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Law for the Octopus: Land Monopoly, Property, and the Crises of California Settler Society, 1840-1880



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# Law for the Octopus: Land Monopoly, Property, and the Crises of California Settler Society, 1840-1880

By

Kyle Scott DeLand

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Committee in Charge:

Professor Christopher L. Tomlins, Chair
Professor Jonathan Simon
Professor Rebecca McLennan

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## Abstract

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This dissertation analyzes the coalescence, rise, contestation, and fall of multiple jurisprudences of colonial property from the American plans to acquire Mexican Alta California in the 1840s to the adoption of the State's revised constitution in 1879. It follows a cadre of lawyers as they seek to answer the apparently simple questions of who owned what, how much, and why? In this investigation it asks, how did these transformations of property law reflect and shape the larger development of American Empire? The arguments herein reflect and complicate classic theses on the liberalization of property and the demystification of law, and thereby the work makes significant contributions to the fields of American Legal History, Settler Colonial Studies, American Political Development, and the History of Capitalism.

The first half of the dissertation excavates the consolidation of "equitable property." Chapter one, "Guides to the Promised Land, 1841-1851," uses an archive of settler guidebooks, geographies, and travel accounts along with prominent reformist writings, like those of George Evans, to analyze the natural legal logic of property. This legality combined themes of anti-legalism, radical Lockeanism, and Christian theology. Across three great questions of American colonization policy – the origin of land titles, policy toward Native Peoples, and the Free versus Slave colonization debate – Pacific settlers employed legal naturalism to craft a radical and genocidal form of Free Labor "settlement." Chapter two, "California Redeemed, 1851-1861," analyzes the changing moral, social, and political meanings of equitable property. Through the personal and professional papers of elite lawyers, newspapers, and court decisions, the chapter argues that uncertain ownership precipitated a "property crisis," which then became a general political and social crisis. The equitable legal concepts of "fraud" and "redemption" enabled elite land lawyers, the judiciary, and the emergent bourgeoisie of California to negotiate and quiet these deadly property conflicts. However, this equitable legality took on a life of its own and was soon turned against the elite lawyers and the ascendant doctrines of liberalism in property law.

The second half examines the partial disintegration of equity and the rise of anti-redistributive and "neutral" liberal law. In chapter three, "A Very Low Price, 1861-1871," the work analyzes the material, legal, and ideological commodification of land and the articulation of a new model of American settler colonization of "cheap colonization." This triple commodification, of land itself, of mortgage securities, and of wheat, marked a dramatic contrast

with the moralistic and natural legality which preceded it. Land lawyers, especially those involved in global markets, increasingly understood land distribution as a matter of markets rather than justice. These two visions of law created a bloody conflict on Suscol Rancho and it became clear to lawyers that equitable property threatened society. To put it crudely, it was one thing to forcibly disposes Native Peoples and quite another to forcibly disposes white landlords. The final substantive chapter, "To Serve God or Mammon, 1871-1880," narrates the rearguard actions of the equitable regime through Georgist thought, the Workingmen's Party of California, and other countermovement to liberalism's free market in land. While disunited, these radicals forced a Constitutional Convention in 1879 and the records of the convention form the archival backbone of this chapter. The records reveal a profusion of ideas on how law could constrain the problems of inequality in land ownership, but an overweening and racialist theory of property defused the anticapitalistic strain of equitable law. What seemed a last opportunity to reorganize American settler colonization became the last gasp of Jacksonian property. In the end, the new California Constitution retrenched the liberal order and marked the transformation of American colonial policy from old to new. Naturally, the conclusion sums up the work with a consideration of Frank Norris's famous contemporary novel *The Octopus* (1901).

*To Allia, with all my love. Look we made a hat!*

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To anyone I neglected to thank please accept my apologies instead – it is not for lack of gratitude but for lack of brainpower that you have been omitted. To any future stranger reading this text of their own free will, many thanks and good luck.

## Land Acknowledgement

I would be remiss, especially given the subject matter of this work, not to provide a word on the settler colonial present of California and of my own relationship to that colonization as the author. Though I have tried to avoid polemics, I have endeavored to tell an honest account and hope this monograph makes clear the scale and brutality of California colonization, its genocidal character, and the substantive injustice done to Native Californians at the hands of American colonists (and their Spanish-Mexican predecessors) – an injustice that still needs to be reckoned by our society. I hope my dissertation moves that reckoning forward in its small way or, at least, does nothing to hinder it.

UC Berkeley sits physically on the territory of "xučyun," the ancestral, conquered, and unceded land of the Chochenyo-speaking Ohlone people. Like other Land-Grant Universities created by the Morrill Act of 1862, Berkeley has directly profited from dispossession of thousands and thousands of acres of Native land as part of its initial endowment. Several figures discussed in this text were integral to that process of redistribution. Likewise, the Huntington Library stands on the lands of the Gabrielino-Tongva and Kizh Nation peoples – to say nothing of the lands controlled by the Central Pacific Railroad that made the Huntington family immensely wealthy. That these dispossessions partly funded this work is not lost on me, nor is the imbrication of my own family history with settler colonization in this country which dates to the mid-seventeenth century.

## Introduction

"But how far has [God] given [all things] *to enjoy*? As much as any one can make use of to any Advantage of Life before it spoils; so much he may by his Labour fix a Property in: Whatever is beyond this, is more than his Share, and belongs to others. Nothing was made by God for Man to spoil or destroy." – John Locke, *Two Treatises of Government* (1689).[1]

"Cultivation is, at least, one of the greatest natural improvements ever made by human invention. It has given to created earth a tenfold value. But the landed monopoly, that began with it, has produced the greatest evil. It has dispossessed more than half the inhabitants of every nation of their natural inheritance." – Thomas Paine, *Agrarian Justice opposed to Agrarian Law, and to Agrarian Monopoly* (1797).[2]

"For we have no right to step between the man who wants to use land and land which is as yet unused, and to demand of him a price for our permission to avail himself of his Creator's bounty." – Henry George, *Our Land and Land Policy* (1871).[3]

In the early 1870s, a struggling San Francisco printer, journalist, and former sailor named Henry George gave new voice to an old concern in Anglo-American radical thought: Land Monopoly.[4] As developed in long pamphlets and daily newspaper columns for the *Daily Evening Post*, price one cent, the basic framework of George's Land Monopoly critique was straightforward and intuitive. Conditions of Land Monopoly existed where a small number of individuals, real or fictitious, owned a disproportionate share of land in a given society, some of which they did not put to productive "use," while other individuals owned no land and lacked the means to acquire it, thus making the landless dependent on the landed in economic, social, and political affairs. In a California dominated by enormous wheat ranches, the largest in the world, and expansive railroad estates, both rapidly consolidated during the Civil War. In George's California, 79% of agricultural lands were held in units of more than 1,000 acres — in Iowa and Illinois the proportions were 4% and 6% respectively.[5] "Across many of these vast estates a strong horse cannot gallop in a day," George wrote, "and one may travel for miles and miles over fertile ground where no plough has ever struck, but which is all owned, and on which no settler can come to make himself a home, unless he pay such tribute as the lord of the domain chooses to exact."[6] Criticism of these lordly wastelands, and the call to redistribute them amongst the

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[1] John Locke, *Two Treatises of Government,* 5th ed. (London: A. Bettesworth, 1728), 163.
[2] Republished in M. Beer (ed), The Pioneers of Land Reform: Thomas Spence, William Ogilvie, Thomas Paine (New York: A. A. Knopf, 1920), 186.
[3] Republished in Henry George, *Our Land and Land Policy; Speeches, Lectures, and Miscellaneous Writing* (New York: Doubleday, 1911), 98.
[4] Henry George, *Our Land and Land Policy* (San Francisco: White & Bauer, 1871). The publication of this pamphlet greatly expanded George's audience. His only notable works up to that point were "The Chinese in California," an anti-Chinese article for Horace Greeley's *New York Tribune* in May 1869 and the anti-railroad "What the Railroad will Bring Us" in *Overland Monthly* in 1868 – the answer was cheap transportation and concentrated political power.
[5] Paul W. Gates, "Public Land Disposal in California," *Land and Law in California: Essays on Land Policies* (Ames: Iowa State University Press, 1991), 250.
[6] George, *Our Land and Land Policy*, 37.

self-proclaimed "*bone fide* settlers," struck a chord. The Land Monopoly movement had begun again.

As suggested by the epigraphs above, the Anglo-American concern with landed power was much older than George, who often referenced "Mosaic Law" as the ur-text of his concerns. Indeed, as the uneducated son of a clergyman, the Bible made perfect sense as the fountainhead of George's thought. Other members of the disparate Land Monopoly movement in 1870s California linked their struggle genealogically to the agrarian Roman Gracchi brothers of the late Republican period or to "Feudal England," though the latter linkage had significant ambiguity.[7] Although George later turned the Land Monopoly problem into a sophisticated political economic plan, known as the "single tax" and based on the works of English political economist David Ricardo, his original critique of aristocratic power in California was unpretentious and based on common racial, political, and moral ideas.[8] *Our Land* was a product of working-class discourse for a general audience. The critique drew on natural law rather than common law, familiar moral notions of right and wrong rather than statutory interpretations. As fellow traveler Charles E. Pickett, wrote in an 1874 screed to the California Assembly, their movement to redistribute property followed in the footsteps of Christ: "The great and good Judean reformer (carpenter Joseph's putative son) … [was] crucified… for seeking to disturb 'vested rights.'"[9]

As it grew, the anti-monopoly movement became so potent that it tore apart the postbellum California Republican Party and set the Democrats at one another's throats. In 1873, the sitting Republican Governor Newton Booth was effectively banished to Washington D.C. as California US Senator, for his attempts to reform property law and reign in the railroads. "Legislation should prevent as far as possible those immense combinations of capital…. The law should do this in the interests of the rights of property itself; for if the tendency to centralization continues," Booth warned the conservatives of both parties, "the tenure of all property will be shaken by the volcanic outbreaks of revolutionary forces."[10]After the Panic of 1873, California plunged deeper into chaos and unrest, a period of popular fervor, particularly in San Francisco, that birthed the Workingmen's Party and forced a Constitutional Convention in 1878. Having ignored Booth's warnings, the conservative element of society and government feared the worst. A specter was haunting California, they lamented, the specter of communism.[11]

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[7] George had a romantic vision of the English past that he hoped could be recreated. As he wrote in *Our Land and Land Policy*, "The feudal system annexed duties to privileges. One portion of the land defrayed the expenses of the State; another portion, those of the army; a third, those of the Church, and also relieved the sick, the indigent, and the wayworn; while a fourth portion, the commons, was free to all the people. The great debts, the grinding taxation, are results of a departure from this system." George, *Our Land and Land Policy* (1911), 103-4.

[8] George published his magnum opus a decade later, in 1880. It became one of the most influential texts of the late 19th-century. Henry George, *Progress and Poverty: An Inquiry into the Cause of Industrial Depressions and of Increase of Want with Increase of Wealth: A Remedy* (New York: D. Appleton and Company, 1880).

[9] Charles E. Pickett, *Address of Charles E. Pickett to the California Legislature: Upon the Government Fee in the Public Domain – Intercommunication and Land Monopolies and Correlative Topics* (Sacramento: T. A. Springer, State Printer, 1874), 6.

[10] Newton Booth and Lauren E. Crane (ed). *Newton Booth, of California, His Speeches and Addresses* (New York: G. P. Putnam's Sons, 1894), 188-9.

[11] As the self-proclaimed voice of the landowners, William Green, wrote "We rather thing we shall have to get after Harry [George] sometimes on some of the 'Commune' notions, with which he is slightly tinctured." William Green, "Crowded Out," *Green's Land Paper*, Jan. 6, 1872.

But the charge of Communism never quite stuck. Other, older specters lingered. The anti-monopolists themselves frequently and loudly distanced themselves from European socialism. Charles Beerstecher, one of the leaders of the Workingmen's Party at the 1878 Convention, opened the proceedings by declaring, "we do not come here for the purpose of taking away any property that any man has honestly acquired. We do not come here for the purpose of confiscating the property of any man…I repel and repudiate the idea that I am a communist and disorganizer."[12] Likewise, Karl Marx dismissed George's ideas as the "utterly backward!" theories of a "panacea-monger."[13] The ambivalence, then, was mutual. American reformers had never given up on Fourierism and older utopian socialisms. Radical members of the Land Monopoly movement suspected (correctly) that it had become merely a vehicle for anti-Chinese racism. (Their infamous slogan "the Chinese Must Go" was an unsubtle clue.) As labor activist Frank Roney lamented, "When I claimed that poverty, misery, distress, crime…were primarily due to the evil of land monopoly my good friends balked because they felt that the Chinese alone were to be blamed for the existing conditions."[14] Hence the 1879 California Constitution was more notable for its assertion of the police power to remove the American Chinese, a power quickly stripped out by Federal Appeals Courts, than for its moderate property reforms, which included George's "single tax" panacea but left common property law otherwise untouched.[15] The volcano had rumbled but never erupted.

While a compelling narrative, the isolation of Land Monopoly to the 1870s and Georgism has prevented a full analytical understanding of the anti-aristocratic impulse in the history of California and American empire. One reason for this ambiguity emerged from George himself. For reasons further explored in Chapter Four, George claimed the single tax was perfectly compatible with the institution of private property; however, even some of his closest adherents disagreed. State Senator John M. Days said that George was clearly mistaken in saying he favored private property, "every argument he made on the question showed that he was opposed to it. From that day to the day of his death Mr. George openly opposed by word as well as argument private property in land."[16] Admitted or not, anti-monopolism cut straight to the heart of property ownership and built on centuries of heterodox property thought in the Anglophone world. By following the genealogy of the Land Monopoly critique into the mid-17$^{th}$-century, a different specter emerges, not communism but Native title and the early debates on the legality of English colonization.

Very few contemporaries understood the enmeshment of the Land Monopoly problem with Native land and colonial claims to it. George had little to say about Native Californians, effectively erasing them from the landscape and considering their "disappearance" inevitable, a

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[12] E. B. *Willis and P. K. Stockton (sten.), Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878,* Vol. 1 (Sacramento: J. D. Young, Supt. State Printing, 1880), 18-9.
[13] Letter from Marx to Friedrich Adloph Sorge, 20 June, 1881. Republished in Karl Marx, Frederick Engels, Leonard E. Mins (trans.), *Letter to Americans 1848-1895: A Selection* (New York: International Publishers, 1953), 128.
[14] Frank Roney and Ira B. Cross (ed.) *Frank Roney: Irish Rebel and California Labor Leader, An Autobiography* (Berkeley: UC Berkeley Press, 1931), 299-300.
[15] For a synthetic account of the politics of the Constitution see Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspectives on the 1879 California Constitution," 17 *Hastings Const. L. Q.* 35 (1989).
[16] Henry George, Jr., *The Life of Henry George* (New York: Doubleday and McClure Co., 1900), 233.

common intellectual impulse among white settlers.[17] One exception was George Henry Evans, founder of the 1840s National Reform Association, a group dedicated to egalitarian colonial policy or "Free Land." Amidst the New York "anti-rent" agitation of the Hudson River Valley manors of the 1840s, Evans articulated Land Monopoly as the great enemy by contrasting it to the Lockean, and natural law, concept of "use and improvement" upon which Anglos staked their theoretical claim over America.[18] Per the immensely influential writings of the 17th-century philosopher and colonial administrator John Locke, the only morally legitimate claim of the colonists was to unused wasteland.[19] Instead, Evans wrote, settlers conquered "entire tracts of the country extending from ocean to ocean, even if it became necessary to slaughter the Aborigines to effect it!" Every man, Native Peoples included, needed sufficient land to survive, and no just title existed to "a foot more than is necessary" while "another is without land."[20] A second exception to the intellectual disconnect between Land Monopoly and settler colonization was given by Commissioner of the General Land Office Joseph S. Wilson who served two terms at that post from 1860-1861 and from 1866-1871 before getting into the land jobbing business himself. In a serialized history of the public domain, written for the conservative (classically liberal) *Green's Land Paper*, Wilson argued that Native Peoples had deserved dispossession.[21] The "Indian monopoly of the continent," Wilson wrote, violated principles of "common justice," thereby justifying expropriation and redistribution to Americans who would use and improve the land. Unlike Evans, Wilson did not extend this principle of usage to white society, rather he declared the birth of a new liberal order in property law.

These passages point toward a novel and compelling reading of Anglo-American colonial property law in the 19th-century. As the following work shows, the Land Monopoly critique was essentially an extension of radical Lockean and natural law principles from Native society to settler society itself. From the opening of the New California project in 1841 to the constitutional settlement of 1879, radical American colonists pushed for a revolution in common property law. They hoped to place all ownership on the grounds of "actual possession" and common justice rather than abstract claims derived from, say, purchase or grant. As shown in Chapter One, radical settlers first used the Land Monopoly critique to justify the expropriation of Native and Mexican lands in California, and *then* they used the logic of waste and spoilage to justify the expropriation of property from white absentee landlords to themselves. The result was a heterodox and uneven vision for a redistributive property law that stood in stark contrast with legal liberalism's commitment to neutrality – law cannot "take from A and give to B." For what was settler colonization but the taking from B and giving to A? Why should redistribution cease if unproductive landowning and inequality had not? With these questions, the snake of settler society began to eat its own tail.

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[17] For an extended discussion of this ideology and its role in creating the conditions for genocide see Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873* (New Haven: Yale University Press, 2016).

[18] See, Christopher L. Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-186* (Cambridge: Cambridge University Press, 2010).

[19] On the political and legal centrality of Lockean thought to both English colonization and American radicalism see, Richard J. Ellis, "Radical Lockeanism in American Political Culture," *Western Political Quarterly* (1992), 825-849 and Barbara Arneil, *John Locke and America: The Defence of English Colonialism* (Oxford University Press, 1996).

[20] George Henry Evans, "The New Constitution No. III," *Young America,* June 28, 1845.

[21] Joseph S. Wilson, "The National Domain – Historical Outline," *Green's Land Paper,* May 1, 1872.

The troublesome question of redistribution rested upon several others: Who owned what land? How much? Why? This work follows a cadre of settler lawyers, a group I collectively call the Land Bar, in their efforts to answer these questions and to distribute the conquered lands of California to Americans. The Land Monopoly problem offers a focusing lens, a way to the heart of property ownership in 19th-century America, by making clear the stakes of such simple questions. It connected individual disputes to the commonwealth. Efforts to allocate land ownership operated at multiple levels. As described above, one level was political and ideological. This discourse on land sought to answer the questions of what colonization was for and how it could be justified. At the level of the individual land dispute, however, the questions were the same: Who owned? How much? Why?

In a long-settled society like the Atlantic coast of the United States these questions could be handled with little more than a reference to vested rights, immemorial customs, and familiar chains of title. It would be absurd, and legally unintelligible, for one individual to suddenly lay claim to all of Manhattan. In colonial California this was commonplace. In February of 1853, for example, a middling French merchant and naturalized Mexican named José Y. Limantour made the audacious claim that, unbeknownst to the roughly 35,000 residents of the burgeoning colonial entrepot of San Francisco, Limantour was the True Owner of half of it, 15,000 acres, including the most valuable land in the city, the Water Lots. What made the Limantour claim troubling to contemporaries, and therefore historically notable, was not its aberrant size but its ordinariness and apparent legitimacy. As the *Daily Alta California* wrote in response the publication of an 80-page pamphlet by James Wilson, Limantour's lawyer, "We previously believed the claim to be an outrageous fraud, after reading this pamphlet we express no opinion, but leave every one to form his own opinion upon the testimony offered, which is not at all equivocal, though it may be false. *The case appears plausible*."[22] It was so plausible that several judicial bodies validated the claim before the Federal District Court exposed the case as a fraud.[23]

What kind of legal system would entertain the redistribution of valuable, improved land – half of a city – on such a scale, from hundreds of individuals to a single man, an act which would surely unleash violence and disorder? Apparently, the 19th-century American common law of property, that superficially conservative, stolid, ancient, and anti-redistributive body of laws. The Land Bar had little choice but to respect the French merchant's "rights." Now multiply this problem by several degrees of magnitude. The *San Joaquin Republican* responded to Limantour's claim with amusement: "The land titles [in San Francisco] are woven into a Gordian knot which Blackstone himself could not untie. Ayuntamiento endowments, Colton grants, Pueblo and Government reservations, Peter Smith sales, Tax titles, *cum multis aliis,* conflict one with the other in amusing perplexity. Finally comes Limantour, threatening to swallow them all in a mouthful. Small wonder that the lawyers thrive so prodigiously at the bay."[24] Each of these classes of titles had factions of men behind them, as well as a small army of well-paid lawyers, all betting that they would be declared the True Owner or could at least extract a pound of flesh for giving up their rights. Underneath the amusement and profit, however, were anxiety, suspicion, and terror. Fencing a lot often precipitated lethal violence among competing True

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[22] Emphasis mine. "Abstract of the Limantour Pamphlet," *Daily Alta California*, December 6, 1853.
[23] Events described in depth in Chapter Two.
[24] "San Francisco Land Titles," *San Joaquin Republican*, 30 March 1853.

Owners, and nearly every square foot of California had multiple prospective True Owners willing to fight for that ownership.

Brutality amongst settlers, however, was farcical compared to the killing campaigns carried out against Native Californians. The basic questions of ownership – Who owned what? How much? Why? – applied to Native lands as well. The histories of Native dispossession and the contest of land amongst the settler population, both Anglo and Californio, have largely been treated separately. In truth, they shared jurisprudential concerns, particularly around "use and improvement," and fed into one another in recursive, unexpected, and often violent ways.[25] Racial ideology played a decisive role in distinguishing these discourses, but they nonetheless formed one "Property Crisis" of dispossession and distribution.

The narratives that follow are both historically familiar and strange. This work finds processes of commodification, demystification, and bureaucratization of property law over California colonization that will be unremarkable to 19th-century historians. The property law discourse of the 1840s was very different to that of the 1880s. But Anglo property law moved along violent and conflicting paths in the California colony, indicative of a tortured relationship between property law and settler colonization rather than an instrumental one. As one visitor to California, Horace Bushnell, observed of the 1850s: "Society was dissolved and law reduced to an instrument of suspicion."[26] In that dissolving and suspicion one can see the larger arc of American imperialism, the movement from the "First" to "Second" American empires, the turn from continental settler society to blue-water imperium in Hawaii and the Philippines. California, I argue, was the hinge upon which American empire swung.

Of course, this work builds on and revises disparate and deep historiographies, some relatively new and some over a century old. In the sections to follow I situate this dissertation in relation to (1) settler colonial studies, (2) legal and intellectual histories of property, and (3) the history of capitalism.

**American Settler Colonialisms**

Over the last two decades, historical works on 19th-century American empire have increasingly analyzed the United States as a "settler colonial" or "settler imperial" state. Per settler colonial scholar Lorenzo Veracini, this development was "late" in the histories of the United States and Canada with the "birth" of American settler colonial studies as late as 1993.[27] These, now quite numerous, histories have used the settler colonial analytical lens, its "larger ideological and institutional context," to reconfigure and revive the study of the American "West."[28] In doing so, these revisionist historians have moved settler colonial studies to the

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[25] Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873* (New Haven: Yale University Press, 2016); Julius Wilm, *Settlers as Conquerors: Free Land Policy in Antebellum America* (Stuttgart: Franz Steiner Verlag, 2018).
[26] Horace Bushnell, *California, its Characteristics and Prospects* (San Francisco: Whitton, Towne, & Co., 1858), 34.
[27] Veracini considers the first such work to be Amy Kaplan and Donald Pease, *Cultures of United States Imperialism* (Durham: Duke University Press, 1993). Lorenzo Veracini, "'Settler Colonialism': Career of a Concept," *The Journal of Imperial and Commonwealth History* 41 (2), 2013, pp. 313-333, Fn 52, 328.
[28] Aziz Rana, *The Two Faces of American Freedom* (Cambridge: Harvard University Press, 2010), 3.

center of contemporary history of American imperialism.[29] While sometimes modest in their initial claims, these works go far beyond answering the "whether or not settler empire" question (yes) and open new questions on the character of that settler society, its plurality, its change over time, and its specificity across space and place.[30] As this dissertation shows, American settler colonialism was not singular and static but multiple and changing.

While the use of the settler studies lens may date to the 1990s in America, the study of land ownership in the American West is of course quite old. Often imagined as a Populist battle of the people versus the railroads, this period has been documented, revised, and reformed by generations of historians. Highlighted by the prolific works of Paul W. Gates,[31] works in the "Progressive" and "Neoprogressive" schools of the mid-20th century, quoting historian Julius Wilm, "understood public land history in terms of an intra-white struggle among common settlers, landlords, and speculators seeking to monopolize the western lands."[32] In other words, they accepted the framework articulated by George. Histories since Gates have painted a more complex picture, especially regarding the central position of anti-Chinese politics as part of the Land Monopoly crusade.[33] Recently, historian Tamara Shelton has written a definitive account of the politics of antimonopolism in California, charting the rise and fall of "the land question" and "landed independence."[34] Shelton argues that antimonopolism cannot be reduced to agrarianism, socialism, or liberal capitalism, rather, it was a "distinctly alternative way" to organize society, which generated a "vocabulary of reform" in political life long afterwards. Shelton does a particularly excellent job of analyzing the class formation of "squatters" and "speculators" and in recasting George's thought as fundamentally racial.

This work builds on Shelton's by altering the analytical focus in two important ways, first by making common property law, legality, and the judiciary the principal subjects of analysis and second by situating the property law of Land Monopoly firmly within the settler colonial context. Taken together, these shifts allow us to connect the question of Native title and the violent, often genocidal, campaigns against California's Native peoples with inter-settler power struggles and

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[29] See, e.g., Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge: Harvard University Press, 2007); Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836* (Cambridge: Harvard University Press, 2011); Paul Frymer, *Building an American Empire: The Era of Territorial and Political Expansion* (Princeton: Princeton University Press, 2017); Julius Wilm, *Settlers as Conquerors: Free Land Policy in Antebellum America* (Stuttgart: Franz Steiner Verlag, 2018).

[30] I would argue this question/framing of settler colonial studies *alone* is no longer sufficient to justify a historical work with reference to the academic historical field, if not the "historical consciousness" of the public (whatever that might mean).

[31] Paul Wallace Gates, "The Homestead Law in an Incongruous Land System," *The American Historical Review*, Vol. 41, No. 4 (July 1936), pp. 652-681; Paul W. Gates, "The Suscol Principle, Preemption, and California Latifundia," *Pacific Historical Review*, 39.4 (1970), pp. 453-471; Paul W. Gates, *Land and Law in California: Essays on land policies* (Ames: Iowa State University Press, 1991).

[32] Julius Wilm, *Settlers as Conquerors: Free Land Policy in Antebellum America* (Stuttgart: Franz Steiner Verlag, 2018), 18.

[33] The classic work on the subject is Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: UC Press, 1971). For a more recent and global account see Mae Ngai, *The Chinese Question: The Gold Rushes and Global Politics* (New York: W. W. Norton & Co., 2021).

[34] Tamara V. Shelton, *A Squatter's Republic: Land and the Politics of Monopoly in California, 1850-1900* (Berkeley: University of California Press, 2013), 1-9.

to fit both within the discourses of property law. The effect of this is to make Shelton's guiding questions of "First, who had the right to own land? And second, how much land should they be allowed to own?" into legal questions crucial to understanding the transformations of American settler empire and landed property itself. The usefulness of the settler studies lens is principally in breaking down the analytical separation between Native dispossession by colonists and the intrasettler politics of distribution.

Histories of American empire that explicitly take the perspective of Native Peoples reveal the obvious problems with an analysis entirely within settler society. Nowhere is this more obvious than in the study of genocide. As Patrick Wolfe argues, settler colonialism has an inherent logic of elimination in its territorial acquisitions.[35] "Settler colonialism destroys to replace," Wolfe writes, and an account of that replacement without an understanding of its relation to destruction is necessarily incomplete. Anti-Native violence was central to the political and legal case for colonization. For example, after the 1847 Whitman Massacre in Oregon, historian Julius Wilm writes, the resulting Cayuse War became a political "model" for other retributive campaigns and land grabs – a model carried to California.[36] These "wars" were an important part of mass popular politics. As historian Stephen Rockwell argues, "Indian Affairs" was not an issue confined to the frontiers of Anglo society but one central to federal politics and state building.[37] Despite many contemporaneous claims of "emptiness" in the American West, these have always been fictions, justifications for emptying and taking rather than statements of fact. While Wolfe notes there is not a 1:1 relationship between settler colonization and genocide, American colonization of the Pacific Coast was genocidal throughout the period under study here. As Benjamin Madley argues, colonization in California from 1846 to 1873 meets the contemporary definition of genocide, that is actions with intent to destroy a group "as such." Crucially, this was not only "lawless" frontier violence, but a legally structured "exclusion and vulnerability" of California Indians combined with the militia-appropriations schemes of settler politics. The processes and logics of dispossession and distribution of land were intimately linked, particularly through land law and the processes of commodification.[38]

In this way, the integration of settler studies has opened up the history of the American West to a consideration of different modalities and ideologies of colonization. As historian Thomas Richards Jr. recently argues, 1836 began the "Texas Moment," in which the ethnically Anglo but independent Texas Republic formed a model and a language for "the future

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[35] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research,* 8(4), pp. 387-409, 388; See also, Michael Mann, *The Dark Side of Democracy: The Modern Tradition of Ethnic and Political Cleansing* (Cambridge, 2005).

[36] Wilm, 224.

[37] Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (New York: Cambridge University Press, 2010).

[38] George Harwood Phillips, *Bringing Them Under Subjection: California's Tejon Indian Reservation and Beyond, 1852-1864* (Lincoln: Nebraska University Press, 2004); Gray H. Whaley, *Oregon and the Collapse of Illahee: U.S. Empire and the Transformation of an Indigenous World, 1792-1859* (Chapel Hill: UNC Press, 2010); Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873* (New Haven: Yale University Press, 2016); William J. Bauer, Jr., *California Through Native Eyes: Reclaiming History* (Seattle: University of Washington Press, 2016); Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* (Boston: Houghton Mifflin Harcourt, 2016).

geopolitics of the continent."[39] The "Texas Moment" lasted from 1838 to 1846 and was a period of radical colonial possibilities rather than a singular "Manifest Destiny." The moment produced a "dizzying number" of political projects: the Republic of Upper Canada, Mormon Nauvoo, a united Indian Territory, shared sovereignty in Oregon, or an independent Pacific Republic. That these visions were not realized reflected considerable historical accident – the Presidency of expansionist Whig Zachary Taylor chief among them. American empire was not "destined," but the product of men envisioning and building many empires. Mexican California, Richards Jr. writes, was a "seigneurial" or oligarchic, republic of approximately 50 families who "in the feudalistic society of the Californios" treated Natives as serfs.[40] Some American colonists joined and hoped to perpetuate this society rather than turn it into a white yeomen republic, as their American counterparts did in Oregon.

Differences in the scale of white landowning paled in comparison to the differences between Free Soil and Slave colonization. As Walter Johnson and Kevin Waite argue, a vision of Southern empire was realized in the Old Southwest and efforts to extend plantation slavery across the continent were very real, if occasionally farcical.[41] Pro-slavery colonization in Texas might have extended into Cuba, Honduras, or the Yucatan if not for the opposition of Free Soilers who may have shared the white supremacy of their Southern counterparts but envisioned very different colonial societies north of the Missouri Compromise line. For that matter, they also envisioned a recolonization of Africa, and potentially even Central America, with freed slaves.[42] As shown in Paul Frymer's expansive synthetic account of "race and empire building," the borders of the United States may have been very different if not for the "limits of Manifest Destiny," particularly the weakness of central state authority. The Kansas crisis and the *Dred Scott* case derived from these sectional differences in colonial vision, divergences that also characterized California in the 1850s as explored in Chapters One and Two. In any case, the antebellum United States did not have a singular settler colonial ideology that drove conquest and division of lands from Florida to Oklahoma to California.

Scoping outward to consider a longer stretch of the 19th-century, across the gulf of the Civil War, one finds still more variations and transformations in American empire. As Aziz Rana shows, the "basic components of American settlerism" – economic independence, producerism, conquest, new land, and racial citizenship – all came under "profound pressure" during and after the War.[43] As a result, settler society experienced a degree of "unraveling" and "dissolving" under the double movements of capitalist development and populist reaction during the last decades of the 19th-century. To a large extent, Rana's larger analysis describes developments in California well and accords with Shelton's work on populism in the postbellum period. However, Rana's ambitious work encompasses over a century of material across the United States, a scope which produces a discontinuity at its midpoint. An analysis of settlerism in California can, in part, examine that slippage. As a matter of timing, the crisis began in the antebellum period – the

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[39] Thomas Richards, Jr., *Breakaway Americas: The Unmanifest Future of the Jacksonian United States* (Johns Hopkins University Press, 2020), 7.
[40] Ibid, 151.
[41] Walter Johnson, *River of Dark Dreams: Slavery and Empire in the Cotton Kingdom* (Cambridge: Harvard University Press, 2013); Kevin Waite, *West of Slavery: The Southern Dream of a Transcontinental Empire* (Chapel Hill: UNC Press, 2021).
[42] Frymer, *Building an American Empire* (2017),
[43] Rana, *Two Faces of American Freedom* (2010), 172-175.

settler state was already "dissolving" in California during the 1850s over control of land distribution and the foundations of colonial ownership. The rise of liberal political economy and land commodification accelerated that process during the Civil War, but dissolution had already begun. Further, one of the central arguments of this work is the centrality of the material and legal issue of property in that transformation.

These changes in California property reflect the grand change between the First "continental" and Second "overseas" forms of American empire.[44] This work suggests that the move to the Second US Empire began much earlier than the annexations of Hawaii, Puerto Rico, and the Philippines in 1898. The groundwork for a shift toward the British form of liberal imperialism began much earlier in the property crisis of California. American colonization in the Pacific coincided with the settlement of Australia and British Columbia and was part of a global movement of people, money, and law through the Pacific Rim.[45] Some historians, rather than splitting these various colonies, have lumped the American Pacific into sprawling Anglo-American histories of the "Great Divergence," in which Anglo settler colonization became a world-revolutionary force.[46] This convergence should not be surprising as the law of these settler societies shared common, if distant, provenance. That the contemporary law of Prince Edward's Island entered the conversation of the 1879 Constitutional Convention is suggestive of the depth of these commonalities.

**Transformations of Property Law**

The multiple roles and meanings of property law in Anglo settler societies have been subject to deep historiographical inquiry from New Zealand to New York, California to Prince Edward's Island. This is only natural – the heart of settler colonization is ownership and control of land (which is also necessarily a contest over life) and the most common, even hegemonic, discourse of land ownership is property. To quote Patrick Wolfe again, "Whatever settlers may say – and they generally have a lot to say – the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism's specific, irreducible element."[47] Among the most common interpretations of property law in the historiography of Anglo colonization, and of common property law generally, is the "fee simple private property" story. (A fee simple estate means that the state imposes no conditions upon the alienability of the property – it can be bought, sold, devised, and inherited in

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[44] Thomas McCormick, "From Old Empire to New: The Changing Dynamics and Tactics of American Empire," in Francisco Scarano and Alfred McCoy (eds.), *Colonial Crucible: Empire in the Making of the Modern American State* (University of Wisconsin Press, 2009), pp. 63-79.

[45] See, e.g., A. R. Buck, "The Logic of Egalitarianism: Law, Property and Society in Mid-Nineteenth Century New South Wales," *Law in Context: Socio-Legal Journal* (1987), pp. 18-34; A. R. Buck, John McLaren, and Nancy E. Wright (eds.), *Land and Freedom: Law, Property Rights and the British Diaspora* (Aldershot; Burlingame, VT: Ashgate/Dartmouth, 2001); John C. Weaver, *The Great Land Rush and the Making of the Modern World, 1650-1900* (Montreal: McGill-Queen's University Press, 2003); Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010); Mark Hickford, *Lords of the Land: Indigenous Property Rights and the Jurisprudence of Empire* (Oxford, 2012).

[46] Kenneth Pomeranz, *The Great Divergence: China, Europe, and the Making of the Modern World Economy* (Princeton University Press, 2001); James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld, 1783-1939* (Oxford University Press, 2011).

[47] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research,* 8(4), pp. 387-409, 388.

any manner the True Owner may decide. Private property, of course, refers to singular and exclusive ownership of land by individuals, not the state.) Generally, historians mobilize "fee simple private property" to signify the radical, and very real, changes from Indigenous systems of land organization based in, for example, group ownership with conditions upon the land's use and alienability, to the commodities of the market. Historian Patricia Limerick termed this transformation "the evolution of land from matter to property."[48] In this narrative, fee simple private property acted, to use James Scott's phrase, as a tool of "state simplification" meant to make a distant frontier tractable in the metropole.[49] In this effort it generally worked. To employ James Belich to summarize this line of thought: "The common law protected property rights, which encouraged trade in land, and facilitated borrowing and repayment."[50] While this instrumental story has strong explanatory power in general, it is also misleading in its simplicity and, as this work aims to show, a poor explanation of law in California colonization.

Legal histories, however, have long complicated the singular concept of commodity property. As historian Gregory Alexander writes in his intellectual history of property in America, "the idea of property as commodity is familiar to the point of banality," but it was not the only idea of what property was or could be.[51] As Alexander writes of the period which birthed the California project, antebellum property discourse created a dialectic of "liberality" and "technicality" as the nodes of reform, though these did not represent two sides of a debate so much as impulses within a broad and heterogenous discourse. Similarly, as Gregory Ablavsky puts it in his recent work on the Northwest and Southwest territories, one finds a "property morass" on the frontier of American Empire rather than a unified field. Further, this "morass" can be better understood as "property pluralism — the proliferation of multiple sources of ownership with disputed legitimacy."[52] Multiple "legalities" of property co-existed and competed with one another.[53] Though a generally good description of all law, pluralism was "particularly acute and significant" in the colonial periphery. These are not new insights from legal history. As J. Willard Hurst argued back in 1964, "fee simple" was really "shorthand for rights of privacy, politically healthy dispersion of power, constitutional limitations upon official authority."[54] Fee simple signified ideological meanings beyond and between the legal rules of the market. In this way, the fee simple private property story hides a double complexity: the plurality of the property field in general and the complexities of fee simple itself. Wherever it occurred, land commodification was a difficult and work-intensive process rather than a steady state.

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[48] Patricia Nelson Limerick, *The Legacy of Conquest: The Unbroken Past of the American West* (New York: W. W. Norton, 1987), 27.
[49] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998).
[50] James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld, 1783-1939* (Oxford University Press, 2011), 168.
[51] Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago: University of Chicago Press, 1997), 4,
[52] Gregory Ablavsky, *Federal Ground: Governing Property and Violence in the First U.S. Territories* (Oxford, 2021), 19.
[53] Christopher L. Tomlins and Bruce H. Mann (eds.), *The Many Legalities of Early America* (Chapel Hill: UNC Press, 2001).
[54] Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Madison: University of Wisconsin Press, 1984 [1964]), 126.

Consider further the concept of the "private" in the fee simple story. The messiness of the public-private distinction, its use as a technology of law, has been a concern of several generations of legal historians, particularly Progressives taking aim at the (alleged, mythical) laissez-faire past and the pretensions of classical legal thought as well as Critical Legal Historians deconstructing the "givens" of law.[55] Private property law, legal historians have concluded, was in fact quite public. It was a foundational and complex component of the 19th-century governmental structure, especially in cities.[56] The law of nuisances, in particular, conditioned property usage. To put it in the terms of the American Political Development literature, common law property in 19th-century America existed within the form of the "State of Courts and Parties."[57] As Thomas McCormick put it, 19th-century Americans "possessed only an imprecise conception of the distinction between what was public and what was private."[58] Indeed, he continues, "The government's most pervasive role was that of promoting development by distributing resources and privileges to individual and groups."[59] These resources included land, charters, franchises, privileges and immunities, public bounties, infrastructure construction, and, to some extent, the tariff schedule. Property law in California certainly had its technical elements, but it was simultaneously a matter of mass politics and goods distribution.

For both substantive and methodological reasons, this work mirrors that of legal historian Charles W. McCurdy, whose writing on the anti-rent era in New York operates "at the borderland of American legal and political history."[60] As explored in depth in Chapter One, the project of American California emerged from the anti-rent movement, which directly connects McCurdy's history to Pacific colonization. *Anti-Rent Era* also provides a model for thinking about lawyers, in the California case *land* lawyers, as "integrators" of party ideology and legal theory within the state of courts and parties.[61] Lawyers also served as integrators, and bureaucratizers, on the systemic level. As outlined above, the line between official officeholding and private practice was thin and porous. During most of the period under discussion, the lawyers involved in the nascent imperial land bureaucracy of the United States – an ever growing body of surveyors, registers and receivers, Indian Agents, commissioners, and other state agents – operated in the

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[55] See, e.g., Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 1998 [1975]); Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *The Journal of American History* 61(4) (1975), pp. 970-1005; Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977).
[56] See, Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Cornell University Press, 1989); Robin L. Einhorn, *Property Rules: Political Economy in Chicago, 1833-1872* (University of Chicago Press, 1991); William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: UNC Press, 1996).
[57] A concept famously introduced in, but not elaborated by, Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982).
[58] Richard L. McCormick, *The Party Period and Public Policy: American Politics from the Age of Jackson to the Progressive Era* (New York: Oxford University Press, 1986), 209.
[59] Ibid, 204.
[60] Charles W. McCurdy, *Anti-Rent Era in New York Law and Politics, 1839-1865* (UNC Press, 2001), 16. Also, Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America," *Law & Society Review* 10(2) (1976), pp. 235-266;
[61] McCurdy, *Anti-Rent Era*, 17-8.

"fee for service" and legislative eras of American administrative history.[62] Through the Land Bar, jurisprudence, party doctrine, and the demands of administration were reconciled with one another, often uneasily. As a matter of jurisprudence, the line between federal, public land law and state, private property law was also porous, to a much higher degree than most historians of the public domain credit.

This work also builds on and extends intellectual histories of the common law of property. In particular, it shares common concerns with Morton J. Horwitz's classic account of transformation and the changing distribution of power in law to 1860. As Horwitz writes, "That the [social struggle] was turned into legal channels (and thus rendered somewhat mysterious) should not obscure the fact that it took place and that it enabled emergent entrepreneurial and commercial groups to win a disproportionate share of wealth and power in American society."[63] California too saw its share of social struggle and redistribution of power to a bourgeoise alliance of lawyers and businessmen as well as the "instrumentalization" of legal thought – explored in detail in Chapter Three. However, this work must depart from Horowitz at several points. Most obviously Horowitz's account of "American Law" might be better rendered as "Atlantic Law." Developments in the Pacific colonies were not completely autonomous, but they followed different paths because of the underlying disputes at hand. For example, in Massachusetts disputes over the distribution of returns in the milling industry made eminent sense among upstream and downstream owners who asserted their rights and demanded recompense.[64] In California, the ownership of the mill itself was the question. The initial distribution of rights was in contention. Even the many technicalities and anachronisms of common property law could not mystify the basic question of who owned, even if courts wrapped their decisions in abstract legal reasoning. Either person A or person B was the True Owner – courts had to pick. The next day, the newspapers of California would carry a headline like "Person A Declared Owner of Rancho." Like in Horowitz's account, some California courts used formalism to achieve certain desired ends, but unlike on the Atlantic coast this was not lost on the general public and often worked in favor of "the People" over the "interests" in the antebellum period.[65]

Likewise, this work follows the more recent work of historian Kunal Parker on common law "before modernism."[66] Much of Land Monopoly thought before *Progress and Poverty* was distinctly "pre-modern," in the sense used by Parker. It operated according to a capacious naturalism that denied the power of human law.[67] This "antinomian" (anti-legal) impulse, to use Christopher Tomlins's phrase, was traceable to Thomas Paine and other 18th-century radicals and

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[62] Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (New Haven: Yale University Press, 2012); Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940* (New Haven: Yale University Press, 2013).
[63] Morton J. Horowitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), xvi.
[64] Conflicts between miners and agriculturalists did take the Horowitzian form, largely as a result of hydraulic mining and the downstream slag it produced. See, McCurdy, "Stephen J. Field and Public Land Law Development in California," (1976). Likewise, riparian cases exhibited parallels between East and West. See, David Igler, *Industrial Cowboys: Miller & Lux and the Transformation of the Far West, 1850-1920* (Berkeley: UC Press, 2001).
[65] Discussed in depth in Chapter Two.
[66] Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism* (Cambridge: Cambridge University Press, 2011).
[67] Parker, *Common Law, History, and Democracy in America, 1790-1900,* 14-5.

clearly dominated antebellum California, as explored in Chapter One.[68] Common property law in California also operated along different "times" – the "nonmodern times of the common law and the varying times of nineteenth-century history."[69] Providential, racial, and stadial histories circulated through and around common law disputes and developments in a jumble of reasoning that tied fee simple to ancient Teutonic customs. One of the most contentious historical "moments" was the "end" of the state of nature and the beginning of positive law, a fundamental component of colonizing for Anglo settlers. The multiple times of property disputes confounded this mercurial discourse. Property could be bought and sold in days, but court cases took years, often decades, and involved intense scrutiny of the "chain of title" from one owner to another. Even "fee simple" followed complex histories of evidence, memory, and law.

With that said, common property law in California *did* undergo a process of rapid demystification, the stripping of substantive meaning from property law, during the 1860s and '70s.[70] As legal historian Stuart Banner recently asked, why did American lawyers stop using natural law?[71] In part, the answer was simple, over the 19th-century lawyers won fewer cases when they used natural arguments instead of rational or formal appeals. With respect to property, Banner argues that the birth of two natural laws of property, one liberal and one radical, left property law in a state of intellectual "indeterminacy."[72] This part of Banner's analysis describes California legal development well, but his work does fully explain its transformation.

To understand the "decline" of natural law thought, this dissertation employs legal philosopher Robert Cover's framework of legal meaning from his famous essay "Nomos and Narrative."[73] Property law constituted an essential element of the American colonial "nomos," the normative world. This narrative meaning cannot be removed from an abstracted "law," nor does this meaning-making require a state.[74] "Jurisgenesis," Cover's term for the creation of legal meaning, occurs at the level of culture. Through a pluralist lens, one can imagine how jurisgenesis creates multiple meanings, perhaps compatible and perhaps not. To take an obvious example from the previous section, human property gave divergent meanings to Free and Slave colonization. But here, Cover writes, violence enters the picture: "the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. And from this fact we may come to recognize a special role for courts. Courts, at least the courts of the state, are characteristically 'jurispathic,' [law destroying]."[75] Problems of legal interpretation, Cover continues, should be understood *really* as problems of "*too much* law" rather than "*unclear* law."[76] This maintains the centrality of violence to the operation of the legal order, some legal meanings will be suppressed

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[68] Christopher Tomlins, "History in the American Juridical Field: Narrative, Justification, and Explanation," 16 *Yale J.L. & Human* (2004), 323-8.
[69] Parker, *Common Law, History, and Democracy in America, 1790-1900*, 21.
[70] For a general theory of disenchantment in law, as well as many particular exceptions, declensions, and caveats, see Max Weber and S. N. Eisenstadt (ed.), *On Charisma and institution Building* (Chicago: University of Chicago Press, 1968), 81-128.
[71] Stuart Banner, *The Decline of Natural Law: How American Lawyers Once Used Natural Law and Why They Stopped* (Oxford University Press, 2021).
[72] Ibid, 144-5.
[73] Robert Cover, "Nomos and Narrative," 97 *Harvard Law Review* (1983-4), 4-68.
[74] Ibid, 11.
[75] Ibid, 40.
[76] Ibid, 42.

or eliminated. Commodification of property, as will be explored in Chapter Three, was a jurispathic and violent process. In this way, one can see the resolution of a property dispute as a jurispathic choice between multiple meanings rather than a simple matter of making clear which party is True Owner.

