/Chicano property interests. See, e.g., *Alliance of Descendants of Tex. Land Grants v. United States*, 27 Fed. Cl. 837 (1993) (heirs and successors to recipients of 433 land grants sought compensation from the United States for taking approximately 12 million acres of land without compensation); Sam Howe Verhovek, *South Texas Families' Land Fight A Battle for the Ages*, FT. WORTH-STAR-TELEGRAPH, July 20, 1997, at 57.