Before concluding this section and scoping outward, it is useful to stay in the frame of legal philosophy to underline some deep features of Anglo property law that structured and troubled California colonization. As legal philosopher Larissa Katz writes, the concept of singular property ownership in common law has been a troubled question of jurisprudence for the last several centuries. For a field of law so archaic, immemorial, and stolid as property this seems a startling problem. There *remains* (to this moment) legal-philosophical disagreement as to whether something called "ownership," distinct from possession, exists in Anglo-American common law *at all*.[77] The problem begins in a basic legal framework called "relativity of title," which means that claims of ownership to a thing (title) are measured only against other claims of ownership to that thing. In such a system the owner is always provisional rather than final.[78] Some speculative and enterprising person or lost heir might, at any time, demand the law recognize them as True Owner in the stead of the current True Owner. (The True Owner is dead, long live the True Owner.) Katz' sharp solution is to define ownership as an office rather than a personage, an office in which transference is governed by the *nemo dat* rule – one cannot give what one does not have. Solving that particular riddle is far beyond the scope of this dissertation, but one can see its influence everywhere in California history, in the struggles between two characters: True Owners and Actual Possessors. In California, relativity of title and the *nemo dat* rule combined to create a radically unstable legal environment.

In short, fee simple private property was anything but simple on the American periphery. It was one idealized legal form among many competing meanings, and before the Civil War it was certainly not the hegemonic jurisprudence posited by some historians. The entire Land Monopoly movement was arrayed against it, as was the radical Lockean tradition on which the anti-monopolists relied. The commodification of land, the removal of state influence over property, and the ascendance of the market were unlikely legal events, or at least not *necessary* developments. And yet multiple commodifications occurred in California during and after the Civil War, events which corresponded to a redistribution of material wealth and power within settler society.

**Moral and Political Economies of Land**

With the rebirth of economic history under the heading of history of capitalism, as well as the articulation of a law and political economy field, questions of law's many relationships to capitalist development and ideology – of political economic thought and organization – have risen to the fore of historiographical conversation.[79] These questions, of course, never really went

[77] Larissa Katz, "The Concept of Ownership and the Relativity of Title," *Jurisprudence* 2(1) (2011), 191-203.
[78] Katz, 196.
[79] On the relationship between economic history and the "new" histories of capitalism see, Eric Hilt, "Economic History, Historical Analysis, and the "New History of Capitalism," *The Journal Of Economic History,* Vo. 77, No. 2 (June 2017), pp. 511-536.

away, but the line between, say, Hurst and contemporary legal historical concerns with capitalism has not been straight, with a rather notable gap between 1970 and 2003.[80] As legal historian Ron Harris argues, this gap can be attributed to various degrees of mutual unintelligibility, the ascendance of the law and economics movement, and the "neo-classical" methodologies of economic historians. This work attempts to bridge these gaps through its intensive examination of property law and 19th-century political economic thought. To some extent, it addresses classic law and economics concerns like the security of property in the construction of a functioning market and the settling of disputes.[81] However, this work has a greater interest in historical questions of wealth distribution and redistribution than those of efficiency or price theory – though the development of neoclassical political economy in 19th-century California *is* a topic of study.[82] In any case, this work aims to contribute to both the history of capitalism and law and political economy in its analysis of empire, property, and capital in California.

In this analysis, the work builds from a general Marxist legal historical framework.[83] The relationship of this work to Marxist legal history operates at several levels. First, as a contemporary, Marx himself is a minor character in the narrative. As Marx wrote in a letter of November 1880: "California is very important for me because nowhere else has the upheaval most shamelessly caused by capitalist centralization taken place with such speed."[84] California development was a case study for Marx's theories of historical materialism. As indicated briefly above, George and other California radicals oriented themselves and their thought in relation to Marx and other European socialists. Pickett, for example, came to a class-based understanding of politics and society by the late 1870s with pamphlets speaking out against the "*bourgeoisie* oligarchy" and their efforts to stop the new California Constitution.[85] Likewise, the conservative imagination in California was haunted by the Paris Commune and the prospect of a redistributive working-class political movement in California.[86] Evolutionary or stadial history, of which Marx was but one practitioner, of the change from a "Feudal" to a "Liberal" property order was influential in how American lawyers thought through developments in law. Utopian socialism undoubtedly had a greater influence on American settlerism than Marx's scientific variety, but they nonetheless existed in the same increasingly global discourse on capital and society.

On another level, that of the historiographical or secondary source, Marx's writings and theories are useful for analyzing developments in California property history. As Marx wrote on

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[80] See the excellent review essay on this subject: Ron Harris, "The Encounters of Economic History and Legal History," *Law and History Review* 21 (2003), pp. 297-346.

[81] Take, for example, the very famous work of Coase which operates on the simplifying assumption that property rights are clearly assigned. Ronald H. Coase, "The Problem of Social Cost," *The Journal of Law & Economics,* vol. 3 (1960), pp. 1-45. On dispute settlement and law (or the lack of law) see Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1994).

[82] On the question of distribution and its treatment in the economic historiography see the much-celebrated Thomas Piketty, *Capital in the Twenty-First Century* (Cambridge: Belknap Press, 2013).

[83] For an excellent (and brief) overview see Alan Hunt, "Marxist Theory of Law," in Dennis Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (New York: Blackwell Publishing, 2010), 350-360.

[84] Karl Marx, Frederick Engels, Leonard E. Mins (trans.), *Letter to Americans 1848-1895: A Selection* (New York: International Publishers, 1953),126.

[85] Charles E. Pickett, *Philosopher Pickett's Anti-Plundercrat Pamphlet. Dedicated to the Partially Disenthralled People of California* (San Francisco, June 1879), 4.

[86] See, e.g., "Governor Haight and the Land Laws," *Green's Land Paper,* Jan. 6, 1872: "This language [in Gov. Haight's Speech] might have been tolerable in the mouth of a Paris Commune."

primitive accumulation, the "original sin" of property acquisition, the tendency of economists to wave aside history in favor of a mythical (and given) original allocation of land was a notable feature of liberal thought – discussed in depth in Chapter Three. "Thus it came to pass that the former sort accumulated wealth, and the latter sort had at last nothing to sell except their own skins," Marx writes. "In actual history it is notorious that conquest, enslavement, robbery, murder, briefly force, play the great part."[87] Force played a very great part in California colonization, but rarely appeared in the jurisprudence of property cases. (Thus it came to pass that the Native Peoples of California were dispossessed.) The process of enclosure in England, and its discontents, "recurred" to some degree in California with the consolidation of a landed, capitalist rancher class and the creation of a landless population of seasonal laborers, the processes critiqued by anti-monopolists.[88]

Marx's analysis of the colonial theory of E. G. Wakefield's "systematic colonization" and its relation to capitalist development is also worth touching upon briefly here. As I show in the first two chapters of this dissertation, the initial colonization of California was to a notable extent anti-capitalist. As Marx writes, "The essence of a free colony, on the contrary, consists in this – that the bulk of the soil is still public property, and every settler on it therefore can turn part of it into his private property and individual means of production, without hindering the later settlers in the same operation. This is the secret both of the prosperity of the colonies and of their inveterate vice – opposition to the establishment of capital."[89] Contrast this to the capitalistic American colonization policy after the Civil War and the overall scheme, provided by Marx, has strong explanatory value – or at least provides an explanation of the transition from the First to Second US Empires – it was driven by capital and defined by its changed relationship to capital.[90]

Other classical Marxist concerns run through the work, particularly on class formation and the role of the legal profession in that formation. Histories of the 1856 Vigilance Committee uprising, covered in detail in Chapter Two, have long characterized those events as a "bourgeois coup" rather than a civic-minded, emergency police action.[91] Indeed, as discussed above, historians of California have long documented the formation of "squatters" and "speculators" into interests and classes of people.[92] Following Sven Beckert, this dissertation examines the role

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[87] Karl Marx, *Capital: A Critique of Political Economy*, 3rd Ed. (London: S. Sonnenschein, 1889), 737.
[88] Marx, *Capital*, 736-800. California had its own population of agrarian discontents who behaved similarly to their 18th-century English counterparts. See, E. P. Thompson. *Whigs and Hunters: The Origin of the Black Act* (London: Breviary Stuff Publications, 2013).
[89] Marx, *Capital*, 793-4.
[90] "The American Civil War brought in its train a colossal national debt, and, with it, pressure of taxes, the rise of the vilest financial aristocracy, the squandering of a huge part of the public land on speculative companies for the exploitation of railways, mines, &c., in brief, the most rapid centralisation of capital." Ibid, 799.
[91] See, e.g., David A. Johnson, "Vigilance and the Law: The Moral Authority of Popular Justice in the Far West," *American Quarterly* (1981); Don Warner, "Anti-Corruption Crusade or Businessman's Revolution - An Inquiry into the 1856 Vigilance Committee," *California Legal History* 6 (2011), pp. 403-442; Philip Ethington, *The Public City: The Political Construction of Urban Life in San Francisco, 1850-1900* (UC Press, 2001); Nancy J. Taniguchi, *Dirty Deeds: Land, Violence, and the 1856 San Francisco Vigilance Committee* (Norman: University of Oklahoma Press, 2016).
[92] Shelton, *A Squatter's Republic* (2013).

of the legal profession in processes of bourgeois class formation and property acquisition.[93] It follows that property law sometimes played an ideological role, especially as it diverged from the guiding antebellum concept of equity.[94]

The Civil War accelerated the transformation of California colonization and its legal basis. The choices of the Union Government during the War, regarding land and corporations, created what historian Richard White calls "hothouse capitalism," the intensification of private, financial systems supported by the "liberality" of the Republican Party-State.[95] As Richard Bensel argues, the Union greatly expanded central state reach into the financial system, though state capacity remained restrained in other areas. Relying on securitized debt to finance the war, the Union Government created a clientele of finance capitalists who would not simply recede into the ether at war's end.[96] The transformation and extension of the corporate form, especially in railroads, further revolutionized property and the public land system.[97] Matching, in many ways, the "liberality" of the Mexican grants in Alta California, railroad corporations received tremendous public subsidies in the form of abstract swaths of "land," often with loosely enforced conditions. In turn, these railroad lands were securitized through mortgages, creating new, secondary commodities. School building and swampland "reclamation" were achieved through the same means of massive state subsidy and the creation of a land market. As Jonathan Levy writes, the western mortgage market proliferated in the postbellum period, leading to a tremendous expansion of food production – "capital wanted wheat."[98] Commodified and securitized land underwrote the development of wheat monoculture in California.[99]

There is some historiographical debate on whether the American frontier was "born capitalist" or if it shifted from a "moral economy" to a "market economy," a question posed by Wilma Dunaway in 1996. [100] With respect to American California this dissertation strongly supports the latter interpretation. Property law and land ownership, and the economic activities

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[93] Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850–1896* (Cambridge: Cambridge University Press, 2001).
[94] Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (Cambridge University Press, 1993); Matthew Crow, "Thomas Jefferson and the Uses of Equity," 33 *Law & History Review*. 151 (2015).
[95] Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: Norton, 2011), 17.
[96] Richard Franklin Bensel, *Yankee Leviathan: The Origins of Central State Authority in America, 1859-1877* (New York: Cambridge University Press, 1990), 10-11, passim. See also, Richard Bensel, *The Political Economy of American Industrialization, 1877-1900* (Cambridge: Cambridge University Press, 2000) on the role of the Republican party-state in mediating the "overlapping set of government policies that permitted both aggressive popular claims on wealth in electoral politics and high levels of capital accumulation and investment in industry," xviii.
[97] Sean M. Kammer, "Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850-1903," *Law & History Review* 35 (2017), pp. 391-432.
[98] Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge: Harvard University Press, 2012), 160; See also, C. Knick Harley, "Western Settlement and the Price of Wheat, 1872-1913," *The Journal of Economic History*, Vol. 38, No. 4 (Dec., 1978), pp. 865-878; Scott Reynolds Nelson, "A Storm of Cheap Goods: New American Commodities and the Panic of 1873," *The Journal of the Gilded Age and Progressive Era* 10:4 (2011), pp. 447-453.
[99] Rodman W. Paul, "The Wheat Trade Between California and the United Kingdom," *The Mississippi Valley Historical Review*, Vol. 45, No. 3 (Dec. 1958), pp. 391-412; Alan L. Olmstead and Paul Rhode, "An Overview of California Agricultural Mechanization, 1870-1930," *Agricultural History* 62(3) (1988), pp. 86-112.
[100] Wilma A. Dunaway, *The First American Frontier: Transition to Capitalism in Southern Appalachia, 1700-1860* (Chapel Hill: UNC Press, 1996), 16.

they supported, remained deeply moral ideas in the American colony of California. To use E. P. Thompson's concept, there was a "moral economy" at work in addition to a "political economy."[101] Moral economy, or the "popular consensus as to what were legitimate and illegitimate practices" in economic life, in California was deeply concerned with the honest acquisition of land, especially from the State, and the appropriate amount of land one ought to own.[102] Legal historian William Novak has argued for the use of "public economy," or laws constituting the well-regulated market, rather than moral economy, but the analytical result is similar.[103] Offenses against public/moral economy included fraud and engrossing monopolies as well as usury, illegal weights and measures, operating without a license, and "offensive trades."[104] Egalitarianism of property ownership among white settlers was a cornerstone of this moral economy.

**Road Map**

Temporally, the ending of this work is easier to define than its beginning. It ends in 1880 for two related reasons. First, the 1879 Constitutional Convention was as decisive an end to the property law question as could reasonably be imagined. It defused the radicalism of the insurgent Workingmen, stopped the introduction of direct property limitations, and retrenched the common law of property upon the anti-redistributive principle. Second, within California history, 1880 marks a clear division between the first explosive American colonization of Northern California, centered on San Francisco, and the second re-colonization of Southern California, centered on Los Angeles, which heretofore was sleepy colonial town.[105] A longer work could profitably accommodate both these phases of California settlement, but they are separate enough phenomena to make for an ending to this work.

The question of where the work begins is more difficult to answer. In part, this work is a genealogical study of land monopoly and Anglo settlerism that draws the account back into the late 17th-century. Furthermore, because the subject of this work is the law of landed property, the history must follow the peculiar internal temporal structure of that law (the chain of title), which was often out of joint with both contemporary "times" and the scope of a focused historical account. But the longer temporalities of thought mattered and are therefore reflected in the text, especially the intellectual history portions.

These insights do not make for a good beginning, however, and more proximate dates establish the beginning of the account. While several dates in legal-political time make solid claims on the beginning of the American colonization in California – the Bear Flag Revolt and the Mexican-American War of 1846, for example – events truly begin in 1836, the horrible year of the Mexican Empire. That year saw the end of the First Mexican Republic, the centralist revision of the 1824 Mexican Constitution by the Siete Leyes of President Antonio López de

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[101] E. P. Thompson, "The Moral Economy of the English Crowd in the Eighteenth Century," *Past & Present* 50 (1971), pp. 76-136, 79. For a synthetic overview see Tim Rogan, *The Moral Economists: R. H. Tawney, Karl Polanyi, E.P. Thompson and The Critique of Capitalism* (Princeton: Princeton University Press, 2017).
[102] Thompson, "The Moral Economy," 79.
[103] William J. Novak, *The People's Welfare: Law & Regulation in Nineteenth-Century America* (Chapel Hill: UNC Press, 1996), 83-88.
[104] Ibid., 87.
[105] Belich, *Replenishing the Earth* (2011), 402.

Santa Anna, and the disastrous Texas War of Independence. Like in Texas, Northern Californios under the leadership of Juan Alvarado declared independence, only backing down when Alvarado was appointed Governor of Alta California by the central authorities in Mexico City. Alvarado's ascension brought with it a vast increase in the scale of the colonial policy of Mission Secularization, the conversion of church property to private individuals, and the corresponding granting of large "wilderness" tracts to private individuals, like Limantour. These "Mexican Grants," as they were collectively termed by their American successors, covered Alta California in property claims and thereby produced trouble in the colony with litigation extending the remainder of the century and occasionally beyond. These massive land transfers from Missions and Natives to Californios reflected both the ideological liberalism of the Californios and the seignorial structure of their rule. In this way, 1836 saw the foundering of the Mexican settler colonial project and the foundation of the state Americans would inherit a decade later.[106]

The other necessary event for understanding the birth of American colonization in California, had little to do with the Texas Republic or the Mexican Empire at all, but rather originated in the dual "oldlands," to use Belich's phrase, of the Angloworld, the Atlantic United States and Great Britain. That event was the Panic of 1837.[107] The notably anti-capitalist and anti-legal aspects of early American visions of California, explored in Chapter One, emerged in the shadow of this economic, and as Jessica Lepler argues psychic, calamity. In this sense, the settler colonization efforts of the 1838-46 period were not so much seeking to extend or even reproduce the United States, as such, but to escape its orbit and build a variety of settler "utopias" from slaveholding Texas to free Oregon.

Situating this work within the temporalities of Native Californians is a harder task, though historian Benjamin Madley's "catastrophe" makes a start. Relative to c. 12,000 years of Native life in Pacific North America, with a dense population of c. 300,000 Native Peoples within the borders of present-day California, the American conquest occurred with unfathomable speed. Settler statistics, however imprecise, are sufficient to sketch the scope and scale of the societal destruction, and revolution, that occurred. In 1846, the year of American conquest, the total population of Alta California stood at roughly 160,000 people – 150,000 Native Californians and 14,000 Europeans, the majority of this latter group Californios who were confined largely to the coast.[108] Native peoples outnumbered Europeans by 15:1, a ratio that was substantially higher in the early 19th-century before a series of smallpox epidemics in Northern California devastated local Native populations. In 1846, San Francisco had a mere 800 white inhabitants.

Then the colony exploded. By 1852, the settler population neared 250,000, San Francisco neared 35,000, an increase in population of 1,800 percent. Over the same period, c. 70,000 Native Californians died under American rule from diseases, settler killing campaigns, and the destruction of the means of life, namely land, leaving a population of c. 80,000 – a 50 percent decline. By 1860, the Native population had fallen to c. 30,000. A deadlier conquest could

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[106] See Timo H. Schaefer, *Liberalism as Utopia: The Rise and Fall of Legal Rule in Post-Colonial Mexico, 1820-1900* (New York, Cambridge University Press, 2017).
[107] See, Jessica M. Lepler, *The Many Panics of 1837: People, Politics, and the Creation of a Transatlantic Financial Crisis* (New York: Cambridge University Press, 2013).
[108] Madley, 3, 50

scarcely be imagined. That thousands of Native Californians survived this apocalypse is miraculous, not least because of the continued exterminationist policies of Anglo settlers into the 1870s. Unlike other regions of North America colonized by Europeans, there was no "middle ground" between the Indigenous and the conquerors.[109] The betrayal of treaty promises, repeated removals to barren reservations, and widespread unfree labor form the sorry history of law under American rule during the period under study. Indigenous Californians resisted both in organized war bands and in raiding settler sites for livestock; however, the resultant "warfare" and "chastisements" were asymmetric and exterminationist. Anglo law offered very little to the Indigenous population.

With those various times and events in mind, the work is organized into four chapters, each covering roughly a decade of material. In Chapter One, "Promised Land, 1841-1850," I use an archive of settler guidebooks, geographies, and travel accounts along with prominent reformist writings, like those of George Evans, to analyze the natural legal logic of property. This legality combined themes of anti-legalism, radical Lockeanism, and Christian theology. Across three great questions of American colonization policy – the origin of land titles, policy toward Native Peoples, and the Free versus Slave colonization debate – Pacific settlers employed legal naturalism to craft a radical and genocidal form of Free Labor "settlement." In Chapter Two, "California Redeemed, 1851-1861," I analyze the changing moral, social, and political meanings of equitable property. Through the personal and professional papers of elite lawyers, newspapers, and court decisions, I argue uncertain ownership and the maldistribution of property precipitated a legal crisis, which then became a general political and social crisis. The equitable legal concepts of "fraud" and "redemption" enabled elite land lawyers, the judiciary, and the emergent bourgeoisie of California to negotiate and quiet these deadly property conflicts. However, this equitable legality took on a life of its own and was soon turned against the elite lawyers and the forces of commodification in property law.

The second half of the work examines the partial disintegration of equity and the rise of anti-redistributive and "neutral" liberal law. In Chapter Three, "A Very Low Price, 1861-1871," I analyze the material, legal, and ideological commodification of land and the articulation of a new model of American settler colonization which I term "cheap colonization."[110] In this form, property law became a medium of commodification rather than an impediment to it. I study a triple commodification, of land itself, of mortgage securities, and of wheat, which marked a dramatic contrast with the moralistic and natural legality which preceded it. Land lawyers, especially those involved in global markets, increasingly understood land distribution as a matter of markets rather than justice. These two visions of law created a bloody conflict on Suscol Rancho and it became clear to lawyers that equitable property threatened society. To put it crudely, it was one thing to forcibly disposes Native Peoples and quite another to forcibly disposes white landlords. In the final substantive chapter, "To Serve God or Mammon, 1871-

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[109] Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815,* 2nd edition (Cambridge University Press, 2010).

[110] Similar to what Thomas McCormick calls "imperial pragmatism." McCormick, "From Old Empire to New: The Changing Dynamics and Tactics of American Empire," in Francisco Scarano and Alfred McCoy (eds.), *Colonial Crucible: Empire in the Making of the Modern American State* (University of Wisconsin Press, 2009), 70. The language of cheapness owes its theoretical backing to Jason Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (London: Verso, 2015).

1880," I analyze the rearguard actions of the equitable regime through Georgist thought, the Workingmen's Party of California, and other countermovements to liberalism's free market in land. These disparate radicals forced a Constitutional Convention in 1879. The records of the convention form the archival backbone of this chapter. The records reveal a profusion of ideas on how property law could constrain the problems of inequality in land ownership; but, I argue, an overweening and racialist theory of property defused the anticapitalistic strain of property law. What seemed an opportunity to reorganize American settler colonization became the last gasp of the Jacksonian common law of property and the settler colonial regime it supported.

## Chapter 1: Guides to the Promised Land, 1841-1851

"Here, on the very threshold of the country, was California in a nutshell, Nature doing every thing and man doing nothing —a text on which our whole sojourn proved to be little but a running commentary." – Sir George Simpson, *Narrative of a Journey Round the World* (1847).[1]

"In those days there was no king in Israel, but every man did that which was right in his own eyes." – J. Q. Thornton, *Oregon and California in 1848*, Vol 2 (1849).[2]

Lansford W. Hastings' account of Pacific colonization began with the invocation of law, or rather its absence. In the summer of 1842, Hastings and a company of armed settlers from Missouri passed beyond the pale of American law and reached a peculiar place beyond the Mississippi River: the "state of nature."[3] In this state without order, law, or restraint, Hastings wrote, "Some were sad, while others were merry; and while the brave doubted, the timid trembled!" When one of the company proposed stealing "an Indian horse" and set off with a rope with that purpose – returning without success – the company halted to enact a code of laws for governing their company and to structure a trial for the would-be horse thief. Hastings, a lawyer, chided the company, "In view of this alarming state of facts, it was urged by over-legal and over-righteous, that the offending party should be immediately put upon his trial, for this enormous and wanton outrage upon Indian rights." Hastings defended the man before the "bar of imaginary justice," noting the crime in question "was neither *malum in se*, nor *malum prohibitum*." Evidently convinced by Hastings, the company, sitting as a jury, found the defendant not guilty. Following the facsimile of a trial, a committee for drafting a code of laws got to work; however, the committee soon reported that "no code of laws was requisite, other than the moral code, enacted by the Creator of the universe, and which is found recorded in the breast of every man." The company voted favorably on this report against a written code of "human laws" and in favor of natural law alone. The result was an "extremely simple, yet purely democratic" government without positive law – a form of rule that Hastings, along with many other visionaries and sojourners, envisioned would organize the Pacific coast colonies under American rule.

The writing and publication of settler guidebooks marked the beginning of American colonization in California in 1841. The first of these works, penned by William Kennedy, a British poet and lawyer, was published in London and was intended to promote Anglo-American colonization in Texas.[4] California, another peripheral Mexican territory, seemed a logical extension of what historian Thomas Richards, Jr. calls "the Texas moment," a period from 1838 to 1846 in which the settlement of Texas "became a language through which to understand the future geopolitics of the continent."[5] While Kennedy's interlocutors in the London presses were not persuaded, one Richard Hartnel advised emigrants to settle in British colonies instead,

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[1] Sir George Simpson, *Narrative of a Journey Round the World, During the Years 1841 and 1842* (London: H. Colburn, 1847), 274

[2] Jessy Quinn Thornton, *Oregon and California in 1848: With an Appendix, Including Recent and Authentic Information on the Subject of the Gold Mines of California, and Other Valuable Matter of Interest to the Emigrant, Etc*. Vol. 2 (New York: Harper & Brothers, 1849), 42.

[3] Lansford W. Hastings, *The Emigrants' Guide, to Oregon and California* (George Conclin: Cincinnati, 1845), 6-7.

[4] William Kennedy, *Texas: The Rise, Progress, and Prospects of the Republic of Texas* (London: R. Hastings, 1841).

[5] Thomas Richards, Jr., *Breakaway Americas: The Unmanifest Future of the Jacksonian United States* (Johns Hopkins University Press, 2020), 7.

Kennedy's speculations of a "liberal" Texan Empire extending to the Pacific nonetheless marked the opening of a discourse on American colonization of California.[6]

Kennedy, Hastings, and their fellow projectors joined in a revival of colonial thought in the Anglo-American world of letters. Historian James Belich describes the period from 1815-1830 as a "tidal shift" in Anglo-American colonial ideology, associated in Britain with the 1830s works of Edward Gibbon Wakefield and others.[7] For example, from 1810-14 the British Library, Belich writes, catalogued no books with "emigration" "emigrants" or "settlers" in the title, these words were generally considered interchangeable with "desperate pauper." Five years later, however, the catalogue had 20 such books, the beginning of a publishing explosion and a revolution in settler colonial ideology across the "Angloworld." As a genre, settler guides combined practical advice, geographic and climatic description, personal narrative, history, racial theory, and legal and political commentary into unified discourses on colonization. By the 1830s, this was a centuries-old form of writing, in English dating to John Smith's *A Description of New England* (1616) and earlier across continental Europe.[8] While guidebooks often appeared as mere geographies or travel accounts, they amalgamated "geographic knowledge" with questions of law and sovereignty. As legal historian Lauren Benton writes, "Law formed an important epistemological framework for the production and dissemination of geographic knowledge, while geographic descriptions encoded ideas about law and sovereignty."[9]

The many guidebooks to the American Pacific published during the 1830s and 1840s, peaking during the Gold Rush, conjured plural legalities, "the legal conditions for social life," for organizing new settlements.[10] Guidebooks presented sprawling and heterodox answers to the *why* of settler colonization, what was it for and what did it mean. Property law provided the terms for answering these questions. As this chapters shows, guidebooks emerged from a rich juridical field in the height of Jacksonian Democracy, a field riven with fundamental property problems for colonists to face: the extension of limitation of human property and Southern plantation slavery; the legal status of Native Peoples and their lands; and the distribution and governance of property within Anglo settler society. In answering these jurisprudential questions, however, the rule of law itself was challenged and destabilized, as settlers took up the American tradition of anti-legalism, or "antinomian democracy" to use Christopher Tomlins's phrase, traceable to Thomas Paine and other 18th-century radicals.[11] In addition to being, as in Hastings, suspicious of lawyers, this literature was also distinctly "pre-modern," in the sense used by Kunal Parker, because it operated according to a capacious naturalism that denied the power of human agency.[12] As Parker writes, "the nineteenth century was a world in which the notion of *given*

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[6] Richard Hartnel, *Texas and California: Correspondence, through the "Times" Newspaper, of William Kennedy and Nicholas Carter, Esquires, and Richard Hartnel Showing the Danger of Emigrating to Texas and the Superior Advantages of the British Colonies* (London: W. Tyler, 1841), 26-7.
[7] James Belich, *Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld, 1783-1939* (Oxford University Press, 2011), 147-150.
[8] Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge: Cambridge University Press, 2010), 1-7
[9] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge: Cambridge University Press, 2010), 7.
[10] Christopher Tomlins, "History in the American Juridical Field: Narrative, Justification, and Explanation", 16 Yale J.L. & Human. (2004), 323-8.
[11] Ibid, 328. See, M. Beer (ed), *The Pioneers of Land Reform: Thomas Spence, William Ogilvie, Thomas Paine* (New York: A. A. Knopf, 1920).
[12] Kunal Parker, *Common Law, History, and Democracy in America, 1790-1900,* 14-5.

constraints was very real indeed." Whether imposed by the Christian God or a nameless Providence, the natural order of things gave logic to the American revival of settler colonial ideology, a resurgence that shared more with the Second Great Awakening than with the writings of Chancellor Kent (much of the motive force for Pacific colonization emerged from New York). However, these works *did* share concrete legal concerns with Kent, particularly with respect to property, real, Native, and chattel.

The resultant discourse was curious. Despite a preponderance of lawyers as authors, guidebooks had little to say about Common Law. Instead, guides put forward a plan of colonization that did not require lawyers, judicial systems, or the legislative imprimatur of statutes – "human law" in their words. By falsely constructing New California as a vacuum of habitation and law, guides rested settler colonization on naturalistic grounds. They offered a theory of ordered colonization without human law. In this way, the dominant legality of American colonization during the 1840s was a legal minimum; to modify John Philip Reid's famous phrase, New California law rested on nothing *but* "legal habits."[13] A purposeful removal of law, combined with fortuitous conditions, held out the promise of a new, utopian social order governed by natural law – a purified, white democracy of independent laborers. This "legal lack," however, had unexpected consequences. Guidebooks left settlers unprepared to face the legal realities of property in Alta California. If reformer's dreams depended on waste, and if California was in fact peopled and lawed, then colonists would endeavor to make the land waste, to create a state of nature.

## Equitable Dreams and Vested Realities

"Man did not make the earth, and, though he had a natural right to *occupy* it, he had no right to *locate* as *his property* in perpetuity any part of it; neither did the Creator of the earth open a land-office, from whence the first title-deeds should issue." – Thomas Paine, *Agrarian Justice opposed to Agrarian Law, and to Agrarian Monopoly* (1796).[14]

Every guide, implicitly or explicitly, needed to answer the question of "why colonize?" While writers offered diverse answers in their particulars, many rested on romantic, utopian, or reformist foundations, i.e., the purpose of colonization was the creation of a more just, more equitable society than could be achieved on the Atlantic Coast, particularly with respect to the distribution of land. As Montesquieu warned, while equality of landholding was virtuous in a republic, "A settlement of this kind can never take place except upon the foundation of a new republic."[15] Further, the distribution would need a legal regime opposed to free alienability, "For were we once allowed to dispose of our property to whom and how we pleased, the will of each individual would disturb the order of the fundamental law." The latter-day agrarian colonists of the 1830s wished to create such a society, one without what they called "Land Monopoly."

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[13] John Phillip Reid, *Law for the Elephant: Property and Social Behavior on the Overland Trail* (The Huntington Library, 1980).

[14] Republished in M. Beer (ed), *The Pioneers of Land Reform: Thomas Spence, William Ogilvie, Thomas Paine* (New York: A. A. Knopf, 1920), 184-5.

[15] Baron De Montesquieu and Franz Neumann (ed)., *The Spirit of the Laws* (New York: Hafner Press, 1949 [1748]), 42-3.

Therefore, the manner of distributing land in New California was a legal question of tremendous importance for prospective colonists. "Equity" was their watchword.

The planners for Pacific colonization revitalized a long tradition of agrarian radicalism in American legal thought, manifested most clearly in the idealized colonial program of Jeffersonianism, the famous Yeoman farmer. Equity was a particularly vital piece of this radical legality. As historian Matthew Crow writes of equity in Jeffersonian thought, "Equity was both a legal institution and a political idea, and, as such, it was a bridge that linked law with political thought and private law with contests over sovereignty, jurisdiction, and civic identity."[16] In the antebellum period, equity possessed a double meaning as the law of chancery courts and as the general right and good. Crucially for this chapter, many Americans believed that equity created positive natural rights to land, a hallmark of working-class reform thought. As historian Julius Wilm argues, "The idea that settlers were entitled to claim land free of government interference was prominent in the radical anti-British agitation that led up to the American Revolution."[17] The beauty of settler imperialism as a redistributive social policy was, of course, that such appropriation did not target established white landowners on the Atlantic coast but Native Peoples whose vested rights could be ignored.

While popular among the lay public, for those of a legalistic bent equity was a dangerous basis for law. It was "a fraught, even anxiety-producing concept" in the Early Republic, Crow writes, especially among those who feared the appropriation of their property.[18] The tension between law and equity in property was long-standing. As a fundamentally moral system, equity had radical potential and that was precisely the problem for lawyers. For the American colonists of the 1840s, especially those in the North, the issue of equity's contest with law had been raised to salience by the contemporary anti-rent struggle in New York state.[19]

The anti-rent movement in New York state emerged from a legal remnant of feudalism on the great manors of the Hudson Valley – the paradoxical "lease in fee."[20] The narrow goal of the anti-renters, and the government officials and lawyers who supported reform, was to convert all property in the state to fee simple titles. Radicals, however, articulated a theory of the manor problem as one of "Land Monopoly" that resulted from feudal forms of social and economic organization, not mere legal technicalities. As land reformer George Henry Evans, founder of the National Reform Association, a group dedicated to egalitarian colonial policy, defined it, Land Monopoly was "one man holding in his possession land on which two or more might subsist, while others are without any, or the means of acquiring any, and therefore dependent on those who hold it or the means which command it."[21] This message "quickly spread from its labor base in New York City" into the wider political culture.[22]

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[16] Matthew Crow, "Thomas Jefferson and the Uses of Equity," 33 *Law & History Review*. 151 (2015), 152-3.
[17] Julius Wilm, *Settlers as Conquerors: Free Land Policy in Antebellum America* (Stuttgart: Franz Steiner Verlag, 2018), 25.
[18] Crow, "Thomas Jefferson and the Uses of Equity," 161.
[19] For a thorough accounting of the anti-rent struggle see Charles W. McCurdy, *Anti-Rent Era in New York Law and Politics, 1839-1865* (Chapel Hill: UNC Press, 2001).
[20] Tenants on these estates owed rents and had conditions on alienability attached to their estates, like the "quarter sale" which imposed a fee when a manor property was sold to a stranger. Ibid, 60-71.
[21] George Henry Evans, "The New Constitution No. III," *Young America,* June 28, 1845.
[22] Wilm, *Settlers as Conquerors,* 240.

One tentpole of reform thought was theological. As one "young reformer" wrote to Evans' *Young America*, referencing Genesis 3:19, "In the first place I discovered that the principle of Land Monopoly was directly opposed to the design of the Great Creator, who positively declared that by the sweat of his brow man should eat bread." [23] Another writer, an old itinerant teacher, quoted from Psalms 24:1, "I consider the controversy to be between the Great God of Heaven and the demi-gods of the earth. The Lord Jehovah has declared that 'The earth is *his* and the fullness thereof.' The Land-Lords declare 'the earth is *theirs*, and the fullness thereof.'"[24] Other writers expressed a similar moral economy rooted in Biblical verse. "Mortgages with their abject slaves, cringing and fawning around the foul and sordid usurer, kneeling to the proud worshippers of Mammon," one B.G. Veazie wrote referencing the Gospels and Mammon, the deification of wealth, "these could not be thrown around a freeman, standing upon his inalienable homestead, unencumbered by laws for the collection of debts."[25] Biblical text laid the base of a full theory of natural rights. Evans was particularly clear on this point in a series of essays on a new constitution for New York. He wrote, "I have said, and now repeat, that should we resolve ourselves back into a state of nature, for the formation of a new constitution of government…there is no reason…why that Constitution should not secure, inalienably, to every human being in this State, every natural right."[26] Natural rights included a positive right to the common property of the Creator.

According to radicals, equity jurisprudence was the medium by which this triumph of natural law could be achieved. Evans recommended a special court of equity "composed of Landholders and (poor) Lacklanders proportioned to the numbers of their respective classes…[who] shall…in all cases where land is held by a twenty years' or more, a life, or a perpetual lease, determine, on principles of *equity*, (without regard to legal wrongs,) what (or whether any) compensation shall be paid to the claimant in full extinguishment of his claim."[27] Conservatives warned that this was not only an attack on the "lease in fee" but an attack on private property itself, and as recounted by McCurdy, lawyers and politicians in New York ultimately could not deviate from the "fixed star" of vested rights.[28] Suggestively, anti-renters came the closest to solving the feudal problem with challenges to the original manor title as fraudulent, and therefore void, an argument that would be repeated and amplified in California. Unable to craft a legal justification to redistribute manorial lands, reformers put forward settler imperialism as an alternative program for social reform.

The context of land monopoly was explicitly colonial in nature and tied to the equitable and Lockean concept of "use." As Evans explained, land monopoly derived from the original conquest of the continent. Rather than take only the land required for subsistence, the only morally legitimate claim of the colonists, they instead conquered "entire tracts of the country extending from ocean to ocean, even if it became necessary to slaughter the Aborigines to effect it!" Every man, Native peoples *included*, needed sufficient land to survive and no *just* title existed to "a foot more than is necessary" while "another is without land."[29] Evans' ideas hewed

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[23] Isaac S. Tingley, "Letter from a Young Reformer," *Young America,* Sept. 27, 1845.
[24] A. D. C., "A Voice from Delaware County," *Young America,* June 21, 1845.
[25] B. G. Veazie, "Land Monopoly," *Young America,* March 21, 1846.
[26] George Henry Evans, "The New Constitution No. III," *Young America,* June 28, 1845.
[27] Ibid. Emphasis in original.
[28] McCurdy, *Anti-Rent Era*, 593.
[29] Evans, "The New Constitution No. III.".

to a common, radical reading of Lockean thought.[30] As Locke wrote in the famous property section of *Two Treatises*, "But how far has [God] given [all things] *to enjoy*? As much as any one can make use of to any Advantage of Life before it spoils; so much he may by his Labour fix a Property in: Whatever is beyond this, is more than his Share, and belongs to others. Nothing was made by God for Man to spoil or destroy."[31] Possession and spoilage were the great arbiters of ownership in this equitable logic. Hence the fondness of radical colonists for the Pre-Emption laws of 1841 and 1843, which incorporated this equitable logic of use and improvement into land policy.[32]

One "squatter" group made the connection between the anti-rent struggle and California colonization explicit in 1849: "They say that it is too early yet to commence that immense system of land monopoly here which has caused so much distress in Europe and also in the case of Van Rensselaer in the State of New York."[33] The old Atlantic states and the new Pacific states shared the great, perhaps insurmountable, problem of vested rights, which rendered all efforts to change the distribution of property prospective only. The California colonists carried this conceptual problem with them. The *Daily Alta California* continued from the same article: "one of the speakers said that if any man had purchased lots before the agitation of this question and paid his money in good faith, that his property should be respected by him."[34] The prospect of redistributing vested rights acquired "in good faith" was a serious problem for land reformers – hence the utility of fraud in countering such claims, an issue discussed in the next chapter.

Some settler guidebooks added a distinctly anti-legal strain to this reformist discourse on anti-monopoly. One attorney G. G. Foster compiled "official documents and other authentic sources" into a 25-cents book for the New York market. Foster's preface reflected the contemporary moment. Foster wrote, "it is evident enough that everything here is… tending to a consolidated and omnipotent *financial feudalism*, beneath whose iron sway the sinews of labor would be bound irrevocably, and the heart of the great mass of laboring men paralyzed before the irresistible power of accumulated capital and landed proprietorship."[35] The solution to this "constantly-increasing current of land monopoly," and the social problems it created, was the colonization of California. Anglo-Saxon imperialism, Foster wrote, would surpass even "the golden dreams of [Charles] Fourier," the French utopian socialist, in establishing an egalitarian society. With any luck the "virtuous social development" of New California would avoid the corruptions plaguing the Atlantic states – "lawyers and licentiousness, prostitution and petty larceny, small-pox and the venereal, rheumatism and intemperance, and the whole horrid train of civilized vices and diseases."[36]

Settler guides' advice on the legal acquisition of land promoted the natural law reading of colonization. Guides made few, if any, references to common law, Native title, or positive Mexican property law. Most insisted simply that anyone could claim any land for themselves. J.

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[30] Richard J. Ellis, "Radical Lockeanism in American Political Culture," *Western Political Quarterly* (1992), 825-849.
[31] John Locke, *Two Treatises of Government,* 5th ed. (London: A. Bettesworth, 1728), 163.
[32] The Preemption Act of 1841, 27th Congress, Ch. 16, 5 Stat. 453 (1841).
[33] "Land Titles v. Squatters," *Daily Alta California,* Dec 21, 1849.
[34] Ibid.
[35] G. G. Foster, Esq. (ed.), *The Gold Mines of California* (New York: Deweitt & Davenport, 1848), iv-v. Emphasis in original.
[36] Ibid, 65.

M. Shively offered his readers the following advice in 1846: "Seek a good location for your farm, and stick to it. The Spaniards may molest you – but be firm, and soon the destiny of California will be governed by yourselves."[37] Hastings wrote that "Any person arriving in [Alta California], is at liberty to take any lands which are not taken, or which have not been applied for, even without making any application for that purpose, but in such case, he is liable to be dispossessed at any time, by the lands being regularly applied for, by another."[38] J. Q. Thornton, an eminent jurist, wrote in his guide of Oregon: "The whole land [of Oregon] also was before us, where to choose some pleasant, shaded, and well-watered spot, upon which to build a cabin and make a little farm. And there could be no doubt that the General Government of the United States would make to each emigrant a grant of a reasonable number of acres of land. Many acts of the Government had raised such an implied promise, and had induced emigrants to fill up the country."[39] In a footnote Thornton added the important proviso that "Congress has since refused to recognize the validity of the law of the Provisional Government of Oregon, under which I made this 'claim.'"[40]

The legal culture of the Gold Rush reflected, and entrenched, the egalitarian anti-legalism of the first California projectors. As historian Andrea McDowell writes, the miners "came to associate title in land with monopoly, and restricted property rights with the interests of labor, and they consistently resisted attempts to introduce fee-simple into the mines."[41] This resistance to *all* title in land, and therefore property law *as such*, was a heterodox position, but a relatively common one. Working-class miners sharpened their anti-legalism into a critique of law as a tool of class domination. McDowell writes that the miners believed "with title would come lawyers, and with lawyers would come the protection of one class of claims against another."[42] Radicals argued that the arrival of lawyers threatened the organic, classless order of the white colonies in California. The word "settler" itself began to mean a distinct class within the broader settler society, a class of those arrayed against the large absentee landowners and their lawyers.[43]

This natural legalism, however, contradicted Mexican, American, and international law on the status of property in conquered territories. Contrary to the claims of guidebooks, California was not a legal vacuum. In 1841, Kennedy told his readers that the land was "waste," populated by a "few hundreds of Mexican motleys and scattered tribes of wretched Indians," and "Government or law there is none."[44] This was a theme that would be emphasized repeatedly in subsequent guides. Hastings, for example, characterized the Mexican legal system as an elaborate game of bribery, which "partakes as little of *law* as it does of divinity."[45] However, the various people who governed Alta California in 1841, the Mexican Empire, Native polities, and,

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[37] J. M. Shively, *Route and Distances to Oregon and California, With a Description of Watering-Places, Crossings, Dangerous Indians, Etc.* (Washington D. C.: William Greer, Printer, 1846), 14.
[38] Hastings, *The Emigrants' Guide*, 122.
[39] Jessy Quinn Thornton, *Oregon and California in 1848: With an Appendix, Including Recent and Authentic Information on the Subject of the Gold Mines of California, and Other Valuable Matter of Interest to the Emigrant, Etc.* Vol. 1 (New York: Harper & Brothers, 1849), 240.
[40] Ibid, 238.
[41] Andrea G. McDowell, "From Commons to Claims: Property Rights in the California Gold Rush, 14 Yale J. L. & Human. 1 (2002), 5-6.
[42] Ibid, 58.
[43] Shelton, *A Squatter's Republic*, 25.
[44] Hartnel, *Texas and California,* 26-7
[45] Hastings, *The Emigrants' Guide,* 127

to a much lesser extent, the Russian Empire, had recognizable legal systems of various levels of formality – that many colonists hoped to get rid of both the people and the laws did not make them less real. Guides advanced no legal claims to American sovereignty over California, not even implausible ones. Though guides saw a polity in the state of nature, the laws of the United States on the incorporation of settled territories were quite clear, and guidebooks ran headlong into this jurisprudence because it supported the incorporation of Mexican law into Common Law. During the re-settlement of Florida, for example, the US Supreme Court decided *American Ins. Co. v. 356 Bales of Cotton* (1828), in which they ruled on the reception of private laws in conquered or ceded territories: "In such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change."[46] In other words, the private law of Mexico, the vested rights of property owners, remained in full force.

Less ideological guidebooks recognized the reality of Mexican property rights while casting doubt on their legitimacy. "The grants of land which have been given by Mexico are very large," one 1847 book read, "and it is often the case, that a man who lives on a farm will have to travel one or two hundred miles to purchase the actual necessitous clothing, or to sell his produce."[47] In other words, the formal grants were large but there were few actual improvements. Indeed, Mexican colonization of California was not going well as American eyes turned to the territory in the 1840s. As in Texas, Californios seized the opportunity provided by the legal crisis of 1836 to declare independence – only the aforementioned "very large" grants of land lured the oligarchs back into the political fold. Despite the contiguous land connection between Alta California and Mexico City, it was in effect an overseas colony, cut off by the Comanche Empire.[48] One Mexican commission on the problems of colonization advocated for the settlement of convicts, another for a grant to 3,000 Irish families, but officials eventually resolved on land grants to private individuals after the end of the mission system.[49]

Take as an example one of the properties granted to the architect of Mexican liberalization, Governor Juan Alvarado. In 1844, after his troubled term in office had concluded much as it began, the Departmental Assembly approved a grant to Alvarado of "wilderness country" based upon rough geographic markers: "ten leagues of land north of the river San Joaquin within the limits of the Sierra Nevada mountains, in the same direction as the river Chowchillas on the east, that of the Merced on the west, and to the before mentioned San Joaquin, with the name of the Mariposas."[50] The Departmental Assembly approved the grant subject to the usual conditions as stated by law – the land could not exceed 11 Spanish leagues (roughly 72 square miles), nor be within 10 leagues of the coast, grants needed approval by the Supreme Government in Mexico City, the government reserved the right to build arsenals, warehouses, and other public buildings, the grantee needed to build an inhabited house on the grant within a year, and so on.[51] Alvarado failed to meet several of these conditions subsequent. He had no diseño, or rough map, of the property included with the application. Alvarado later

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[46] *American Ins. Co. v. 356 Bales of Cotton* (1828), 542.
[47] A Captain of Volunteers, *Alta California: Embracing Notices of the Climate, Soil, and Agricultural Products of Northern Mexico and Pacific Seaboard* (Philadelphia: H. Packer & Co., 1847), 11.
[48] Paul Frymer, *Building an American Empire*, 180.
[49] Halleck, Peachy, Billings Papers, Box 3, Folder 302, Bancroft Archive.
[50] Ogden Hoffman, *Reports of Land Cases Determined in the United States District Court for the Northern District of California: June Term, 1853 to June Term, 1858, Inclusive* (San Francisco: Yosemite Collections, 1975), 23.
[51] Henry W. Halleck, *California and New Mexico. Message from the President of the United States* [Halleck Report], Ex. Doc. No. 17, 31st Congress, 1st Sess. (1850), 120-1.

insisted his failure to settle was due to hostile Indians and attested the land "could not be occupied except with the aid of a military force."[52] The subsequent American invasion and continued "hostility" prevented Alvarado from taking possession. Even though he had a dubious title under the letter of Mexican law, Alvarado sold the Mariposas grant to the conqueror of California, John C. Fremont, in 1847. Alvarado's grant resembled many other grants to private individuals in support of Mexican colonization –extensive conditional grants to private individuals and prominent families. Historian Thomas Richards, Jr. described the resultant political economy as "seigneurial," dominated roughly 50 families who "in the feudalistic society of the Californios" treated Natives as serfs.[53] While some American migrants assimilated to this culture, marrying into land-owning families, radicals viewed the Mexican estates as feudal relics, like the Hudson River Manors, that had no place in the new, egalitarian colony of California. The fate of these Mexican grants is covered in the following chapter. Suffice it to say that Anglo settlers planned to deal with these properties "equitably" by redistributing the lands to themselves, the *bona fide* settlers.

**Climates of Slavery and Freedom**

"People generally look on [California] as the garden of the world, or the most desolate place of Creation." – John Bidwell, *A Journey to California* (1842).[54]

In addition to the division of real estate, guidebooks also addressed the most prominent political issue facing American colonization: the fate of human property in the territories. As modern histories show, Free and Slave settlement were radically different legal regimes for organizing labor, production, citizenship, and society.[55] And as historian Kevin Waite argues, slaveholders too had projections of California as an extension of the South, they were not content to leave the projecting to radical Yankees in New York.[56] Kennedy's 1841 Texan empire was a variation on this theme. As with the distribution of land, settler colonists used naturalistic language to justify the extension or limitation of human property to New California. Much like the discourse on vested rights drew on contemporary legal-political issues in New York state, so too did the slavery question reflect the Virginia slavery debates of the early 1830s and the "odious landed aristocracy" that the institution supported.[57] Pro-slavery academic Thomas Roderick Dew's stadial history of slavery, for example, employed a climatic scheme for understanding the development of slavery. This was a common theory. As historian Conevery Valencius writes, "Antebellum Americans inhabited a world in which people belonged innately in certain types of places – and not in others. Climate, with all its myriad meanings, insinuated its way into every element of personhood, determining racial belonging as well as personal well-being. How this happened was the subject of debate by learned men by the middle part of the century"[58] The climate of California thus had outsized influence on the fate of human property.

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[52] Ogden Hoffman, *Reports of Land Cases*, 23.
[53] Richards, Jr., *Breakaway Americas* (2020), 151.
[54] John Bidwell, *A Journey to California: With Observations about the Country, Climate and the Route to this Country* (San Francisco: John Henry Nash Printer, 1937 [1842]).
[55] Paul Frymer, *Building an American Empire*, 132; Walter Johnson, *River of Dark Dreams*, 330-365.
[56] Kevin Waite, *West of Slavery: The Southern Dream of a Transcontinental Empire* (Chapel Hill: UNC Press, 2021).
[57] Christopher Tomlins, *In the Matter of Nat Turner: A Speculative History* (Princeton University Press, 2020), 139.
[58] Conevery Bolton Valencius, *The Health of the Country: How American Settlers Understood Themselves and Their Land* (New York, 2002), 235.

California, of course, was admitted to the Union as a Free State in 1850, but this puzzled contemporary observers. Looking backward from 1858, Horace Bushnell reflected on the happy but baffling legal status of California as a Free State because, he wrote, "There is no state in the Union where slavery could be worked to greater advantage."[59] In Bushnell's thinking, the climate and natural agricultural conditions of California suited plantation production – by the time of Bushnell's writing enormous wheat plantations covered the California countryside – but Bushnell was at a loss to explain *why* slavery had been rejected, without debate, from the California Constitution of 1849. "No inquiries…will quite solve the riddle," Bushnell continued, it was simply an accident of history. It should be noted, however, that important elements of Bushnell's analysis were wrong. California *did* have widespread Native slavery on plantations throughout the antebellum period as well as hallmarks of slave law like a "certificate and pass" system, introduced in 1847 under military rule, and unfree "apprenticeships," created by the Act for the Government and Protection of Indians in 1850.[60] In part because of its wrongness, Bushnell's analysis points toward an explanation. The guidebook discourse of the 1840s was, indeed, relatively silent about the human law of slavery, but American settlers did spend a great deal of time on the question of what labor system "could be worked to…advantage" and how production and society should be organized. They talked about law by talking about climate and race because human law was constrained by nature.[61]

To understand the naturalistic orientation of the 1840s settlers it is useful to return to Montesquieu's *The Spirit of the Laws* (1748), which presented a common theory of race and climate underpinning that Americans adopted, consciously or unconsciously.[62] Montesquieu's basic theory went as follows: climate and temperature lengthened or shortened the body's "fibres" – some combination of nerves and muscles – which determined, through time, racial characteristics like bravery, cowardice, industry, and indolence.[63] These racial characteristics could change based on the climate and its correspondence with race. This theory was especially useful in the settler colonial context as it was, at bottom, a theory of bodies in new environments. In one representative remark, Montesquieu noted, "even the children of Europeans born in India lose the courage peculiar to their own climate."[64] Valencius calls this fitness between people and place "physical citizenship."[65] Often, settlers used the language of health to narrate this connection. As the sickly future governor Henry Haight remarked upon his arrival in San Francisco in 1850, the climate was so healthy it would "frighten away doctors."[66] On the other hand, the "climate of St. Louis [had] injured my constitution."[67]

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[59] Horace Bushnell, *California, its Characteristics and Prospects* (San Francisco: Whitton, Towne, & Co., 1858), 27.
[60] Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* (Boston: Houghton Mifflin Harcourt, 2016), 263-265.
[61] Patrick Wolfe, "Land, Labor, and Difference: Elementary Structures of Race," *The American Historical Review* 106(3) (2001), 866-905.
[62] Baron De Montesquieu and Franz Neumann (ed)., *The Spirit of the Laws* (New York: Hafner Press, 1949 [1748]).
[63] Ibid., 221-225. The empirical evidence for this phenomenon seemed to be studies of sheep's tongues exposed to different temperatures.
[64] Citations omitted, Ibid, 224.
[65] Conevery Bolton Valencius, *The Health of the Country*, 22-23.
[66] Henry H. Haight to F.M. Haight, Sept 13, 1850, San Francisco, Box 1, 1846-1851, *Henry Haight Papers,* Huntington Library, San Marino, CA.
[67] Henry H. Haight to F. M. Haight, July 17, 1850. San Francisco, Box 1, 1846-1851, *Henry Haight Papers,* Huntington Library, San Marino, CA.

In this schema, whites had physical citizenship in "temperate" or "chill" regions, but would degenerate in "tropical" regions, hence the postulated need for black slavery "fitted" to tropical climates. A stopover in Panama occasioned Robert Greenhow to remark, "As to salubrity, there is a difference of opinion; but it is scarcely possible that the extremes of heat and dampness, which are there combined, could be otherwise than deleterious to persons from Europe, or from the Northern States of the American Union, by whom the labor of cutting a canal must be performed, unless, indeed, it should be judged proper to employ negroes from the West Indies on the work."[68] Some settler guides went so far as to advise stepwise migration for whites, warning against settling in too "tropical" a place without a stay someplace more temperate lest their racial character degenerate.[69] This theory was integral to guidebooks because they were in the business of making new places intelligible, and potential settlers wanted to know how they would be impacted by laboring in a new climate.

In Montesquieu's theory, human law depended on these natural laws. Montesquieu posited a reactive, thermostatic relationship between law and climate, wherein law would provide a countervailing force to climatic vices, undesirable traits like laziness. The appropriate property law, he wrote, followed from the natural characteristic of a population. It was dangerous for law to compound a "climatic vice": in India, bad laws, "which give the lands to the prince…[destroyed] the spirit of property among the subjects, [increasing] the bad effects of the climate, that is, their natural indolence."[70] Although Montesquieu believed his theories discredited slavery, he made some "hypothetical" arguments in favor of "Slavery of the Negroes": "The Europeans, having extirpated the Americans, were obliged to make slaves of the Africans, for clearing such vast tracts of land."[71] In other words, having destroyed the Native population, the Europeans needed a labor force fitted to the climate.

The climate of California, a subheading in every guide, needed to be deciphered and made legible for emigrants and agriculturalists. The key question was whether California was a healthy place for white labor. Initially, colonists had no good answer to this question because California appeared utterly alien. In 1842 the unfamiliar climate provoked different reactions from settlers and the first geographical commenters emphasized California's difference. The Pacific coast "differs essentially from that on the Atlantic in the same latitudes," Thomas Cowperthwait wrote in 1846.[72] Lands in the same latitude on either coast differed dramatically. Lands parallel to Wisconsin were "rarely covered with snow" on the Pacific coast and in lands parallel to Virginia "the winter is merely a wet season, no rain falling at any other time."[73] Parts of greater California, present day Nevada, were more analogous to "an Arabian desert" than anything on the Atlantic coast.[74] Nearly every guide put forward or repeated some version of this analysis. As W. H. Rogers, a professor of various fringe sciences, warned potential gold-seekers in 1848: "few, very few, indeed, understand the nature of the climate of the land to which they

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[68] Robert Greenhow, *The Geography of Oregon and California, and other Territories of the North-West Coast of North America; Illustrated by a New and Beautiful Map of those Countries* (New York: M. H. Newman, 1845), 42.
[69] Gottfried Duden, William G. Bek (trans., ed.), *Gottfried Duden's 'Report,' 1824-1827* (1919 [1829]), 114.
[70] Montesquieu, *The Spirit of the Laws*, 226.
[71] Ibid., 238.
[72] Thomas Cowperthwait, *Geographical Description of the State of Texas,* 21.
[73] Ibid, 29.
[74] Ibid, 52.

are so thoughtlessly hastening."[75] As security against the climate, Rogers advised emigrants to bring medicines and a copy of "Dr. Beach's American Practice," to "cleanse the stomach and bowels thoroughly" in preparation for the voyage.[76] However, Following Lauren Benton, this initial confusion and trepidation gave way to a new "geographic trope" that understood California's healthy climate as an anomaly in the world and created the conditions for an ideal Free Labor society.[77] Its climate violated the natural laws of race and place.

Thus, the regular schema of Free and Slave labor did not apply to California. As Bidwell wrote, "The Country is acknowledged by all to be extremely healthy, there is no disease common to the country, the fever and ague are seldom known….the indians [sic] who died so several years ago, were…afflicted with the smallpox."[78] Ague, the common term for Malaria, was a menace in other colonies – but not California. Hastings praised the Sacramento Valley for its "uniform, mild and delightful climate."[79] Guides piled on superlatives to describe California. One wrote the Bay Area was "the healthiest climate on the continent," another that there were "few portions of the world, if any, which are so entirely exempt from all febrifacient causes," and that the "purity of the atmosphere, is most extraordinary, and almost incredible."[80] Some saw in this a Providential design, others simply a tremendous opportunity for colonization. However they characterized the reasons for the healthy climate and the fertile soil, guides argued the country could support millions of white settlers, who, critically would be independent laborers.[81]

The miraculous climate created the possibility for a society that did not need to rely on a massive importation of unfree, non-white laborers, and where all white settlers would be entitled to an equal portion of this fertile and healthy land. Although various Southern politicians argued for the introduction of black slavery up to the Civil War, few guides truly favored this position during the 1840s. In his account, published in 1848, Lieut. Emory concluded, "No one who has ever visited this country, and who is acquainted with the character and value of slave labor in the United States, would ever think of bringing his own slaves here with any view to profit."[82]

This conclusion, however, was contradicted by the institutions of Native slavery that settlers encountered. The Northern California colony of "New Helvetia," the site of modern Sacramento, was an especially influential model for guidebooks. Fremont's first military survey of California reached Sutter's Fort in March 1844 after an ill-advised overland journey from Oregon to reach what Northern California Indians called the "country of the whites."[83] Fremont's

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[75] W. H. Rogers, *Facts in Magnetism, Mesmerism, Somnambulism, Fascination, Hypnotism, Sycodonam, Ehterology, Pathetism, &c., Explained and Illustrated* (Auburn: Derby, 1849), 84.
[76] Ibid., 90-91.
[77] Lauren Benton, *A Search for Sovereignty*, 7.
[78] Bidwell, *A Journey to California*, 41.
[79] Hastings, *The Emigrants' Guide, to Oregon and California*, 69.
[80] Thomas Jefferson Farnham, *Life, Adventures, and Travels in California: To Which are Added the Conquest of California, Travels in Oregon, and History of the Gold Regions* 2nd ed. (New York: Nafis & Cornish, 2849), 411; Hastings, *The Emigrants' Guide, to Oregon and California*, 85.
[81] F. P. Wierzbicki, *California as it is, and as it May be, or A Guide to the Gold Region* (San Francisco: Washington Bartlett, 1849), 10-16.
[82] G. G. Foster, Esq. (ed.), *The Gold Mines of California. And Also A Geographical, Topographical and Historical View of that Country, from Official Documents and Authentic Sources. With A Map of the Country, and Particularly of the Gold Region* (New York: Deweitt & Davenport, 1848), 47.
[83] J. C. Fremont, *Narrative of the Exploring Expedition to the Rocky Mountains, in the Year 1842; and to Oregon and North California, in the Years 1843-44* (Syracuse: L. W. Hall, 1846), 232-3.

description of Sutter's fort, held it out as an ideal: "the first settlement in the valley, on a large grant of land which he obtained from the Mexican Government. He had, at first, some trouble with the Indians; but, by the occasional exercise of well-timed authority, he has succeeded in converting them into a peaceable and industrious people. The ditches around his extensive wheat fields; the making of the sundried bricks, of which his fort is constructed; the ploughing, harrowing, and other agricultural operations, are entirely the work of these Indians, for which they receive a very moderate compensation — principally in shirts, blankets, and other articles of clothing."[84] In describing slavery at Sutter's Fort as contractual, Fremont mirrored the shifting discourse of the Atlantic states on human property. A Dr. Sandels visited New Helvetia in 1843 and reported that hundreds of Indian laborers who engaged in the wheat harvest were fed thin porridge from troughs "more like beasts than human beings."[85]

In the end, when faced with the fraught question of the legality of slavery, American settlers responded with a certain kind of ambivalence. They dismissed Indian slavery as an impermanent institution. Most shared the assumption, usually unstated, that African slavery was a necessary evil in tropical climates and not a good organization of society in itself. According to the geographic trope of California as *sui generis*, the question had already been settled by nature or by Providence. Yet in this case nature was not limiting but liberating. California was "eminently calculated… in all respects, to promote the unbounded happiness and prosperity, of civilized and enlightened man."[86] During the 1850s, the climatic debate become a general feature of the sectional crisis. In Kansas, for example, the question became whether the Great Plains were tropical or temperate.[87] In this way, geographical writing, superficially descriptive, had legal consequences and meanings common to the public. Tropicality meant the extension of slavery and temperance meant the extension of free labor. In the *Dred Scott* case, Chief Justice Taney gave the highest sanction to this theory, arguing that abolition had "not been produced by any change of opinion in relation to this race; but because it was discovered, from experience, that slave labor was unsuited to the climate and productions of these States."[88]

### *Vacuum Domicilium* and Genocidal Colonization

"The government at Washington will find itself somewhat embarrassed in selecting a course of conduct with these Indians… it would be more humane to butcher them outright than expose them to a slow but sure extinction." – F. P. Wierzbicki, *California as it Is, and as it May Be* (1849).[89]

Federal Indian policy had reached an impasse by the 1840s. The dominant policy of the preceding period was removal, an element of American settler colonization from the start, but one which had achieved a broad base of Anglo support reflected by the 1830 Removal Act. The subsequent administrative and military removals carried out over the 1830s succeeded in the

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[84] Ibid, 253.
[85] Andrés Reséndez, *The Other Slavery*, 255.
[86] Hastings, *The Emigrants' Guide,* 133.
[87] See, e.g., N.E. Emigrant Aid Co., *Two Tracts for the Times* (Boston: Alfred Mudge and Son, 1855).
[88] *Dred Scott v. Sandford*, 60 U.S. 393, 412 (1857).
[89] F. P. Wierzbicki, *California as it is, and as it May be, or , A Guide to the Gold Region* (San Francisco: Washington Bartlett, 1849), 18.

sense that they "accomplished" their goal of ethnic cleansing of the Old Southwest.[90] Yet, as historian Paul Frymer has argued, removals were humanitarian, political, and governmental disasters that revealed the limits of the General Government's powers.[91] Thousands of Choctaw, Creek, and Cherokee – the "Civilized Tribes" – suffered and died as a result of State weakness. What would come next? The idea of an Indian territory, and eventually an Indian state, was one new direction supported by Native peoples, various white radicals, and (curiously) pro-slavery politicians, though the last group only as a bulwark against Free Labor colonization.[92] As yet, reservations presented an ill-defined legal alternative.[93] In this way, the 1840s represented an interregnum, the decline of the old national regime with no clear successor. In settler guides to California two main alternatives to removal emerged: extermination and enslavement. To American colonists, these policies were not mutually exclusive. The prospect of extermination or race war, what we would now call genocide, recurred in many guides, as did the prospect of creating a slave society based on unfree Indian labor, though the latter policy depended, as above, on the sectional divide.[94] Removal represented a massive government undertaking far beyond the meager capacities of Government along the Pacific coast – as Federal Indian Agent Elija White wrote in 1846, removal in Oregon Territory was a removal to "the grave" because of hostilities among Native polities and the distribution of the food supply.[95] Extermination had long been posed as the dark alternative to removal, but in California it became a real and horrifying alternative.

Though recognized by neither the Spanish and Mexican governments nor the American successor state, California Indians had recognizable systems of territory, property, and legal organization, even as these systems varied in substance and formality and were rapidly changing under population collapse and violent invasion.[96] Despite European claims that California was wilderness and waste, it was in fact thickly settled. The California Indian population stood at 150,000 in 1846, and although smallpox epidemics during the preceding 20 years had exacted a large toll, Indians still outnumbered whites by 15:1, with roughly 10,000 to 14,000 whites before the Gold Rush, nearly all confined to the Coast.[97]

Many California Indian polities, as historian William J. Bauer, Jr. writes, had well-defined territories which they ruled and owned. For example, Pomo polities, native to the what is now Sonoma County north of San Francisco, warred with one another over well-defined territories. As Bauer recounts from an oral history, "One day the People from K'e bāy Cho k'lal went to K'ŏ,ŭlK'ŏy … to harvest 'grain,' likely indigenous oats or ryes, in order to make pinole. The People from the town of P'hŏ,ŏl, K'ŏy … observed the K'e bāy People harvesting grain …and attacked because the K'e bāy People had not asked for permission." Bauer continues, "Pomos possessed a finely tuned sense of their territory's limits. In the right circumstances borders could be fluid. It was not unheard of for People to ask for approval to use resources

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[90] Samuel Rockwell, *Indian Affairs*, 188.
[91] Paul Frymer, *Building an American Empire*, 113-127.
[92] Ibid., 125.
[93] Samuel Rockwell, *Indian Affairs*; Benjamin Madley, *An American Genocide*, 163-172.
[94] For usage of genocide see Benjamin Madley, *An American Genocide*, 3-7.
[95] Elija White, *A Concise View of Oregon Territory, its Colonial and Indian Relations; Compiled from Official Letters and Reports, Together with the Organic Laws of the Colony* (Washington: T. Barnard, 1846), 23
[96] Benjamin Madley, *An American Genocide*, 16-30. On the plurality of Native legal cultures see Pekka Hämäläinen, *The Comanche Empire* (New Haven: Yale University Press, 2009).
[97] Benjamin Madley, *An American Genocide*, 3, 50.

within another group's territory. If one did not ask for clearance or offer a payment, as appears to have occurred in Francisco's story, violence and conflict followed."[98] While not an exact analogue to Anglo private property, Native practices for governing territory were clearly legible to Europeans, at least in theory. In reality, colonists used Native understandings of place only when it suited them. For example, many Mexican grants relied on Native place names to define their boundaries. American courts readily accepted these as "precise" and "notorious" enough to countenance as good property law.[99]

Indeed, after the American colonization process began in earnest, Native peoples in Oregon and California clearly understood "settlement" as an invasion of their territory, an invasion which rested on specific legal forms, hence the harassment and killing of government surveyors. Chinook peoples of the Pacific Northwest called Anglo survey markers "power sticks," which they believed, quite reasonably, produced disease.[100] California Indians often invoked the concept of the "stranger" to describe their relationship to the Anglo-Americans, an unambiguous analogue of American common law.[101] Northern California Indians shared labor values and social structures with the Americans as well, though no guidebooks mentioned this commonality. As Bauer writes, the Atsugewis in particular: "extolled the ability of men and women to work constantly and forgo sleep. The Atsugewi language reflected this emphasis on hard work, 'industriousness,' and social status. Among the Atsugewi, there were three social groups— the saswahecar (industrious and wealthy), the wikoi (commoners), and the brumui (lazy paupers)."[102] Without irony, American settlers pointed to industriousness as the vital difference in racial character that justified expropriation of Native lands.

In the years preceding 1846, Elijah White, the Indian Agent in Oregon Territory, attempted to use law to create a middle ground in a dangerous situation. In Oregon, White reported to Congress, the settlers had "found themselves hemmed in…in the midst of, and surrounded by, many thousand Indians, on whose lands they have been obliged to settle — thus following the offers and invitations of this Government."[103] The results of this taking had been a disaster for the Indians, White wrote, "Their beaver and otter have been hunted — their deer, elk and antelope slain — their fisheries occupied — towns taken possession of — the monuments of their dead broken down — and the graves of their ancestors rudely ploughed and harrowed over."[104] If these conditions persisted, then White feared a war of extermination would result in the "total destruction of the white population." But White had a plan to avoid this eventuality – the introduction of a legal code. Beginning with the Nesperces, White called a meeting to establish common laws to regulate property and crime. The code, which White called the "Laws of the Nesperces," had 11 Articles, most laying out crimes against persons and property and remedies ranging from corporal punishment to money damages. Article 8, for instance, defined the punishment for "entering a field, and injure the corps, or throw down the fence, so that cattle

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[98] William J. Bauer, Jr., *California Through Native Eyes: Reclaiming History* (Seattle: University of Washington Press, 2016), 75. Citations omitted.
[99] Ogden Hoffman, *Reports of Land Cases*, passim.
[100] Whaley, 95.
[101] William J. Bauer, Jr., *We Were All Like Migrant Workers Here: Work, Community, and Memory on California's Round Valley Reservation, 1850-1941* (Chapel Hill: UNC Press, 2009), 39. See, e.g., Bruce Mann, *Neighbors and Strangers: Law and Community in Early Connecticut* (Chapel Hill: UNC Press, 2001).
[102] Ibid., 25.
[103] Elija White, *A Concise View of Oregon Territory*, 1.
[104] Ibid., 2.

or horses go in and do damage" which allowed for both damages and 25 lashes per offense.[105] Article 11 assigned jurisdiction according to race: "If an Indian break these laws, he shall be punished by his chiefs; if a white man break them, he shall be reported to the agent, and punished at his instance." Those at the meeting accepted the code unanimously. White went to work, turning the laws into a small book which was taught alongside scripture in Indian schools. Although property culture still differed – the two populations seemed to have a difficult time distinguishing rent and usage from ownership and dominion – this could be resolved by "wholesome laws and well-regulated society." Removal, White informed Congress, would not work and instead he proposed a society of laws.

Another group of American settlers, however, vehemently opposed White's efforts at establishing the rule of law in Oregon. Opposition was led by Charles E. Pickett, at the time a homesteader and newspaper publisher. Pickett wrote directly to President Polk to have agent White removed for, among other crimes, allegedly inciting the Indians to murder Pickett to drive him off land owned by the Methodist Church on which he was squatting. President Polk obliged these settlers and removed White from his position, offering Pickett the job of Indian Agent.[106] Pickett, already on his way to California, declined the post, but the change in personnel signaled a stark change in Federal Indian policy. Pickett, a proud Southerner, was an enthusiastic supporter of a policy of Native enslavement and, if that did not work, extermination. Writing in the *California Star* in January 1848 under the pseudonym "Pacific," Pickett was plain, "Indians, and particularly those in California, are, as we all know, mentally, and morally, an inferior order of our race; are unfit and incapable of being associated with whites on any terms of equality, *or of being governed by the same laws*; and if retained among us, must necessarily have a code and treatment applicable to their peculiar character and condition."[107] Pickett continued, "Either this plan must soon be adopted, or else they be driven out of the settlement…against whom a continual war will necessarily be waged, for depredations committed, till all are exterminated."[108] Law, in the sense used by Pickett, represented a relationship of racial domination. Radical Anglo-Saxons believed race created the capacity, or incapacity, for legal rule – much in the same way that race corresponded to climate. Racial ideology marginalized law as a common frame between the groups.

Pickett's "plan" was not a fringe view in the settler guide discourse of the 1840s. As recently laid out by historian Benjamin Madley, for the next three decades of American colonization the overarching policy of whites was extermination, or, in its modern construction, genocide. From 1846, the start of formal American control, to 1873, the end of the Modoc War, Madley writes, "9,492 to 16,094 California Indians," were killed by settlers – as individuals, in militias, and in the army – with a clear intent to destroy Native group as such.[109] The other policies of removal and enslavement operated within this framework. While Native enslavement proliferated, for example, it was often genocidal. Subscribers to "Free Labor ideology," Madley

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[105] Ibid, 22.
[106] Lawrence Clark Powell, *Philosopher Pickett: The Life and Writings of Charles Edward Pickett, Esq., of Virginia, Who Cam Overland to the Pacific Coast in 1842-3 and for Forty Years Waged War with Pen and Pamphlet against all Manner of Public Abuses in Oregon and California; Including Also Unpublished Letters Written by Him from Yerba Buena at the Time of the Conquest of California by the United States in 1846-7* (Berkeley: UC Berkeley Press, 1942), 13-15.
[107] Emphasis mine. "Cal. Star's Sonoma Correspondence," *California Star* Jan 15, 1848.
[108] Ibid.
[109] Madley, *An American Genocide*, 12.

writes, "attempted to justify the killing or driving off of California Indian miners as the righteous elimination of unfree labor from California's placers and eventually from the state as a whole. It may seem contradictory to combat unfree labor by exterminating unfree workers, but liberating unfree workers was not the aim of such violence."[110]

The racial ideology and theory which underwrote this policy of extermination was extreme in the California case. As in the case of climate, according to guides, California diverged from other American settler colonies. In this case it differed by the hierarchical position of the California Indians. As legal historian Stuart Banner writes in his comparative account, Australia and California, the most notable cases of *terra nullius* as the organizing legal theory in the Anglo-American world, shared an especially virulent discourse about Native peoples.[111] In 1845, for example, Greenhow wrote the following in his *Geography*: "The aborigines of California are placed, by those who have had the best opportunity of studying their character and disposition, with the Hottentots, the Patagonians, and the Australians, among the lowest of the human race."[112] Wierzbicki thought the Northern California Indians were "probably the most inferior race of all the Aborigines of the continent."[113] While some guides wrote about the California Indians as "useful" laborers or servants, at least in the transition to Free Labor, this discourse of racial hierarchy justified the exclusion of California Indians from most of organized legal life. Thomas Butler King, United States Government Agent for California, expressed the general sentiment when he concluded that the California Indians were the "lowest grade of human beings" who lived as children of nature.[114]

Criminal law, or a twisted version of it, was the exception to the general aversion to a legal middle ground. Guides argued that Indigenous Californians were racially disposed toward crime and needed group "correction." Prohibitions or regulations on alcohol were a popular topic but were ancillary to the general policy. As Judge Thornton described, whites summarily and brutally killed Indians "when not violating the laws or disturbing the peace of the country, as pests to society, and enemies of the general welfare of the government."[115] In other words, they were things to be destroyed under the police power, and not individuals with legal rights or personality.

While all guides had some version of this commentary on Indigenous people, Hastings' guide in particular foreshadowed the extermination campaigns to come. As suggested by the opening anecdote discussed at the opening of this chapter, Hastings' guide covered several instances of violence and conflict between the Hastings' party and Native peoples, including one encounter in which Hastings killed 5 men for trying to steal his horse.[116] As he travelled through Northern California, Hastings began to notice depopulated villages, which he regarded as odd because the "Indians of this country, are not migratory, but it is seen, that they have, in numerous

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[110] Ibid., 91.
[111] Stuart Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska* (Cambridge: Harvard University Press, 2007), 34.
[112] Greenhow, *The Geography of Oregon and California,* 14.
[113] Wierzbicki, *California as it is*, 17; J. M. Shively, *Route and Distances to Oregon and California, With a Description of Watering-Places, Crossings, Dangerous Indians, Etc.* (Washington D. C.: William Greer, Printer, 1846), 13.
[114] Thomas Butler King, *California: The Wonder of the Age*, 6.
[115] Thornton, *Oregon and California in 1848* [Bancroft Archive], 94.
[116] Hastings, *The Emigrants' Guide*, 14-6.

instances, abandoned their old haunts, and re-established in other portions of the country" that were less advantageous. Hastings hypothesized potential causes of this internal migration, noting that "the desolating ravages of war" were the most likely causes as he found villages of 50 to 100 dwellings with the ground covered in human skulls.[117] "[W]hatever the cause of this mortality, might have been, it was, evidently, inflicted upon them, when within their huts, for the earth of the external covering of the huts, having fallen in, was extensively intermixed with skulls, and other human bones," he wrote. Hastings' visit to a populated village provided further context. Upon approaching a group who he described as "more advanced, in civilization," Hastings was met with the "most extraordinary confusion" and "loud and confused appeals" to spare "their tribe, from the dire calamity, of extermination, or, at all events, to save their village, from which the earth may be repeopled."[118] After some time in the village, Hastings managed to assure them he would "spare their village."[119] This encounter established a pattern wherein Hastings or, he wrote any white person, would approach a village and "the males, both old and young, immediately flee in the utmost confusion, to the surrounding hills and mountains, while the females remain; and as you advance, they commence a most doleful moaning and crying, and, at the same time, persist in offering you such food as they have collected."

When the time came to create an organic constitution for American California in 1849, ending a 3-year period of military rule, the settlers of Sacramento elected Hastings to represent them in the Constitutional Convention. At the convention, he advocated against extending the franchise to California Indians on the grounds that they were dependent and would be controlled by whites, as they were at Sutter's Fort.[120] The delegates deadlocked on the provision of whether to exclude the franchise to adult men except "citizen[s] of Mexico, Indians, Africans, and descendants of Africans," but it was passed with the vote of the chairman.[121] Hastings' vote was, of course, no more influential than any of the other votes in the affirmative, but it represented a concrete connection between the guidebooks and the course of American colonization.[122] The deeper role of the guidebooks in setting the legality of colonization was more diffuse and fundamental, particularly their delegitimization of Native title and insistence that California was *vacuum domicilium*, empty of true habitation and therefore of property.[123]

In the midst of the Mexican-American War, the United States Supreme Court "clarified" the status of Native titles in *United States v. Rogers* (1846), a criminal case from Indian Territory.[124] Contemporary lawyers understood the decision to mean that Native peoples did not legally own their lands, the United States did, though they might retain equitable or usage rights therein. Nonetheless, over the course of 1850-1, agents of the Federal Government – Redick McKee, O. M. Wozencraft, and George Barbour, along with a robust military escort –

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[117] Ibid., 116-7
[118] Ibid., 116-7.
[119] Ibid., 117.
[120] Madley, *An American Genocide*, 151-2.
[121] Ibid.
[122] Hastings was also indirectly responsible for the Donner Party disaster.
[123] The term is an invention of early Puritans, in Latin presumably to give it legitimacy. They did not use the term *terra nullius*. Guidebooks used neither terms of art, generally referring to the lands as waste or wilderness. See Tomlins, *Freedom Bound* (2010), 138-156.
[124] *United States v. Rogers,* 45 U.S. 567 (1846),

"negotiated" a series of treaties of land transfer with various Native Californian tribes.[125] Of course, these groups were not representative nor were the treaty negotiations exhaustive nor bloodless, but they did produce treaties and paper reservations up and down the San Joaquin Valley. As the agents travelled the state, they found frequent conflict between colonists and Natives over property, for example in the (allegedly) widespread problem of "horse theft." As part of these treaties, the Indigenous groups relinquished "any claim or title whatsoever" they retained in their lands, even if, per *Rogers*, this was merely an equitable title.[126] The ultimate question, however, was one of power not of law. The treaties had to face ratification. Commissioner Wozencraft, in a 1852 speech arguing for ratification before the hostile California legislature, said, "[the Aborigines], gentlemen, would enrich the State with their labor, for they will remain, if you will permit them, and freely spend all the fruits of their toil."[127] Unpersuaded, the California legislature rejected setting aside any lands even for "occupation and use."[128] The Committee lamented that many of the reservation lands were valuable: the legislators ventured the lands worth "one hundred millions of dollars," and they had adverse pre-emption claimants, the Committee guessed twenty thousand. This was all speculative, but the Committee offered a fundamental reason for nullification drawn straight from guidebooks: Native people could not "use" the land because of their "habit of wandering with unrestricted freedom…and subsisting upon the profuse contributions of a beneficent Providence."[129] Per the recommendation of California's delegation, the US Senate secretly rejected the 1851Treaties on June 8, 1852, rendering California, per Banner, "*terra nullius* by default."[130] The reservation system was off to an inauspicious start. As historian George Phillips put it, the newly appointed Superintendent for California, Edward F. Beale, "had to devise some way to subjugate the Indians of California without the use of treaties."[131]

Beale proposed the use of military reservations to circumvent the treaty failures. These military posts would be funded by "the surplus produce of Indian labor." However, as Beale wrote in a letter to the Commissioner of Indian Affairs, the reservations were temporary property arrangements: "The reservations to be made with a view to a change in location, when increase of white population may make it necessary."[132] Hostile, anti-reservation members of the press, like newspaperman Charles Pickett, understood Beale's maneuver and argued that it controverted the logic of property. To Anglo colonists, reservations, like the Mexican ranchos, resembled feudal legality, fiefs with land worked in common, and enserfed Natives unable to move freely. Despite the continued hostility of key politicians and the public, a version of Beale's military reservation plan made it into the 1853 appropriations bill. The press was incensed, with some claiming the General Government had no right to reserve California lands at all.[133]

The ideational power of the guidebooks, as plans and projects of colonization, mattered in staking out the legal terrain of conquest. In aggregate, the legality of guides, rooted in nature

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[125] George Harwood Phillips, *Bringing Them Under Subjection: California's Tejon Indian Reservation and Beyond, 1852-1864* (Lincoln: Nebraska University Press, 2004), 25-35.
[126] Ibid, 37.
[127] "The Indian Commissioners, Dr. Wozencraft's Policy," *Western American*, February 17, 1852.
[128] *Journal of the Proceedings of the Assembly* (1852), 202.
[129] Ibid, 203-4.
[130] Banner, "California: Terra Nullius by Default," *Possessing the Pacific*, 163-194.
[131] Phillips, *Bringing Them Under Subjection*, 73.
[132] Ibid, 82-3.
[133] Ibid, 98-9.

and race and opposed to human law and lawyers, created the conditions, a legal lack, for a policy of genocide in which the State excluded California Indians from any legal protections whatever, in their lands and in their persons.

**Conclusion**

"Clustered without law, without government, without the ministrations of religion, without the restraining influences of society and relatives, or even the gentleness of woman. Yet the rights of person and property are secure…And why? Because everybody has ample and well-recompensed employment." – Horace Greeley, *New York Tribune* (1848).[134]

The American colonization of California began in 1841 as an ambitious but nebulous project of empire building. The lawyers who planned this far off settlement did not situate it within the rule of law, but rather in the state of nature. On the major legal difficulties of Mexican property rights, Southern slavery, and Native title, guidebooks operated within a Lockean frame in which colonization occurred conceptually prior to the introduction of human law. Indeed, some, like Horace Greeley above, understood their project as one of creating a society without positive law at all. In terms of real property, this discourse supported an egalitarian plan of land redistribution among Anglos. The encounter between this ideal and the reality of vested rights structured the subsequent three decades of property conflict within settler society. As to unfree labor, a commitment to legal naturalism, in which law followed climate, prevented the mass introduction of African slavery while maintaining Native slavery as an "impermanent" form. The providentially healthy environment of California only heightened its position as a Promised Land for white colonists and this feature of guidebooks changed very little over the next thirty years.[135] The anti-legal impulse had the gravest consequences in the contests over Native title. Guidebooks helped create the legal conditions for genocide, the lack of Native rights, and, more importantly, provided a clear motivation and justification for that genocide, namely the redistribution of Native lands to white colonists in pursuit of societal reform. Fundamentally, 1840s guidebooks naturalized American imperialism and gave form and substance to a legality of Manifest Destiny.

Anglo colonists did not stop writing guidebooks to California in the early 1850s. However, the tenor of the legal discourse on property changed substantially with the ebbing of the Gold Rush and the arrival of boatloads of lawyers seeking to make their "pile" not in mining but in litigation. Moreover, the audience for settler guides expanded beyond prospective migrants to include prospective capitalists looking to invest in California. To these men a vacuum of law was horrifying because it tended to destabilize property – it was not prudent to invest in a Mexican rancho when those vested rights might be redistributed to others based on a vague Lockean usage. As the New York Committee of Pacific Emigration wrote in 1856 in an attempt to assuage reluctant settlers, "The question of titles to these, as well as to the extensive tracts

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[134] Quoted in Foster, Esq. (ed.), *The Gold Mines of California* (1848), 36.

[135] "All strangers observe the beautifully-developed forms, the rounded limbs, swelling bust and rosy cheecks, of California children; and with a climate so favorable to sound health and muscular development, if we shall properly train the moral and mental faculties, the men and women hereafter to grow up in California will furnish the finest types of the Anglo-Saxon race." J. B. Crockett, "What Sort of a Country California Is" (1868) in California Immigrant Union, *All About California, and the Inducements to Settle There* (San Francisco: The California Immigrant Union, 1870), 48.

covered by private Mexican grants, has kept back these surveys, as well as the settlement and purchase by settlers, of the lands themselves; but the Board of Land Commissioners, and the United States Supreme Court, are now making such rapid headway in the settlement of the Spanish titles, that we may safely advise our correspondents that no difficulty need now be apprehended in procuring good lands, with satisfactory titles, and on reasonable terms for actual settlement."[136] As suggested by this passage, the "question of titles" had become a tremendous problem of law by 1856. The genesis and course of this "property crisis" is the subject of the next chapter.

[136] New York Committee of Pacific Emigration, *California: How to Go and What to do There* (New York: Nesbitt & Co., 1856), 6.

## Chapter 2: California Redeemed, 1851-1861

"Captain Joseph L. Folsom died last night at the age of 39 years. He was accounted the wealthiest man in the State, but his property is all held by titles more or less uncertain. For the last five years he has been engaged constantly in lawsuits and broils, worried, vexed, and harried to death." – Oscar L. Shafter, Esq. Diary, July 20, 1855.[1]

"Throughout the land that you hold as a possession, you must provide for the redemption of the land." – Leviticus 25: 24.

In mid-summer of 1850, land lawyer, and future Reconstruction Governor of California, Henry H. Haight sent a letter to his father, attorney Fletcher M. Haight, in St. Louis attempting to summarize the real estate situation in the burgeoning entrepot of San Francisco, as yet a city of tents and sojourners. In a "very meagre outline," Henry sorted city titles into a taxonomy of eight sources, noting the extent and legal character of each class.[2] Most of the titles circulating in the city were of "dubious legality if not positively illegal" and contingent upon the future actions, or inactions, of the government. For example, as to the Water Lots, the valuable mud flats between high and low tide, the younger Haight wrote, "These sales are not authorized by or in conformity to law but still it is the general expectation that they will be sanctioned as they ought to be. Valuable improvements have been made on these lots relying on the future ratification by Congress of the acts of General Kearney & the town council." Only the fifty to one hundred vara (Spanish yard) town lots granted by the Alcalde of the Pueblo of Yerba Buena, the former name of San Francisco, before the "gold era" seemed legally unimpeachable. In stark contrast, the so-called Colton Grants, named for the Justice of the Peace who issued them, ranked as the worst titles, being frauds meant only for speculation and unpossessed by their putative owners. Haight concluded, "You see it is in confusion worse confounded."

Since the cession of the Mexican state of Alta California to the Americans in 1848, at the close of the Mexican-American War, to Haight's writing, California property law had been in a severe crisis of uncertainty. Under the tremendous pressure of Gold Rush colonization – the discovery of gold coincided with the close of the war – the same parcels of California land, both in the mining regions and without, accrued title claims by numerous individuals, often under multiple, incongruous legal logics.[3] But following recent work by Gregory Ablavsky, the California legal situation was not simply a confused "property morass" but "property pluralism" — "the proliferation of multiple sources of ownership with disputed legitimacy."[4] Justice of the

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[1] Oscar Shafter and Flora Haines Loughead (ed.), *Life, Diary, and Letters of Oscar Lovell Shafter Associate Justice Supreme Court of California January 1, 1864 to December 31, 1868* (San Francisco: The Blair-Murdock Company, 1915), 160.

[2] Letter from Henry Haight to F. M. Haight, July 17, 1850, San Francisco. Box 1, 1846-1851, *Henry Haight Papers,* Huntington Library, San Marino, CA.

[3] On the mixed nature of law in 19th-century American land policy see Paul Wallace Gates, "The Homestead Law in an Incongruous Land System," *The American Historical Review* 41(4) (1936), pp. 652-681, and Sean M. Kammer, "Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850-1903," *Law & History Review* 35 (2017), pp. 391-432.

[4] Gregory Ablavsky, *Federal Ground: Governing Property and Violence in the First U.S. Territories* (Oxford, 2021), 19.

peace grants, forced sheriff's sales, public auctions, federal reservations, Mexican Grants, and naked squatter claims, among other sources of rights claims, created what Robert Cover famously called a "jurisgenerative" legal climate, one that created many meanings.[5]

However, in Haight's letter one can also detect the anxiety of "too much law," too many competing claims to meaning and ownership, for there could only be one True Owner of any given lot. One disaffected visitor from the same period noted it was common to have "as many as half as dozen claimants to a single lot" in San Francisco, to be ultimately determined "*vie et armis*," by force of arms, rather than by the rule of law.[6] The alienation, generally buying and selling, of these titles expanded the number of involved persons geometrically, and because of the common law *nemo dat* rule – one cannot give what one does not own/have – chains of title anchored "good faith" purchasers to the original claim no matter how removed in time or intention. An original claim deemed "fraudulent" by the judiciary could not vest but was a nullity, thereby erasing the entire chain of title. The further principle of "relativity of title," that claims of ownership to land were measured only against other claims of ownership to land, meant that the True Owner was always provisional rather than final.[7] In San Francisco, these foundational rules of common property law produced a legal slot machine with destabilizing consequences for security of property. As long as insecurity of property prevailed, the specter of violence and disorder loomed over San Francisco. Acts of ownership, like fencing a lot or attempting to collect on a note, could, and often did, precipitate inter-settler violence.

Such was the fraught situation facing Haight and the cadre of lawyers arriving in San Francisco in 1849-1850, a group indexed in a contemporary survey of property values in the city.[8] It was both volatile and lucrative, offering thousands in fees to the ablest lawyers many of whom, like the prominent Oscar Shafter, emigrated from the Atlantic Coast because of lucre: "going by Atlantic standards, the rates of professional compensation are perfectly fabulous. $1,000, $5,000, $20,000 retainers are of frequent occurrence."[9] For reference, the average white American household (outside of the South) had $3,000 in wealth in this same period.[10] As future California Supreme Court Justice Joseph Baldwin, author of several crucial cases in this article, wrote in 1854, colonial frontiers in general, and California in particular, promised "a bountiful system of squabbling…whose surface strife only indicated the vast *placers* of legal dispute waiting in untold profusion."[11] The Land Bar charged with resolving the property crisis directly profited from its perpetuation.

So while many of the legal issues examined in this article were analogous to those elsewhere, for instance the tension between squatters and absentee landholders, the San

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[5] Robert Cover, "Nomos and Narrative," 97 *Harvard Law Review* 4 (1983-4), 11-19.
[6] Hinton Rowan Helper, *The Land of Gold. Reality Versus Fiction* (Baltimore: H. Taylor, 1855), 62-3.
[7] Larissa Katz, "The Concept of Ownership and the Relativity of Title," *Jurisprudence* 2(1) (2011), 191-203, 196.
[8] *A "Pile," A Glance at the Wealth of the Monied Men of San Francisco and Sacramento City. An Accurate List of the Lawyers, their Former Places of Residence, and Date of their Arrival in San Francisco* (San Francisco: Cooke & Lecount Booksellers, 1851).
[9] Shafter, *Life, Diary, and Letters*, 67-8.
[10] Robert E. Gallman, "Trends in the Size Distribution of Wealth in the Nineteenth Century: Some Speculations," in Lee Soltow (ed.), *Six Papers on the Size Distribution of Wealth and Income* (1969), 3.
[11] Joseph G. Baldwin, *The Flush Times of Alabama and Mississippi a Series of Sketches* (New York: D. Appleton & Co., 1854), 47-8.

Francisco bar faced an increase in speed and scale so vast that it wrenched the common law system "out of time" to the point of general social crisis.[12] Property transactions were measured in days, even hours, property cases, on the other hand, were measured in years, even decades. No wonder that San Franciscans went to law and then grabbed their gun just in case.

The apogee of what I call the "property crisis" of the 1850s has been relatively well-studied by historians: the 1856 San Francisco Vigilance Committee uprising. While the vigilantes themselves narrated their actions in the registers of criminality and republican virtue, historians have characterized the uprising as more like a bourgeoise coup than a civic-minded police action.[13] In addition to several public lynchings of known killers, several the result of property disputes, the Executive Committee of the Vigilantes, nearly all members of a certain "respectable" social class, banished many prominent members of the Democratic Party in the city and affected long-term regime change and a redistribution of power through the vehicle of the People's Party. In particular, this article builds on the breakthroughs of Nancy Taniguchi regarding the property conflict running beneath the uprising by situating the events of 1856 within a larger narrative of property law in American settler colonization.[14] Similarly, historian Tamara Shelton's outstanding account of the politics of "squatters" and "speculators" in California also prefigures this article, particularly the insight that the squatter class believed "that natural law superseded the actual law."[15] Within property pluralism, however, this distinction makes little sense – squatters had a different legality than speculators that they believed *was* the "actual" law. The Mexican Grants, lands granted during Mexican rule of Alta California, constitute the other well-explored historical topic of this period.[16] Whether American state acted fairly toward the Californios and their property, one prominent historical concern, is a question that can be put to the side by understanding Mexican law as another legality of property circulating through early American California, in addition to those of squatters and speculators.

This chapter deepens and expands the insights of Taniguchi, Shelton, and others by situating the property crisis, as represented both by the Vigilance Committees and the Mexican

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[12] On analogous legal disputes between frontier settlers and distant speculators see Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), 59-62 for a discussion of *Green v. Biddle* 21 US 1 (1823), a Kentucky case. On the relation between common law and time see Kunal M. Parker, *Common Law, History, and Democracy in America, 1790-1900: Legal Thought Before Modernism* (Cambridge: Cambridge University Press, 2011).

[13] See, e.g., David A. Johnson, "Vigilance and the Law: The Moral Authority of Popular Justice in the Far West," *American Quarterly* (1981); Don Warner, "Anti-Corruption Crusade or Businessman's Revolution - An Inquiry into the 1856 Vigilance Committee," *California Legal History* 6 (2011), pp. 403-442; Philip Ethington, *The Public City: The Political Construction of Urban Life in San Francisco, 1850-1900* (UC Press, 2001). For contemporaneous bourgeois class formation in New York City see Sven Beckert, *The Monied Metropolis: New York City and the Consolidation of the American Bourgeoisie, 1850–1896* (Cambridge, 2001).

[14] Nancy J. Taniguchi, *Dirty Deeds: Land, Violence, and the 1856 San Francisco Vigilance Committee* [Kindle Edition] (Norman: University of Oklahoma Press, 2016).

[15] Tamara V. Shelton, *A Squatter's Republic: Land and the Politics of Monopoly in California, 1850-1900* (Berkeley: University of California Press, 2013), 39. The legal culture of squatters is more fully explored in Andrea G. McDowell, "From Commons to Claims: Property Rights in the California Gold Rush, 14 *Yale J. L. & Human.* 1 (2002).

[16] See, Paul W. Gates, *Land and Law in California: Essays on land policies* (Ames: Iowa State University Press, 1991); María Montoya, *Translating Property: The Maxwell Land Grant and the Conflict over Land in the American West, 1840-1900* (Berkeley: University of California Press, 2002).

Grants, in the American Political Development framework of the "State of Courts and Parties."[17] With very few exceptions, the lawyers of the Land Bar were active in partisan politics, patronage, and office-holding, with little distinction between their public and private legal activities.[18] (The Vigilance Committee of 1856 proved the exception – no lawyers were part of the Executive Committee and even their closest allies, like Shafter, kept a studied distance.) Courts in early American California actively participated in distributing and redistributing landed property, though they often obscured this function through the legal fiction of the True Owner – the law did not *take* the property of Peter Smith but simply determined he was not the True Owner, but a fraudulent one. Peter Smith and other putatively false owners, whose property rights ceased to exist, usually did not see it that way. Following work by legal historians Hendrik Hartog and Robin Einhorn, this article explores the complex municipal governance undergirded by the distribution and control of land through property law.[19]

As revealed in this chapter, the common law distributed and redistributed property rights, which destabilized trade in land, and rendered borrowing, repayment, and foreclosure a fraught, potentially violent action. Understanding the complex political economy of land distribution in settler colonial sites renders protection and stability quite fragile characteristics of the legal order rather than natural consequences of lugging Blackstone's *Commentaries* into legal frontiers. Through court cases, newspaper accounts, and the private papers of San Francisco lawyers this article reconstructs the California ownership crisis of the 1850s in San Francisco. In doing so, it argues, in this time and place, common property law was the principle means of redistribution rather than a conservative bulwark against redistribution. However, in contrast to Horowitz, it also shows that moral concerns of fraud and equity dominated this jurisprudence and attributed meaning to the formalities of law. In this suspicious, vexed, and fraught culture of law, missing paperwork was transformed from legal accident to evidence of deep conspiracies. In this way, I show common law gave meaning, emotion, and worth to the distribution of land and power over the 1850s – strange soil in which to plant a neutral and anti-redistributive "rule of law."

## Fraud and The Law of the Land Bar

"Whatever purification from sin and its contaminations is accomplished here, but hastens the hour of completed regeneration hereafter, while every evil act performed here, every evil thought

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[17] A concept famously introduced in, but not elaborated by, Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge: Cambridge University Press, 1982). For more robust accounts see Charles W. McCurdy, "Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America," *Law & Society Review* 10(2) (1976), pp. 235-266; Richard L. McCormick, *The Party Period and Public Policy: American Politics from the Age of Jackson to the Progressive Era* (New York: Oxford University Press, 1986).

[18] A who's who of the Land Bar can be found in the office-holding index of Winfield J. Davis, *History of Political Conventions in California, 1849-1892* (Sacramento: California State Library 1893).

[19] Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Cornell University Press, 1989); Robin L. Einhorn, *Property Rules: Political Economy in Chicago, 1833-1872* (University of Chicago Press, 1991).

indulged here, but delays and postpones the period of redemption." – Oscar L. Shafter letter to Sarah Riddle Shafter, July 28, 1855.[20]

As eminent antebellum jurist Joseph Story wrote in his treatise on the subject, "In the most general sense, we are accustomed to call that Equity, which in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex aequo et*."[21] The actual jurisprudence of equity in America did not embrace all of "natural justice" but it nonetheless had substantial powers in "matters of fraud, accident and trust."[22] Indeed, quoting Blackstone, Story wrote, Courts of Equity were meant to "detect latent frauds and concealments which the process of the Courts of Law is not adapted to reach." As suggested by the language of "concealment," much of fraud jurisprudence depended on evidence and interpretation. Melville M. Bigelow, in his extensive postbellum treatise on the law of fraud, defined it as "one man's endeavoring by deception [or circumvention] to alter another man's general [or particular] rights."[23] Deception dealt in motives while circumvention did not, but all fraud, Bigelow noted, involved the moral determination of "guilt."

The boundaries between fraudulent and good faith action were constituted by interpretive evidentiary rules. Per historian Edward Balleisen, these rules became more restrictive over time as courts became skeptical of equity's broad application.[24] The logic of this shift was its effect on commercial life, on the stability of property. As the Pennsylvania Supreme Court noted in 1839, a robust law of fraud "would put a stop to commerce itself in driving every one out of it by terror of endless litigation."[25] This was precisely the tension that emerged in California: on the one hand, law provided a medium of determining frauds, on the other hand its "endless" application hindered the development of a stable property market. Seemingly innocuous questions of evidence became loaded in a fraud case. When was a missing document an accident and when was it a fraud? How about an odd signature or contradictory testimony? Was possession itself relevant to the moral quality of a title?

These questions were endemic in all American settler colonies, and a land bureaucracy had developed over the Early Republican period to quiet the problems of conquest and colonization. Though decentralized, fee-based, governed by hundreds of statutes, and operated by lawyers who straddled the line between public officials and private attorneys, this land administration was not weak nor meager.[26] It was chaotic and cumbersome, but generally it

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[20] Oscar Shafter and Flora Haines Loughead (ed.), *Life, Diary, and Letters of Oscar Lovell Shafter Associate Justice Supreme Court of California January 1, 1864 to December 31, 1868: A Daughter's Tribute to a Father's Memory* (San Francisco: The Blair-Murdock Company, 1915), 160.
[21] Joseph Story, *Commentaries on Equity Jurisprudence: As Administered in England and America*, 4th ed. (London: V. & R. Stevens and G. S. Norton: 1849), 2.
[22] Ibid, 66.
[23] Melville Madison Bigelow, *A Treatise On the Law of Fraud on its Civil Side* (Boston: Little, Brown & Co., 1888), 4-5.
[24] Edward J. Balleisen, *Fraud: An American History from Barnum to Madoff* (New York: Princeton University Press, 2017), 49.
[25] Quoted in Ibid, 50.
[26] William Wharton Lester, *Decisions of the Interior Department in Public Land Cases and Land Laws Passed by the Congress of the United States Together with the Regulations of the General Land Office,* Vol. 1 (Philadelphia: H. P. & R. H. Small, 1860).

worked.[27] Matters in California, however, had grown several degrees more complex under the pressure of explosive Gold Rush colonization. As US Agent Thomas Butler King lamented to Congress in 1850, "The greatest confusion prevailed respecting titles to property, and the decision of suits, involving the most important rights, and very large sums of money, depended upon the dictum of the judge. The sale of the territory by Mexico to the United States had necessarily cut off or dissolved the laws regulating the granting or procuring titles to land; and, as our own land-laws had not been extended over it, the people were compelled to receive such titles as were offered to them, without the means of ascertaining whether they were valid or not."[28] A great work of law would be necessary to repair this breach.

At first, matters seemed in hand from the perspective of the land bureaucracy. Following this established scheme of legal conquest in California, the military government commissioned a survey of Spanish-Mexican colonization law in 1848, to prepare American land officials to take over the myriad property disputes waiting for them. Henry Halleck, an influential member of the land bar and the secretary of state under military rule, prefaced his Report on the subject with disquiet: "disputes are daily arising between the different claimants, I deem it exceedingly important to the peace and prosperity of California that measures be immediately taken for the speedy and final settlement of these titles upon principles of equity and justice."[29] To the educated Halleck, the problem was not "arbitrary" or "fraudulent" rule by municipal magistrates as lay settlers complained, or deficiencies in Spanish-Mexican property law, as they also complained, but the actions of American colonists themselves. He wrote, "the laws relating to the granting of lands in California are…very minute and perfect, resting… upon positive and definite decrees of the Mexican congress, and the subordinate but no less distinct enactments of the territorial legislature – laws which seem to have been perfectly understood and pretty generally obeyed here previous to the irregular proceedings springing out of the mania for land speculations following the conquest of the country by the Americans."[30] The problem of titles emerged from the disregard of law, Halleck argued, not from law itself. Appraising this dire, but expected, situation Halleck knew just the men for the job: educated lawyers like himself.

In 1851, an anonymous statistician reckoned the wealth of prominent men in San Francisco and Sacramento in a booster pamphlet titled *A "Pile,"* a reference to a pile of gold.[31] Tabulations of private wealth, the booster wrote, revealed "a mighty empire on the shores of the Pacific." Stable landed wealth was integral to this vision of empire. After the "Monied Men," the "*Pile"* offered a who's who of prominent attorneys in the capital and the queen city. Incidentally, many lawyers and law partnerships doubled up on the first list as wealthy holders of property. Halleck and his partner Nathaniel Bennett had $15,000 in their legal firm.[32] Prominent Vermont attorney Frederick Billings, the principal in a decisive 1857 property case discussed below, owned $35,000 in real estate. All these values were "uncertain," but the point was clear enough: the stability of landed wealth, and therefore the liberal colonial project, depended on the work of

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[27] See generally Frymer, *Building an American Empire* (2017).
[28] Thomas Butler King, *California: The Wonder of the Age. A Book for Every one Going to or Having an Interest in that Golden Region* (New York: William Gowans, 1850), 4.
[29] And, of course, leader of the Union Armies. Col. R. P. Mason to Brigadier General R. Jones, April 13, 1849, in *Halleck Report*. 31st Congress, 1st Sess. Ex. Doc. No. 17 (1850), 118.
[30] *Halleck Report*, 130.
[31] *A "Pile,"* (1851), 4.
[32] Ibid, 5.

lawyers, who would profit handsomely in their defense of property. In the cash-strapped periphery, property lawyers were often paid in kind, i.e. in a portion of the land claim. As historian Paul W. Gates notes, "Because the rancheros frequently lacked ready money, it was common practice for attorneys who successfully presented cases before the land commission, district court, and the Supreme Court to take a share of the land."[33]

While the land bar hoped to cabin off property disputes in the judiciary, the scale of the uncertainty turned "private" disputes into objects of mass public contestation. Nowhere was this truer than in in the Mexican Grant cases. The Mexican colonization of Alta California had, after 1836, depended on large grants to private individuals as a general policy of liberality and patronage.[34] The problem was not grants as such – the American government granted land all the time – but their size, informality, and uncertainty. American land law "simplified" land into rectilinear sections of 80, 160, 320, and 640 acres (1 square mile), enough land, lawmakers and the public figured, for a family farm of the Atlantic type. The Pre-Emption laws, for example, capped the amount a family could receive from the public domain, under those laws, to 160 acres. The legal limit of Mexican grants – 11 leagues – was 300-times the Pre-Emption maximum. The prospect of some obscure Californio claiming to own all of San Francisco under a grant was absurd, but in fact there were several such people, like French businessman and naturalized Mexican Joseph Yves Limantour, whose claim will be discussed in detail below. The prospect of a grantee "floating" an enormous claim "on top of" land possessed by others horrified the public. The question of the True Owner quickly became an object of intense public interest in the colony.

Doctrinal law greatly favored the Mexican grantees no matter how absurd or large their claims. The Treaty of Guadalupe Hidalgo had guaranteed private rights in Alta California.[35] But even if the Treaty had said nothing on the subject, the law of nations generally recognized the continuity of private rights in conquered and ceded lands. So too did domestic US law. The US Supreme Court thought this a settled legal matter writing, in an 1828 Florida case, "In such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change."[36] Private law, including property, grants, and contracts, remained undisturbed by a change in sovereignty. To lawyers this made eminent sense. As one settler guide for California argued, "It would be impossible by any legislative act to change suddenly the character of former civil institutions of the country without committing outrageous injustice to its inhabitants."[37] Moreover, by the early 1850s, 42 percent of Mexican grants were held by Americans who had been granted land as naturalized Mexican citizens, purchased the claims, or married into landed Californio families.[38] It was one thing to disregard utterly the rights of

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[33] Paul W. Gates, *Land and Law in California: Essays on land policies* (Ames: Iowa State University Press, 1991) citation omitted, 141.
[34] See Thomas Richards, Jr., *Breakaway Americas: The Unmanifest Future of the Jacksonian United States* (Johns Hopkins University Press, 2020), 150-180.
[35] Article VIII of *Treaty of Peace, Friendship, Limits, and Settlement Between the United States of American and the United Mexican States Concluded at Guadalupe Hidalgo* (1848).
[36] *American Ins. Co. v. 356 Bales of Cotton* (1828).
[37] F. P. Wierzbicki, *California as it is, and as it May be* (San Francisco: Washington Bartlett, 1849), 17.
[38] Paul Gates, "The California Land Act of 1851," *California Historical Quarterly,* Dec. 1971, Vol. 50, No. 4, pp. 395-430, 410.

Native People or Californios, but respectable American businessmen? The "confiscation" of property on such a scale was unthinkable.

Pulled one way by the radical demands for nullification and another by the legal imperative to protect vested rights, the 32nd Congress decided to split the difference, creating an inquisitorial body to settle the issue case by case, the Board of Commissioners.[39] Following a model used in other American colonies, the General Government opened every Mexican grant to scrutiny by three appointed commissioners. The loser had the right to appeal to the Federal District Courts, which they invariably did. The Board quickly established the principle that it would approve claims the Mexican judiciary *would have* approved, which prompted a deep dive into Halleck's Report. Though "perfect" in statutory design, Halleck had identified many problems of form in the operation of the granting system that opened Mexican grants to rejection. The question became how much formal deficiency the preceding government would have tolerated. The answer was a great deal. Grantees and their assigns might not have complied with every condition subsequent, like, say, improving the land or knowing where it was, but the judiciary established that the property right itself vested *immediately* upon the issuance of a valid grant. Like all great compromises the Board appeased neither the conservative lawyers nor the radical settlers who now had hundreds of chances to contest their differing legalities of property. Over the period from 1851-54, the Board of Land Commissioners heard 395 cases – they would hear nearly 800 all told. President Fillmore's appointments were very solicitous toward the grantees and confirmed 69 of 70 of the claims brought before them.[40] The subsequent Democratic administration thought the Whigs had been altogether too liberal with the grantees and hoped to show their pro-settler bona fides. From 1853 to 1854, under the Pierce commissioners, the Board heard 325 cases, approving 223 and rejecting 102.[41] Although the commission may have started with the easy cases, and still approved 2/3 of the claims, this was a signal of the state of courts and parties digesting the Mexican claims issue in a plural legal order.

As part of this expansive jurisprudence, the loser before the Board had the right to appeal to the Federal District Court for Northern California, which was bound to redetermine the cases on the facts. During the period from 1853 to 1858, this was the courtroom of Ogden Hoffman. From his first opinions in June 1853, Hoffman lamented that he could not reject appeals from the Board of Commissioners, but was bound by his office to hear appeals, though, he recognized, the Board had vastly greater fact-finding capacity.[42] Poised between the facticity of the Board of Commissioners and the laws of grant interpretation handed down by the US Supreme Court, Hoffman had the unenviable job of sorting through inchoate and contested titles a second time.

In this effort, Hoffman was joined by the US District Attorney in charge of handling the appeals by the United States. The first of these attorneys, S. W. Inge, a Democratic politician from Alabama, appealed a healthy number of confirmed grants without additional argument or

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[39] "An Act to Ascertain and Settle the Private Land Claims in the State of California," 31st Cong., Session II. Ch. 40-1 (1851), 631-635. The military government had used the commission model in several instances from 1846-1850 to settle titles in Sonoma and San Jose de Guadalupe. Halleck Report (1850), 146-8.

[40] Paul Gates, "The California Land Act of 1851," *California Historical Quarterly,* Dec. 1971, Vol. 50, No. 4, pp. 395-430, 402.

[41] Ibid, 402.

[42] *The United States v. Cruz Cervantes, Claiming the Rancho of San Joaquin or Rosa Morada* (June 1853) in Hoffman, *Reports of Land Cases*, 10.

evidence, often merely alleging a shadowy "fraud."[43] A victory for the Government would add the grant in question to the public domain and therefore benefit pre-emptors on that land. In the June 1855 term, for example, Inge appealed the confirmation of the Jimeno's Rancho claimed by Thomas O. Larkin, an American with an extensive land business in the state. Hoffman tersely ruled that "the case has been submitted by the District Attorney without the statement of any objection to the validity of the claim on the part of the United States…. The grant is fully proved." [44] Inge similarly offered no reasons for reversing the Board's decision in, inter alia, the Rancho Caymas case, the Rancho Capay case, the Rancho Cañada de Raymundo case, the Rancho Casada de Raymundo case, and the Rancho El Valle de San José case of the same term.[45] Most were met with a terse "no reason for appeal has been given" by the United States. "The United States have taken an appeal in this case," Hoffman wrote in one case, "but it is submitted to us as usual without argument."[46] Why was the District Attorney challenging the rulings of his own Government's Board of Commissioners? In short, for popular political reasons. Inge was trying to appease the settler faction of the Democratic Party that viewed all the Mexican grants as illegitimate, and was therefore appealing the cases pro forma – the popular politics will be discussed further in the next part. Even if Inge had made a case, however, he could well have lost because the rules of interpretation handed down by the US Supreme Court, most notably in the Fremont case in 1853, were heavily weighted toward the grantees and vested property rights.

With the jurisprudence stacked increasingly in favor of the grantees on matters of form and precision, fraud claims became a way for the Government to retain land in the public domain without reversing the liberal legal decisions of the judiciary. Archives and memories were fickle and those who looked for suspicious circumstances readily found them. In an 1855 case argued by Halleck, Peachy, and Billings on behalf of the Heirs of Jose Cornelio Bernal, Hoffman listened to a week of new evidence, in addition to that collected in the record by the Board, because of the number of interested parties.[47] Hoffman wrote, "A mass of testimony has accordingly been taken, but it is for the most part so inconclusive, irrelevant and conflicting that the District Attorney in his concluding argument forbore to allude to it, and based his objections to the confirmation of the claim almost exclusively upon the suspicions suggested by a comparison of the original title papers with the expediente from the archives."[48] The key witnesses for the United States, a Mr. and Mrs. Lowell, undermined their credibility when they could not agree on the composition of a "party from Monterey" allegedly involved in creating the fraudulent grant. Mrs. Lowell swore that three of the conspirators were Americans and one Mexican; Mr. Lowell swore three were Indians and servants of one Mexican. Hoffman wrote, "To any one acquainted with the difference in appearance between Americans and the Indians of the country, the existence of such a discrepancy suggests doubts which impair the credibility of

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[43] See, e.g., *The United States v. Thomas O. Larkin et al., Claiming Jimeno's Rancho* (June 1855), 41; *The United States v. George C. Yount, Claiming the Rancho Caymas* (June 1855), 45; *The United States v. Maria Louisa Greer et al., Claiming the Rancho Canada de Raymundo* (June 1855), 71 in Ibid.
[44] *The United States v. Thomas O. Larkin et al., Claiming Jimeno's Rancho,* in Ibid, 41. See also Gates, "The Land Business of Thomas O. Larkin," *Land and Law in California*, 95-115.
[45] Hoffman, *Reports of Land Cases*, 49, 68, 72, 74.
[46] Ibid, 83
[47] *United States v. The Heirs of Jose Cornelio Bernal, Claiming the Rancho Rincon de Las Salinas y Portero Viejo* (June 1855)
[48] Hoffman, *Reports of Land Cases*, 53

all the evidence of these witnesses."[49] Hoffman dismissed other elements of the United States' case as fantastic. For it to be a fraud, he wrote, it would need to be of "an extent and character without parallel."[50] In *Bernal*, Inge tried to produce the factual basis for such a claim but managed only to try Hoffman's patience. Though Bernal's heirs won the case, this was the second federal adjudication of this property alone and retaining Halleck, Peachy, and Billings cost thousands of dollars – even frivolous appeals were expensive to defend. In this manner the land bar sought to settle the grant question by creating an archive deposition by deposition, artifact by artifact, year over year – and made good money doing so.

With the fruits of this legal business, successful members of the land bar turned to buying real estate for themselves. The career of Oscar Shafter was illustrative in this regard. Lured to California with a salary of $10k, "too generous for a thrifty New Englander to Ignore," the educated lawyer routinely tried cases worth thousands to himself.[51] One case from 1857, he wrote to his father, was "worth to us in coined gold $50,000. This is between you and me."[52] The law partnership was deeply involved in the economics of large landholding. In November 1857 Shafter's law partner, Park, was supposed to go on a trip to Europe to "effect a loan upon Fremont's Mariposa ranch, but the recent monetary disturbances must diminish very materially the chances of success."[53] With this considerable wealth, Shafter, together with his law partner, Park, his brother Jim Shafter, and former California Supreme Court Justice Solomon Heydenfeldt, purchased the Rancho Punta de Reyes in Marin County, 50,000 acres remarkable for its potential as a cattle ranch, for duck and geese hunting, and for containing the "landing-place of Sir Francis Drake, the first Anglo-Saxon to place foot upon the western shore of this continent".[54] Litigation over the Rancho came swiftly. "Our success in the principal suit has stirred up the rapacity of about half of the San Francisco bar and they are hawking at the property like so many kites," Shafter wrote. Still, "The title is impregnable in our judgement."[55]

**Property Crisis**

"About 8 o'clock yesterday evening, a difficulty occurred in Sydney Valley, beyond Clark's Point between a land owner and some squatters. A woman who was about to be ejected chopped the land owner over the head several times with a cleaver with some damage to the hide but none to the skull. A third person who was attempting to make peace got cut severely in the arm with a sickle in the hands of another man." – "Local Matters: Squatter Riot," *Daily Alta California* May 22, 1853

While the Land Bar politely and carefully pulled apart the Gordian Knot of property claims, resolving small uncertainties and creating new problems, all with the most thorough documentation and care, they did so in a political climate highly animated by the question of deciding True Ownership. The attempts by Inge to overturn confirmed property claims reflected

[49] Ibid, 54
[50] Ibid, 64.
[51] Shafter, *Life, Diary, and Letters,* 31
[52] Ibid, 189
[53] Ibid, 190-1.
[54] Shafter, *Life, Diary, and Letters*, 7-8.
[55] Ibid, 199.

the popular legality of San Francisco. The popular press drove this discourse forward, flooding their pages with conspiratorial charges of fraud. As was later proved to the satisfaction of the Federal Courts, some of the grants *had* been antedated or forged, clear fraud, but the radicals had little evidence for their charges of dishonesty and corruption. Not that this lack bothered them. God had left California in the "state of nature" for the Anglo-Saxon race, radicals reasoned; why should they let the dictates of the judiciary get in the way of actually possessing it? Charles E. Pickett, a radical newspaperman who fancied himself the American Jean-Paul Marat, warned of a "revolution of force" should Congress fail to "settle these [Mexican grant] claims upon an equitable and democratic republican basis,"[56] by which he meant that very few grants should be declared valid, preferably none. In the same issue of February 17, 1852, Pickett advertised a mass meeting for "renters and residents" of the portion of San Francisco waterfront called the "Government Reserve," then being litigated in the Superior Court, to a mass meeting at the shop of E. B. Sackett to discuss their common interest in the proceedings.[57] The line between meeting and mob was thin. Sackett was subsequently arrested as part of a "squatter riot" attacking the property of banking house Palmer, Cook, & Co in the Reserve.[58] Mass meetings on property disputes were common in San Francisco throughout the 1850s, underscoring the political nature of the legal disputes. It was not only the lawyers but the People too who would dictate how property conflict unfolded.

Matters escalated quickly. In February of 1853, José Y. Limantour brought a truly audacious property claim before the Board of Land Commissioners and the public at large: unbeknownst to the roughly 35,000 residents of the city, Limantour was the True Owner of half of it, 15,000 acres, including the most valuable land in the city, the Water Lots.[59] Though it was a city of tents, sand dunes, and shabby wooden structures, everyone knew the value of the waterfront. Hundreds of claimants had been squabbling over the lots for years. The *San Joaquin Republican* responded with amusement: "The land titles [in San Francisco] are woven into a Gordian knot which Blackstone himself could not untie. Ayuntamiento endowments, Colton grants, Pueblo and Government reservations, Peter Smith sales, Tax titles, *cum multis aliis,* conflict one with the other in amusing perplexity. Finally comes Limantour, threatening to swallow them all in a mouthful. Small wonder that the lawyers thrive so prodigiously at the bay."[60]

Through his lawyer, late Filmore-appointed Land Commissioner James Wilson, Limantour petitioned the Board for confirmation of his claims and printed a 75-page pamphlet for circulation to the public. In the characteristic style of the Land Bar, Wilson's pamphlet contained extensive testimony from members of the land bar and other legal papers bound together. In the city papers, Wilson wrote, it was common to slander the Limantour claims with "hints, innuendos and imputations of fraud or forgery, or some other dark crime, as connected with it."[61] At the time, the *Daily Alta California*, the paper of record for the respectable citizens

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[56] "Copy of a Letter to Gen Foote," *Western American*, 17 Feb. 1852.
[57] "Palmer and Others v. Webster and Others" and "Important Meeting," *Western American*, 17 Feb. 1852.
[58] "Local Matters," *Daily Alta California* March 30, 1852.
[59] James Wilson, *Pamphlet Relating to the Claim of Señor Don José Limantour, to Four Leagues of Land in the County Adjoining and Near the City of San Francisco, California* (San Francisco: Whitton, Towne, & Co., 1853).
[60] "San Francisco Land Titles," *San Joaquin Republican*, 30 March 1853.
[61] Ibid, 3.

of San Francisco, reacted to Wilson's pamphlet with nervous reserve: "We previously believed the claim to be an outrageous fraud," the paper admitted on December 6, 1853, "after reading this pamphlet we express no opinion, but leave every one to form his own opinion upon the testimony offered, which is not at all equivocal, though it may be false. The case appears plausible."[62] In what kind of legal system would it be "plausible" for one man to gobble up half a city? Apparently this one. The stakes were absurdly high. According to the pamphlet, Limantour had sought to acquire a large tract in Yerba Buena (San Francisco) as a speculation in 1841, based on the belief that Mexico would soon sell Alta California to the British Empire for payment of sovereign debts.[63] His chance came in 1843 when he had the good fortune to meet the newly appointed Centralist governor of California, Manuel Micheltorena, then stranded in Los Angeles for want of funds (reigning in the territory of Alta California was not going well for the Mexican government). Limantour, in a canny business move, agreed to provision Micheltorena and his troops in exchange for $4,000 of "vacant land." The veracity of these documents, copied in the pamphlet, was attested to by many members of the land bar. The *DAC* reported "no contradiction worthy of notice" in this testimony.[64] The valuable claim was so convincing that the Board of Commissioners confirmed it, but suspicion and legal problems lingered. Was this a successful speculation, purchased for valuable services from the governor of Alta California, or a sinister fraud, antedated to cover lands once they had become valuable? And even if it were a canny business move, was the claim so valuable and extensive that it could be morally illegitimate?

Shafter represented Joseph L. Folsom, on paper one of the wealthiest men in the city, in an assault case derived from this property uncertainty. In a letter, Shafter described the incident in question. In the summer of 1854, workingmen under Folsom's employ were working on one of his San Francisco properties when they were attacked and expelled by "an Irishman, one Larkin" and several others. Larkin et al. did so "without any title to the land," Shafter noted, though it would seem they disagreed. Later in the evening Folsom's workingmen returned and a fight ensued in which Larkin's arm and thigh were "desperately fractured by pistol balls" which would leave him "crippled for life." Larkin sued Folsom for $20,000.[65] The "First Street Squatter Riot," as the press termed the incident, ended in an acquittal of Folsom's workingmen.[66] Such squatter or title "riots," "difficulties," and "fights" had become a semi-regular occurrence, including one colorful incident with a meat cleaver.[67] Moments of legal significance, like fencing a lot or an ejectment precipitated violence.

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[62] "Removal," *DAC*, December 6, 1853.
[63] Wilson, *A Pamphlet,* 5-6.
[64] "Removal," *DAC*, December 6, 1853.
[65] Shafter, *Life, Diary, and Letters*, 66.
[66] "Law Report," *Daily Alta California*, Dec. 14, 1854.
[67] See, e.g., "City Intelligence," *Daily Alta California* Sept. 18, 1851 (shoot-out over a lot on Battery St after one claimant attempted to fence the lot. Broken up by the police); "Local matters," *Daily Alta California* March 24, 1852 (a body of 40-50 attacked a property recently litigated in favor of a Mr. E. A. Hodges); "Local Matters," *Daily Alta California* May 22, 1853 (a squatter facing ejectment attacked the owner with a cleaver "with some damage to the hide but none to the skull"); "Another Squatter Riot," *Daily Alta California*, June 9, 1854 (on a lot owned by James Lick under a city title, lead to death of one woman).

As shown by the Limantour issue, the ownership of the city's valuable Water Lots proved especially contentious.[68] Trouble began innocently enough in 1851 with the City indebted to one Dr. Peter Smith for medical services. Short of cash to pay the doctor, Smith forced the city's hand by way of a sheriff sale of municipal lands. The sheriff duly sold the water lots and the titles purchased thereafter became known as the "Peter Smith titles." The lots were immediately embroiled in litigation and legislation. The City tried to transfer the property to "commissioners of the funded debt," which it had just invented, who would hold it in trust. Meanwhile, the State "confirmed" the lands to the city but demanded ¼ of any revenue derived thereby. New "Water Lot Bills" chased the old in a flurry of lobbying. In an admirable effort to summarize the situation in January 1852, a reporter for the *Daily Alta*, described how the Smith titleholders wanted to repeal the first Water Lot Bill to "alarm the property holders of the original water lots" and force them to band together with the Smith title holders to secure the titles of all parties through a new Water Lot Bill.[69] Confusion, worse confounded, reigned.

Finally, the State Legislature found itself arguing explicitly about the principle at stake, namely what counted as unlawful confiscation of property. Opponents of the Smith titles had turned their attention to the legitimacy of the original wartime grant of General Kearney to the city. Chivalry Senator Archibald Peachy, law partner of Billings, Halleck, and Shafter and one of few individuals who attempted to introduce Southern slavery into California, tried to resolve the case in favor of the Smith title holders, generally Democratic partisans, by referencing *Fletcher v. Peck* (1810) on the sanctity of vested rights. "[Deeming] that they had a good title," Peachy said on the floor, San Francisco had sold to the purchasers who "honestly paid $5,000,000 more than it is now worth, and now must this great State go back into the past, rake up dusty papers, and seek to pick a flaw in Kearny's grant, in order at this late day to take advantage of it…Is there any real ground to take this property away from 1,000 families, and beggar them? Are they to be deprived of their all, when the title has not been proved to be bad?"[70] "Fraud is never to be presumed," Peachy said, "but must be proved." Senator McMullen replied that the rights had not vested because the city had not paid ¼ of the sale price to the state, thereby violating a condition subsequent of the grant. This was a weak and technical retort, and Peachy deftly shifted ground to state finances. "Was poor San Francisco to suffer because the State had squandered thousands to chastise the Indians in Trinity county?" In other words, California had been beggared by land-grabbing "Indian Wars," genocidal killing campaigns, which they wanted to pay for with the disputed tidal lands of San Francisco, a knot of violence and property pulled tighter and tighter.

The California Supreme Court attempted to settle the issue in *Smith v. Morse* (1852). Penned by the young Chief Justice Hugh Murray, only 27 years old, the decision considered whether the city could transfer the lands to the commissioners of the funded debt. They absolutely could not, Murray ruled, writing, "it would certainly be a new and dangerous doctrine to establish, that municipal corporations might at any time defeat their creditors through fraudulent assignment."[71] Smith was an "honest creditor" and "entitled to be paid." The City could not "warp the stern rules of law…to defeat rights property and legally acquired."[72] Fraud

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[68] See generally, Matthew Morse Booker, *Down by the Bay: San Francisco's History Between the Tides* (Berkeley: University of California Press, 2013).
[69] "The New Water Lot Scheme" DAC, 20 January 1852.
[70] Legislative Intelligence, *DAC*, 20 March 1852.
[71] *Peter Smith v. P. A. Morse, et al.,* 2 Cal. 524 (1852), 540.
[72] Ibid, 557.

had provided a way to assign the rights to an honest party at the expense of a dishonest one, but not in the expected way. Firm as Murray had been, litigation and violence continued. In February 1853, following the public mood, the Attorney General and the Surveyor General reported that *Smith* should be set aside because the City "never obtained such a title to the property under the law, as could be sold by execution."[73] The *nemo dat* rule in action. Opponents of the Peter Smith titles – or the "Peter Smith Swindle" as it was commonly known in the press – considered the matter yet open and pulled the legal slot machine *again*. Before this new litigation, however, in September 1853, one Hiram Pearson, a Peter Smith title holder, decided to enforce Murray's decision himself, leading a group of 80 to 100 sailors to seize the ship of McKenzie, Thompson & Co. who operated their slip under a squatter title.[74] A firefight ensued and one of the rioters was fatally shot through the lung. On and on it went, with no end in sight.

The Court reiterated their position in *Cohas v. Raisin* (1853), rejecting the popular legality put forward by elected officials. Justice Solomon Heydenfeldt ruled that "by the laws of Mexico, towns [pueblos] were invested with the ownership of lands" and that the "right to alienate was incident to ownership."[75] Municipal corporations could alienate their lands how they saw fit. Murray explained the subtext of the decision in a later ruling. *Cohas* was "an olive branch of peace; it restored confidence in landed property, gave security to business operations, and quieted the angry passions of those who imagined, not without cause, that they had been improperly stripped of their property."[76] The justices were well aware of the passions of the People, the angry and righteous True Owners, and sought to pacify the situation. At the same time, the judiciary guarded its prerogatives over property from the partisan state apparatus and established, as best they could, a conservative doctrine on vested rights. As the *Alta* reported, "Most lawyers and judges hold to the doctrine that it is far better for a community to hold fast to those decisions of the Supreme tribunals which affect the titles to property, even though somewhat erroneous, than to seek too nicely to adjust the scales of justice."[77] Too much property law disturbed property – if only the lawyers were not making such fabulous money perpetuating the crisis.

Things only got worse in 1854. Nature, weighing in on the property question, blessed California with two straight years of drought. Partly as a consequence, the California real estate market, and one of the city's most important banks, Page, Bacon, & Co., imploded. As an English political economist reflected after the Panic, "Property under mortgage realized scarcely one-third of the sum advanced on it; there was a great fall in the prices of almost all commodities…to crown the whole, some extensive swindles and forgeries were revealed just at this time…One European house alone lost something like 600,000 dollars, advanced most recklessly on forged warrants."[78] Uncertainty of titles, and therefore mortgages, had destabilized the entire California economy. And then the United States Supreme Court blundered onto the scene, issuing their hopelessly unpopular (and destabilizing) decision in the *Fremont* case in

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[73] "Reports of the Surveyor General and Attorney General" SDU, 18 February 1853.
[74] "Title Riot — Man Shot," DAC, 19 September 1853.
[75] *Cohas v. Raisin and Legris* 3 Cal. 443 (1853), 452-3.
[76] *Welch v. Sullivan*, 8 Cal. 165 (1857), 200.
[77] "New and Important Views on the 'Peter Smith' Titles," DAC, 25 Feb 1855.
[78] Ernest Seyd, *California and Its Resources: A Work for the Merchant, the Capitalist, and the Emigrant* (London: Trubner, 1858), 97.

which they established the principle that the rights of a grantee vested regardless of meeting conditions of a grant, like knowing where that grant was or possessing it.[79]

Mass organizing followed in the wake of the *Fremont* decision in an increasingly desperate City. As Shafter recorded in 1855, "There is a growing spirit of turbulence and disorder here. Murders are almost nightly occurring in this city."[80] Groups of settlers convened mass meetings. Some represented those interested in specific claims. For example, one meeting represented adverse claimants to the Bolton-Santillan claim, named for Catholic priest Jose Santillan and his assignee James Bolton, which covered ten thousand acres in San Francisco County conservatively estimated to be worth $2m.[81] In a telling distinction, some mass meetings represented the settlers as a distinct *class* within society regardless of the particular claim. One such meeting at the Musical Hall on June 23, 1855, headed by land lawyer William J. Shaw, soon to be elected State Senator, introduced an ambitious slate of reforms meant to overhaul the common law of landed property.[82] Very basically, they hoped to tip the scales away from abstract owners to "the actual possessor" of a property. (By actual possessor they emphatically did not mean Indigenous Californians – whether they recognized this irony was not reported by the press.) The actual possessor, the mass meeting urged, should be favored in registration laws, alienation of an "actually occupied" property by another title-claimant should be prohibited and void, actions against the possessor should be subject to strict statutory limitations, and much more.[83]

Building on this brewing class consciousness, the settlers held a convention in Sacramento that called for the creation of a new "settlers and miners" party statewide to represent their class interest in property matters. Again headed by Shaw, the nascent party put out a statement on the Mexican "speculations" and the *Fremont* decision: "According to the recent extraordinary decision of the supreme court of the United States, neither boundaries, nor possession, nor location of the lands, prior to our acquisition of this country, is necessary to insure the confirmation of these claims… he must be blind to actual experience who does not see that scenes of bloodshed and open resistance to the decisions of our courts, will be the painful result of longer neglect."[84] The threat was difficult to miss. To these settlers, the law of property was full of betrayals and empty of equities worth the name. This was law without equity. Years of bloodshed and suspicion had only worsened the crisis within settler society. In a speech early in the following year, 1856, calling for constitutional revision, Senator Shaw blamed the ongoing crisis on the judiciary, calling their actions tyrannical and inappropriate for republican government:

> Indeed, of all tyrannies none could possibly be better calculated to deprive freemen of their right, than that which steals upon them in the very garb of justice. Courts of justice can spin their strong and insidious webs in secret, and roll man up, and bind them hand and foot, in the strong and inextricable meshes of their judicial orders and decrees, whilst the people cannot perceive the wrong, and the injured can only buzz, and struggle, and

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[79] *Fremont v. U.S.*, 58 U.S. 542, 560 (1854).
[80] Shafter, *Life, Diary, & Letters*, 164.
[81] "Settlers' Meeting," *DAC*, 21 June 1855; "Fourth Meeting of the Settlers," *DAC*, 25 June 1855.
[82] San Diego Alcalde, and an independent candidate for state attorney general in 1850. Winfield J. Davis, *History of Political Conventions in California, 1849-1892* (Sacramento: California State Library 1893), 10.
[83] "Fourth Meeting of the Settlers," *DAC*, 25 June 1855.
[84] Ibid.

> wonder how such things can be. And thus, in their own courts…the people and their laws are continually caught in the mischievous and unseen cobwebs of *judicial* law.[85]

In this increasingly anti-legal discourse, property law had departed from the "true" law of justice and nature. San Francisco landowner Dr. Andrew Randall, a man with a tragic role to play in the events to come, described it as "the ablest speech ever delivered in Cal legislature, has given the judiciary Hell."[86]

The settlers' remedy to forestall the threatened bloodletting was legislation to make the state's common law more equitable. With intense competition between the major parties, Democrats and the new American Party, for settler votes, their movement secured the passage of "An Act for the Protection of Actual Settlers and to Quiet Land Titles in this State," signed into law by the American Party Governor J. Neely Johnson in spring 1856.[87] Built from the previous year's mass meetings, the Protection Act altered property law on multiple fronts, from the rules of evidence to remedies to jury instructions, all in favor of the settler class. Though the legislation drew on the political force of anti-legalism, it was a sophisticated statutory reformation. The Protection Act raised the status of possessory titles, providing that "actual and peaceable possession" was *prima facie* evidence of "a right to such possession in the person so in possession."[88] The settlers undercut ejectment by limiting the action to two years after the issuance of a patent.[89] The Act created a defense of "use and improvement" against ejectment[90] and also changed the remedies for ejectment cases, providing that verdicts in favor of the ejector required the plaintiff to pay the defendant the value of growing crops and improvements made during possession, with the amount to be decided by a jury.[91] The settlers and miners, however, had been correct in predicting an eminent uprising in response to the property crisis, though they were wrong about its form and ideology. That uprising was the Vigilance Committee of 1856.

The Vigilance insurrection of May 14 to August 11 was complicated, dynamic, and paradoxical series of events. Foremost, it was a successful political coup. In the following fall elections, the vigilantes cemented their control of San Francisco through the election of the People's Party, thereby democratically legitimizing their takeover. Despite open acts of violence against federal and state officials, including the kidnapping and near execution of California Supreme Court Justice David Terry, the ringleaders went unpunished, a tacit legal acceptance of the uprising. It was also, historians agree, a bourgeois revolution of Yankee businessmen that

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[85] Emphasis in original. William J. Shaw, *Speech of Hon. William J. Shaw, on the Necessity of Immediate Constitutional reform, Delivered in the Senate of California, Feb. 7, 1856* (Sacramento: Office of the Democratic State Journal, 1856), 27-8.

[86] Dr. Andrew Randall to H. Pearsons, Mar 2, 1856, San Francisco, enclosed in H. Pearsons to Henry H. Haight, April 2, 1856, Box 4, 1856-1857, *Henry Haight Papers,* Huntington Library, San Marino, CA.

[87] Chapter XLVII, "An Act for the Protection of Actual Settlers and to Quiet Land Titles in this State," Approved March 26th, 1856, 7th Sess. Published in *The Statutes of California, Passed At the Seventh Session of the Legislature* (Sacramento: James Allen, State Printer, 1856), 55.

[88] Protection Act, Sec. 2.

[89] Ibid, Sec. 11.

[90] Ibid, Sec. 4. Defendants "may deny the plaintiff's right" and "may also set up and aver in his answer that he…[has] made lasting and valuable improvements," describing the improvements and their value, in addition to growing crops.

[91] Ibid, Sec. 5.

overthrew and persecuted the Democratic ruling class.[92] Publicly, the Vigilantes portrayed their actions as motivated by police and public safety, much like their forerunner the 1851 Vigilance Committee, and indeed they staged two large public executions of known killers. But after dispensing the justice of "Judge Lynch," the 1851 Committee had dissolved with no change in city governance. Two of the large, ongoing property conflicts in the city, the Bolton-Santillan claim to the mission lands of San Francisco and the Peter Smith titles to water lots, had a clear partisan basis with Democrats deeply interested in the success of both claims. As Taniguchi shows, the Vigilantes used their power to extort documents vital to defeating these claims from land lawyer Alfred A. Green and Judge Ed McGowan of the Court of Sessions. The Vigilantes "arrested" Green, with no reason given, to force him to "sell" them an archive called "the Pueblo Papers," which purported to establish the city as a legal Pueblo under Mexican law, a decisive record in the water lot contest. Similarly, they forced Judge McGowan to surrender papers belonging to the San Francisco Land Association of Philadelphia, the financial force behind the Bolton-Santillan claim.[93]

One of the central events of the uprising was the murder of the aforementioned Dr. Andrew Randall by his mortgager Joseph Hetherington, another landowner in the city. Like many men in the city, legal troubles encumbered Randall's lands, and increasingly his mind, for years – it had become, he wrote, "a weary dream."[94] Hetherington, who had killed another man in "self-defense" of a property claim in 1853, held a $20,000 mortgage on Randall's lands. When the note came due, the cash-poor Randall could not pay. First, the creditor turned to property law: "Suit, for foreclosure and sale was brought by Hetherington, which Dr. Randall was endeavoring by every legal means in his power to hinder and delay – hoping, if he could gain a little time, to be able to redeem his property, which if brought under the hammer now, must be sacrificed."[95] When this failed, Hetherington sought to collect by force, hunting Randall down at the St. Nicholas hotel on the evening of Thursday July 24. The men exchanged gunfire in the crowded barroom, with Randall shooting a hole through Hetherington's hat, missing by inches. Hetherington did not miss, shooting the unfortunate mortgagor in the skull. It was not the wisest time to commit murder in San Francisco, and the Vigilantes promptly arrested Hetherington. Upon Randall's death, the Executive Committee held a secret trial and condemned Hetherington to hang. And so, on the summer evening of July 29, 1856, Hetherington stood atop the gallows with a white cap drawn over his head, a crowd of thousands watching and waiting.[96] Playing his role well, Hetherington gave a speech on the usual gallows themes of redemption, penitence, and forgiveness. His last words, however, were curious and revealing. As recorded by the press: "The Lord have mercy upon my soul. I will meet my Saviour. I should like to have seen Fletcher Haight, but it was denied me. Remember me to Fletcher Haight and Henry Haight. Lord have mercy on my soul."[97] With his last breaths Hetherington asked to be remembered to his land lawyers. Hetherington may have died, but his property disputes lived on.

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[92] David A. Johnson, "Vigilance and the Law: The Moral Authority of Popular Justice in the Far West," *American Quarterly* (1981), 583.
[93] Taniguchi, *Dirty Deeds* [Kindle Edition], 1588.
[94] Dr. Andrew Randall to H. Pearsons, Mar 2, 1856, San Francisco, enclosed in H. Pearsons to Henry H. Haight, April 2, 1856, Box 4, 1856-1857, *Henry Haight Papers,* Huntington Library, San Marino, CA.
[95] "The Murder of Dr. Randall," *Sacramento Daily Union*, 28 July 1856.
[96] "The Murder of Dr. Randall," *Sacramento Daily Union*, 28 July 1856.
[97] "Execution of Hetherington and Brace," *Sacramento Daily Union*, 1 August 1856.

The public hangings and the secret seizure of archival papers suggests a complicated legality behind the Committee's actions. As contemporary historian H. H. Bancroft synthesized, "The vigilance committee will itself break the law, but it does not allow others to do so. It has the highest respect for law, and would be friendly with the law, notwithstanding the law is sometimes disposed to be ill-natured; yet it has a higher respect for itself than for ill-administered law."[98] No lawyers served on the Executive Committee but they took care to mimic legal forms. When the committee arrested Supreme Court Justice David Terry, sent to the insurrectionary city as an envoy from the state, for murder, they proposed replacing him with Shafter. As Shafter recorded in his diary on July 3, 1856, "An effort has been made [by the Committee] to compromise on terms that [Justice Terry] should resign and quit the State…it was proposed as part of the plan that I should be his successor. It is hardly necessary to say that I peremptorily refused to play the part assigned to me."[99] Shafter nevertheless approved of the "purifying effect" of the insurrection, as did many others in the California bourgeoisie.

In this way, a double movement of legalities reached fruition in the spring and summer of 1856. One movement was a radical democratic legality embodied in the Protection Act and carried by the settler class. The other was a liberal bourgeoise legality embodied in the successful overthrow of the Democratic government by the speculator class. They shared a belief that they were the morally worthy True Owners of the city. The property crisis seemed no closer to ending than it had in 1850, and then the California Supreme Court torched the Protection Act.

**Redemption and True Ownership**

"I have examined the evidence before the commissioners and most of that which has been taken since the appeal, and I am now thoroughly satisfied that it is the most stupendous fraud ever perpetrated since the beginning of the world." – US Attorney General J. S. Black, 1858.[100]

After Justice David Terry's narrow escape from death, he returned to the California Supreme Court to chart the future of property law in the shadow of the 1856 "revolution." Upon the beginning of the 1857 term, the Court immediately faced the Protection Act in an ejectment case *Billings v. Hall* 7 Cal. 1 (1857). The plaintiff, Frederick Billings, the powerful San Francisco attorney, had purchased several lots in Sacramento, valued by the trial jury at $4k, from John A. Sutter who in turn derived his title from the New Helvetia grant made out to him by the Mexican government in 1841. The defendant, John F. Hall, had adversely possessed and improved the lots for five years. Applying the new Protection Act, the trial jury decided in favor of Hall on the grounds that Sutter had never "actually possessed" the plots in question.[101] It did not matter that Sutter legally "owned" the lots; he had not met the Lockean standard of the Protection Act. For the trial jurors, his ownership was not legally or morally complete. This was the Protection Act working as intended, shifting the moral emphasis of law to the "actual possessors." Billings, however, was not willing to let his property, nor for that matter common property law, go.

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[98] Hubert H. Bancroft, *Popular Tribunals* Vol. 1 (San Francisco: The History Company Publishers, 1887), 8.
[99] Shafter, *Life, Diary, and Letters*, 182.
[100] J. S. Black, "Expenditures on Account of Private Land Claims in California," 36th Cong., 1st Sess., H. Ex. Doc. 84 (1860), 5.
[101] *Billings v. Hall* 7 Cal. 1 (1857), 1

Billings was not disappointed in his appeal. Two members of the three-person Court, Chief Justice Murray and Justice Peter Burnett, reversed the ejectment decision and along the way struck down key portions of the Protection Act, in particular Sec. 5 requiring indemnification of the losing party, on the grounds that the legislature could not derogate vested rights of property by changing the remedy for ejectment.[102] The principle established in *Billings* held that the legislature could neither directly "pass a law divesting vested rights" nor indirectly bring about that effect. Murray understood the underlying battle of popular wills at work in *Billings*. The case was a political one, he noted, insofar as it turned on the large Mexican grants: "It has become common in our Courts to denounce titles similar to the one under which the plaintiff claims, and it is useless to disguise the fact, that they are unpopular with the people at large, owing, probably, to the circumstance that many grants have been forged for the purpose of covering improvements made in good faith."[103] Then Murray made his crucial argument, "but this prejudice should be confined to such fraudulent grants, and ought not to be extended to all alike." According to the judiciary, in various rulings from the Board to the Northern District to the Supreme Court, the Sutter grant was valid, and therefore the legislature had interfered with the vested rights of the True Owner. In a confusing hodgepodge of logic, the Chief Justice both denied the equity justification for changing property law, noting that "equity follows the law" ("*equitas sequiur legem*"), *and* turned to natural law to justify his decision, quoting Locke to establish that the legislature could not "destroy, enslave, or designedly to impoverish the subject," as it had apparently done with the Protection Act.[104] In the end, Murray dismissed the squatter class as "needy adventurers" attempting to divest brave pioneers of their "honest acquisitions of toil and danger." Billings was honest, Hall was not. Judge Terry, a card-carrying Jacksonian, dissented. Unless the constitution specifically prohibited a legislative power, he wrote, its Act was valid.[105] The people could, in their mass political parties, change the common law. Terry, Hall, Shaw, the legislature, and the settler movement all lost a decisive battle to the increasingly conservative Land Bar. The legislature could not violate the rights of honest purchasers, no matter how large or suspicious their estates might be. Murray had, however, left an opening – the continued vulnerability of fraudulent grants – to be determined, of course, by the courts *not* the legislature, a shifting of the balance of power over land.

The office of the Attorney General in far-off Washington sensed an opportunity to settle the crisis, and perhaps salvage both the Democratic party in the state and Federal authority. To do so, the Government embraced the logic of fraud favored by the lay public. They had already tried this tactic, to little success. From 1854-6, under President Pierce, the General Government repeatedly attempted to use fraud to void Mexican grants in the Northern District, but they had no evidentiary case. Furthermore, despite the decisive moves of the Vigilance Committee, in 1857 the Bolton-Santillan claim remained legally contested, the Limantour claim continued to hang over half of the city, and no one quite knew who owned the Water Lots. Faced with continued legal embarrassment and the threat of more mass violence, President Buchanan gave Attorney General Jeremiah S. Black the task of compiling the evidence of fraud to contest the

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[102] Ibid; Essentially the same logic of the US Supreme Court in *Green v. Biddle*, a Kentucky case from 1823. For a detailed discussion of the Green case and other statutes similar to the Protection Act Horowitz, *The Transformation of American Law, 1780-1860*, 59-61.
[103] *Billings v. Hall*, 10.
[104] Ibid, 7.
[105] Ibid, 7, 16.

largest outstanding grant claims, and the administration wrangled $40,000 from Congress to send attorney Edwin M. Stanton to Mexico and California to find evidence for the government's claims.[106]

Black instructed Stanton to direct special attention to the Limantour case and to "remain in San Francisco as long as you may deem essential" to defeat the claim.[107] Stanton made use of the congressional appropriation, paying witnesses, hiring a "detective police," a printer, and two "pairs dividers" (compasses) and other instruments to examine "forged seals."[108] Stanton spent $4,305 on 287 photographs of "Spanish and Mexican documents and archives" related to the Limantour case.[109] The Government used this mountain of evidence in the Northern District to bury the Limantour claim in paper. As Judge Hoffman summarized the key evidence, while some witnesses still maintained that the handwriting on the grant belonged to "Maciel, a captain under Micheltorena's command," thereby proving the documents were created in 1843, additional testimony and comparison to a document known to be written by Maciel suggested the document was really written by E. Letanneur, a clerk of Limantour's in 1852.[110] The text contained linguistic errors "Maciel would not have made" due to his education. Lengthy testimony spoke to the production of Mexican "official paper."[111] Hoffman concluded, "It would be tedious to recapitulate the numerous differences in the shape of the letters, in the length of the words, in the distances between the words, between the letters, and between the lines" in support of this conclusion.[112] The Government's evidence was so overwhelming that most of Limantour's counsel, eminent members of the Land Bar, "retired from the case," and did not appeal.[113] Limantour fled to Mexico, leaving his lawyers liable for the bond. For five years, Limantour's "plausible" claim had haunted the City, now it was dead at the hands of the Federal Government. Black could not have wished for a better result.

The Bolton case, however, stuck firmly in the mud of previous decisions. The fate of the prominent banking firm Palmer, Cook, & Co. hung in the balance – another banking bust loomed. As Fletcher M. Haight speculated about the appeal, "Palmer is finally shut up and probably gone in for good unless relieved by the Mariposa or Bolton…stock neither of which is likely to occur."[114] Law fatigue had begun to settle in. The dreaded "instability of property" began to appear to some as a problem perpetuated by the judiciary not one the judiciary was "fixing." This was certainly the view of Judge Hoffman. In *Bolton,* the US attorneys asked the Northern District to issue a bill of review as a Chancery Court on the basis of newly discovered evidence. Hoffman did not believe he had such an equity power, and even if he did, it would be poor policy to review the Bolton-Santillan claim *again*:

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[106] J. S. Black, "Expenditures on Account of Private Land Claims in California," 36th Cong., 1st Sess., H. Ex. Doc. 84 [Black's Report] (1860), 32.
[107] "Instructions to Edwin M. Stanton," February 18, 1858, in Black, 2.
[108] "Exhibit H," 12-16.
[109] Pg. 22
[110] *U.S. v. Limantour,* Hoff. Land Cas. 389 (1858), 949.
[111] Per Mexican law the paper was "habilitated," made fit, for two years. At the end of each period a law might modify the material requirements of stamps, seals, and prices and Mexican officials received sealed packets of such paper. Hoffman, *Report of the Land Cases*, 408.
[112] *U.S. v. Limantour*, 956.
[113] Ibid, 971.
[114] Fletcher M. Haight to Henry H. Haight, Dec. 19, 1857, San Francisco, Box 4, 1856-7, *Henry Haight Papers,* Huntington Library, San Marino, CA.

> The pernicious effect of the prevailing uncertainty of titles is universally recognized. But if every case… is liable to be reviewed, and reversed at any time within five years from the rendering of the decree, unless finally decided on appeal, and even then, if permission be given by the Supreme Court, the policy of the act of congress so strongly enforced by the condition of the country would be wholly defeated. No confirmation or rejection of a claim to land heretofore made by this court could in such case be deemed 'final,' and the majority of land titles in this state would, for at least four or five years, be involved in the same uncertainty from which it has hitherto been supposed they were at last emerging.[115]

Aside from this legitimate concern whether the uncertainty was being made worse by law, the Government's "new evidence" was exceptionally weak, amounting solely to an affidavit by Alfred A. Green – possessor of the Pueblo Papers. In March 1857, Santillan had appointed Green his attorney, and the lawyer had sold portions of the estate to two buyers. Hoffman was incredulous, "according to his own affidavit, [Green] was aware Santillan had not the slightest pretension" to owning the land. If such evidence, presented by a man *involved in the fraud*, was sufficient for a bill of review "there would scarcely be an end to litigation in chancery cases."[116] The Supreme Court ignored Hoffman's concerns and granted review. Justice Patron, writing for the court, attempted to hem in the redistributive and destabilizing implications of the decision with formalism, arguing that the government could reasonably require a formal record as a "necessary condition of a legal administration, and a necessary precaution against fraud."[117] In other words, nothing to see here.

Black, however, wanted everyone to know about these cases, and his other appeals fit this same pattern of formalism dressed up as fighting fraud. In his summary to Congress, Black described the reasons for the reversal of large claims, in total worth an estimated $150,000,000. In some cases, he wrote, the Government exposed "fraudulent oaths" by "professional witnesses." Each case summary had an unambiguous moral character, otherwise how could the State justify confiscating $150m in property? The actual ruling of the Court, however, often did not match Black's moral language. Of *US v. Osio* (1859), for example, Black wrote, "It is not possible to believe that any governor would have given [Angel Island] away, or that any individual would have asked for it," implying it had been secured by fraud.[118] But the key ruling in *Osio* was formalistic, having nothing to do with fraud. The Court ruled that the power to grant away islands under Mexican law was "special" and could only be exercised exactly as formally prescribed. The grant had not been approved by the Departmental Assembly and was therefore void.[119] Similarly, Black described the ludicrous Iturbide claim, brought by the descendants of the one-time Emperor of Mexico for *400 leagues* due to his "patriotic services," as a "monstrous" and obviously fraudulent story, but the Court rested its terse ruling on the 1851 statute requiring appeals to be filed by the losing party within 6 months, which Iturbide's heirs had not done.[120] Of James Noe's claim to an island in the Sacramento River, Black reported it as "fraudulent," but the Supreme Court ruled that the vague danger of "hostile Indians" was not

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[115] *US v. Bolton*, Hoff. Dec. 93 (1858), 1199-1200.
[116] Ibid, 1201.
[117] *United States v. Bolton*, 64 U.S. 341 (1859), 351.
[118] *Black Report*, 35-6.
[119] *US v. Osio*, 64 U.S. 273, 285-6 (1859).
[120] *Yturbide's Executors and Heirs v. U.S.,* 63 U.S. 290 (1859).

sufficient to justify nonperformance of grant conditions. This kind of formalism controverted the entire line of cases that had emerged from *Fremont*, a half decade of jurisprudence, a fact the Court was careful not to mention. Missing paperwork, vague boundaries, contradictory testimony, and uncompleted conditions were *now* all evidence for dishonesty and wrongdoing rather than error or accident. Black summarized his efforts in revealing terms:

> The preservation of all this property to the government, and the honest settlers deriving their titles from the United States, is of course a matter of great importance; but the moral effect of it will prove to be still more beneficial. These frauds operated like a curse and scourge upon the most magnificent portions of the American empire…. No people can be loyal whose rights of property are not secured, and it is vain to look for public morality under a government which fails to distinguish between honest titles and fraudulent claims.[121]

Property law was redemptive in both senses of the word: it returned the land to its true owners and in so doing morally purified morality American empire.

By 1860, Bolton and Limantour had been defeated by the Federal land administration, and so the only major San Francisco case remaining was the Water Lot question. The California Supreme Court's decision in *Hart v. Burnett* (1860) represented the end of the long struggle over the Peter Smith titles. The case turned entirely on the content of Alfred Green's Pueblo Papers, though the Court studiously ignored their revolutionary provenance. The legal question, alienability, was exactly the same as it had been in the first 1852 case: What kind of estate did the city hold in its lands?

The parties and attorneys involved in the Water Lots tracked the changing political struggle between radicals and conservatives, Democrats and Republicans, squatters and speculators on the property question after 1856. Like the other mass meetings of the 1850s, the litigation in *Hart* had a popular element, though a different class basis. In January 1859, the opponents of the Smith titles organized into a group called the "General Committee of the citizens of San Francisco," which would "use every legitimate and honorable means…to protect the real property of the *bona fide* owners and residents of this city and county, from land titles unquestionably fraudulent, especially…the Peter Smith titles."[122] Though many were well-to-do merchants and gentlemen, they were still conceptually squatters, tracing their rights to the water lots back to possession under the Pre-Emption laws, which was enough for the radical members of the Land Bar, still lamenting the death of the Protection Act in Billings.

The legal team of the appellants reflected an alliance of convenience. The attorneys included Shaw, the firebrand of the settler class, and the old, conservative land bar institution Thornton, Williams, & Thornton. The team also included Edmund Randolph, then the Anti-Lecompton Democratic candidate for State Attorney General.[123] On the rather obvious *stare decisis* argument that the Peter Smith issue had been "decided" several times already, the

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[121] Black's Report, 32-3.
[122] Ibid.
[123] Anti-Lecompton Democrats were the anti-slavery faction of the party, the "Lecompton Constitution" being the pro-slavery Constitution of Kansas. Davis, *History of Political Conventions*, 99-103.

lawyers reached for Kent's commentaries, quoting, "It is more than probable that the records of many of the courts in this country are replete with hasty and crude decisions; such cases ought to be examined without fear and revised without reluctance, rather than to have the character of our laws impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."[124] The law, in other words, ought not to stop its operation for the convenience of the land market and the peace and stability of property. The attorneys needed to get around the *Cohas* opinion in particular. "The state of feeling in the midst of which we are told the decision in *Cohas v. Raisin* was rendered does not at all exist now," Randolph and his fellow attorneys concluded – the property crisis was apparently over.[125] In any case, *stare decisis* was a legal concept, but this case depended on the *fact* of San Francisco's legal character under Mexican law.[126]

The case of the Peter Smith titles rested on the simple idea that it was time to be done with litigation of this kind because it disturbed vested rights. Again, the legal team revealed the partisan underpinnings of the case. The lead attorney was Joseph P. Hoge, long-time state chairman of the state Democratic Party. The team also included F. M. Haight, another committed Democrat.[127] Here was the old Democracy, the ruling class of the city that had been driven out in 1856. This was all subtextual, however. In their extensive brief, they first argued that a functioning property market depended on *stare decisis*, and to disturb titles further would be "nothing short of judicial confiscation!"[128] The Board of Land Commissioners "sat the matter at rest," the attorneys continued, and gave "peace and security" to land sales.[129] As the California Supreme Court itself had ruled repeatedly, all property "not exempted by law" was leviable for city debts.[130] Exemption from execution "cannot be claimed, with any reason, for [San Francisco's] lands, and other property, which she owns, not as a *government*, but as a *corporation*."[131] "The title of the city is a legal title, and not an equitable one," Hoge concluded confidently.[132]

Here, in the briefs, one sees how the distribution of power and wealth, a violent political struggle, was transmuted into a technical archival question. The real question of *who should* own San Francisco, an explosive question, became a bloodless march into Mexican legal history. Even those who opposed the Supreme Courts' property jurisprudence, like Shaw, saw *Hart* as an opportunity to settle the squabbling and unrest of the California colony. But a ruling for the squatters would controvert the spirit, if not the letter, of the *Billings* case. The squatters had hope for a different result because the personnel of the Court had changed. Chief Justice Murray had died of consumption in 1857, replaced by the esteemed Stephen J. Field, and in 1859 Justice Terry had lost the Democratic party nomination to Warner Cope. Only wry, pragmatic Joseph Baldwin remained. Fully aware of its incendiary nature, the Court took its time writing the *Hart*

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[124] Edmund Randolph, *Appellant's Brief* (San Francisco: Commercial Steam Presses, 1859?), 9.
[125] Ibid, 17.
[126] Ibid, 21.
[127] Davis, *History of Political Conventions*, 70, 79, 88, 104, 111, 176, 224, 264, 289, 350.
[128] Papers pertaining to case in California Supreme Court, *Hart vs. Burnett*, et al, concerning land in San Francisco, 1860. BANC MSS C-I 24. Portfolio 1, 8.
[129] Papers pertaining to case in California Supreme Court, *Hart vs. Burnett*, Portfolio 1, 8, 15-17.
[130] Ibid, 24.
[131] Ibid, 26.
[132] Ibid, 32.

decision and stuck to the safe grounds of legal history. Although the literal extent of the lands in contention was quite small, Justice Baldwin began the opinion, "the question really to be decided affects property of immense value, and the right and title of the city of San Francisco to what is termed its municipal lands."[133] The key to Pueblo titles was the equitable concept of "trust." As the squatters had been claiming for years, the city did not own land outright to sell to whomever it pleased but held the land in trust for the sovereign people. Contrary to the natural law conservatism of *Billings*, Baldwin and Field agreed with the appellants using Mexican equity law – "the lands assigned to pueblos…were not given to them in absolute property, with full right of disposition and alienation, but to be held by them in trust, for the benefit of the entire community."[134] This public trust doctrine voided the executory sale to Peter Smith from 1851, poisoned the entire line of title, and overturned *Smith* (1852), *Cohas* (1853), and similar cases.

Justice Cope dissented, writing that "the stability and uniformity of our decisions, in matters of property, are of much greater importance than any consideration connected with the preservation of individual rights."[135] As a general rule, the judiciary should not "do anything, the effect of which may be to impair the security or diminish the value of these interests." It did not matter to Cope that a title might be tainted by fraud, the moral character of the property was immaterial to the question of ownership. Though this liberal theory of property lost in the Peter Smith cases, it would not take long for the Land Bar to accept Cope's conclusion. Cold comfort for the holders of the now worthless Peter Smith titles.

The victors and their allies, those who based their Water Lot claims on squatter titles, greeted the result with a large party. A group of 5,000 "respectable citizens," in the words of the *Daily Alta,* filled the night with fireworks, bonfires, torches, and cannons (stolen by the Vigilantes from the Federal Government), as they packed into the Mechanics' Institute on Montgomery St.[136] The décor of the Institute highlighted the cause for celebration. "Conspicuously posted above the platform were four maps," the *Alta* reporter wrote, "one of which was deeply crimsoned, designating the bloody region, of the tract covered by the Peter Smith title. On the corners the words 'The Wicked shall be Confounded,' and 'Peter Smith Swindle.'" Although the *Hart* case had precipitated the gathering, the respectable citizens likewise celebrated the cases won by Attorney General Black. A map of the "Limantour swindle" was painted green, and a map of the "Bolton Santillan Forgery" black. "The fourth [map] presented a more cheering spectacle. The canvas retained its native purity, and inscribed on the white sheet, in glowing characters, 'Excelsior' – 'San Francisco Redeemed.'"[137] Victorious attorney William Shaw took the stage to speak, "He opened his address by stating that he deemed the decision of the Supreme Court in the Peter Smith case, the most important ever delivered, so far as the interests of San Francisco were concerned. *He considered the titles to property, for the first time in its history, finally and irrevocably settled.*"[138] The General Committee dissolved with triumphant speeches drawing long into the evening. Theirs was ostensibly a victory of the "home-owner" over the "land-grabber," of the people over the speculators, and of honesty over fraud. The celebrants declared the crisis of uncertainty over, a

[133] *Hart v. Burnett*, 15 Cal. 530 (1860), 537
[134] Ibid, 573.
[135] Ibid*,* 623.
[136] "Mammoth Meeting at the Pavilion," *Daily Alta California,* June 29, 1860.
[137] Ibid.
[138] Emphasis mine. Ibid.

full decade after Halleck called for a speedy and final resolution. Law, the respectable citizens claimed, had at last redeemed the city, returning it to its true owners – themselves.

**Conclusion**

The ending of the 1850s San Francisco property crisis marked two transformations in the political economy of property, one a matter of logic and one a matter of power. As to the first, *Hart* established a curious year zero for vested rights in San Francisco. All subsequent attempts to re-open the great inquisition against fraud were denied by the Land Bar, to the great surprise of the squatters, as interferences with vested rights.[139] After the *Hart* case and Black's redistribution of $150m in land this must have seemed a pointed reversal in logic from a distributional property law to a studiously neutral one. As to the distribution of power, the post-1856 property system showed two shifts: one, based in *Billings*, shifted control of property law from the parties to the courts, the other, based in Black's actions, established General Government authority on the Pacific periphery (though this power was promptly handed back to state officials during the Civil War). By some alchemy the Land Bar had managed to transmute "confusion worse confounded" into the beginnings of the rule of law. This transformation was a brazen disavowal of the role of property law in distributing and redistributing rights. The betrayed squatters knew this, and they knew who to blame. In a $0.25 pamphlet published in 1864, prominent squatter George Fox Kelly inveighed against the lawyers now seeking to halt the land litigation.[140] The Courts had become "aristocratic" such that property law was not the means of rooting out conspiracy, it *was* the conspiracy.

The San Francisco case shows the multivalence of property law on the Anglo-American periphery and its central role in allocating conquered lands. Only *after* 1860 can the (principle) purpose of property law be described as stabilizing a property market. Fee Simple private property, the lodestar of 19th-century Liberalism, did not arrive amidst the copies of Blackstone's *Commentaries* carried by the lawyers of *A "Pile,"* rather legal liberalism and land commodification emerged from the plural law of the ownership crisis, from moralism, suspicion, terror, violence, and officious pieces of paper. In this way, this article presents a new account of the emergence of the rule of law in California, and suggests similar revision is possible in other Anglo-American colonial histories. As historian David A. Johnson writes, the 1856 Vigilance Committee was "a vigilance committee to end all vigilance committees."[141] Similarly, it might be said that the inquisition against fraud was an act of redistribution to end all redistribution, a reactionary, strange, and contradictory set of impulses in search of order and the rule of law.

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[139] See T. G. Phelps, "Argument of T. G. Phelps, of California, Before the Committee on Private Land Claimof the House of Representatives: Against Opening the Renewed Litigation of Mexican Land Grant Titles Which Have been Finally Adjusted," (1875?).

[140] George Fox Kelly, "Land Frauds of California. Startling Exposures. Government Officials Implicated. Appeals for Justice. The Present Crisis" (Santa Rosa, November 1864).

[141] David A. Johnson, "Vigilance and the Law: The Moral Authority of Popular Justice in the Far West," *American Quarterly* (1981), 579.

## Chapter 3: A Very Low Price, 1861-1871

"It is just as legitimate to buy and sell a tract of land for a profit as it is a horse or a milch cow…just as long as there is fee a simple title to land, just so long will it be subject to speculation." – William S. Green, "The Land Monopoly Question," *Green's Land Paper*, February 3, 1872.

"California is very important for me because nowhere else has the upheaval most shamelessly caused by capitalist centralization taken place with such speed." — Karl Marx to Friedrich Adolph Sorge, Nov. 5, 1880.[1]

Joseph S. Wilson was the Commissioner of the General Land Office (GLO) from 1860-1861 and from 1866-1871, and in this post stewarded the development of Republican land distribution policy as it displaced the crumbling Jacksonian regime. Wilson, an immigrant from Ireland, was a career land bureaucrat who lived in Washington D. C., three weeks travel from California in the 1860s. At the end of his public career, Wilson became president of the European and Oregon Land Co., an exceptionally well-capitalized venture backed by the powerful William C. Ralston, head of the Bank of California, as well as banks from San Francisco, London, and Frankfurt.[2] For a prominent member of the land bureaucracy this was a typical and lucrative move. The California corporation had charge of selling the "Five Millions Three Hundred and fifty Thousand acres, in vacant odd-numbered sections" conditionally granted by Congress to the Oregon and California Railroad to support construction of its line from Portland to the California border. Wilson described the "simple and perfect" land system of the United States for an international market of capitalists in radically "simplified" terms: with a diagram of a square grid.[3] The rectangular survey, Wilson explained to European capitalists, created neat packets of land in parcels of 40, 80, 160, and 320 acre. The lands, he wrote, were "unoccupied" and the titles "complete and indefeasible." These were two ridiculous claims on the ground in the Pacific colonies, but the claims made sense in offices in Washington, London, and Frankfurt. At such a distance, California's lands were reduced to commodities, little different from horses and cows, bought and sold in a global marketplace.[4]

When Wilson entered office in 1860, however, matters had been far different. The redemptive, moral legality of fraud, trust, and usage had (seemingly) taken hold of the state and federal judiciaries alike as the land bar attempted to resolve the two facets of the "property crisis" – distribution and uncertainty. At that moment, liberal legality, in all its commercial formalism, was confined to dissents. But matters would not remain that way for long. As discussed in the introductory chapter, the Civil War and Reconstruction accelerated the transformation of California colonization and its property law. The consolidation of the Republican party-state, its creation of a capitalist clientele, the proliferation of the corporate form, the massive transfer of abstracted "land" from the public domain to private hands, the

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[1]Karl Marx, Frederick Engels, Leonard E. Mins (trans.), *Letter to Americans 1848-1895: A Selection* (New York: International Publishers, 1953),126.
[2] Joseph S. Wilson, *Railroad Lands in Western Oregon: For Sale at Low Rates and on Liberal Terms: Extraordinary Inducements to Emigrants* (San Francisco: European and Oregon Land co., 1872).
[3] James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), 33-52, 80-83; Wilson, *Railroad Lands*, 7.
[4] Wilson, *Railroad Lands*, 6, 24.

securitization of land and farming, the simplification of land, and the creation of an international property market were tremendous, radical, and rapid undertakings. This legal, material, and ideological process was the "commodification" of landed property.[5] Commodification contained, as one of its vital components, Scott's "state simplification," by which I mean the changing of the real to fit the simplified vision through the power of the state, but this was not all.[6] The process by which a "tract of land" became legally and formally like "a milch cow" or "beef," to use Green's language from the epigraph, entailed the elimination of restrictions on alienability and on estates in general. The end of making land a commodity was to sell and securitize it in national and international markets. Indeed, commodification entailed the construction and support of these very markets through networks and institutions.

Commodification also operated on the level of legal meaning, challenging moral and equitable conceptions of property in favor of a market logic. Commodification was, to use Cover's term, "jurispathic," it eliminated and subordinated alternative legalities to the state's preferred legal vision, often violently.[7] California had "too much" property law. The land market provided the justification and motive force of this movement toward liberalism. As I show, the jurispathic function of law reduced property to its commodity form by eliminating or restraining alternative legal forms, Pre-Emption claims foremost among them. The elimination of legalities, or their hierarchical ordering, was a coercive process that produced an adversarial reaction in the communities whose legalities have been subordinated. Such communities, as Cover writes, "may assert their constitutionalism as the true constitution and denounce that of the courts as not only misguided, but also 'void.'"[8] And indeed we see just this phenomenon among the *bona fide* settlers of California, the preemptors, squatters, and smallholders. In this sense, the liberal movement for commodification was not against "uncertainty" as such but aimed at the alternative legal orders of California's founding, particularly usage and improvement. Commodification represented a violent contestation over nature and society, not a legal-scientific working out of clear rules.

The material signs of commodification were plain. In 1869, the year the transcontinental fully connected California to major American markets, the state produced more agricultural products than Iowa, Texas, and Illinois, a rapid boom in the production of food, particularly wheat. An "export rescue" of its economic base as historian James Belich argues was characteristic of similar "explosive" colonization events.[9] "Fresh farmland, or rather land freshly seized from indigenes, was the most explosive," Belich continues. Though other American states followed a similar pattern of commodification and export, they had different distributions of land among their Anglo settler populations. In California, 79% of agricultural land was held in units of more than 1,000 acres — in Iowa and Illinois the proportions were 4% and 6% respectively.[10] In historian Paul W. Gates' article on the Suscol land cases, from 1970, he argues that a

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[5] Also discussed in the Introductory chapter. See, Gregory S. Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought*, 1776-1970 (Chicago: University of Chicago Press, 1997), especially "'Liberality' vs. 'Technicality': Statutory Revision of Land Law in the Jacksonian Age," 97-126.
[6] Scott, *Seeing Like a State*, 80-3; See also, Kammer, "Railroad Land Grants."
[7] Robert Cover, "Nomos and Narrative," *Harvard Law Review* 97(4) (1983-4), 41-2.
[8] Ibid, 43.
[9] James Belich, Replenishing the Earth: The Settler Revolution and the Rise of the Angloworld, 1783-1939 (Oxford University Press, 2011), 85-8.
[10] Paul W. Gates, "Public Land Disposal in California," *Land and Law in California: Essays on Land Policies* (Ames: Iowa State University Press, 1991), 250.

combination of official cupidity and lies by the large grantees led to the concentration of land ownership in the 1860s.[11]

Gates' analysis of land policy was influential in forming the concept of this chapter, and the arguments hold up in large part; however, Gates did not go far enough in integrating his insights into an analytical whole. Gates elsewhere wrote of the period: "Prominent Californians seemed determined to bring about the greatest possible concentration of land in large ownerships and bent their energies to shape state and federal legislation to contribute to that end, while paying lip service to the small-family-farm concept."[12] This analysis, while accurate, does not go far enough in explaining how and why concentration and commodification occurred, especially given the moralistic legal environment of the 1850s discussed in the last Chapter.

The Suscol land case between Pre-Emptors and landowners offer an excellent case study of the dramatic change from the inquisitions against "fraud" that closed the 1850s and the swift ascent and domination of liberal thought in the 1860s. Suscol represented a jurispathic contest of law, of one logic of land ownership trying to subordinate the other. The legal narrative begins with the US Supreme Court case of *United States v. Vallejo*, 66 U.S. 541 (1861), one of Attorney General Black's efforts to return fraudulently acquired land to the public domain, and ends with the case that overruled the *Vallejo* decision in 1869: *Frisbie v. Whitney*, 76 U.S. 187 (1869). The latter was, in essence, the taming of Pre-Emption, the great symbol of working-class, reform, and Free Land thought. Interwoven with the Suscol story, this Chapter analyzes the commodification of the "waste" lands of California, with a focus on swamp lands, and the coalescence of liberal ideology both in property law and in envisioning American empire. This legal reformation of property in American empire, from the loose equities of antebellum Pre-Emption to the demanding formalism of the Land Office, brought property law closer in form to the British Empire and served to secure commercial linkages between California and the rest of the global European world. First, prominent liberals argued, they needed to deal with one aspect of the property crisis – that of too much law. After, they would let the forces of the market do the rest to redistribute land. A strengthening of state authority and a drawback of state meddling characteristic of laissez faire. The market in land formed the foundation of a vision of "cheap" colonization in which prices, not substantive justice, would govern property law.

## Liberal Property History

"[It] is plain, that Men have agreed to a disproportionate and unequal *Possession of the Earth*, they having by a tacit and voluntary Consent, found out a Way how a Man may fairly possess more Land than he himself can use the Product of, by receiving in Exchange for the overplus Gold and Silver, which may be hoarded up without Injury to any one….For in Governments, the Laws regulate the Right of Property, and the possession of Land is determined by positive Constitutions." – John Locke, *Two Treatises on Government* (1689).[13]

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[11] Paul W. Gates, "The Suscol Principle, Preemption, and California Latifundia," *Pacific Historical Review*, 39.4 (1970), pp. 453-471.
[12] Gates, "Public Land Disposal," 252.
[13] John Locke, *Two Treatises of Government: In the Former the False Principles & Foundation of Sir Robert Filmer & his Followers, are Detected & Overthrown; the Latter is an Essay Concerning the True Original, Extent & End of Civil Government* 5th ed. (London: A. Bettesworth, 1728 [1689]), 175.

It is useful to begin at the end of this period and look backward. At the same moment as Wilson wrote for the European and Oregon Land Co., he took a turn at writing a legal history of the public domain of the United States. Wilson wrote for a new weekly called *Green's Land Paper*, named after its editor William S. Green, a major landholder in swamp lands, land dealer, surveyor, and Democratic official. Green's newspaper venture, a vehicle for advertising and selling land *and* defending the interests of the landowning class, crystalized the material and ideological work of liberalism in California. Though an unreconstructed Democrat, Green invited Wilson, a chief architect of national Republican land policy, to pen a legal history of the public lands, which published over four issues from April 10 to May 1, 1872 – a clue that liberalism acted in both major parties. "The National Domain – Historical Outline" was not striking for its analytical ability, but the central claim was a clear and suggestive one – the story of land in the American empire was the stadial demise of feudal legality and the ascendance of liberalism.

Writing in the form of a property dispute, Wilson began by following the "chain of title" of the public lands. After a long disquisition on English Crown grants of the 17th-century, he concluded: "It will be observed that these grants from the Crown were frequently in conflict with and overlapped each other. Not only a want of geographical knowledge, but a disregard of prior grants, often led the capricious mind of the Stuart dynasty to annul their own solemn public acts, and to ignore rights acquired under those acts."[14] Stuart arbitrariness was hardly an original theme, and the irony of these criticisms, which applied with equal force to the morass of California land under Wilson's supervision, was lost on the Commissioner. (The first clue that Wilson was not really engaging in history as such.) In any case, respect for vested property rights formed one plank of Wilson's story. He continued to set out, in tedious detail, each cession of various states after independence. A sample will be sufficient to understand the general point: "This loose method [of surveying], and the entire absence of public monuments of survey in the 'Virginia military district,' was necessarily productive of many conflicts of title, requiring a long course of litigation to settle, and seriously retarding the growth of civilization. After a quarter of a century, however, titles became measurably quieted, and the march of improvement accelerated."[15] Law quieted the land through formalism which enabled improvement. The jurisprudence which protected private landholders under foreign cessions also met with Wilson's approval. Glossing over the challenges to Mexican grants, the Commissioner intoned, "Vested rights acquired under former jurisdictions have ever been held sacred."[16] There was one large exception, and Wilson immediately followed this statement with a section on "Indian Usufructuary Interests" – again without a trace of irony – which were of course founded upon "different principles" that demanded "far different treatment."

Wilson's analysis of Indigenous title revealed a deep continuity with the founding visions of legal order for California. Here, as discussed in Chapter One, we find a racial theory of law. Like the lawyer-settlers of the 1840s and '50s, Wilson employed a confused combination of Montesquieu and Locke to explain legal-historical developments in land law in terms of racial naturalism rather than historical events. Again, Wilson's analysis was not subtle or insightful, it was commonplace, but for that reason it revealed the legality of the land bureaucracy of the 1860s. Though a standard liberal history through three entries, Wilson established that liberal

[14] Joseph S. Wilson, "The National Domain – Historical Outline," *Green's Land Paper,* April 10, 1872, 1.
[15] Joseph S. Wilson, "The National Domain – Historical Outline," *Green's Land Paper,* April 24, 1872, 1.
[16] Joseph S. Wilson, "The National Domain – Historical Outline," *Green's Land Paper,* May 1, 1872, 1.

legality on explicitly exterminationist (genocidal) grounds. In this sense, liberal thought was not a departure from its equitable counterpart, but in accord with it. Wilson wrote:

> The American people deeply deplore and reprobate the destruction of the Indian tribes, in spite of the utmost efforts of the General Government; but still, the popular insight detects an underlying infraction of the great law of humanity, of common justice, in the Indian monopoly of the continent. As action and re-action are equal and reciprocal no less in the moral than in the physical world, it is not at all surprising that this great fundamental wrong in the social arrangements of our race has been productive of unhappy consequences, or that these have fallen with especial weight upon the heads of their unconscious agents and instruments.[17]

In other words, the social relations of property law derived from an Indigenous "monopoly," and this fact justified the exterminationist policy of the state toward the various "Indian tribes." The language of "monopoly," mirroring the Georgist movement, was a peculiar and pointed reversal. Wilson's European and Oregon Land Company, for instance, was one of the hated Land Monopolies. Wilson thus appropriated a critique levelled on his administration by his opponents and used it to retroactively justify the "unhappy consequences" of colonization for Indigenous Californians. Colonization was not incidental to liberal history, but an engine of it. Wilson wrote that territorial expansion was undoubtedly the basis of a "democratic," "equal," and "free" society.

Wilson concluded, "The failure of the first aristocratic efforts at colonization upon the basis of feudalistic social organization now appears as an event giving decisive advantage to the development of freedom."[18] The legal manifestation of freedom was "allodial tenure," estates with no conditions imposed by the state. This too was racial rather than historical. In American law, Wilson wrote, the "doctrine of tenure is entirely exploded; it has no existence, even in theory….[tenure] is purely allodial, with all the incidents pertaining to that title as substantial as in the infancy of Teutonic civilization."[19] (Where Wilson derived this assessment of ancient Teutonic law he does not mention.) The ascent of "our liberal system of land-law" was thus a development of racial and moral laws with individuals merely the agents of those forces. By such forces, American law had dispensed with "Feoffments, fines and recoveries" as well as "livery of seizin and its consequences" and "entailments and perpetuities." "Real actions, with their multitudinous technicalities, never had an existence in our western jurisprudence," Wilson explained. Ejectment was the "universal" remedy. Land law evinced the transformation from a feudal social order to a liberal one. Wilson's own role in this process did not appear in his history, remaining a massive discontinuity.

Clear as such a story was from an office in Washington D. C., the real story of the 1860s in California was a great deal more muddled. The settler lawyers, surveyors, and bureaucrats who were the supposed agents of racial and moral laws did not *find* the land unoccupied, rationally surveyed, commodified, and ready for sale to buyers thousands of miles distant. They *made* the land that way with immense, dedicated effort. This was a wrenching, violent, jurispathic transformation of law, land, and the people living on it. Wilson told a deluded historical narrative, but it was a delusion imposed on the world by men like Wilson. It should be

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[17] Ibid.
[18] Wilson, "The National Domain," May 1, 1872.
[19] Ibid.

added that this was not only the stuff of tedious stadial histories by retired bureaucrats, but of popular politics. In a speech before the split Republican convention of 1873, John B. Felton extolled the virtues of cheap transportation and of the accord between wealth accumulation and liberty. His reference point was English history where the battle was perpetually fought between capitalist "Equality" against "old feudal prejudices and power."[20]

Wilson's history raised as many questions as it ostensibly answered. It elided the distribution of land within settler society. Just as in the passage from Locke, there was a slippage in Wilson's liberal history from a land governed by moral economy, according to use, waste, labor, and worth in which one group could be rightly dispossessed by another, to a land governed by the formalism of vested rights, strict surveys, and fee simple tenures. Why was it legal and legitimate to redistribute land from the "Indian monopoly" to Anglo settlers but illegitimate to disturb "vested rights" of large, feudal landholders? One answer is quite simple: the racial theory of law. Only the Anglo-Saxon race was "capable" of fee simple property. However, both Wilson and his radical, anti-liberal opponents shared a racial theory of law. Nearly all colonists agreed the ongoing dispossession of Native Californians was legal and legitimate, but settler society split about the nature of property within *their* society. Did property law have one form in 1872 as Wilson argued? If so, how did it become that way? Because of its elisions, slippages, and inaccuracies, Wilson's history provides a way into the liberal legality that came to unlikely dominance in California over the 1860s.

**The Trouble with Pre-Emption**

The case that would mark the statist reaction to the Free Land Regime, represented most clearly by the Pre-Emption statutes, began in the far northern "wilderness" of the Mexican department of Alta California or, to put it more accurately, the lands of the Pomo, Wappo, Wintun, and Miwok Peoples. Suscol Rancho, in present-day Napa and Solano Counties, was 90 to 100 thousand acres altogether, bounded, per the terms of the original 1843 grant, "on the north by lands named Tulucay and Suisun, on the east and south by the Straits of Carquines, Ysla del a Yegua, and the Estero de Napa"[21] As with many Mexican grants, Suscol's borders depended on landmarks, Native land designations, and the uncertain boundaries of other ranchos, information sufficient for a diseño or "rough map" but far from the rectilinear grid of American law. Part of the Rancho was granted to Mariano Guadalupe Vallejo in 1843, and he purchased the remainder the following year. Vallejo's brother, Salvador, likewise held a land grant to "Lop Yomi," per Salvador the local "Indian name" meaning "town of stones," that covered Clear Lake, north of Suscol, a region inhabited and owned by the Eastern Pomo and Clear Lake Wappo, though such ownership was unrecognized.[22] The Vallejo family, prominent and wealthy stewards of Mexican colonization, began to change the land and the people who lived on it. Over the 1840s, Don Guadalupe held 700 California Indians in various degrees of unfree labor, a relationship the

[20] "Ratified. The Nominees and Principles of the Republican Party Warmly Indorsed…" *Daily Alta California*, August 22, 1873, 1, 4.
[21] *United States v. Vallejo*, 66 U.S. 541 (1861), 550.
[22] Ogden Hoffman, *Reports of Land Cases Determined in the United States District Court for the Northern District of California: June Term, 1853 to June Term, 1858, Inclusive* (San Francisco: Yosemite Collections, 1975), 36.

Vallejos understood as benevolent and based in kinship.[23] Salvador "improved" his Rancho and "put upon [Lop Yomi] large numbers of horses and cattle and hogs…built several houses" and cultivated "corn, beans and watermelons."[24] Salvador leased part of his land to settlers Charles Stone and Andrew Kelsey. As historian Benjamin Madley writes, the white settlers treated the local Eastern Pomo and Clear Lake Wappo as serfs that ran with the land.[25] It was, in this sense, a feudal arrangement of property. For years, Stone and Kelsey operated a brutal and lethal system of unfree labor that treated the people who worked on the Ranch as disposable. Scores died of starvation, exposure, disease, and torture. In December 1849, five enslaved Native men – Shuk, Xasis, Ba-Tus, Kra-nas, and Ma-Laxa-Qe-Tu –killed Stone and Kelsey. News of these killings triggered a punitive expedition by the US Army. As Madley argues, the expedition had a "pseudo-judicial rationale for both the indiscriminate killing of California Indians…and the theft or destruction of their property" – the concept of collective guilt.[26] The results were horrific.

The punitive expedition of 1850 brought with it one of the Rancho cases' main protagonists: Captain John B. Frisbie, Esq, of Buffalo, NY. On May 5, 1850, Frisbie and 75 armed men under Brevet Captain Nathaniel Lyon, set off on their expedition against the Indigenous people around Clear Lake – individual guilt for the murders of Stone and Kelsey did not very much matter to the Army. The flimsy legal logic for the expedition was not for lack of lawyers: Major General Persifor Smith, the engineer of the expedition, was a college-educated lawyer from Philadelphia.[27] The party set out across the vast Vallejo family domains from the town of Benicia to Clear Lake, arriving on May 15. Though accounts differ, Madley estimates that the US Army detachments killed between 500 and 800 people from various Pomo and Wappo tribes in the tules and islands of Clear Lake. In Captain Frisbie's account of the incident, the US Army killed Indigenous men, women, and children indiscriminately. Felled, Frisbie reported, "as grass before the sweep of the scythe."[28] In the days following the genocidal slaughter, Frisbie wrote to the *Daily Alta California* an honest reporting of these events – which became an article entitled "Horrible Slaughter of Indians" – a public disclosure that earned him the enmity of his fellow officers. Frisbie then recanted, folding to the pressure of the Army's official, far less bloody, story.[29] Whether Frisbie regretted either his participation in the massacre or his retraction is not extant, but we do know he had something else entirely on his mind as he travelled from the town of Benicia to Clear Lake and back. Frisbie looked out on the changing, bloodied lands of the Vallejo family and saw capital.

In Autumn following the massacre, Frisbie settled in Benicia, having apparently realized that the Suscol grant land represented a tremendous speculative opportunity. So began a new career as a booster and land speculator. He wasted little time establishing this new career. As the President of Board of Directors of Benicia, Frisbie purchased an ad in the *Sacramento Transcript* that ran daily, or nearly so, from September to May 1851. In this advertisement, Frisbie

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[23] Andrés Reséndez, *The Other Slavery: The Uncovered Story of Indian Enslavement in America* (Boston: Houghton Mifflin Harcourt, 2016), 248; The population is simply referred to as "Suscol Indians" in "The Indians of Napa Valley," *Daily Alta California,* February 1, 1860, which remarked they had been largely "swept away."
[24] Hoffman, *Reports of Land Cases*, 34.
[25] Benjamin Madley, *An American Genocide: The United States and the California Indian Catastrophe, 1846-1873* (New Haven: Yale University Press, 2016), 127.
[26] Ibid.
[27] Madley, *An American Genocide*, 119.
[28] Quoted in Ibid, 130.
[29] Ibid, 129-30.

advocated for Vallejo to be made the state capital, citing, among other features, its potential for a commercial harbor. It had an "inexhaustible" quantity of fine stone for building, an "unsurpassed" topography, and "several bold mineral springs."[30] And the reader did not have to take Frisbie's word for it: "The Surveyor-General of the State…having made careful reconnoisance [sic] of this place, fully confirms the facts herein set forth, and the proprietors publish them with a view of inviting public attention to the same. The subscriber is authorized to dispose of a limited number of lots upon liberal terms, and he invites the attention of capitalists and the public generally to the new city."[31] To this small, colonial town amidst princely, personal estates worked by unfree laborers, Frisbie invited modern capital. Frisbie's grandest ambition of securing the American capital briefly succeeded before it failed in favor of Sacramento. Despite this failure, Frisbie hit upon another speculation at the same time when he successfully courted one of the most eligible women in the county: Epiphanra "Fanny" de Guadalupe Vallejo, eldest daughter of Don Guadalupe. The two married on April 2, 1851, at the Guadalupe Vallejo estate.[32] It became the Frisbie estate shortly thereafter when Don Guadalupe assigned the Suscol lands to his daughter and new son-in-law. In one year, Captain John B. Frisbie had gone from a Captain in the bloody punitive expedition to a position within one of California's most prominent colonial families with plans to transform his land.

The Vallejo-Frisbie family owned the Suscol land for the next decade, selling and renting out parcels, and operating the Rancho with its many "servants" engaged in the grain harvest, a booming industry in California. Many parties had purchased under the title with full faith in its legitimacy. In 1860, the *Daily Alta* estimated the land was worth $50 an acre based on its "wonderful" grain production, the best in the state.[33] The Vallejos remained a socially and politically prominent family through the 1850s. Don Guadalupe had been a member of the 1849 Constitutional Convention and a state senator 1849-50 (Davis, years).[34] In addition to managing his estates, Frisbie was an active, if minor, Democratic Party functionary. Less some money in legal fees, the family's land rights, and therefore their wealth, were upheld by the Board of Land Commissioners and by the Northern District Court. However, as might be expected for an immense estate owned by a small family, partly unimproved, worked by unfree Indigenous labor, and sold for speculation, the grant drew the ire of the settler class who viewed the family's ownership of Suscol as morally and legally illegitimate, even fraudulent. By the late 1850s, despite the family's political connections in the Democratic party and well-compensated and successful legal efforts in shoring up the title, Suscol become a target of Attorney General Black's crusade to redistribute large private estates to the public domain, and therefore to the *bona fide* settler class.

In December 1861, months into the Civil War, now former-Attorney General Jeremiah Black brought *United States v. Vallejo* before the US Supreme Court.[35] (Black had been replaced

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[30] "Vallejo," *Sacramento Transcript*, September 16, 1850.
[31] Advertisement that ran (nearly) daily in the *Sacramento Transcript* from September 16 to May 1851. "Vallejo," *Sacramento Transcript*, September 1850 to May 1851.
[32] "Married," *Sacramento Daily Union*, April 15, 1851. On the culture of such marriages generally see Maria Raquél Casas, *Married to a Daughter of the Land: Spanish-Mexican Women And Interethnic Marriage In California, 1820-80* (University of Nevada Press, 2009).
[33] "Notes of a Trip to Solano County – No. 2," *Daily Alta California*, July 15, 1860.
[34] Winfield J. Davis, *History of Political Conventions in California, 1849-1892* (Sacramento: California State Library 1893), 659.
[35] *United States v. Vallejo,* 66 US 541 (1861).

as Attorney General by his deputy from the redemption cases Edwin Stanton.) The Vallejo case was distinguishable from the other cases before the court from California. Unlike, say, the Limantour case, fraud was not obviously in evidence. Indeed, the *genuineness* of the grant was in the record and generally accepted in California. However, in Washington, far from the ground of Suscol, a majority on the US Supreme Court had other ideas. Justice Samuel Nelson, a New Yorker appointed by President Tyler in 1845, wrote for the majority. Given the extent of the Suscol land, Nelson ruled, the improvements were "slight" – establishing little equity by way of use and improvement. The grant formally violated the Mexican colonization laws in several ways: Suscol was too close to the coast and exceeded the maximum number of leagues in a single grant. However, following the *Fremont* case covering Mariposas Rancho, discussed in Chapter Two, Mexican grants with just these deficiencies had breezed through the courts for years in deference to the equitable rights of the Mexican grantees.[36] How would the Court explain their obvious reversal of law?

Most damning, the Court declared, was an archival absence. No material, proper record of the title could be found in the Mexican archives. The Court ruled that it would not accept a claim so deficient in form regardless of whether that lack of form was fraudulent or honest. Nelson explained the logic of this formalism for the majority: "Without this guard, the officers making the grants…would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the Government without the means of information on the subject till the grant is produced from the pocket of the grantee."[37] With California so far from the General Government's powers, arbitrariness and the worst excesses of the patronage system would result unless the General Government imposed its will on land administration. Nelson was, in effect, proposing a more rationalized system of land distribution than had heretofore existed and using this formalism and appeal to the rule of law to strip Vallejo and his many assigns of their titles, much as the court had done in the other redemption cases. The Government did not make a strong case of fraud, merely alluding to it, and rested their main arguments on the deficiencies of the material archive. Therefore, the entire Suscol grant – all one hundred thousand acres of it – was *voided*. The Court's decision in *Vallejo* was radical, whether they recognized it or not. The equitable stance of federal law toward the grantees established in *Fremont* was effectively reversed: formalism, not equity, would govern land policy. In reversing the cant of federal land law, the Court imposed the bureaucratic vision of the General Land Office onto alternative legalities of property, but the nature of this change was obscured by the redistributive nature of *Vallejo* itself. As in the other redemption cases, this was formalism in furtherance of equitable ends.

This new insistence on formalism, without shadow of fraud, earned the majority an aggrieved dissent on the dangers of "confiscation." Penned by Justice Robert Grier, a Jacksonian Democrat appointed by President Polk in 1846, Grier was clearly bothered by *Vallejo*. This was Don Guadalupe Vallejo, Justice Grier wrote, not "some obscure person, such as…[the priest] Santillan [in the *Bolton* case]."[38] Grier continued, "I cannot agree to confiscate the property of some thousand of our fellow-citizens, who have purchased under this title and made improvements to the value of many millions, on suspicions first raised *here* as to the integrity of

[36] *Fremont v. U.S.*, 58 U.S. 542, 560 (1854).
[37] *Vallejo,* 556.
[38] *United States v. James R. Bolton*, 64 U.S. 341 (1859).

a grant universally acknowledged to be genuine in the country where it originated."[39] The rights of Suscol's owners had vested – it had been, after all, 17 years of title transfer and land transformation. As in many of the other cases discussed in the last chapter, Grier accused the majority of reasoning backward from its opposition to large property holdings as such: "Now that the land under our Government has become of value these grants may appear enormous; but the court has a duty to perform under the treaty, which gives us no authority to forfeit a *bona fide* grant because it may not suit our notions of prudence or propriety."[40] Furthermore, far from providing predictability and "rationality" the Court would now throw Suscol Rancho into chaos. What would happen to that land now that it had been returned to the public domain? As a matter of default, the Rancho was immediately part of the public domain and thereby legally open to pre-emption and homesteading. Vindicated by the judiciary, settlers wasted no time in seizing the opportunity. For these settlers, the "right and good" had won the day, the spirit of Jeffersonianism triumphed against aristocracy and redistributed property from a single family to the whole people. Matters in the Pacific colony were not so simple as they seemed from Washington.

Vallejo's assigns and the *bona fide* settlers acted simultaneously and in a manner that revealed the confused character of the Court's vision of formalism and of the land system in general. During the Civil War, the General Government, understandably, did not always have a good sense of what Federal officials in California or state officials were *actually* doing. As the Attorney General James Speed put it in 1866, after the Federal officials *found out* how land distribution went during the war years, state officials had acted "against law."[41] In 1862, state and local officials had control over how *Vallejo* would be implemented. They initially acted in a manner the Supreme Court no doubt would have disapproved: Carrying "with them blank forms" to keep the property in its current hands. The grantees relied on the pre-emption laws for small portions of 160 acres per claimant, the maximum acreage under those laws, but this was not sufficient to cover the grant. The Vallejo assigns hoped to use the state School Land Warrants to "cover" the vast remainder. "Any other course would have been a serious detriment to the business interests of Solano County," the *Marysville Daily Appeal* wrote approvingly, a hint to the growing capitalist undercurrent in property thought.[42] Predictably, fraud jurisprudence had collided with commercial life and the landed interest would not accept *Vallejo* lying down.

Per the formalities of the School Land Laws, the General Government granted every "sixteenth and thirty-sixth section" of the rectangular grid, roughly 1-mile square to the states for funding common schools.[43] When those sections had adverse claims, the state could "select" suitable, alternative Federal lands. These selected lands were limited to those which had been "offered at public sale and [remained] unsold."[44] As a matter of form, these selections needed to be (1) properly surveyed lands and (2) needed to be approved by the General Land Office. The Act was drawn to limit any one individual from attaining more than 320 acres (a ½ section). But

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[39] *Vallejo*, 556-7. This was not the "correct figure," and the Justices were likely knowingly mislead as discussed in Gates, "The Suscol Principle," 455.
[40] Ibid.
[41] "Important Land Opinion" *Green's Land Paper,* Jan 6, 1872.
[42] "Suscol Rancho," *Marysville Daily Appeal*, April 26, 1862.
[43] Act of Congress, 3d March, 1853.
[44] William Wharton Lester, *Decisions of the Interior Department in Public Land Cases and Land Laws Passed by the Congress of the United States Together with the Regulations of the General Land Office,* Vol. 1 (Philadelphia: H. P. & R. H. Small, 1860), 493 – Circular to the Land Officers in the Territories June 25, 1844.

as the Surveyor General of California later wrote, "the law was drawn so that the restriction amounted to nothing…."[45] Assemblyman William Green later defended the law. At the time of drafting, the problem was "not so much how to keep one man from getting too much, but how to get money into the school fund from that source."[46] California land officials happily sold unapproved, unoffered, and unsurveyed selections for School Lands. The state and its officials had little interest in enforcing the acreage cap. In a fee-for-service model of administration, Vallejo and his assigns were confident they could purchase thousands of acres through the School Land system.[47] This might have worked in a vacuum, but the grantees were not the only parties to the ensuing struggle. Squatters, the putative beneficiaries of the *Vallejo* decision, wasted no time in storming into the voided lands with, it would seem, a great deal more legal justification for doing so.

Once news of the *Vallejo* decision reached the Pacific Coast, hundreds of pre-emptors trekked into the lands of the voided Suscol Rancho, particularly the vast "unimproved" portions, and hastily erected shacks, fences, and other improvements to demonstrate their use and improvement. Many of the pre-emptors had families in tow, and for a moment it must have seemed to them a chance to redeem the egalitarian colonial vision for New California. The Supreme Court had spoken in their favor, but the Supreme Court was far away – the county sheriff was not. Matters grew violent on Point Farm, "owned" by Frisbie, when Sonoma County Sherriff Neville attempted to enforce writs of ejectment issued against the pre-emptors by a certain Justice Dwyer who was (apparently) satisfied Frisbie's title was the better one. The settlers did not go quietly. As reported for the newspapers by Mrs. John R. Price, one of the pre-emptors, on December 8, 1862, Neville's deputy went to eject the Martin family from Point Farm.[48] The deputy came face to face with Mrs. Martin who, genuinely or as a ruse, was "too ill to be moved." When the deputy's "man" refused to grant Mrs. Martin privacy, he was thrown down the stairs and a "volley of Cayenne pepper" followed. The well-spiced deputy retreated to form a *posse commitatus*. The posse, "approaching in armed array to eject a sick woman," Price wrote dryly, demanded Mrs. Martin leave so they could destroy the home. Against the advice of a panel of doctors consulted on the matter, the posse carried the ill woman in her bed to a waiting wagon and razed the house. Price reported with horror that similar scenes attended the ejectment of the Curley family and the Hanson family, including one death. Suggestive of the jurispathic nature of these acts, and the oppositional legality of the settlers, Price concluded: "so far, the instigators of all this crime have gone unpunished, for they have money to cover their tracks." Here the preemptors made a claim on *their* law, the true law, as against the judicial machinations of the California courts which, they argued, was organized not by morality but by money.

In the face of these ejectments the pre-emptors organized into a "Settlers' League" for their common defense and legal interest.[49] In January 1863, a month after the Martin ejectment, an ejectment on the lands of another grantee ended when the ejector, one S. Finelle, killed settler

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[45] Surveyor-General of California, *Statistical Report of the Surveyor-General of California, for the Years 1869, 1870, 1871* (Sacramento: D. W. Gelwicks, State Printer, 1871), 5.
[46] Surveyor-General's Report," *Green's Land Paper*, Jan 6, 1872.
[47] Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940* (New Haven: Yale University Press, 2013).
[48] "Statement of Facts Relative to the Ejectments on the Suscol Rancho," *Daily Alta California*, January 14, 1863.
[49] Reminiscent of the Pike Creak Claimants Union in J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

Lewis R. Cox – "blowing his brains out" – and wounded another settler in the leg.[50] In May, Manuel Vera was accused of shooting one of the settlers in the leg and was duly arrested by Sherriff Neville and confined in an ad hoc jail in Vallejo.[51] On the night of May 6, members of the Settlers' League "disguised by turning their coats and blacking their faces," skulked the streets of Vallejo in search of Vera.[52] The League members, the *Daily Alta California* recounted, "entered the building where Vera was confined, seized the Deputy Sherriff, and then murdered Vera, by firing their weapons coward-like, through the door of his room." Still alive after this barrage they "dispatched him," leaving no trace of their identities. Ostensibly fearing separatism, the Army responded. Sherriff Neville, aided by 39 Light Dragoons, and by the San Francisco Detective Service, labored for seven months to identify the men responsible, finally arresting 16 men in the early hours of December 16. In the subsequent trial, the principal, F. A. Preston, was acquitted, on the grounds that he had an alibi, and the prosecution could not prove he had been present at the Vera killing. The District Attorney entered "a *nolle prosequi*" for the remainder.[53] Levi H. Whitney was also briefly arrested for the murder while lobbying for the Settlers in Washington D. C., but was released after a hearing before the Supreme Court of the District of Columbia which found no evidence to hold him.[54]

Events continued to escalate on the rancho. In June 1863, Sherriff Neville and US Army detachments arrested four settlers for "trespass, cutting hay, etc."[55] The four men were tried and acquitted "there not being sufficient proof that any resistance had been made" the *California Farmer* explained. Two of the settlers then sued the Sherriff for damages on the grounds of unlawful arrest, claiming $5,000 each. Weary of being branded secessionists, the Settlers' signed an oath of allegiance to the United States which they published in the paper.[56] The writer for the *California Farmer* put the difficulty of property law to resolve the conflict well, if inadvertently: "As we have always said, if a man has a *good, clean title to his land*, one thousand, ten thousand, or a hundred thousand acres, give it to him, let him enjoy it, and protect him in it. But if that title is not good, if it is fraudulent, it then belongs to the United States, and the settlers have a right to it by law and justice, and we say give it to them." Fraud was proving a difficult concept with which to shape the land as "true owners" abounded.

Amidst the unrest, the land bar and land bureaucracy got to work to resolve the impasse through administrative adjudication. The ranks of this group had been growing as the California land lobbyist was becoming a feature of some prominence in the capital.[57] This group acted quickly. The first fruit of their efforts came in March 1863 when they secured a special act from Congress giving the Vallejo assigns privileged pre-emption claims.[58] The Act called for the tract to be surveyed and "to have approved plats thereof duly returned to the proper district land

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[50] Shooting Affair at Napa from Squatting on the Suscol Ranch," *Daily Alta California*, January 25, 1863.
[51] "Interior Items," *Daily Alta California*, December 17, 1863.
[52] A scene straight out of E. P. Thompson, *Whigs and Hunters: the origin of the Black Act* (London: Breviary Stuff Publications, 2013).
[53] "Interior Items," *Daily Alta California*, January 27, 1864.
[54] "A Californian Charged With Murder," *Daily Alta California*, March 8, 1864.
[55] "Trouble among the Settlers on the Suscol Grant," *California Farmer*, June 12, 1863.
[56] Ibid.
[57] Men like John Mullan and James Shanklin.
[58] "An Act to Grant the Right of Pre-emption to Certain Purchasers on the 'Soscol Ranch,' in the State of California," March 3, 1863 as published in William Wharton Lester, *Land Laws: Regulations and Decisions,* Vol. 2 (Philadelphia: Kay & Brother, 1870), 78.

office," but its principle purpose was to grant Vallejo's assigns, for twelve months, the right to pre-empt their former lands for $1.25 an acre (recall the grain lands were estimated at $50 an acre) provided that land "had been reduced to possession at the time of said adjudication of said Supreme Court [in *Vallejo*.]"[59] It would be up to the Register and Receiver, the offices in charge of land recording, to determine what that possessory proviso entailed. Further, the land officials needed to do something about any rights established during the period between 1861 and 1863, *before* Congress intervened to modify the Court's decision. Equity was proving itself quite troublesome indeed.

In a pamphlet published in 1864, George Fox Kelly spoke for the pre-emptors of California in their growing concern over the direction of land law. Kelly clearly saw the judiciary, and the Republican Party, taking a turn in land policy during the Civil War, away from an expansive view of property law to a constrained one.[60] By way of example, Kelly used his own pre-emption case which he had appealed to Justice Field in equity jurisdiction. Field denied the claim, writing that "ejectment and trespass," the common law remedies, were "appropriate."[61] While this may have been a technical question to Field, Kelly understood this rejection as part of a larger world of meaning. Kelly wrote, "Equity is the highest standard of judicial investigation; it not only embraces, but goes beyond the technical advantages of the law. The Supreme Court say [sic], that a bill in equity is the most appropriate remedy. It was the original purpose of the law to give every man a hearing in the name of justice; it is only unprincipled men who seek by technicalities to evade investigation…"[62] Technicalities, so recently an integral part of defeating "frauds" against the United States had now turned against the pre-emptors. In a visit to Washington D.C. to present the case of the settlers, Kelly had a meeting with President Lincoln, which Kelly provided as a dialogue:

> The President says, "Well, I would advise you to commence suit in the United States Courts. Fraud is not a legal title, and, if you can show those grants to be such, they will no doubt relieve you."
>
> Kelly replies: "But, sir, they will not permit us to be heard; and certainly seem to be implicated in these frauds."
>
> Lincoln: "Very well; let them sue you in the State Courts; then prove your better right to the premises."
>
> Kelly: "But, President, the State Courts will not allow us to show title on our part…"
>
> …
>
> Lincoln: "But I must now say, once for all, that no vague assertions that the decisions of the Courts are fraudulent, with appeals to me to reverse them, can be entertained."[63]

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[59] "Reduced to Possession" was a legal concept much adjudicated. Placing a tenant on land, for example, counted as possession.
[60] George Fox Kelly, "Land Frauds of California. Startling Exposures. Government Officials Implicated. Appeals for Justice. The Present Crisis" (Santa Rosa, November 1864).
[61] Ibid, 16-7.
[62] Ibid, 18.
[63] Ibid, 7-8.

The dialogue evinced the articulation of a new land regime by the Republican party. The President refused to "entertain" Kelly's legality of equity and conspiracy, embraced only two years prior. Kelly's legality derived from natural law, which "originated in the revelations of nature," but was also based on a clear jurisprudential tradition in American law.[64] Kelly cited extensively from treatises like William Lester's restatement of the land laws and from O. L. Barbour's treatise on courts of chancery.[65] He also relied on various strong authorities to make his legal points.[66] In addition, Kelly recounted numerous instances of land officials charging illegally high fees. A vast conspiracy existed against the pre-emptors – "a combination numbering thousands of our most talented men, coupled with hundreds of millions of wealth, aided by Government officials, in accomplishing this deplorable work."[67] The law was a conspiracy for Kelly. "Our Courts are getting so aristocratic that they spend most of their time fishing up some pretext to get out of doing their duty…"[68]

As illustrated by Lincoln's cold reception of Kelly's moralistic claims, the Republican administration was turning away from pre-emption as *the* model of land acquisition in colonization. As it did so, it also turned away from usage as the source of colonial property rights. The radical Free Land wing of the party had won the long-promised Homestead Act in 1862, but the current of law was clearly running away from entitlements as the basis of distribution. After the war, this conflict over law and land policy would pull the California Republican party apart; however, during the war the liberal Republicans, and a fair few Democrats, had the opportunity to set colonization on a different ground than the egalitarian white promised land of the 1840s. As Kelly wrote bitterly, in the place of God these men substituted money.

**Cheap Colonization**

"We have [in reclamation], then, an investment for the capitalist which will return to him enormous profits; a rich and productive farm for the agriculturalist, that will yield him tenfold for his labor; a means of employing the thousands who are daily flocking to our shores from Europe; and last, though not least in importance, a means of providing an abundant supply of fresh, cheap food for the people who are compelled to purchase the diseased meat and stale and unhealthy vegetables and diluted milk which are to be found in our markets." – "A Glance at the History of Reclamation," *Green's Land Paper* Feb 3, 1872.

An alternative vision of liberal colonization based on the commodity land form did not emerge from nowhere. As discussed in Chapter Two, the anonymous attorney and statistician who authored the pamphlet *A "Pile"* understood landed wealth, and the property lawyers who gave that wealth solidity, to be the basis of liberal empire whose prosperity would be measured

[64] Kelly, "Land Frauds of California," 20.
[65] Lester, *Decisions of the Interior Department in Public Land Cases and Land,* Vol. 1 (1860); Oliver Lorenzo Barbour, *A Treatise on the Practice of Courts of Chancery* (Albany: Wm. & A. Gould, 1843-44).
[66] For example, citing to *United States v. Fossatt*, 25 F.Cas. 1166 (1862)*, Owings v. Hull,* 34 U.S. 607 (1835)*, United States v. Judge Peters*, 3 U.S. 121 (1795).
[67] Kelly, "Land Frauds in California," 5.
[68] Ibid, 23.

in dollar value.[69] This political economic conception of property remained a countercurrent in American colonial thought through the 1850s, though one can make out its contours in the Vigilance Committee movement for example. Colonization as a wealth accumulating activity was secondary to a vision of natural law, equity, and redemption – the white promised land of Chapter One. To members of the land bar on the eve of war, however, pre-emption seemed increasingly incapable of providing "certainty" in the land market. Rich as litigation might make them, many were also landholders and real estate jobbers involved in international financial arrangements. Such arrangements could not rest on an inchoate property regime that measured itself by morality. Rather, as Kelly accurately pointed out, money became the measure of property law in California. Property became part of a whole system of political economy that operated by prices. In this regime, projectors began orienting colonization to a new measure, what they often called "cheapness."[70] "Too much law" was an expensive situation for the colony to find itself and rendering land cheap meant commodification of it – formalization, simplification, and quantification. It did not stop at land, however. Cheap land supported "cheap food," "cheap money," "cheap transportation," and (most troubling for settlers) "cheap labor."

The creation of cheap land was the work of many hands, minds, and mechanisms. For instance, the 1860s saw the emergence of professional title searchers, men whose job it was to navigate the internecine recording systems of the state and county to facilitate land sales. The real work of commodification rested on these petty officials, surveyors and recorders, locating agents, whose job entailed the reduction of land to the rectangular grid and the cataloguing of these maps as official state knowledge of property. They produced the facts on which jurisprudence and policy rested. Commodification was, in vital part, a material process of enclosure and clearance, measurement and manipulation directed by law.[71] This disciplined form of property required teams of surveyors, often with armed escorts, to tramp around the land to make the state's maps. It required registers and receivers who handled the mountains of paper created by this system. These various offices demanded technical skill, but were also patronage or elected positions, subject to the various forces of party and interest. Capitalists worked with and within this ballooning administrative state to remake the land itself.

In 1858, an English political economist named Ernest Seyd published a new kind of settler guide for California, one which targeted "merchants" and "capitalists" in addition to *actual* settlers. Contrary to the settler guidebooks discussed in Chapter One, Seyd's introduction framed the Anglo-American expansion into the Pacific in California and Australia as events of "commercial history" rather than as providential events borne out of the nature of the Anglo-Saxon race (colonization could, of course, be both those things). This was a dramatic tonal shift from the guidebooks of the 1840s which were critical of commercialism and envisioned California as a place to escape the capitalist order of the East. The "great process" of industrialization had enabled the "cheap production and consequent consumption of most articles

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[69] *A "Pile," A Glance at the Wealth of the Monied Men of San Francisco and Sacramento City. An Accurate List of the Lawyers, their Former Places of Residence, and Date of their Arrival in San Francisco* (San Francisco: Cooke & Lecount Booksellers, 1851).

[70] On the theoretical valence of cheapness and nature see, Jason W. Moore, *Capitalism in the Web of Life: Ecology and the Accumulation of Capital* (London: Verso, 2015).

[71] See, e.g., Surveyor General, *United States, General instructions to his deputies: by the Surveyor General of the United States, for Wisconsin and Iowa* (Dubuque: William W. Coriell, Printer, 1840).

of necessity and luxury…" a development catalyzed by the introduction of precious metals into world circulation from the gold mines of California and Australia. Cheap and easy money "facilitated all sorts of commercial operations" which benefitted the "general welfare of the world" not just individual merchants[72] Contrary to the settler guides analyzed in Chapter One, which scorned commercial life, Seyd discussed the money market in depth, suggesting that California needed a state bank modelled after the Bank of England.[73]

In the mid-1850s, British observers looked upon the legal and social climate of California with concern, and it was generally regarded as an inferior investment to British colonies where property seemed more secure. European capitalists were twice shy after the bust of 1854, in which "Property under mortgage realized scarcely one-third of the sum advanced on it; there was a great fall in the prices of almost all commodities…to crown the whole, some extensive swindles and forgeries were revealed just at this time…One European house alone lost something like 600,000 dollars, advanced most recklessly on forged warrants…."[74] The property crisis of California had international financial consequences, but it had been an aberration of excess speculation, Seyd advised, not a reflection of California's character or prospects. The legal climate had much improved during the 1850s – the Vigilance Committee of 1856 was an especially welcome development for Seyd.[75] What jurist Oscar Shafter called a "new class of men," many members of the land bar among them, had entered public life, including himself.[76] Though the property crisis of "insecurity of titles" had created a loss of confidence in the land market, matters were "now in a much more satisfactory state" thanks to the work of the legal system. Property law, in other words, was only secondarily a matter of morality (equity) and primarily a matter of underwriting "very profitable transaction[s]."

The economist paid special attention to the California land market. Syed's market vision was systematic. The value of town lands, he wrote, depended "upon the fluctuations in the value of buildings and other matters" and was depressed by "heavy taxation." "[We] have [no] doubt that judicious purchases would be found good investments," but for the "agriculturalist and the speculating capitalist," Seyd recommended the "*unbroken farming and other lands*" that could be purchased at a "very low price."[77] For these outlying lands prices varied "from 37 ½ cents (1s. 6d.) to 75 cents (3s.) per acre." Seyd found such prices "unaccountable," in their cheapness, in the context of the national American land market: "In Wisconsin, Iowa, Missouri, &c., the lowest price for government land is 1 ¼ dollar, while in California it can be bought for half, or less than half the price!"[78] Seyd's was a colonial world measured in prices and percentages, and it was a world in which social and economic life had systemic relationships, ties between average

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[72] Ernest Seyd, *California and Its Resources: A Work for the Merchant, the Capitalist, and the Emigrant* (London: Trubner, 1858), 1-2.
[73] The Bank of California would be chartered in 1864 after the passage of An Act to Amend an Act to Provide for the Formation of Corporations for the Accumulating and Investment of Funds and Savings, March 12, 1864 (Statutes 1863-4, pg 158).
[74] Seyd, *California and Its Resources*, 97.
[75] For skeptical English accounts see, Henry Vere Huntley, *California: Its Gold and Its Inhabitants* (London: T. C. Newby, 1856); Contra the bullish Thomas Spence, *The Settler's Guide in the United States and British North American Provinces* (New York: Davis & Kent, 1862).
[76] Oscar Shafter and Flora Haines Loughead (ed.), *Life, Diary, and Letters of Oscar Lovell Shafter Associate Justice Supreme Court of California January 1, 1864 to December 31, 1868* (San Francisco: The Blair-Murdock Company, 1915), 193.
[77] Seyd, *California and Its Resources*, 102.
[78] Ibid, 103.

wages and the interest rate for instance, and existed internationally. California and Australia frequently provided foil for one another in his account.[79] Australia had too much capital, in 1858, that ought to travel to California for higher rates of interest and return.

Then there was the question of scale and what social order land would support. Rather than only the familiar family homesteads of political discourse, Seyd recommended that his capitalist readers "combine with a purchase of land, farming on a large scale, especially sheep-farming….California, in fact, will soon successfully vie with Australia in the production of fine wools."[80] Perhaps by chance, in that same year, jurist Oscar Shafter and his partners purchased $6,000 worth of sheep for their large Rancho in Marin County.[81] In Seyd's text, large-scale agriculture, producing for an international commodity market, had supplanted the vision of California as an egalitarian place where none owned more than they could use with their own labor. Rather, he wrote that the agricultural products of California land required "very little labor."[82] Wheat production was especially lucrative, for landowners large and small. "It is nothing unusual in California to see a wheat-field bear 60 bushels to the acre, and there are instances of 100 and 120; and the average run of good and bad yields is estimated at from 25 to 35 bushels, which is double and treble the yield in Europe and elsewhere….These extraordinary results are obtained with comparatively little labor…and one man can easily cultivate from twenty to twenty-five acres."[83] Small-scale farming would also pay and benefited from this new colonial vision: "A German farmer squatted on 160 acres of ground, some four years ago. Although he began without a halfpenny, he made in the first year by wheat-growing the handsome sum of 900 dollars…." In addition to these vast sums, Seyd added, the weather produced no period of forced idleness in winter. Cheap land and good yields meant that "almost every farmer…must become rich; he can scarcely avoid doing so" [84] All this rested on land which had become "legally regulated."[85] But, Seyd warned, a laborer needed industry and prudence to succeed if they did not get tempted by luxury – advice which pertained to men and women both.[86] "Free Land" entitlements had been replaced by "Cheap Land." Liberal political economy, founded upon a cheap land market, promised prosperity and property law's purpose was to provide security to this system.

The land itself supported a growing market for commodified debt secured by mortgages. As Oakland land baron James de Fremery explained for European capitalists, the law of mortgages in California was rigorous and secure, provided the investor exercise due care and diligence, like hiring a title searcher.[87] "In fact, the business of searching records, on account of its importance for all transactions in real estate, and the vast amount of time involved, has grown to be a profession," de Fremery explained.[88] As historian Gordon M. Bakken writes of the

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[79] It was also a world of vital statistics in which Seyd argued for the health of California from bills of mortality in San Francisco to other cities. Ibid, 116.
[80] Ibid, 104.
[81] Shafter, *Life, Diary, and Letters,* 194.
[82] Seyd, *California and Its Resources*, 121.
[83] Ibid, 129.
[84] Ibid, 132-3.
[85] Ibid, 147.
[86] Ibid, 159, 164.
[87] James de Fremery, *Mortgages in California. A Practical Essay* (San Francisco: J. J. Lecount, Publisher, 1860), iii-iv.
[88] Ibid, 28.

development of mortgage law in California, the land bar worked hard to "enable transactions in a frontier marketplace."[89] By way of the "trust deed," for example, lawyers skirted the robust equity jurisprudence out of which the law of mortgage had emerged. As Justice Heydenfeldt, later co-owner of the Reyes Rancho with Shafter, wrote in 1852, mortgages were "mere securities for the payment of money, and no breach of their conditions can possibly vest the title in the mortgagee."[90] Bakken writes that creditors won 58 percent of mortgage cases before the state Supreme Court from 1850-1866 and "Had the lender/plaintiffs been more careful in drafting documents, securing a wife's signature, searching title, or prosecuting foreclosure in a timely manner the percentage of creditor holdings would have been much higher."[91] The land bar was dipping their toes into European commerce. In November 1857, for example, Shafter's law partner travelled to Europe to "effect a loan upon Fremont's Mariposa ranch…."[92] The growth of the mortgage market coincided with a wheat production boom and the proliferation of commercial ties between California and global markets.[93] As de Fremery assured his capitalist readers a "resident alien mortgagee enjoys, with reference to property, the same rights as a citizen…."[94]

Seyd and de Fremery's texts evinced the increasing ties between California, Europe, and the British Empire in both commercial and ideological life, particularly in the wheat trade. It was in part through this vector that visions of liberal imperialism circulated into elite California, especially amongst the class of businessmen and lawyers, dominated by Yankees, who had supplanted much of the old Democracy in government office.[95] Due to the tremendous influx of gold seekers, California was a major importer of breadstuffs from 1848-1854, and this bread sold at incredibly high prices in the money-flush region. A sack of flour, historian Malcolm Rohrbough writes, "commanded the highest possible price, or were literally beyond price."[96] In 1854-5, however, the wheat and flour producers of California began exporting a breadstuff surplus.[97] It began modestly enough in 1855, when, Seyd wrote, "we ourselves shipped the first cargo of wheat that ever crossed the equator twice."[98] During that same period, Isaac Friedlander – later known as the "Grain King" of California – staked his account to the British Imperial wheat market. Friedlander successfully "cornered" the Northern California flour market in 1852, amassing such a share of the trade as to manipulate the price.[99] Friedlander backed the some of

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[89] Gordon M. Bakken, "The Development of the Law of Mortgage in Frontier California, 1850-1890: Part I: 1850-1866," *Southern California Quarterly,* 63 (1) (1981), pp. 45-61, 45.
[90] *Godeffory v. Caldwell* (1852) quoted in Ibid, 52.
[91] Bakken, "The Development of Mortgage Law…Part I," 58.
[92] Shafter, *Life, Diary, and Letters*, 190-1.
[93] Gordon M. Bakken, "The Development of Mortgage Law in Frontier California, 1850-1890: Part II: 1867-1880, *Southern California Quarterly* 63 (2) (1981), pp. 137-155, 137.
[94] De Fremery, *Mortgages*, 2.
[95] On the negotiation of American and British conceptions of Empire during the period see Marc-William Palen, *The "Conspiracy" of Free Trade: The Anglo-American Struggle Over Empire and Economic Globalization, 1846-1896* (Cambridge: Cambridge University Press, 2016).
[96] On prices and the moral decoupling of the "just price" in the Gold Rush, see Malcolm J. Rohrbough, *Days of Gold: The California Gold Rush and the American Nation* (Berkeley: University of California Press, 1997), 70, generally 68-130.
[97] Rodman W. Paul, "The Wheat Trade Between California and the United Kingdom," *The Mississippi Valley Historical Review*, Vol. 45, No. 3 (Dec., 1958), pp. 391-412, 394.
[98] Seyd, *California and Its Resources,* 129.
[99] Rodman Wilson Paul, "The Great California Grain War: The Grangers Challenge the Wheat King," *Pacific Historical Review*, Vol. 27, No. 4 (Nov., 1958), pp. 331-349, 337.

the first grain ships to Great Britain and Australia with the firm Falkner, Bell, & Co., which had extensive business ties to London.[100] Friedlander worked closely with William S. Chapman, one of the largest landowners in the state, and later with the Bank of California, operated by the influential William C. Ralston. By the late 1860s, the grain export trade grew from a handful of ships to hundreds making the trip from the Pacific Coast to Liverpool, supplied by the grainlands of Suscol and other large estates.

Before 1869 and the completion of the first transcontinental railroad, the extent of San Francisco's commercial ties to the British Empire would be difficult to overstate. In 1860, half of California wheat and flour exports went to the UK, Australia was second, New York third, and China fourth.[101] Wheat shippers used the cental (100 lbs.), the unit of measure on the Liverpool exchange, and the amount of wheat in one sack.[102] The material for the sacks themselves needed to be imported from Scotland, often at prices farmers considered extortionate. The risks of such journeys were underwritten by British insurance firms and banks which dotted San Francisco or had agents there. As historian Rodman Paul argues, these insurance firms became routes for Scottish and English funds for mortgages and land development schemes to enter California. [103] California imported coal from Great Britain along with iron, chemicals, general merchandise, and textiles — a triangle trade that sent British finished goods to Australia, Australian coal to SF, and California grain to Great Britain - a voyage of a year.[104] The dynamic accelerated during and after the Civil War as still more European banks entered San Francisco. The completion of the transatlantic and transcontinental telegraph cables drew the commercial worlds of San Francisco and Liverpool still closer together. Attuned to the exuberance of his social circle, Shafter described the transatlantic cable as the greatest historical development since Columbus.[105] Information on wheat prices at Liverpool, and Chicago, and the wider world became readily available to the farmers and shippers of California. Cheap wheat became a measure of the integration of California into a larger Anglo-American imperial world.

During 1866-7 wheat production exploded and truly turned to export. Wheat and flour export doubled with 50 to 550 ships a year sailing for foreign ports.[106] On the production side, California wheat acreage increased 300% from 1866 to 1872. By 1872 a wheat processing machine of mammoth proportions had grown up at Liverpool: "The scene of operations is a huge pile of warehouses, or granaries, covering several acres of ground, and reaching upwards to the height of some six or eight floors. The grain ships arrive alongside these warehouses, and the cargo, whether in bulk or bag, is emptied into what is called the 'well' of the building…It falls into a 'hopper,' capable of holding six tons…and the quantity discharged at each descent of the bucket is one ton…being accomplished in forty-five seconds." Its total capacity was 40,000

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[100] The firm operated as the Agents of the Imperial Life Insurance Co., of London, and others, in the same period, "Imperial Life Insurance Co.," *Daily Alta California* March 10, 1855.
[101] Paul, "The Wheat Trade," 395.
[102] Paul, "The Wheat Trade," 392. The market in jute (grown in India) and sacks (manufactured in Scotland) had its own complicated politics of price in the British imperial sphere. The sacks were necessary so that the wheat would not unduly shift in the hold of the ships making such a long journey. The price of imported jute sacks infuriated farmers and met with the ire of agrarian protest. See, for example, "The Grain Sack Question," *Pacific Rural Press*, March 8, 1873. Eventually the wheat raisers got the state to begin manufacturing sacks at San Quentin.
[103] Ibid, 404-7.
[104] Ibid, 402.
[105] Shafter, *Life, Diary, and Letters,* 198.
[106] Paul, "The Great California Grain War," 333.

tons.[107] Wheat ranches took on an enormous scale. Although supporters of cheap colonization insisted landed wealth was still within reach of the poorest citizen, the ranks of an agricultural proletariat of seasonal laborers grew with wheat yields.[108]

Much of this boom in cheap food could be attributed to the commodification and "reclamation" of cheap "waste" lands, most prominently swamps. Wheat production on "reclaimed" swamplands was more akin to soil mining than family farm agriculture, and it depended on the cheap land policies of the state. "In general," Bentham Fabian, founding member of the California Labor Exchange, wrote, "land is rich and cheap…Two [wheat] crops are produced from one seeding, the second being termed the volunteer crop, which springs up without any cultivation from the seed left after the removal of the first crop."[109] Swamp land reclamation was paradigmatic of land commodification.

The commodification of "worthless" swamp lands was a development years in the making, and one which revealed the clear limits and potentialities of such a simplified theory of land. Legally, the state first had to decide on a definition for "swamp." However, Anglo-American lawyers thought little about defining the *concept* (let alone something as messy as reality). In 1850, Congress passed a statute for "reclaiming" swamps in the territories and new states. In this statute, the drafters listed only two criteria ("criteria" being a generous term for it) for defining swampy lands: the "greater part" of a legal subdivision of the rectilinear grid had to be (1) "wet" and (2) "unfit for cultivation."[110] If any unsold federal lands fit this category (notice the problem pre-emption was going to cause *again*) the General Government was to grant such lands to the states, subject to approval of swamp land lists by the GLO. The states would use the funds/ lands to construct levees and drains. As Horace Greeley later recalled, the bill arrived as "a meek innocent-looking stranger, by whom we were taken in and done for. It was a bill to cede to the several new States (so called), such portion of the unsold public lands within their limits respectively as were submerged or sodden, and thus rendered useless and pestilential — that is, swamps, marshes, bogs, fens, etc. These lands, we were told, were not merely worthless while undrained — they bred fevers, ague, and all sorts of zymotic diseases…."[111] Such pestilential lands would be "reclaimed," or more accurately claimed, and made fit for colonization in the ordinary way. Greeley later ascribed avaricious motives to this legislative "ineptitude," but whatever the motivation the administrative questions left open by the legislature were obvious and many. Did the land need to be wet for a portion of the year or all of it? For that matter did it need to be wet every year? If the land grew commodifiable grasses did this count as cultivation? What if crops grew part of the year but not at other parts? This "radically simplified" conception

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[107] "The Grain Elevators of Liverpool," *Green's Land Paper*, May 22, 1872.
[108] See, e.g., Richard Steven Street, "Tattered Shirts and Ragged Pants: Accommodation, Protest, and the Coarse Culture of California Wheat Harvesters and Threshers, 1866-1900," *Pacific Historical Review* 67 (4) (1998), pp. 573-608.
[109] Bentham Fabian, *The Agricultural Lands of California: A Guide to the Immigrant as to the Productions, Climate and Soil of Every County in the State* (San Francisco: H. H. Bancroft & Company, 1869), 5.
[110] An Act to Enable the State of Arkansas and other States to Reclaim the 'Swamp Lands' Within Their Limits" 9 Stat. 519, 1850. Congress itself used quotes, as if "wet and unfit for cultivation" were terms of art.
[111] Quoted in California Legislature, *Report of the Joint Committee to Inquire into and Report upon the Conditions of the Public and State Lands Lying Within the Limits of the State* (Sacramento: T. A. Springer, State Printer, 1872), 10-11.

of nature was vague and practically unworkable, but the General Government insisted on its common definition.[112]

Thus, what constituted wetness and unfitness was left to surveyors and citizens with avenues for appeal in the event of a contested determination. Administration of the swamp land laws hinged on a common-sense definition of the word "swamp" and little else – California's enabling Act of 1855 did not provide further definition.[113] Reclamation efforts in California mounted at the same time as the Supreme Court handed down its *Vallejo* decision – the beginning of the Civil War. Swampland was established by affidavits from citizens and by December 1861, standardized, form affidavits circulated amongst county surveyors to swear to "the mode and manner of surveying and marking." The forms had a factual focus on unfitness for cultivation by quarter-section and cause of overflow, and little else.[114] This land was, by statutory definition, worthless and therefore needed to be sold cheaply – even more liberally than the policy of the General Government for non-swamp lands – and in great quantity in order to meet the end of reclamation. Lands classed as swamp or overflowed would be sold for $1 per acre, optionally on credit for five years at 10% annual interest. This was less expensive than the "government minimum" price of $1.25 an acre. All expenses of the surveys would be paid by the purchaser, a common practice of the land offices, but one with an outsized impact on actual administration. Cheap sale was the policy not a reflection of the market worth of the lands: as the Board of Swamp Land Commissioners reported in December 1862, "one dollar per acre, [was] an exceedingly small sum; for there is not an acre of such land, that is not worth from five to fifty dollars per acre."[115] The Union/ Republican government under Governor Leland Stanford sold the policy as a political economic one: "thousands will [travel] to this state for employment [in reclamation]; we want the population to settle up and cultivate these lands, and render them valuable. If we can give the emigrant laborers enough to buy them a home, we shall be advancing the cause of humanity, and add very greatly to the taxable property of the country."[116] Increased land values, measured by market price, would benefit emigrants and the state.

Enter the county surveyor. Colusa County Surveyor, none other than William S. Green, collected affidavits throughout November 1861, countersigned by the Justice of the Peace.[117] Witnesses made special note about the seasonal patterns of farming and that many lands had flooded during the floods of 1850 but not since – here, one of many early hints at the conflicts between real nature, state simplification, and human interest. Because California's land officials looked upon the legal requirement that the GLO approve the swamp land lists as more of a suggestion, they began vigorously claiming land for the state with vigor. As one might expect, ownership conflicts followed. A tension quickly emerged between the ostensible purpose of the legislation, taking *untillable* and *unhealthy* land and reclaiming it, and the actual character of

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[112] Per the US Attorney General, "The general description of all swamp lands within the limits of the State, was certain and definite enough for purposes of notice." From Opinion of Attorney-General, vol. 9, p. 253, published in Lester, *Land Laws: Regulations and Decisions.,* Vol. 2, 238.
[113] "An Act to Provide for the Sale of Swamp and Overflowed Lands Belonging to this State" 189, 1855.
[114] Swamp/Overflowed Land Locations Alameda County, State Land Office Records, R388.18, 43/1, California State Archives, Office of the Secretary of State, Sacramento, California.
[115] Board of Swamp Land Commissioners, *1862 Annual Report*, State Land Office Records, R388. series number, 44/2, California State Archives, Office of the Secretary of State, Sacramento, California, pg. 4-5.
[116] Ibid, 4.
[117] Swamp/ Overflowed Lands Locations Colusa County, State Land Office Records, R388.18, 43/2, California State Archives, Office of the Secretary of State, Sacramento, California.

"swamp" lands claimed under the act. Farmers regarded overflowing as a seasonal condition which *improved* yields. In a deposition before the California Assembly in 1872, farmer William Reynolds swore to the character of his "prairie lands" that he had settled in 1852 for ranching cattle and wheat. The land was ordinarily quite dry "with the exception of such times as very heavy freshets would occur in the Sacramento River and overflow the greater portion of the valley, the water remaining from three to ten days…."[118] James Benjamin complained that his "swamp" lands needed irrigation not drainage.[119] According to the settlers, the County Surveyors operated by the following definitions: "all land on which cereals could not be successfully raised on account of overflow of water was swamp and overflowed land; and that grass was no crop; and that even if land would produce cereals nine years out of ten and fail the tenth year, it would be swamp and overflowed land." It did not help public confidence that the County Surveyors were often personally involved in buying the lands they surveyed. The case of "township eighteen north, range one west" was suspicious to the Legislature as it seemed physically impossible without fraud. The township, 175 miles from the SF Office of the US Surveyor General, was platted at Marysville four days after the survey — "the facts in this case show an instance of expedition in public matters never before equaled."[120]

Only after the conclusion of the Civil War did federal officials recognize the scale of the alienation of the public domain under the swamp land law. Two land lobbyists, and prominent swamp landowners, were dispatched to Washington on behalf of the swamp land interest: J. W. Shanklin, former Register of the US Land Office, and Captain John Mullan, a settler guide author, military surveyor, attorney, and map maker (both men were also attorneys for the railroads.)[121] The men secured the desired result: confirmation of the huge swampland ranches and the political economic order they underwrote. Evidently warry of disturbing the vested interests of the swampland owners, Congress passed "An Act to quiet land titles in California" on July 23, 1866.[122] Green later described the liberal motivations of this act which was to deal with the "insufferable evils of uncertainty of title."[123] The Act confirmed all selections made under grants to California to the state provided that no "selection made by the said State contrary to existing laws" with pre-emption or homestead claims will be confirmed. Sec. 4 provides for the confirmation of "large bodies of land, notoriously and obviously swamp and overflowed."[124] This Act did not, in fact, "quiet" the issue of titles, but rather shored up the commodity form of land.

Reclamation, wheat raising, and concentrated ownership of land supported a new kind of labor in colonization. The California Labor Exchange was an institution that produced statistical information on wages and, increasingly, coordinated colonization. In its very first meeting in 1868, the Exchange fielded a letter from the Swedish consul inquiring into the price of lands for

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[118] California Legislature, *Report of the Joint Committee to Inquire into and Report upon the Conditions of the Public and State Lands Lying Within the Limits of the State* (Sacramento: T. A. Springer, State Printer, 1872), 17.
[119] Ibid, 23.
[120] Ibid, 50.
[121] "Swamp Land Decision," *Green's Land Paper* Jan 6, 1872; "Meeting of Swamp Land Owners," *Green's Land Paper* Jan 20, 1872.
[122] Republished in Lester, *Land Law,* Vol. 2 (Philadelphia: Kay & Brother, 1870), 180-3.
[123] "Important Land Opinion," *Green's Land Paper* Jan 6, 1872.
[124] Ibid.

a "colony" of "300 to 400 Swedes."[125] Ira P. Rankin, Esq., a prominent member of the 1856 Vigilance Committee, was voted president of the new organization. The *Daily Alta California*, the paper of record of the cities' commercial elite, covered the operations of the Exchange in great detail, including the Exchange's statistics on wages for professions from furniture polishers to mattress makers, though these professions were in very short supply relative to farm hands and general laborers.[126] White labor cost $30-$40 a month with board, Fabian advised in his settler guide, but Chinese workers – "profitable and desirable servants" – were paid less *without* board.[127] Seyd too had reasoned in average wages, statistical aggregations that reconfigured how colonization was measured. By articulating American Chinese as "cheap labor," the Exchange highlighted the racial stakes of an increase in unlanded wage laborers.

The Exchange was a model for similar corporations. The following year, in 1869, a group of self-described "responsible and prominent business men" chartered the California Immigrant Union, a corporation whose self-described purpose was to organize colonization of California by whites.[128] The officers of the corporation were indeed prominent. Charles Crocker, one of the "Big Four" founders of the Central Pacific Railroad, was Second Vice-President.[129] The trustees included some of the largest landholders in the state, William C. Chapman and Charles Lux, and its "honorary committee" included former-Governor Leland Stanford, Friedlander, and then-sitting Democratic governor Henry H. Haight.[130] In a pamphlet, the president of the corporation, Casper T. Hopkins, another prominent man in insurance, explained the logic of the venture. (These men often shared a social life as well as a business life. Edward Tompkins, a prominent California attorney, was married to Sarah Haight, sister of H. H. Haight, whose journey to Yosemite for Ralston's wedding was preserved by the Bancroft Library.[131]) The transcontinental railroad, completed the same year, had not yet produced the immigration expected. Further, the money market was tight, and business was suffering from general stagnation.[132] Like Seyd, Hopkins argued the problem was political economic in nature, though Hopkins put a decidedly white-supremacist spin on that theory. California was an aberration in the "history of the Anglo-Saxon race" in its economic organization.[133] Mining, speculation, "careless credit," and general mania had created an unstable economic situation in the state.[134]

By attracting European migrants and constructing a land market, the political economy could be set right. Hopkins, while not exactly expressing a partisan position on Chinese labor, laid out the (familiar) racial legal world in which people were divided into those "*naturally loving liberty*" and those "*incapable of desiring liberty*," which is to say the Union opposed further immigration from China.[135] The Union claimed, without further explanation, that the

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[125] "Local Intelligence: California Labor Exchange," *Daily Alta California*, April 23, 1868.
[126] "California Labor Exchange," *Daily Alta California,* June 6, 1868.
[127] Ibid, 6.
[128] Caspar T. Hopkins, *Common Sense Applied to the Immigrant Question: Showing Why the "California Immigrant Union" was Founded and What it Expects to do* (San Francisco: Turnbull & Smith, 1869), 60.
[129] White, *Railroaded*, 18.
[130] Haight fn. (among many other things the late Joseph Hetherington's land lawyer)
[131] Sarah Haight Tompkins and Francis P. Farquhar (ed.), *The Ralston-Fry Wedding and the Wedding Journey To Yosemite May 20, 1858* (Berkeley: Friends of the Bancroft Library, 1961).
[132] Hopkins, *Common Sense*, 3.
[133] Ibid, 4, 6.
[134] Ibid, 4-5.
[135] Ibid, 21-2.

"law of *laissez faire*" would resolve the Chinese "question" in the state.[136] Like the Labor Exchange, and *Green's Land Paper*, the work of the Corporation involved gathering information on the available lands for sale, selling these lands in Europe through the Corporation's factors, and then providing transportation and lodging to the emigrants. They would charge both the land seller and the immigrant buyer for the privilege of joining this international network, and also hoped for "donations" from the state to finance their operations.[137] In addition to landowners, however, the Union also hoped to secure the emigration of domestic servants, particularly women of "good character," with the promise of $200 to $300 a year and "meat three times a day beside," a luxury according to Hopkins.[138] The low cost of California goods and high wages for whites, Hopkins concluded, would certainly provide the market incentive for robust colonization.

In further writings, the Immigrant Union put forward the legality of their colonial vision. The Immigrant Union adopted the conservative position that property law ought to create the conditions for a stable, secure land market by upholding vested rights to their fullest extent – but little else. In their pamphlet, the Union included a letter from GLO Commissioner Wilson, to Albert Rhodes, the American Consul to Holland, from May 1869 on the security of titles in Southern California.[139] The "ordeal of judicial investigation" had perfected the Mexican grant lands, Wilson reassured the consul and potential Dutch migrants, and even in the rare case that the land should be declared part of the public domain no "great injury" would result because of the "liberal provisions in favor of *bona fide* settlers" established by Congress.[140] A person of "ordinary prudence" could discover the condition of title to "every tract of land" in the state, a job for the professional title searcher. Much of the land was owned, Wilson conceded, but could be "readily obtained at very moderate prices, generally varying from one dollar to five dollars and upward per acre, according to value." Prudence required purchasers to turn to professional title searchers as legally land was sold by "bargain and sale," which put the risk of a bad title on the purchaser, rather than warranty which put it on the seller.[141] There was also no imprisonment for debt and protection for homesteads from creditors. Public education was freely open to "the children of the poorest citizens."[142] As the manager of the corporation, Charles S. Capp, summarized, "Our laws are more liberal than those of the older States."

Impactful as the Exchange and Union were for coordinating market functions, railroad corporations were by far the largest private subsidiaries of state colonization and land sale that emerged from the 1860s, and therefore became the locus for mechanisms of cheap colonization. The Pacific Railway Act of 1862, which realized the long-held dream of government support for a transcontinental road was an explicitly colonial venture. The road would suppress Native resistance overland and "protect" emigrants, F. P. Weirzbicki wrote way back in 1849.[143] Aaron A. Sargent, Esq., a Republican lawyer and newspaper editor in Nevada County, wrote the House

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[136] Ibid, 22.
[137] Ibid, ix.
[138] Ibid, 51.
[139] California Immigrant Union, *All About California, and the Inducements to Settle There* (San Francisco: The California Immigrant Union, 1870), 44.
[140] Ibid, 45.
[141] Ibid, 15.
[142] Ibid, 5.
[143] As early as 1848, commenters discussed the idea favorably. See, J. Ely Sherwood, *California: Her Wealth and Resources…* (New York: George F. Nesbitt, 1848); F. P. Wierzbicki, *California as it is, and as it May be, or , A Guide to the Gold Region* (San Francisco: Washington Bartlett, 1849), 15.

bill for the road, though the land grant ballooned to much greater proportions in 1864. As historian Richard White writes, "If all these federal land grants had been concentrated into a single state, call it Railroadiana, it would now rank third, behind Alaska and Texas, in size."[144] White continues, "On paper land grants seemed to be foolproof; in operation they seemed the work of fools."[145] Theoretically, commodified land provided a fungible alternative to money subsidy, the problem was in the commodifying. One need only look at the example of the Mexican grants to know why this was the case, and any member of the California land bar could have foreseen the consequences. Introducing a new claimant to the California lands could only mean endless litigation and, *necessarily*, the exacerbation of the property crisis on both fronts of distribution and "too much law."

Perhaps seeing where the money was headed, elements of the land bar moved their practices into the railroad corporations. Frederick Billings, Shafter's law partner and plaintiff in *Billings v. Hall* (1857) (see Chapter Two for extended discussion), was active in the California land bar through the opening of the Civil War and was put forward as a Union candidate for Congress in 1864, but returned to his home state of Vermont that same year.[146] In Vermont, Billings became increasingly involved, both legally and financially, with the transcontinentals. The Atlantic and Pacific Railroad, chartered by Missouri in 1857, had been a failure and reverted to the state before being purchased by none other than John C. Fremont whose Mariposa estate was now an object of international capital.[147] Here we see the direct connection between land policy and capitalist accumulation. Measured by miles of track laid, the venture fared poorly. As the *Daily Alta* reported, "stealing had been discovered inside the corporation" and Billings, "disgusted," withdrew as one of the road's Vice Presidents, ending the prospects of the road except as a "scheme" for money making.[148] The fallout and attempts to salvage the road continued for years.[149] Billings became still more involved in the Northern Pacific Railroad Corporation, profiting handsomely from its land business even as it disastrously collapsed in 1873.[150]

Profitable as it may have been, railroad grants also revealed the hard limits of commodification. Conditional land grants to the railroads, in addition to rights of way, construed land as a fungible subsidy that could be readily sold or mortgaged (or double mortgaged) to pay for the construction of a road and to pay interest on bonded debt. This scheme required a simplified commodity form of land that could be bought and sold like horses, but the reality of land was at variance with this simplification. Take, for example, the question of what kind of title the railroad held before it completed the conditions (usually miles of road) of the grant. Under the law of Mexican grants developed in the 1850s, the grantee would have an inchoate or equitable title. But with equitable title decried as "uncertain" and jurisprudentially on the wane, courts were forced to deal with grants *anew* within liberal legality. As in *Hart* (1861), Stephen

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[144] Railroaded, 24.
[145] Ibid, 25.
[146] Though he remained the subject of Republican political gossip in the state for years. "Frederick Billings," *Stockton Independent,* September 24, 1864.
[147] Later: "Sale of the Mariposa Estate," *Green's Land Paper*, Feb. 14, 1872, 1: "The conflicting titles to the Mariposa Estate having been bought up by the trustees, the entire property was sold last week for $800,000, to the Mariposa Mining and Land Company, a New York corporation."
[148] "A Great Railroad Contract Forfeited," *Daily Alta California,* June 24, 1867.
[149] "Committee of One Hundred," *Daily Alta California*, July 6, 1872.
[150] White, *Railroaded*, 156.

Field put his considerable talent to work to settle the thorny legal issues implicated – and as in *Hart* the results were uneven. In Justice Field's *Schulenberg v. Harriman* decision in 1874, the Supreme Court ruled that the *whole* legal title passed to the railroad at time of grant, *regardless of whether the road completed the conditions*, though the patent lacked a definite location.[151] The federal appellate jurisprudence on this question became "confused" when the court issued a contradictory decision the following year. As historian Sean Kammer notes "the grant passed a present legal title in fee to the railroad company, except when it did not."[152] As Kammer argues, the cases represented the utter failure of classical legal thought and "legal science" to make "law certain, stable, and predictable."[153] The gap between the simplification and the reality was simply too great. An overburdened land office struggled to handle all the resulting disputes, in part because of the legal complexity of property law and the relative inexperience of officials and clerks.[154] Billing's Northern Pacific, for example, was part of 3,000 cases over its land grant.[155] Railroad litigation revealed how irrational and unsettling the property system remained not in spite of liberal legality but *because* of it.

**Liberal Legality and the Jurispathic Function of Law**

"Are not our land laws complicated enough, and our titles insecure enough already, without piling on the agony and increasing the evil ten-fold?" – William S. Green, "Mr. Barker's Land Bills," *Green's Land Paper*, March 20, 1872.

As the land administration and businessmen busily surveyed and sold land during the 1860s, the legal system moved to eliminate the equities standing in the way of this process. After all, international capitalists could not invest in a land corporation with "uncertain rights" to commodities, whether the land itself, securities derived therefrom, or the products of the soil. The pre-emptors on swamp lands, on railroad lands, on reservations, and on voided ranchos, created constant problems for the security of commodities. However, these pre-emptors seemingly acted with the backing of the government. Notably in the Suscol case, the land bar reduced claims of fraud and appeals to morality to impediments to commercial life. The Republican Party of California, led by men like Stanford, Shafter, and Billings, but also by Democrats like Henry Haight and William Green, played a decisive role in disrupting and replacing the relics of Jacksonian land policy. Bourgeois class formation, especially among lawyers, provided the ideological and social basis for articulating liberal legality. As I show below, *Frisbie v. Whitney* (1869), the resolution of the Suscol case, dismantled pre-emption, completing the jurispathic turn against equity.

The resolution of the mess at Suscol revealed the advances of liberal legality during the 1860s. A high degree of formalism distinguished the administrative directives from Washington. In Commissioner of the GLO James M. Edmunds letter of instruction to the Register and Receiver of San Francisco he demanded an orderly, bureaucratic, and formal administration of

[151] *Schulenberg v. Harrima* 88 U.S. 44 (1874),
[152] Kammer, "Railroad Land Grants in an Incongruous Legal System," 422, Fn. 122.
[153] Ibid, 430.
[154] Ibid, 409.
[155] Ibid, 417-8.

the Suscol claims.[156] Subsequent instructions revealed he was less than pleased with the results. In March 1864, Edmunds admonished the officials, demanding they "require the production of the highest evidence" as to being a *bona fide* purchaser from Vallejo 's assigns, which they evidently had not done.[157] The Commissioner complained that the officers did not correctly sign affidavits ("You will require the claimants, in each case, to take and subscribe an affidavit in legal form…") and also that the certificates of the Register were undated. For parties claiming to be attorneys, administrators, or executors the Register and Receiver were to require "written evidence of [their] authority" — an affidavit was insufficient. Further, the officers needed to give every party a right to "cross-question the witnesses of others." Edmunds continued with his list of procedural instructions: "The testimony…must be reduced to writing, and subscribed by the witnesses in your presence, and authenticated by the certificate of the officer administering the oath." The General Land Office included blank notices to be distributed and posted to give "due and full notice" to the parties. It was an effort at bureaucratic control that resisted the government's patronage, profit-motivated form. In this manner, the hundreds of claims to Suscol ground their way through the land bureaucracy, and the land bar, but the governing regime and ideology was changing as Suscol played itself out.

Indicative of the shifting balance of power, the entire California Supreme Court was remade by the Republican/ Union Party in 1863. Oscar Shafter, Lorenzo Sawyer, John Currey, Augustus L. Rhodes, and Silas Sanderson were all swept into office over a "discouraged and disorganized" Copperhead opposition.[158] The five men were all born in Vermont or New York between 1812 and 1824 and all were prominent, respectable members of the land bar before their Supreme Court terms. They were learned men of property and increasingly conservative on property matters. In letters to his father at the time, Shafter explained their electoral fortunes: "The people have…hitherto suffered greatly from incompetent, or dishonest, or partisan Judges, and there is a general disposition just now to select men for judicial positions with some reference to their qualifications."[159] Shafter embodied the landholding lawyer, and his fellow justices had similar ideologies. As Shafter wrote in the same letter, "This State is prospering beyond all parallel, and in the next ten years will take high rank in the matter of wealth and population…" Similarly, Sanderson later became a powerful railroad lawyer. As Shafter gossiped to a fellow lawyer in 1867, "Sanderson is getting rich as an attorney of the Central Pacific Railroad Co. With a salary of $1000 per month, and a good practice besides."[160] During the early 1870s, former Justice Sawyer lamented the "sand-lot politics" of the "communistic mob."[161] As historian Michael Ross wrote of the elite bar during the period: "[Stephen] Field's great fear of debt repudiation reflected the widespread sense of uneasiness felt by men of property during the late 1860s and 1870s. Industrialists and financiers amassing great fortunes

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[156] J. M. Edmunds to Register and Receiver, April 10, 1863 in Records relating to Suscol Rancho cases, MICROFILM BANC MSS 70/67 c, Reel 2.
[157] J. M. Edmunds to Register and Receiver, March 10, 1864, in Ibid.
[158] Shafter, Letter to his Father Oct 21, 1863, pg 223.
[159] Ibid, 222.
[160] Shafter, Letter from J. B. Crockett, pg 231; Sanderson represented the Central Pacific in the influential tax case *People v. Central Pacific RR Co* (1872).
[161] John McLaren, "The Early British Columbia Judges, the Rule of Law, and the 'Chinese Question': The California and Oregon Connection" in John McLaren, Hamar Foster, & Chet Orloff (eds.), *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: University of Regina, 1992), 249. See also, L Przybyszewski, "Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit," *Western Legal History 1* (1988).

were terrified that the laboring majority might attack their property both through violence and the ballot box."[162] After 1871, the Paris Commune loomed especially large in their legal imaginations. One can easily imagine how the squatters at Suscol appeared to these men in the mid-60s.

Three Suscol cases were appealed up to this newly reconstituted, and thoroughly conservative, Court. In *Hastings v. McCoogin* (1864), an ejectment case against a squatter, Sanderson wrote for the Court in favor of Vallejo's purchasers, noting that the purchasers had "inclosed" their property "by a fence" and thereby withdrawn it from pre-emption.[163] Similarly in *Page v. Hobbs* (1865), Sawyer wrote that the lands were not subject to pre-emption because they had been "reduced to possession" by Vallejo's assigns.[164] Both cases relied on narrowly construed readings of the pre-emption laws and the facts of possession by Vallejo's assigns. In a more technical case, *Page v. Fowler* (1865), which involved the value of hay grown by the squatters (124 tons of it), Rhodes wrote that neither party could make a claim to title based on a pervious ruling, by Field, which held: "The personal action cannot be made the means of litigating and determining the title to the real property, as between conflicting claimants."[165] In other words the squatters could keep the hay, and no ruling was made as to the true owner of the underlying real estate. In all three cases the Court was loath to redistribute property from one party to the other, whether real (land) or personal (hay), when they felt the party had come by the property honestly and in good faith.

A more confused dynamic was playing out in federal administration and appeals as relics of the old order supported the squatters. In this way, the course of *Whitney v. Frisbie* evinced a struggle of various legalities within the land bar. On the initial hearing, the Register and Receiver found in favor of Frisbie and Vallejo's assigns; this decision was reversed by the Commissioner who decided for Whitney and the pre-emptors. In May of 1866, Attorney General James Speed, hearing the appeal from the General Land Office, reversed the Commissioner and dismissed the equitable claims of the pre-emptors on the grounds that no rights vested *until* the land bureaucracy performed the proper procedures: "It is not to be doubted that settlement on public lands of the United States, no matter how long continued, confers no right against the Government…It is compliance with those conditions that alone vests an interest in the land."[166] By contrast, Vallejo's claimants had a right which "no supposed equity, based upon simple settlement" could defeat.[167] The Attorney General favorably cited Justice Grier's *Vallejo* dissent to support the "superior equity possessed by all *bona fide* purchasers from Vallejo…."[168] In only four years, Grier's conservative position on "confiscation" was now the policy of the Government. This decision was dutifully appealed to the Supreme Court District of Columbia.

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[162] Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era* (Baton Rouge: Louisiana State University Press, 2003), 186. See also, John F. Burns and Richard J. Orsi (eds.), *Taming the Elephant: Politics, Government, and Law in Pioneer California* (Berkeley: University of California Press, 2003).
[163] *Hastings v. McCoogin* (1864), 86.
[164] *Page v. Hobbs* (1865), 489.
[165] *Page v. Fowler* (1865), 610.
[166] "Opinion of the Attorney-General in the Case of the Suscol Rancho" in Lester, *Land Laws,* Vol. 2, 381.
[167] Ibid, 284.
[168] Ibid, 285.

Here, Justice Wylie reversed Attorney General Speed in August 1866, making the case that the law was entirely on the side of the pre-emptors and that the Attorney General was simply making a political decision.[169] Various legislative Acts had opened even unsurveyed California land to pre-emption, the most recent in June 1862, Wylie wrote, and this statute clearly governed when Whitney entered the quarter section in October 1862. Whitney, Wylie ruled,

> made the necessary improvements and cultivation…[and] from this date, had acquired as good and valid a right to pre-empt this tract of land, as can ever be obtained by any settler prior to the completion of his title by patent. But after he had thus acquired an inchoate equitable title to the land, Congress…interposed in behalf of the *bona fide* purchasers under Vallejo, to take it away from him and sell the land to them.[170]

Unlike the Attorney General, Wylie had decades of case law to bolster his ruling. Wylie cited *US v. Fitzgerald*, 15 Peters 407, that no reservation or appropriation could be made after a citizen has "acquired the right of pre-emption," and *Delassus v. US*, 9 Peters 133, which ruled that "no principle is better settled in this country than an inchoate title to lands is property."[171] Not only did the Attorney General rule against law, but also against colonial land policy which, Wylie wrote, was to "invite immigration, to encourage the growth of the new States."[172] In the end, Wylie ruled, Whitney "acquired a vested interest therein, which the Constitution has placed beyond the reach of even an act of Congress to take from him and grant to another."[173]

Wylie's decision was a thorough defense of equitable land law in general, but it also operated through equity in the strict legal sense because it was an equity case. The remedy asked by Whitney was "to obtain a decree on the ground of fraud and trust, which will prohibit the defendant from obtaining from the Government a patent for the land, which in equity ought to be made to himself."[174] It was well established in equity that getting a patent for land known to be held according to law, but without patent, by another, as Frisbie was doing by asking for a patent to Whitney's land, was a "constructive fraud."[175] The Vallejo claimants were responsible for their fraudulent "deception" of Congress.[176] Wylie duly enjoined the patent from issuing to Frisbie. Ten years earlier Wylie's decision likely would have persuaded the land bar, it perfectly fit the redemption framework advanced by former Attorney General Black. However, the pre-emptors now faced a hostile and reactionary Supreme Court that was quite unmoved by Wylie's extensive citations. To resolve the impasse at Suscol, the Court took aim at the key problem – pre-emption property as such.

The Court had created the mess at Suscol in 1861 with formalism, so it was perhaps fitting they used the same logic to get out of that mess in 1869. Writing for the Court, an agitated Justice Samuel Miller clearly had enough of the "equities" of pre-emption no matter how well-supported by antebellum legal thought. Miller's restatement of the facts made plain his distaste for Whitney and the Settlers League: "Frisbie having become possessor of the legal title to the

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[169] "Opinion of Mr. Justice Wylie as to the Rights of Pre-Emptors on the 'Suscol Ranch,' in California," Lester, Vol 2., 285.
[170] Ibid, 287.
[171] Ibid, 288.
[172] Ibid, 289.
[173] Ibid, 290.
[174] Ibid.
[175] Ibid, 292. Quoting Justice Story.
[176] Ibid, 293.

land in controversy, the complainant, Whitney, claims that he shall be compelled to convey it to him, because he has the superior equity; for this is a suit in a court of equity, founded on its special jurisdiction in matters of trust. It is, therefore, essential to inquire into the foundation of this supposed equity."[177] Despite being rejected by the land office, Miller wrote, Whitney claimed:

> that his intrusion on Frisbie's inclosed grounds by violence, and his offer to prove his intention to become a *bona fide* occupant of the land, create[d] an equity superior to Frisbie's, which demand[ed] of a court of chancery to divest Frisbie of his legal title and vest it in him. If there be any principle of law which requires this, the court must be governed by it, but it is idle to pretend that such a decree would be founded in natural justice.[178]

Predictably, Miller found no such principle. He concluded by dismantling pre-emption as a form of property, ruling, "There is nothing in the essential nature of [going upon the land and building and residing on it] to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right."[179] Here, then, was a clear rejection of the Lockean foundation of property . Use and improvement were not the source of property rights, rather formal state recognition alone was the source of property rights. The redistributive potential of pre-emption was central to its rejection. In a separate case, the Court ruled that "all just legislation that the legislature shall not take from A. and give it to B" a principal clearly operative in the *Frisbie* case.[180] This neutrality was an important pillar of the liberal legality *Frisbie* represented. The *Sacramento Daily Union* described the legal development well: "[The pre-emption law's] obvious purpose is to settle the country, not to disturb settlements."[181] No justice dissented.

The companion to the federal case at state law, *Hutton v. Frisbie* 37 Cal. 475 (1869), was decided the same year, and incorporated the same conclusions into California law: no rights vested in the pre-emptor until they had paid for, *and* received, a patent – a process entirely controlled by land administrators. Writing for the majority, Justice Sawyer wrote that Congress never intended for the pre-emption laws to operate in this way, rather the laws were "intended to give those who were pioneers in the unsettled wilds of the public domain the right to purchase the unoccupied ands which they have had the courage and hardihood to settle…"[182] In other words pre-emption was a legal agent of colonization, but inappropriate for governing a colony. Sawyer through the Settlers' League was trying to benefit from the honest labor of others. No contract existed between pre-emptor and the state for the simple reason that contract provided far too much right. If it was a contract, they would have to find a different result. The two Democratic appointments now on the court, J. B. Crockett and Royal Sprague, preferred the antebellum legal formula of inchoate rights and expressed skepticism of the contractual reasoning.[183] Though Crockett shared the sympathies of the men of his class – writing, "Instead of loafing about the cities earning a precarious living, often by questionable methods, and daily

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[177] *Frisbie v. Whitney*, 76 U.S. 187 (December 1869), 192.
[178] Ibid, 193.
[179] Ibid, 194.
[180]Chief Justice Chase quoted in Ross, *Justice of Shattered Dreams*, 185.
[181] "The Soscol Ranch Pre-Emption Rights," *Sacramento Daily Union*, July 29, 1869.
[182] *Hutton v. Frisbie* 37 Cal. 475, 486 (1869).
[183] They replaced Shafter and Rhodes respectively.

complaining of a lack of employment, let [the ungrateful wretch] go into the country and rent, if he cannot buy, a small piece of land" – he maintained a legal commitment to the Jacksonian order.[184]The two Democrats defended the free land policy of pre-emption and the antebellum order of colonization: "[selling] to actual settlers at a very low price…has been for many years a favorite policy with the government. It was deemed advisable to sell the lands to actual settlers at a low price, and thus promote the rapid expansion of our national wealth and the speedy development of our agricultural resources, rather than to sell, for a higher price, to speculators, who would or might keep it out of the market, and thus greatly retard the growth of the country."[185] Note, however, Crockett's justification of pre-emption: not to create an egalitarian property order, but to maximize the amount of land in the market, a liberal aim if there ever was one. Cheapness had fully taken hold as the dominant logic of colonial land policy. The Democratic dissent marked how far the Republican transformation of property had progressed during the 1860s and how far the liberal construction of colonization had taken hold.

What happened to the land of Suscol following the *Frisbie* decision? Two years after the case sounded the death knell for preemption, John Frisbie took his holdings sold them to a corporation called the Vallejo Land and Improvement Company.[186] It was through this vehicle that Frisbie hoped to realize his plans of two decades earlier, to make the city a rival to San Francisco in the international commodity trade. Former US Senator Milton Latham and former Governor Stanford joined Frisbie as trustees, along with E. H. Green, a London capitalist and Vice President of the London and San Francisco Bank, and Faxon D. Atherton, "one of the Directors of the California Pacific Railroad," a line that would link Vallejo to Sacramento.[187] At its incorporation, the company – on paper – had a capital stock of $4 million and, as the *Vallejo Chronicle* breathlessly added, "an unlimited amount of capital" to draw upon.[188] This was a speculative venture of an immense scale. The company's accounts from 1872-3 with the London and San Francisco Bank evince an actual operation on a smaller scale than the initial newspaper accounts of unlimited capital.[189] Commercial revolution it was not, but the records of the company do indicate Suscol's continued production for the booming international wheat and flour markets. To make the land pay, the Company contracted with Friedlander to start exporting wheat – though Friedlander expressed serious doubts about the physical infrastructure available. The land was now thoroughly capitalized, as were its products. In a letter of July 30, 1872, for example, Frisbie corresponded with a local bank to loan "money on wheat" in particular for "no 1 quality and in a good warehouse."[190] On this "wheat loan," as Milton Latham recorded one

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[184] Reprinted in California Immigrant Union, *All About California*, 49.
[185] 508-9.
[186] "Another Immense Corporation," *Vallejo Chronicle* republished in the *Stockton Independent*, October 20, 1871. "The *Chronicle* asserts that they have already secured possession of nearly all the unimproved and much of the improved property of Vallejo. The object of the incorporation is to improve the facilities of that place as a railroad terminus and shipping point."
[187] "A Reported Great Enterprise," *Sacramento Daily Union*, October 20, 1871
[188] "Another Immense Corporation."
[189] "Vallejo Land & Development Co.: Accounts with the London and San Francisco Bank, 1872-3," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.
[190] Outgoing from John B. Frisbie, July 30, 1872, and Letter to John B. Frisbie, August 2, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

month later on August 30, 1872, the Vallejo Company secured $80,000 which Friedlander could draw on from the company's account to ship the wheat.[191]

Other land corporations proliferated. Former Superintendent Beale's one-time reservation turned private estate became the Tejon Land Company, and Fremont's Mariposa estate became the Mariposa Mining and Land Company. The legal powers of these "new" land companies were construed liberally by the California Supreme Court in *Vandall v. South San Francisco Dock Co*., 40 Cal. 83 (1870). The case involved the powers of the South San Francisco Dock Company, chartered under the liberalized 1864 Incorporation Act. As the *Daily Alta* recounted, the case was of "general interest to businessmen and lawyers. The main question at issue was whether a corporation formed for the purposes, as stated in the certificate, of buying, improving, leasing and selling land, could levy a valid assessment to assist the construction of a railroad not on their property, but to give access to it."[192] The articled noted the novelty of "land-speculating corporations," which have "been more numerous and successful in California than elsewhere," but did so with approval of their role in colonial policy: "Land speculation is one of the chief branches of business in the newer portions of the United States, and it aids in developing the country, attracting immigrants, and giving wealth to persons of superior knowledge and judgment." The legal question was whether the railroad assessment fit within the authority of the corporation, in particular its power to "improve" land. Attorneys for the Company argued that, by increasing the sale price of the land, they "improved" it, drawing an analogy to personal property.[193] The stockholders trying to thwart the gift to the railroad argued that if improvement meant only an increase in price, or market value, the corporation could do practically anything. The court reluctantly agreed with the company, with Justice Crockett writing: "I may remark, in conclusion, that, whatever difficulties surround this question, result from the peculiar nature of this class of corporations, organized for the novel purpose of speculating in real estate; and, though it may be a very questionable policy, which permits corporations to be formed for such a purpose – that is a consideration to be addressed to the Legislature, and not to the Court."[194] Corporate law would not be used by the courts as an impediment to the land market.

In 1872, William Green appointed himself the task of unifying these diverse jurisprudential developments into a coherent ideological whole. An unreconstructed Democrat, Green, as mentioned above with respect to swampland laws, won a single term as Assemblyman for Colusa and Tehema in 1867 in the backlash to Reconstruction.[195] The first edition of *Green's Land Paper* rolled off the press in early January 1872. In the first edition Green wrote, "This

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[191] Milton S. Latham to J. K. Duncan, Esq. Aug 30, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.
[192] "Decision on the Power of Real Estate Corporations," Daily Alta California, October 30, 1870.
[193] *Vandall v. South San Francisco Dock Co*., 40 Cal. 83 (1870), 84.
[194] Ibid, 91.
[195] Davis, *History of Policial Conventions,* 268. Green offered a resolution in the assembly that resolved, in part: "1. That such military governments are totally inconsistent with our free institutions and destructive of civil liberty. 2. That the negroes of the south are now incapable of self government, and therefore it would be unsafe and unwise to intrust [sic] them with political power or social equality. 3. That the action of congress in establishing pretended state governments in the said ten states, wherein the whites are disenfranchised and the negroes enfranchised, is unconstitutional and void."

paper will be devoted strictly to the interest of the land owners of the Coast."[196] It was not, in other words, a partisan paper, but a voice for the propertied as a class. The paper was also itself a land market for Green's real estate business.[197] Each issue listed information for W. S. Green & Co.'s agents, many of whom were attorneys in addition to "conveyancers" in real estate, some were title searchers, registers, and one a justice of the peace. The agents operated out of the "court house" or the public land offices. Atop this network rested the land market. In a call for advertisements titled "To Land Owners" Green wrote, "We would also most respectfully call your attention to the unparalleled facilities for placing your offers before the *entire purchasing population.* No purchaser, in justice to himself, can escape us. It will be known in every nook and corner of this State, and generally in the other States, that there is an office in each town where description, terms, etc., of *all* the land for sale in the State can be found."[198] Each issue carried advertisements for lands owned by Green, anything from small tracts "good grain lands" to "a fine speculation in some 14,000 acres."[199] As indicated by its short print run, the venture did not pay, but it did synthesize conservative, liberal property thought in clear terms.

Green believed fervently that the disruptions of the land market derived from the legislature's misguided attempts to "fix" that market with more law. One of Green's favorite themes was tearing apart proposed reform legislation. When the legislature put together a committee to investigate the land situation, writing that land had been accrued "if not fraudulently, at least by a perversion of the law, engendered by a studied ambiguity that seems to pervade our whole land law system…" Green responded, "If any of them are competent to draw a land law, why, in the name of common sense, don't they do it, and pass it, and have done with it?"[200] Green warned that another proposed act, which would have voided any applications for school or swamp lands in which no purchase money had been paid, would simply embroil the land claims in further litigation.[201] To an act that would have made pre-emption the only basis for alienating public lands, Green wrote that this "system, if system it could be called, compared to which the dominion of old Chaos, as described by Milton, would be order itself."[202] "Mr. Barker's Land Bills" were the "worst bills that could have been devised." Green continued, "Are not our land laws complicated enough, and our titles insecure enough already, without piling on the agony and increasing the evil ten-fold?"[203] An act which planned to imposes a license tax upon "holders and claimants of unoccupied and uncultivated lands, which are not fenced in for grazing purposes," should be titled "An Act to Prohibit Farming and Stock Raising in this State," Green wrote.[204] A plan to tax mortgages would simply lead to a higher interest rate, he explained in another column.[205] Rather than new legislation, the state should focus on efficient administration, Green argued, echoing a favorite theme of fellow land baron William Chapman. The fee system, unprofessional accounting and spending, and breakdowns in federal-state communication added up to systemic administrative flaws. If administrators were paid regularly,

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[196] "By Way of Introduction," *Green's Land Paper*, Jan 6, 1872, pg 2.
[197] "W. S. Green & Co." *Green's Land Paper*, Jan 6, 1872, pg 2.
[198] "To Land Owners" Jan 6, 1872 pg 4.
[199] "To Capitalists," Jan 20, 1872, pg 3.
[200] "Fuss and Feathers," Feb 28, 1872, pg 2.
[201] "Reserving the Public Lands for Actual Settlers," January 27, 1872.
[202] "Cole's new Land Bill," May 15, 1872.
[203] "Mr. Barker's Land Bills," March 20, 1872.
[204] "Mr. Days' Land Bill," Feb 28, 1872, pg 2.
[205] "Mortgage Tax Law," May 15, 1872.

the paper argued, perhaps then they might do their jobs. This was market thinking, and Green's vision of the market needed less law not more except in very specific cases.[206]

Green was a steadfast supporter of cheap colonization as the model of California settlement going forward. California had the cheapest land "of any country occupied by the Anglo-Saxon race," and it was well within reach of "every young man in this State" to own property. Four hundred and fifty dollars would be sufficient, "What young man is there in the State, working for wages, who cannot save more than that amount annually?"[207] Contrary to the misinformation provided by other papers, Green wrote, "our soil is not only productive, but *cheap*. It shall be our business to show this; and if the State wants to spread information cheap, we will make it a very liberal offer."[208] Railroads offered lands "at low prices on very advantageous terms" which would be quickly made valuable by the completion of the roads.[209] Green offered frequent commentary on how to make the land pay as well, commenting on crop prices and tonnage rates.[210] Efforts like the Immigrant Union met with hearty approval.

The paper existed within a rich and contested print discourse on land policy, and frequently reacted to it. This was particularly true with respect to "our friend Harry George, of the *Pest*" (Henry George writing for the *Post*) and the subject of land monopoly. Not everyone was pleased with the concentration of land ownership in individuals and corporations during the 1860s, especially when those lands were alienated from the public domain. With the publication of the pamphlet "Our Land and Land Policy" (1871) Henry George put words to the popular discontent, naming Green as one of the chief speculators "robbing the state."[211] In the liberal narrative, however, concentration of wealth was a temporary state of affairs, unlike under feudalism. "We say that large ownership is a very great evil, but it is an evil that will in a very short time right itself," Green wrote in response to criticism. Contrary to England, "The Americans are a 'dickering,' trading people, and in a few years these large bodies of land will be divided into small farms."[212] The nature of property law was at the base of the disagreement between George and Green. As Green explained, *The Post* "believes that there should be no title to land; but that any man should have a right to use any unoccupied land, the same as he uses any unoccupied water or air; we believe perfect titles and perfect security in the possession of land thereunder to be the very foundation of all prosperity."[213] George proposed making "use and occupancy the only title to real estate" whereas Green, Wilson, and the liberals held by fee simple as the triumph of liberal legal development. In reducing the question to the ultimate source of property right, Green put the situation clearly. "Large landed proprietorships are by no means desirable in any country," Green conceded, "but when any kind of property is in the market, it will be purchased by those who think they can make money out of it…. just as long as

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[206] "The School Land Law," Feb 21, 1827: He wrote that the law had problems with respect to timberlands in which during the "protectorate" period between full payment and patent the settler could clear-cut the land (and then not patent it).
[207] "To Young Men," Jan 20, 1872, pg 2.
[208] "State Aid to Immigration," Jan 20, 1872, pg 2. Emphasis in original.
[209] "Public Lands in California," Feb 3, 1872.
[210] "The Crop Indications," June 12, 1872. Advised shipping wheat to China and Japan because of the tonnage rates.
[211] Henry George, *Our land and land policy; speeches, lectures, and miscellaneous writings* (New York: Doubleday, 1911), 63.
[212] "Green's Land Paper," *Green's Land Paper*, Feb 28, 1872, pg 2.
[213] "Mr. Days' Land Bill" (pg 2): Feb 28, 1872.

there is fee a simple title to land, just so long will it be subject to speculation."[214] Green viewed land as a commodity like any other, to be circulated, bought and sold like any other, and frequently tarred George with having "communistic" ideas. This stripped the land of most of its moral and religious meaning. Property rights needed to be clear, administration efficient, and California would prosper. The system proposed by George was in operation at Suscol and look where that had gone?

**Conclusion**

In the conflict between Green and George, of which more will be said in the next chapter, we see the jurispathic impulse operating from both the liberals and the defenders of equity as each sought to make their property regime the only regime. As I have argued, the antebellum problem of property in California was one of "too many" legalities *not* of "unclear" law. There were multiple ways of conceiving of land, each with a normative legal framework, and some needed to be eliminated. In this way, the legal transformation of Native reservations and pre-emption claims into "purely allodial" property revealed the jurispathic function of the land bar during the 1860s. "Use" was simply too disruptive a logic of property because it provided a path for redistribution *within* settler society. Pre-emption was for "settling" not "unsettling" The circumscription of pre-emption and of equitable property conceptions in general turned against the moralizing property law of the late 1850s to a new property jurisprudence which purposely limited its own capacities to redistribute.[215] Legal formalism and property conservatism provided the rubric for organizing these maneuvers into a project that was not simply amoral, or worse ruthlessly violent – ejectments after all were not pleasant affairs to say nothing of "Indian wars." The liberal project in land was captured by the Latin phrase: *Interest Reipublicae Ut Sit Finis Litium* – it is in the public interest that litigation end. More properly it was in the interest of the land market that litigation end but for liberals the public interest and the market interest were identical.

Measured against the state of land law in 1861-62, this was a startling and swift change in the legal thought underpinning California colonization. *Vallejo* and *Hart* suggested that the judiciary supported the public trust doctrine and the active use of fraud jurisprudence. The redemption cases as a whole evinced a desire to redistribute property within settler society to its "true owners" based on moral worth. A decade later, these doctrines had been thoroughly repudiated, and the land bar – for reasons of class, party, self-interest, and ideology – threw in with the landowners who dominated the California land market. Dissenters were dismissed as communists or secessionists. Rationalization and liberal reaction limited what property law could be and what it could be used to do. The connection between the distribution of land and the moral character society, a common theme of the 1840s and '50s, had fallen out of fashion in governing circles. Returning to the histories from Part I, liberalism, a political ideology of non-action by the state, of "neutrality," appointed itself the counterpoint to feudalism and feudal "restrictions" and confusion in general, but paradoxically produced feudal concentrations of

[214] "The Land Monopoly Question" Feb 3, 1872.
[215] "New Land Policy" (pg 2) news from Washington on a proposed bill to abolish pre-emption in favor of the Homestead Act. Green's 1.8.

wealth. This accumulation produced by liberalism was not lost on the settlers of California as they sought to define and solve the problem of “land monopoly.”

## Chapter 4: To Serve God or Mammon, 1871-1880

"The great and good Judean reformer (carpenter Joseph's putative son) … [was] crucified… for seeking to disturb 'vested rights.'" – Charles "Philosopher" Pickett, *Upon the Government Fee in the Public Domain* (1874).[1]

"Consider for a moment the utter absurdity of the titles by which we permit to be gravely passed from John Doe to Richard Roe the right to exclusively possess the earth, giving absolute dominion as against all others. In California our land titles go back to the Supreme Government of Mexico, who took from the Spanish King, who took from the Pope, when he by a stroke of the pen divided lands yet to be discovered between the Spanish or Portuguese – or if you please they rest upon conquest…. Everywhere, not to a right which obliges, but to a force which compels. And when a title rests but on force, no complaint can be made when force annuls it." – Henry George, *Progress and Poverty* (1879).[2]

As the sun set on the fields around Marysville on the evening of January 9, 1876, a flotilla of thirty to forty masked and armed men gathered by boat at Butte Slough, a southerly branch of the Sacramento River.[3] The river ran high with rainwater. The boats gathered at the half-mile Park's Dam across the Slough. Over the preceding years, the wheat farmers of reclamation District 5, no small number absentee landlords who lived in San Francisco, had spent $500,000 on gates, levees, and dams to regulate water on their 50,000 acres, and the Park's Dam was the key. The dam had been destroyed by vigilantes during the wet winter of 1874 and was now patrolled by guards. In 1876, the armed band overcame the guards and bound them before setting to work cutting the dam apart. With Butte Slough high it did not take much for the levee to crumble, inundating the land. In the professional San Francisco offices of the *Daily Alta California*, journalists suspected the residents of the adjoining District 70. "It is said that their levee was beginning to break, and it is suspected that in the hope of saving their little property they undertook to destroy the extensive property of the adjoining district." The *Daily Alta* saw this as evidence of an increasing "insecurity of property outside the City" and "another proof of the gross lack of conscience among some of the people who want to be considered as 'honest farmers.'" Amidst the financial panics and industrial disruptions of the 1870s, the dreaded insecurity of property, not seen since the dark days of the 1850s, had become more and more pronounced – inside the city as well as out. The newspapers of California's queen city saw in the dam cutting, settlers leagues, sandlot meetings, and other working-class agitation of the period as evidence of a new and insidious force: "communistic ideas." The putative communists, of course, saw themselves as the inheritors to a venerable tradition of radical American democracy and anti-aristocratic law – they saw themselves as the foes of Land Monopoly.

Amidst this insecurity, The Land Bar faced a familiar set of questions. How could California thrive if property was always provisional, always subject to redistribution, threat, or

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[1] Charles E. Pickett, *Address of Charles E. Pickett to the California Legislature: Upon the Government Fee in the Public Domain – Intercommunication and Land Monopolies and Correlative Topics* (Sacramento: T. A. Springer, State Printer, 1874), 6.
[2] Henry George, *Progress and Poverty: Inquiry Into the Cause of Industrial Depressions, and of Increase of Want With Increase of Wealth. The Remedy*, 5th Edition (London: Kegan Paul, Trench & Co., 1883), 307.
[3] "The Parks Dam Again Destroyed," *DAC*, January 12, 1876.

destruction? It could not, answered an increasingly influential cadre of conservative lawyers. They decried ownership disputes as "judicial confiscation" and the settler unrest over the Suscol Rancho during the 1860s, among other incidents, had proved their point. To sell land, mortgages, and commodities property needed to be made safe from democratic power and even the tenants of common property law. As discussed in the previous Chapter, liberals like William Green provided a new logic of settler colonization to justify their reformation – a cheap colonization in which markets, secured by impregnable vested rights, would bring the colony finally out of property crisis by encouraging the exchange of goods and lowering prices. But for the honest farmers, the dam cutters, the workingmen, and the radical democrats, cheap colonization contravened the "true law," the why of settler colonization. These radicals would not let go of their legal vision for New California without struggle, and struggle they did in the fields, ballot boxes, and the press.

The turbulent 1870s have been covered by California historians since the late nineteenth-century, especially in connection to the life and work of political economist Henry George, a major character in the events of this chapter.[4] Historian Tamara Shelton's recent book on the land politics of California in the late nineteenth-century provides an excellent analysis of antimonopolism and its relationship to working class politics, Chinese exclusion, and landed independence.[5] By focusing on politics, however, the book leaves questions of law in the land monopoly movement unaddressed. The squatters, or "true settlers," Shelton writes, believed "that natural law superseded the actual law" – an insight that begs the question of how "natural" and "actual" law related.[6] By focusing on the overlooked property law questions at the heart of George's work, as well as the works of other radicals, this Chapter refocuses the lens of Land Monopoly on to law. It asks, what did the anti-monopolists wish to change about the law? Were these reforms simply revivals of antebellum ideas and themes or something new? Naturally, the answers to these questions varied by newspaper, party, profession, and individual, but because of the explosion of writing on the issue, as well as the second California Constitutional Convention of 1879, forced by the anti-monopolists, a great deal of material can be summoned in answering.

Legal historians of the period have provided various interpretations of the reform movements and their relation to the 1879 California Constitution. Contrary to an earlier generation of interpreters who regarded the new Constitution as a mess, legal historian Harry Scheiber argues that the reform delegates had "significant coherence in many basic social and political goals."[7] One major theme of the Convention was nostalgia for a "golden age of republican politics," another the "quest for a golden mean in politics" between capitalism and communism.[8] Historian Christian Fitz situates the Constitution in the context of contemporaneous constitutional moments in other states.[9] "The central purpose of constitutions

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[4] "California Land Policy and its Historical Context: The Henry George Era" in Paul W. Gates, *Land and Law in California: Essays on Land Policie*s (Ames: Iowa State University Press, 1991).
[5] Tamara V. Shelton, *A Squatter's Republic: Land and the Politics of Monopoly in California, 1850-1900* (Berkeley: University of California Press, 2013).
[6] Ibid, 39.
[7] Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspectives on the 1879 California Constitution," 17 *Hastings Const. L. Q.* 35 (1989), 39, 47.
[8] Ibid, 39.
[9] Christian G. Fritz, "The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West," 25 Rutgers L. J. 945 (1994), 965, 984.

as expressed by nineteenth-century delegates [was] to constrain the powers of the government and the legislature in particular," Fritz writes. California was no exception and was highly influenced by these parallel efforts. Similarly, Arthur Rolston argues the 1879 Constitution should be understood as a class document looking to curtail the ability of the legislature to empower capitalist interests. [10] However, Rolston writes, this effort to constrain legislative power had unintended consequences, particularly the further empowerment of the judiciary.

These histories, however, largely miss the property questions at the Convention. Given the limited nature of property reforms in the final document, this omission is understandable. The ambiguity of Article XVII, Section Two, for example, illustrates this point: "The holding of large tracts of land, uncultivated and unimproved, by individuals and corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property."[11] As one scathing reformist pamphlet responded, "Even the fool knows that this monstrous curse cannot be removed except by interfering with 'the rights of private property.'"[12] Many of the Workingmen's proposed reforms at the Convention aimed to do just that. For example, numerous radicals advocated for land limitation, the hard capping of landholding by acreage, to be enforced by escheat and inheritance rules. Others, harkening back to the 1850s Protection Act and the recently circumscribed Pre-Emption law, proposed making continuous occupation and use for one year a valid title to lands. Radicals shied away from the full implications of the Land Monopoly critique for undermining private property, and instead pinned their hopes on George's "single tax" plan, in which all land would be taxed based on the value of the land alone, regardless of improvements, to force unproductive lands into the market. In time, George imagined all taxes would be provided through this mechanism, hence the name of single tax, a quixotic mix of modern political economic theory and feudal revival. This provision made it into the new Constitution and had a lively afterlife in utopian colonization and subsequent Georgist political movements.[13] In actual application, the fate of the single tax was far muddier, but it did succeed in making redistributive taxation a topic of reformist discourse across the Angloworld.

As historians and contemporaries have long noted, the anti-monopoly movement of the 1870s was far more memorable for its virulent anti-Chinese racism than its political economy of landed property.[14] As radical San Francisco delegate Charles Beerstecher declared the first day of the Convention, "We came here for the purpose of making a crusade against the Chinese, and for the purpose of reforming the taxation system, and the interest system, but we do not come here

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[10] Arthur Rolston, "Capital, Corporations, and their Discontents in Making California's Constitutions, 1849-1911," *Pacific Historical Review* 80 (4) (2011), 521, 554.

[11] E. B. *Willis, and P. K. Stockton (sten.), Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878*, Vol. 3 (*Sacramento: J. D. Young, Supt. State Printing, 1880),* 1486.

[12] "The Proposed Constitution Reviewed in an Address to the Reformers of California" (1879).

[13] See, for example, Charles White Huntington, *Enclaves of Single Tax: Being a Compendium of the Legal Documents Involved, Together with a Historical Description* (Harvard: F. Warren, 1921), which describes various municipal single tax colonies throughout the United States: Fairhope, Alabama; Arden, Delaware; Taranto Massachusetts; Free Acres, New Jersey; and Halidon, Maine.

[14] The classic work on the subject is Alexander Saxton, *The Indispensable Enemy: Labor and the Anti-Chinese Movement in California* (Berkeley: UC Press, 1971). For a more recent and global account see Mae Ngai, *The Chinese Question: The Gold Rushes and Global Politics* (New York: W. W. Norton & Co., 2021).

for the purpose of taking away any property that any man has honestly acquired."[15] The assertation of the police power over the Chinese community of California was quickly nullified by Federal Courts as a clear violation of the new Federal Fourteenth Amendment. In this way, the record of the Land Monopoly revival of the 1870s was decidedly mixed. It failed to resurrect the Lockeanism of the antebellum period and even joined conservatives in kneecapping the legislature and redistributing power to the judiciary. This neutrality was a unilateral disarmament of democratic control over property. Most notable, perhaps, was the secularization of property law and its establishment within a liberal pollical economy of land prices. In other words, property changed from a field of meaning to a technique of governmentality.[16] Even as George based many of his claims on Biblical legality, his actual proposals were entirely modern.

This chapter seeks to explain this mixed course of events. It cannot all be laid at the feet of the Land Monopoly movement. The major members of the Land Bar long had a conceptually difficult relationship with Land Monopoly. The position of the major parties on concentration of land ownership long held the same ambiguity as reflected by Article XVII of the 1879 Constitution: theoretical opposition to concentration on the one hand, and a reluctance to interfere with the rights of property on the other. Back in 1853, for example, the "Broderick Democrats," named after their leader US Senator David Broderick, resolved, "That the true interests of the state demand that the public lands be disposed of in limited quantities to actual settlers, and that it is unwise to adopt any policy that may tend to encourage a landed monopoly."[17] Then the delegates hedged, resolving "at the same time we cherish as a right…that every citizen shall be protected by law to the fullest extent, in his person and in his property." The Whigs did not let this call go unanswered and resolved in their convention, "That we reaffirm our ancient doctrine in favor of the most liberal preemption laws, donation of lands to actual settlers, homestead exemption…opposition to all land monopolies, and in favor of the location and early completion of the great overland railroad."[18] In the pivotal year of 1856, discussed in Chapter Two, the Know-Nothings resolved, "That the American party of this state cannot view with indifference the evil that must naturally grow out of the large amount of our mineral lands, which are covered by Spanish grants, which must ultimately result in immense monopolies, that will endanger the peace and quietude of our state."[19] Still, they steered clear of confiscation adding "that we will…use all our strength and influence as a party to procure the purchase of all such domain by the general government." In other words, vested rights were an exceptionally durable problem within common property law, a problem that had not been resolved by the 1870s.

Furthermore, the conservative liberals were not simple reactionaries dead set against the Workingmen, rather, as discussed in Chapter Three, they had their own positive theory of the case based on the land market. For liberals like William Green or Joseph Wilson, Land Monopoly was conceptually a product of European aristocracy and feudalism that markets in land would destroy. For the markets in land, mortgages, wheat, and capital to function, law needed to be set on a *laissez-faire* footing. There needed to be far less of it to prevent the

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[15] *Debates and Proceedings of the Constitutional Convention,* Vol. 1, 18-9.
[16] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978* (Picador, 2009).
[17] Winfield J. Davis, *History of Political Conventions in California, 1849-1892* (Sacramento: California State Library 1893), 25.
[18] Davis, *History of Political Conventions*, 28.
[19] Ibid, 63.

insecurity and terror of endless litigation, and any threat to vested rights threatened to bring back the inquisition and suspicion of the 1850s. Crucially, for reasons discussed below, George accepted this premise – an acceptance that, as mentioned in the Introduction to this dissertation, earned him the disapproval of Karl Marx. In the end, the new Constitution retrenched the changes of the last two decades of property liberalization in California, and though the reformers hacked away at the dam of vested rights, the new structure of law remained secure.

**The Harvests of Cheap Colonization**

"It is the recognition of the sacredness of private property — that whatever a man has as the result of his industry, economy, and enterprise, is his own; and shall not be taken from him to be given to another." –Newton Booth, "Our Railroads – A Problem," July 21, 1871.

The rapid advance of liberal legality and its commodified vision of land had both ideological and material consequences, and this formed the context for the revival of the Land Monopoly problem. As argued in the preceding Chapter, wowhere was this transformation of economic order clearer than in California's wheat boom. As journalist Charles Nordhoff wrote in his 1872 settler guide, in the major agricultural valleys of California "Wheat, wheat, wheat, is their only crop, and for this every thing else is neglected."[20] Farmers were thereby exposed to enormous market risks, Nordhoff warned, in the form of price fluctuations or, more usually, draught. As the mines had been a generation earlier, the wheat fields, alongside the streets of San Francisco, provided a site for the formation of the white working class and their legality. As labor historian Richard S. Street writes, wheat ranching was characterized by "massive scale, lack of community connections, impersonal relations with markets, and bottom-line concern for bushels per acre measured against cost of production."[21] The workscape reflected this larger structure — "frenetic pace, constant danger, heat, dirt, mechanization, size of crews, and physical isolation." The work was seasonal. Around mid-June each year, Street writes, thousands of men, many of them the putative white yeomanry, migrated to the wheat belt to work for $1.50-$2.00 a day with board.[22] Harvesters and threshers worked from 12-14 hours a day, in conditions which the *San Francisco Morning Chronicle* likened to "old-time slavery." Shoveling wheat into the maw of a thresher, with precious little water and many mosquitos, was dangerous work, and under such conditions moving on, with or without pay, was common, as was the "strike in detail" or the departure of a crew en masse.[23] Occasionally larger-scale labor actions occurred under conditions of local labor scarcity. Acts of industrial sabotage, Street continues, also occurred on occasion. In the great wheat towns of Willows, Traver, Hanford, Newman, and Jacinto, among others, Euro-American wheat harvesters created their own culture of survival, Street argues. Workforce leisure involved hunting, music, blackface performances, card playing, drinking, smoking, and religious meetings. Street describes the fraught violence of living in cramped quarters under harsh

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[20] Charles Nordhoff, *California, for Health, Pleasure, and Residence: A Book for Travellers and Settlers* (New York: Harper & Brothers, 1874 [1872]), 131.
[21] Richard Steven Street, "Tattered Shirts and Ragged Pants: Accommodation, Protest, and the Coarse Culture of California Wheat Harvesters and Threshers, 1866-1900," *Pacific Historical Review* 67 (4) (1998), pp. 573-608, 607.
[22] Ibid, 578.
[23] Ibid, 584. For descriptions of harvest working conditions see also, *Wheat: An Illustrated Description of California's Leading Industry* (San Francisco: Commercial Publishing Company, Printers and Publishers, 1887), 12-3.

working conditions as well as the weekly release provided by "going to town" or the nearest equivalent.[24]

Agrarian unrest and market dislocation were not limited to landless farm hands but also greatly affected landed farmers. The orientation of the economy toward wheat prices pushed farmers toward an increasingly conspiratorial view of price changes and fluctuations. Secretive "rings," the rural press wrote, conspired to rob the farmer of his hard-earned property. A movement of farmers organized to cut out the San Francisco middlemen in 1870-1, targeting the speculators in grain sacks.[25] As historian Rodman W. Paul writes, the so-called Farmer's Union, fronted by John Bidwell, could not compete with the collective action of the sack merchants, folding in 1872.[26] The Granger movement was growing at the same time, with 104 local chapters in 1873 and 231 the following year with 13,514 members.[27] Seeking to cut out Isaac Friedlander, the Grange arranged to ship with A. F. Walcott instead. Friedlander and the old "ring" undercut Walcott's prices and the farmers flocked to the cheaper price, collapsing their own scheme.

The Panics of 1873 highlighted the downside risks of cheap colonization based on international commodity prices. The Panic began with the crash of the Viennese stock market in May 1873, which took the Berlin and New York exchanges down with it.[28] In the Atlantic world, the Panic of 1873 represented the crisis of a particular kind of capitalist relationship, namely the unifying markets of Europe and the United States in everything from foodstuffs to securities. Lawyers played important roles as intermediaries in this international finance system and as purveyors of international liberal legality. As historian Scott Reynolds Nelson argues in an article on the role of cheap American foodstuffs in the Panic of 1873, the infusion of American wheat into European markets in the early 1870s undercut European producers which diminished property values enough to contribute to the crash.[29] The flood of American railroad bonds, backed by generous grants of property from the public domain, accompanied this flood of wheat into Europe. Grants had been leveraged for tremendous amounts of capital. As historian Richard White writes, "The bonded debt of American railroads rose from $416 million in 1867 to $2,230 million in 1874…The majority of these funds came from within the United States, but there as significant investment from Great Britain, the Netherlands, and Germany."[30] These millions depended on fictions of commodity property. Jay Cooke, for example, "had described the land grants as rich and valuable, but a large proportion were 'practically valueless either for cultivation or for lumbering,' and the rest were 'less valuable than the public have been led to believe.'"[31] Whether the railroad could even be said to own these lands compounded the issue of value. The transformation of the economy, and the role of railroads in that transformation, was

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[24] Ibid, 573-595.
[25] Rodman Wilson Paul, "The Great California Grain War: The Grangers Challenge the Wheat King," Pacific Historical Review, Vol. 27, No. 4 (Nov., 1958), pp. 331-349.
[26] Ibid, 342.
[27] Ibid, 345.
[28] See also Cristoph Nitschke, "Theory and History of Financial Crises: Explaining the Panic of 1873," *The Journal of the Gilded Age and Progressive Era* 17 (2018), 221-240.
[29] Scott Reynolds Nelson, "A Storm of Cheap Goods: New American Commodities and the Panic of 1873," *The Journal of the Gilded Age and Progressive Era* 10:4 (2011), pp. 447-453, 449.
[30] Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W. W. Norton & Co., 2011), 68-9.
[31] Ibid, 74.

clear. As White put it, "By the end of the summer of 1873 the western railroads had, within the span of two years, ended the Indian treaty system in the United States, brought down a Canadian government, and nearly paralyzed the U.S. Congress. The greatest blow remained to be delivered. The railroads were about to bring down the North American economy."[32]

It was amidst this dislocation that Land Monopoly returned with a vengeance to Reconstruction California. In the 1871 gubernatorial election, the problem reached a boil. Governor H. H. Haight, a long-time member of the land bar and an unlikely radical, was elected to the Governorship in 1867 on a reactionary platform opposed to Reconstruction. The platform said nothing on Land Monopoly but did resolve that "the money and property of the public should be used for the public good and not wasted in reckless appropriations and private grants," a dig at the many Republican grants to railroads during the 1860s.[33] Little in the platform indicated any radicalism on the property question from the Democratic Party, rather the platform indicated the continued conservatism of the Democracy on property matters. As its Chairman, Conservative lawyer Joseph P. Hoge, who lost the *Hart* (1860) case discussed in Chapter Two and lamented the assault on vested rights and *stare decisis*, still had major institutional sway in the party. Haight may have been the head of the ticket, but considerable ideological differences strained the party under the surface – indeed *had* strained the party on colonization issues since the 1850s.[34] As discussed in the previous Chapter, Green was elected to the legislature in the Democratic reaction to Reconstruction and oversaw the "liberalization" of the swamp land laws. During his time in office, Haight diverged from the conservatives in his veto of a law granting pre-emptor J. M. Hutchings Yosemite Valley, showing some deviation from vested rights orthodoxy, but this was nothing major.[35] The property issue ran a fault line under the Democrats and Republicans alike – silent for the moment.

Haight, unlikely as he was to be a champion of redistribution, fostered a resurgent radicalism in the party. In 1870, Haight injected a new strain of land monopoly thought into the party when he met a struggling newspaperman named Henry George at a meeting of the American Free Trade League.[36] Often penniless during this time in his life, George had only two major articles to his name. The first was written in 1868, titled "What the Railroad will Bring Us," and published in the *Overland Monthly*.[37] In this article, George predicted that the transcontinental would bring an uneven distribution of benefits and worsen the inequality among California's settlers. When he met Haight, George had also written "The Chinese on the Pacific Coast" for the *New York Tribune*, a work of racial liberalism that pinned the problems of the white working class on "cheap" Chinese labor. Haight took on the struggling newspaperman and secured him a job at the *Sacramento Reporter*, the Democratic paper in the capital.[38] Like many jobs for George during these years, it did not stick. George wrote a pamphlet titled "The Subsidy Question and the Democratic Party" for Haight's election campaign of 1871, which read in part: "[Subsidies] are condemned by the Democratic principle which forbids the enrichment of one

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[32] Ibid, 77.
[33] Davis, *History of Political Conventions,* 264-5.
[34] Haight cut his teeth as a Free Soiler in Missouri and an acolyte of Senator Benton. See Ken Mueller, *Senator Benton and the People: Master Race Democracy on the Early American Frontier* (New York: NYU Press, 2014).
[35] "Governor Haight and the Land Laws," *Green's Land Paper,* January 6, 1872.
[36] Henry George, Jr. *The Life of Henry George* (New York: Doubleday and McClure Co., 1900), 209.
[37] Ibid, 176.
[38] Ibid, 211.

citizen at the expense of another; and the giving of one citizen advantages denied to another."[39] For both Haight and George the so-called "vested rights" of the railroad corporations, like the vested rights of the Mexican grantees, could be abrogated on these grounds. For example, Haight called for Congress to revoke the railroad grants.[40] In the runup to the election he also called for a repeal of "all laws in this State providing for the disposal of public lands, and the enactment of some system, not the parent of land monopoly."[41] In 1871 the party, drawing on their old opposition to the Mexican grants, declared the railroad grants a "fraud upon the people of the country."[42] After all, fraudulent rights did not vest. Heading into the election, the party declared itself the "natural enemy of monopolies" and steadfast friend of the white working class, much to the chagrin of Haight's brother-in-law, the more pro-railroad Edward Tompkins.[43]

The Republicans had their own claim on Free Land radicalism, however. Not to be outflanked by the Democrats, they resolved that "the concentration of the landed property of the country in the possession and ownership of a few…is in contravention of the theory of American government…and, if permitted, would invariably terminate in the speedy establishment of an aristocracy."[44] The Party, hoping to shore up their (very dubious) bone fides as the anti-corporate party, called for a constitutional amendment prohibiting any further land grants to "railroads, or other private corporations."[45] Because this represented a repudiation of past Republican policy, the fault lines among the Republicans were quite clear: pro-railroad and anti-railroad. The anti-railroad Republicans held to conservative legal principles but threatened to cut off state patronage for Leland Stanford's wing of the party. In the runup to the election against Governor Haight, the Republicans nominated anti-railroad candidate Newton Booth for Governor. Born in Indiana and trained as a lawyer, Booth worked as a merchant in Sacramento. In a speech in San Francisco during the late 1860s, Booth presented his case against the massive corporations. "There is no danger that we will lose the forms of a republic," he said, "There is a danger that we may ultimately retain *only* the forms…. The contest will be between associated capital and popular rights. Let the field be cleared for *that* action, and let the dead past bury its dead!"[46] Booth's method for burying the past was quite conservative, or liberal, one the property question. On the stump, Booth gave a speech entitled "Our Railroads – A Problem" on July 21, 1871 in which he laid out a case for state neutrality.[47] "If direct legislation can do little to prevent inequality," Booth said, "it should do nothing to foster it. And legislation should prevent as far as possible those immense combinations of capital…. The law should do this in the interests of the rights of property itself; for if the tendency to centralization continues…the tenure of all property

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[39] Ibid, 216-7.
[40] Governor Haight and the Land Laws," *Green's Land Paper,* January 6, 1872.
[41] Ibid.
[42] Davis, *History of Political Conventions,* 299-300.
[43] Edward Tomkins to Henry H. Haight Mar 26, 1870, Sacramento. Box 6, 1869-1885, *Henry Haight Papers,* Huntington Library, San Marino, CA. "I am sure you will not misunderstand me, or consider me intrusive, if I talk to you a few minutes *on paper*, about the Rail Road bill now in your hands. My convictions on this subject are so strong…vital to the development of California & cannot help feeling a little nervous [words] enemies professing to … your confidence, and asserting that they know that you have made up your mind to veto the bill."
[44] Davis, *History of Political Conventions,* 307.
[45] Ibid, 308.
[46] Newton Booth and Lauren E. Crane (ed). *Newton Booth, of California, His Speeches and Addresses* (New York: G. P. Putnam's Sons, 1894), 125.
[47] Ibid, 183.

will be shaken by the volcanic outbreaks of revolutionary forces."[48] This second remark, on preventing property accumulation to save property itself, showed the legally conservative, even reactionary, nature of Booth's anti-subsidy plan.

At the polls, Booth beat Haight 62,581 to 57,520.[49]

Booth's plea to save property by cutting off the railroad roiled the Republican Party. Even a prospective plan that did nothing to touch vested rights was too much for the pro-railroad faction of the party. The rupture broke open two years later in the runup to the 1873 election. Land lawyer John B. Felton did not lament Booth's departure for Washington D.C. as California Senator. Felton was a longtime member of the Land Bar, representing the fraudulent Limantour grant until the bitter end (when Limantour skipped bail, Felton was on the hook).[50] Amateur historian Oscar Shuck later recalled, "[Felton] probably took in larger fees than any other lawyer here. For their successful effort to break the Lick deed of trust, on behalf of Lick himself, [Felton] and Mr. T. H. Hittell received $100,000."[51] After Booth split to form an anti-monopoly party, Felton denounced Booth in a public speech in August 1873.[52] Felton warmly endorsed the state Republican ticket, now headed by Timothy Guy Phelps, the first President of the Southern Pacific Railroad, saying the slate was comprised of "Men to whom none of us would hesitate to entrust his private business, his own private power of attorney." (One imagines Felton had no higher praise than that.) Felton denied that the republican institutions of the state had been reduced in purity, manliness, or independence by the accumulation of wealth. The Republican split put the Democrats back in charge of Sacramento with the election of William Irwin. The electoral contests of the early 1870s revealed the widening split between the conservatives and the reformers in both parties. Both Haight and Booth were lawyers, however, and legal training operated as a hard limit on how far the reformers would go in touching vested rights.

Like the governors, the California Assembly was similarly vexed by the land monopoly critique of property law. An 1872 committee came down on the administration of the swamp land laws, both state and federal, in the strongest possible terms: "This whole system, which was conceived in iniquity, and nurtured in fraud, has from its inception been fraught with evil."[53] The damming conclusions of the 1872 report did not produce a single legislative proposal. Paradoxically, the report extolled the many liberal virtues of the public land system: "One of the principal causes of our unprecedented progression as a nation…has been the liberal landed system projected by the wise policy and farseeing sagacity of the fathers of our Republic….instead of being a mere retainer or tenant at will of the lord of the soil, the actual settler could acquire, upon the most liberal and easy terms, the fee in the land he cultivated and improved, and should in time leave as an inheritance to those who came after him."[54]

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[48] Ibid, 188-9.
[49] Davis, *History of Political Conventions,* 311.
[50] Oscar T. Shuck, *Bench and Bar in California: History, Anecdotes, Reminiscences* (San Francisco: The Occident Printing House, 1887), 32-5.
[51] Shuck, *Bench and Bar,* 35.
[52] "Ratified. The Nominees and Principles of the Republican Party Warmly Indorsed," *Daily Alta California*, August 22, 1873, 1, 4.
[53] California Legislature, *Report of the Joint Committee to Inquire into and Report upon the Conditions of the Public and State Lands Lying Within the Limits of the State* (Sacramento: T. A. Springer, State Printer, 1872), 10.
[54] Ibid., 5-6.

The Committee on Land Monopoly, convened by the legislature in 1874, produced similar "results."[55] The report, penned by Chairman James E. Murphy, a Democratic lawyer from Del Norte County, compared the situation to feudal Europe. Murphy expressed sympathy for those who "acquired large landed possessions in a legal manner" as it was the fault "the law makers." But radical changes needed to be made: "graduated taxation, the policy of making land pay all the expenses of government, and land limitation."[56] Such laws would require a new state constitution, Murphy conceded. Poor Commissioner Ferguson of the companion report on swamp lands lamely concluded that they did not have enough "information" to suggest any remedies.[57] (Perhaps another report would do the trick – they indeed did try *again* in 1876.) In this way, California politics came to resemble the anti-rent era in New York – the parties competed intensely for the anti-rent, anti-land-monopoly vote, but found themselves with few (if any) legal options to remedy the problem.

The closest the liberals came to a legal theory of the problem was through the concept of corruption. As with fraud, corruption provided purchase on the land distribution issue safely within the rule of law. The removal of United States Surveyor-General for California J. R. Hardenburgh in 1874 was a case in point.[58] General Land Office Commissioner Willis Drummond brought 12 charges against the Surveyor-General, ranging from under-the-table patronage relationships to unaccounted appropriations and withholding legal services for exorbitant fees.[59] Here was a source of maldistribution that came from too little law, not the nature of private property itself.

In the shadow of the Paris Commune, few bourgeoise lawyers wished to throw in with the true radicals. In the end, land monopoly was not truly revived at party conventions or the halls of the legislature but in the booming mass print culture of the colony – in pamphlets, broadsides, and 1-cent dailies. The following will explore three figures on the radical leaders in the anti-land-monopoly movement, one who became famous, Henry George, another one who died in obscurity, Charles Pickett, and a third who lived through a crucial moment in the fate of the movement, Frank Roney.

**Radical Revival**

"I will lead you to the city hall, clear out the police force, change the prosecuting attorney, burn every book that has a particle of law in it, and then enact new laws for the workingmen." – Dennis Kearney, President of the Workingmen's Party, 1877.[60]

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[55] *Reports of the Joint Committees on Swamp and Overflowed Lands and Land Monopoly: presented at the twentieth session of the Legislature of California* (Sacramento, 1874).
[56] Ibid, 194-5.
[57] Ibid, 8.
[58] Commissioner Willis Drummond, *Report of commissioner of U.S. General Land Office, upon the charges of official misconduct of J.R. Hardenburgh, U.S. Surveyor-General for California* (San Francisco: Women's Co-operative Union Print, 1874).
[59] Ibid, 8-17.
[60] Davis, *History of Political Conventions,* 370

Due to his lack of formal education, Henry George was an unlikely intellectual figure, but he was a very representative one, shaped by his experiences as a sojourner in American empire. George was born in Philadelphia 1839 to a deeply religious family. Like many Americans of the time, this religiosity marked the first and most profound part of his intellectual development. In Henry George, Jr.'s biography of his father, he wrote, "First, [George] had a grounding in the Bible; and the Puritanical familiarity with book, chapter and verse…"[61] He dropped out of school early to become a sailor aboard the merchant ship *Hindoo* which cruised through the Anglo-American Pacific world from the Atlantic coast to Melbourne, Calcutta, and back.[62] Upon returning from this journey of over a year, George went into printing, which his parents considered a more respectable career than the rough life of a sailor. A decisive moment came in 1857 when some of George's Philadelphia neighbors set out for Oregon. Writing to them, George inquired as to the compensation of printers in the colony, and, finding them much higher than in Philadelphia, secured a position as ship's steward on a ship of the Light-House Bureau to afford passage to the Pacific. The ship was on a colonial mission to the Pacific Coast, to both "maintain the buoyage" and to "protect" government property from the Indigenous population.[63] Unable to find work in San Francisco in 1858, George set out for the Fraser River Gold Rush in British Columbia with tens of thousands of fellow Californians. He returned home no richer but had begun to pick up the politics of his fellow travelers, in particular their anti-Chinese racism.[64] A decade of poverty followed. "I was, in fact, what would now be called a tramp," George recalled in 1897.[65] With a brief attempt at Filibustering during the Mexican Civil War (1857-1860) and a turn as a migrant farm worker, George marked himself as a thoroughly American colonial subject – a young man of little means who set out for high wages in the colonies and dabbled in various colonial projects but ultimately failed to materially improve his life. Why had the promise of the Pacific colonies failed him, and others like him? This was the animating question of George's life.

As historian Tamara Shelton argues, George drew on a deep well of settler ideology in the state in connecting land monopoly with Chinese immigration.[66] In particular, George mobilized Montesquie's racial theories of "stagnant and progressive" races and entwined this account with a unified theory of American aristocracy and governance. His breakthrough article, "The Chinese in California," appeared in the *New York Tribune* in May 1869, and was one of the first to introduce Atlantic readers to the rabid anti-Chinese racism of the Pacific settlers. The "cheapness" of Chinese labor, and their centrality to cheap colonization, was George's central point of attack. As George later said in a speech during the 1876 Presidential Election: "Why, gentleman, you might as well as tell the wolves to prohibit the importation of sheep on the grounds that they are animals too fat to run, too ignoble to fight. Cheap laboring heathen are the very thing [the Republican-Capitalist combination] wants."[67] White supremacist conceptions of law had long been animating forces in California colonization, and, indeed of American liberalism as distinct from its British counterpart. This was made abundantly clear in an exchange between George and John Stuart Mill on the Chinese question, following the

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[61] George, Jr. *The Life of Henry George*, 10.
[62] Ibid, 18.
[63] Ibid, 56-7.
[64] Ibid, 76-80.
[65] Ibid, 93.
[66] Shelton, *A Squatter's Republic*, 76.
[67] Ibid, fn. 57, 95.

publication of "The Chinese in California." "Concerning the purely economical view of the subject, I entirely agree with you," Mill wrote, "But there is much also to be said on the other side. Is it justifiable to assume that the character and habits of the Chinese are unsusceptible of improvement? The institutions of the United States are the most potent means that have yet existed of spreading the most important elements of civilization down to the poorest and most ignorant of the laboring masses. If every Chinese child were compulsorily brought under your school system…would not the Chinese population be in time raised to the level of the American?"[68] A fair question. But the idea that law was fundamentally racial in character was so vital to the California vision, and so common in the settler population, that the formal equality of British liberalism barely registered. Other emigrants from the British Empire, like Frank Roney, would express similar puzzlement at the coincidence of American liberalism and racism.[69]

After a trip to the East Coast to secure Associated Press membership for the *San Francisco Herald*, and the publication of his first articles, George fell in with Haight and the Democratic Party. George, Jr. described this period in his father's life as marked by nearly religious revelation on the land monopoly question. Though embellished, story has it that George found the solution to the "riddle of inequality" while horseback riding outside of Oakland. He asked a rough-looking, passing man what the local land was worth and the man reported it was $1,000 an acre. "Like a blast it came upon me that there was the reason of advancing poverty with advancing wealth," George recalled, "With the growth of population, land grows in value, and the men who work it must pay more for the privilege."[70] At that moment George had little formal education, coming by this political economic point honestly. However, he did have a thorough education in working-class colonial politics, abolitionist thought, and a deep knowledge of scripture – the same ingredients as the radical anti-renters of a generation earlier. George began working this insight into his famous *Our Land and Land Policy*, a pamphlet completed in 1871.

Natural law, scripture, and a heterodox reading of English history formed the basis of George's attack on property in *Our Land and Land Policy*. As God's creation, land belonged to mankind, and should be apportioned, per the logic of the radical Lockeans, by usage *alone*. It followed that "we have no right to step between the man who wants to use land and land which is as yet unused, and to demand of him a price for our permission to avail himself of his Creator's bounty."[71] George's legal ideas for land reform emerged from a revisionist reading of English history. "The spirit of the Feudal System dealt far more wisely with the land than the system which has succeeded it," George wrote, "and rude outcome of a barbarous age though it was, we may, remembering the differences of times and conditions, go back to it for many valuable lessons."[72] *The* lesson George derived from the law of feudal England was a singular tax on land. This required a very different historical narrative than the liberal histories of legal development, cutting directly against the anti-rent formulation of the land monopoly problem as caused by feudalism. "The great debt, the grinding taxation, which now falls on the laboring classes of England, are but the results of a departure from this [feudal] system," George wrote.

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[68] "John Stuart Mill on Chinese Immigration," *Stockton Daily Independent*, November 24, 1869.
[69] See Chapter 3.
[70] George Jr., *Life of George*, 210.
[71] Henry George, *Our land and land policy; speeches, lectures, and miscellaneous writings* (New York: Doubleday, 1911), 98.
[72] Ibid, 102-3.

"Before Henry VIII suppressed the monasteries and enclosed the commons there were no poor laws in England and no need for any…"[73] He asked, "Why should *we* not go back to the old system, and charge the expenses of government upon our lands?" The pamphlet was clearly opposed to private property, though this was lost on George himself as well as much of his readership. In the Lyceum debating society in San Francisco, following the pamphlet's publication, State Senator John M. Days said that George was clearly mistaken in saying he favored private property: "every argument he made on the question showed that he was opposed to it. From that day to the day of his death Mr. George openly opposed by word as well as argument private property in land."[74] Not everyone heard what Days did, and George maintained a studied ambiguity on the most radical legal implications of his writings.

The land monopoly critique produced a bundle of legal maneuvers radicals believed could redistribute land. The eminent domain power provided one logic, though a rather strained and expensive one because it required compensation and a justification of public benefit. Hard caps on private land holding emerged from the Gold Rush camps but, while theoretically lawful, lawyers of the bar rarely put forward such a draconian solution. Fraud jurisprudence provided another avenue of disturbing vested rights. Fraudulent titles could be voided without compensation, but the experience of the Mexican grants made California's legal elites leery of repeating the same trick with the railroad lands.[75] Conquest and colonization of new territory would work, but radicals had little reason to believe the experience would be any different than in Oregon and California.[76] Vested rights was *the* insurmountable problem, but George's solution of redistributive taxation, operating through land markets rather than against them, was an ingenious circumvention of the central conflict and a new synthesis of liberal thought with the land monopoly critique.

To solve the land monopoly problem, George advocated for taxing inheritances and the "*unearned* value of land," amending the Constitution to change the mechanism of land assessments, and eliminating all other taxes.[77] Though inspired by feudalism, George's land tax presumed a working market in land – it could not function otherwise. Land would be assessed regardless of improvements, which, George argued, would incentivize the sale of unimproved land – in other words, "land monopolization would no longer pay."[78] To those who objected that this would eliminate ranching and land uses like it, George proposed the recreation of a public commons.[79] To those liberals like William Green who maintained the land monopoly would dissolve itself without legal changes, George countered with the rhetorical question: "How was the wrong of slavery righted in the United States?"[80] Not by markets, but by force of arms. Vested rights in human property had been eliminated without compensation, George argued, and land monopoly amounted to enslavement of the unlanded. The diffusion of his ideas into the

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[73] Ibid, 103-4.
[74] Ibid, 233.
[75] See Chapter 3.
[76] See Hastings in Brazil.
[77] The New York revenue commission had just recommended a similar scheme to eliminate taxes on personal property in favor of taxing 300% the rent value of land. Our Land and Land Policy, 109-10.
[78] Ibid, 116.
[79] Ibid, 100.
[80] Ibid, 126.

wider population, however, needed a different vehicle than a pamphlet, which only printed 1,000 copies. The *Daily Evening Post* would be that medium.

The *Evening Post* was born on December 4, 1871. Its price of one cent was unaccountably cheap for a paper, not least because California had very few pennies in circulation.[81] Through this paper George clearly, briefly, and repeatedly outlined the key ideas of *Our Land and Land Policy*, particularly the call for equalizing taxation between improved and unimproved lands. George's ideas found a sympathetic readership with the white working classes of California. The Labor Convention of January 1872, for example, was clearly influenced by George. It resolved "that all unimproved lands shall be taxed the same as though settled and improved, for all purposes including building school-houses, public roads and the creation of a School Fund; that land monopoly is the basis of all monopolies and the paramount question of the day; that whoever owns the soil of the country in large tracts has the sure basis of despotic power."[82] While the *Post* was officially a nonpartisan paper, George continued to embed himself in the Democratic Party, accepting a patronage position as State Inspector of Gas-Meters by Governor Irwin – elected over the Newton Booth's split Republican ticket in 1874.[83] George was not the only radical to revive the land monopoly critique. Unlike in the property crisis of the 1850s, the 1870s land monopoly agitation was a product of an emergent working-class legality and not a concern of the elite bar.

The loudest critic of the legal class was settler and newspaperman Charles "Philosopher" Pickett. A generation older than George, Pickett emigrated to the Pacific coast in 1842 from Tennessee – in the same company as future California Governor Peter Burnett – and began his first newspaper there in 1845. In his time in Oregon, Pickett railed against the "land monopoly" of the Methodist missionaries, squatting on their lands, and made an enemy of Indian Agent Elija White. An outspoken proponent of Native enslavement, and (barring that) extermination, President Polk moved to replace White with Pickett, though the "Philosopher" declined the appointment and journeyed to California in 1847. In the 1850s, Pickett headed the short-lived *Western American* paper, wrote for the *California Star* and the *San Francisco Bulletin* as well as Southern staples like *DeBow's Review* and the *New Orleans Picayune*. Though affable and well-liked personally, Pickett adopted a fiery persona in his public writing. At the start of the war, Pickett published "Terrible News from the Northern States," and called for California to join the Confederate cause. Realizing he would likely be jailed if he continued in this vein, his biographer Lawrence Powell wrote, Pickett rode out the war years quietly clerking in the law offices of Thornton and Williams of the land bar, a somewhat ironic turn for reasons we will discuss.[84]

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[81] Life of George, 237-9.
[82] Quoted in "The Land Monopoly Question," Green's Land Paper, February 3, 1871. See also, "Labor Union Convention," *Daily Alta California*, January 26, 1872; "By State Telegraph," *Sacramento Daily Union*, January 26, 1872.
[83] Life of George, 249.
[84] Lawrence Clark Powell, *Philosopher Pickett: The Life and Writings of Charles Edward Pickett, Esq.,* (Berkeley: UC Berkeley Press, 1942), 72-5.

The return of the Democrats to power resurrected Pickett's pamphleteering career.[85] The first target of Pickett's vitriolic pen was the Immigrant Aid Society – a private corporation headed by some of California's most prominent capitalists for the purposes of coordinating colonization.[86] In a "Protest and Memorial" to the California legislature, Pickett argued against subsidizing an organization of "*legal spoliators*" who sought to attract "cheap laborers" to the state.[87] In characteristic prose, he wrote, "Let [immigrants] remain away until that great reactionary and reformatory period (not distant) shall have arrived, when all these fraudulently seized upon public acres (the common property of the whole, and only to be enfeoffed in limited quantities to actual occupants) shall be restored to their original status to be thus parceled out and possessed." The protection of property, Pickett lamented, had supplanted the rights of individuals.[88]

Pickett expanded on these themes two years later in a written address on "the government fee in the public domain – intercommunication and land monopolies and correlative topics."[89] Pickett offered a resolution as to the legal title of the United States writing that the United States did not have "absolute fee" but had "a joint or common estate possessed by the entire people."[90] Further, all railroads, telegraphs, turnpikes, and canals should be made "free and open to all persons at a minimum rate of charge." Pickett's written speech was notable for its degree of violent anti-legalism. "The lawyers, including judges, will, of course, nearly all oppose" his proposals, Pickett complained:

> I look for nothing different in connection with any genuine reform measure from this Bourbonic class. With all their reading and intelligence and profession of love of justice ,where do you find them standing in those great upheavings of a people against the grinding oppressions of a long endured malgovernment? Always, with rare individual exceptions, upon the side of wrong, and staunchly maintaining the *status in quo* or letter of inequitable enactments and decreements. Consequently, whenever these uprising oppressed communities obtained the mastery, their first avenging acts were to burn the law books and court records, and kill all the judges and lawyers they could lay their hands on.[91]

In this address, Pickett channeled the working-class fury of the radical democrats against the legal class. Elsewhere in his speech he threatened to flay the Chief Justice of the California Supreme Court and make his flesh into a chair.[92] Lawyers, Pickett continued, were taught to "maintain every abuse practiced under the *forms* of law."[93] Lawyers were always raising "those canting, swindling and estopping outcries of '*stare decisis!*' '*res adjudicata!*' '*ex post facto*

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[85] Ibid, 83.
[86] See Chapter 3.
[87] Charles E. Pickett, *Protest and Memorial Against Granting Appropriation to the Immigrant Aid Society* (Sacramento: T. A. Springer, State Printer, 1872), 3.
[88] Ibid, 5.
[89] Charles E. Pickett, *Address of Charles E. Pickett to the California Legislature: Upon the Government Fee in the Public Domain – Intercommunication and Land Monopolies and Correlative Topics* (Sacramento: T. A. Springer, State Printer, 1874).
[90] Ibid, 3.
[91] Ibid, 6.
[92] Ibid, 12.
[93] Ibid, 7.

laws!' and 'vested rights!' and thus essay to perpetuate wrong and encourage wrong-doing."[94] Pickett indulged in Biblical analysis, though in his unique style, writing that "The great and good Judean reformer (carpenter Joseph's putative son)…[was] crucified …for seeking to disturb 'vested rights.'"[95] No wonder the assembly declined to let Pickett make the speech in person. Pickett's warnings that only a violent revolution could redistribute land and that lawyers were class enemies were picked up by the unemployed masses of San Francisco, but found few adherents in the land bar.

Pickett's anti-aristocratic pamphlets built on a conspiratorial understanding, not entirely unfounded, of California law and politics. As he wrote in his satirical pamphlet "The California King," a "monologue" by Leland Stanford, "The asinine multitude, particularly those country bumpkins, the Grangers, must be bamboozled with such fair talk. There is no danger in it so long as I can control the party leaders."[96] Stanford and the railroad company pulled the strings, and nothing was as it seemed on the surface. "I have instructed Sargent to continue to play this double game at Washington – ostensibly opposing, but, in reality, supporting us," King Stanford said. [97]"The California King" was in some ways a deeply pessimistic text in addition to a satirical one. On the potential of a new state constitution Pickett wrote, as Stanford, "I don't care myself what sort of a Constitution the people of California may have, since my imperial mandates, like their Supreme Court renditions and dictas, ignore such useless instrument."[98] (6). Stanford's empire included the classes of lawyers and newspapermen who were liberally provided with money to "sophistically pervert the laws, delude and mislead the people, debauch public sentiment, and erect and render paramount our *imperium in imperio*" (13). Law was emptied of its redemptive potential, a tool of the ruling class. Where could the people turn?

To Pickett and George, California had become a failure as a colonial social venture. Dreams of an egalitarian colony had faded and neither the Republicans nor the Democrats had plans for remedying the "vested wrongs" of the past. The revival of land monopoly discourse was a promising challenge to liberal legal hegemony, but its increasingly anti-legal character left a void where lawyers used to be. The extent to which the radicals challenged property law itself was ambiguous.

Despite the economic downturn in Europe and the Atlantic states, however, California was largely insulated from the downturn because of its relative market independence. In response to the downturn emigration spiked with 154,300 arriving from 1873-1875. As labor historian Ira Cross writes, a high percentage of these men were factory hands, with few factories to fill. The population of San Francisco swelled, especially in winter, where "widespread destitution prevailed."[99] In 1875, William Ralston and the San Francisco banking set were some of the first liberals to realize the danger they had placed themselves in with highly leveraged railroad

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[94] Ibid.
[95] Ibid, 6.
[96] Charles E. Pickett, *The California King: His Conquests, Crimes, Confederates, Counsellors, Courtiers and Vassals: Stanford's Post-Prandial New-Year's Day Soliloquy* (San Francisco: San Francisco News Company, 1876), 4.
[97] Ibid, 4.
[98] Ibid, 6.
[99] Cross, *A History of the Labor Movement,* 70.

construction.[100] Ralston's Bank of California, the darling of the liberal financiers, was underwater as the harvest season came around in 1875. A scheme to save the house, which involved a takeover of the Spring Valley Water Company (essentially raiding the coffers of the city of San Francisco), failed. Ralston drowned shortly thereafter, perhaps taking his own life. Perhaps, however, cheap colonization would save itself. A bumper wheat crop in 1876 raised wages for seasonal work, but the rain did not return the following year and draught put California on the precipice.[101]

Irish laborer and labor organizer Frank Roney arrived in San Francisco in 1876. The first thing Roney noted regarding working class politics in the city was its anti-Chinese character.[102] Coming from the Atlantic Coast, where the Irish had been tarred as cheap laborers, the discourse troubled Roney. "The only objection to [the Chinese] that I felt had any validity was that they were cheap workers," he wrote later. "In this respect they were no worse than the immigrants arriving upon the Atlantic side of the continent. It seemed to me that this objection would in a short time pass away, provided the Chinese were allowed the liberty…that was accorded to other immigrants."[103] According to Roney, in late summer of 1877, news of the Pennsylvania Central Railroad strike reached California and ignited the tinderbox (268). Over the following months, thousands of white men took to the streets for mass meetings and (potentially) mob violence. Though "all shades" of political opinion were found in the first of these "sandlot" meetings in September, in front of City Hall, Roney recalled, the dominant element was anti-Chinese and the mobs attacked Chinese businesses and burned the Pacific Mail Steamship Company's wharf.[104] At the September 21st meeting, drayman and sailor Dennis Kearney announced that he would have 20,000 laborers "well armed, well organized" in a year's time, a body of men which would hold against the "military, the police, and the 'safety committee.'"[105] "He said that a little judicious hanging about that time would be the best course to pursue with the capitalists…who were robbing the people."

The loose movement quickly organized itself into the Workingmen's Party of California, announcing their first resolutions on September 23. Kearney, president of the organization, quickly adopted the slogan "The Chinese must go," which Roney found distracting and distasteful.[106] On land monopoly, the new party resolved, clearly following the work of George, "We propose to destroy land monopoly in our state by such laws as will make it impossible. We propose to destroy the great money power of the rich by a system of taxation that will make great wealth impossible in the future" (366). Over the fall of 1877, increasingly incendiary speeches by Kearney, Philosopher Pickett, physician Charles O'Donnell, and others, led to arrests for incitement to riot. The forces of order, Mayor Andrew Jackson Bryant, District Attorney Daniel J. Murphy, Chief of Police Kirkpatrick, and head of detectives Isaiah N. Lees, evidently feeling bereft of police powers to control the situation, lobbied the state legislature to pass a gag law, criminalizing public speech which threatened violence toward people *or* property, which the

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[100] White, *Railroaded*, 79-80.
[101] Cross, *A History of the Labor Movement* ,71-2.
[102] Frank Roney and Ira B. Cross (ed.), *Frank Roney: Irish Rebel and California Labor Leader, An Autobiography* (Berkeley: UC Berkeley Press, 1931), 266.
[103] Ibid.
[104] Ibid, 269.
[105] Davis, *History of Political Conventions*, 365-6.
[106] Roney and Cross, *Frank Roney*, 270.

legislature did.[107] Roney argued the forces of order hoped to provoke violence to justify killing the leading Workingmen, but the speakers went quietly.

The state convention of the party began on January 21, 1878. The Committee on the platform reported back to the whole on the 24th. The influence of Roney on the platform, in particular the downgrading of anti-Chinese rhetoric, was clear. The platform began, "Whereas, The government of the United States has fallen into the hands of capitalists and their willing instruments; the rights of the people, their comfort and happiness are wholly ignored, and the vested rights of capital are alone considered and regarded."[108] Here, Roney and the Platform Committee put their collective finger on the heart of land monopoly: vested rights. The property proposals of the first convention were quite radical, if somewhat convoluted. Section 3 began: "The land is the heritage of the people, and its appropriation by the government for the furtherance of the schemes of individuals and corporations is a robbery." Such a statement of principles was clear and rhetorically commonplace among the major parties. It continued, "and all land so held should revert to its lawful possession, to be held for actual settlement and cultivation, and individuals holding by purchase or imperfect title land in excess of one square mile shall be restricted to the use of that amount only for cultivation and pasturage." Depending on how one reads this confusing passage, the Workingmen seemed to call for all land held in excess of one square mile to return to the public domain, or whatever "lawful possession" meant. The platform further announced that "in the laws of equity and justice…one section of six hundred and forty acres is a sufficiency for any one man to own or transmit to his offspring."[109] Later, the Convention resolved for compensation of adversely possessed Pre-emption claims. Roney's Platform Committee thus put their name to confiscation of private property over a set amount by escheat and a limit on devises. This "land limitation" had circulated through colonial discourse for years but had not found a home in the major parties. The land monopoly plank ended with the Georgist coda, "all lands of equal and productive nature shall be subject to equal taxation" (379). Roney's plank on the Chinese placed the blame on the capitalists rather than the laborers, "In California, a slave labor has been introduced, to still further aggrandize the rich and degrade the poor…" and was comparatively slight when measured against the land monopoly provisions. In the spring of 1878, however, a rift emerged between those who envisioned the Workingmen as a socialist or agrarian party dedicated to land redistribution and those who saw the party as a nativist vehicle for ethnic cleansing. Roney lamented, "When I claimed that poverty, misery, distress, crime…were primarily due to the evil of land monopoly my good friends balked because they felt that the Chinese alone were to be blamed for the existing conditions."[110] The conflict was heightened by the prospect of rewriting the California Constitution.

## The California Constitution of 1879

"If the legislator, in making an [equal division of lands], does not enact laws at the same time to support it, he forms only a temporary constitution; inequality will break in where the laws have

[107] Ibid, 272, 280.
[108] Davis, *History of Political Conventions*, 379.
[109] Ibid, 380.
[110] Roney and Cross, *Frank Roney,* 299-300.

not precluded it, and the republic will be utterly undone." – Montesquieu, *The Spirit of the Laws* (1748).[111]

The politics of redemptive constitutionalism had ebbed and flowed for decades. By the mid-1870s, California's first Constitutional order strained under three decades of tremendous colonial change and development. Indeed, the organic law lasted far past when William Shaw and the radical settlers called for its revision in 1856.[112] Shaw's was a call to the constitutionalism of Montesquieu: "nations never prosper nor attain greatness, until their people respectively enjoy such governments as are best adapted to their own temper and condition."[113] The evils of the 1850s, Shaw argued, derived from the foreign nature of the 1849 Constitution – it derived not from "our own extraordinary and peculiar position" but from the organic law of Iowa. In desperation to cut off slavery, Shaw argued, the people shoved through an imperfect document. The 1849 Constitution was "actually dumb on the all-important subject of finance;" it established no limits on salaries and fees for government officials; it refused to constrain the legislature on land matters or on matters of contracting civil debts; judges acted with impunity and the "cumbersome and anti-republican mode of impeachment" offered no good remedy.[114] Many of Shaw's objections dealt with a *lack* of restraint on legislative and judicial power. The Supreme Court acted as a "despotism," accruing to itself newfound judicial powers inappropriate for republican government (26). Shaw had still more complaints, but it had little to say about land monopoly as such. However, his concern with unlimited legislative power over the public domain prefigured the major concern of land monopoly with the direction of colonial land policy.

At the Democratic Convention of 1875, the Party came out for a Constitutional Convention.[115] A referendum calling for a convention in September 1877 passed 73,460 to 44,214 (with voters 28,525 not responding to the question) (Legislative Journal 77-8, 34). Based on these results the legislature began drafting legislation in the spring of 1878. Though generally not controversial, the number of "at-large delegates," 20 percent of the total and therefore potentially decisive, was briefly contested in the Assembly (Journal, 411). James E. Murphy, a Democratic lawyer representing Del Norte County, moved to strike the at-large delegates, but was defeated soundly by a vote of 12-54. In the Act that passed on March 30, 1878, the final number of delegates was 152, including 31 at-large delegates.[116] The city and county of San Francisco, population 233,959, which accounted for 27 percent of the total California population of 864,694, received 30 delegates.[117] In other words, the queen city was underrepresented

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[111] Baron De Montesquieu and Franz Neumann (ed)., *The Spirit of the Laws* (New York: Hafner Press, 1949 [1748]), 42-3.
[112] See Chapter 2. William J. Shaw, *Speech of Hon. William J. Shaw, on the Necessity of Immediate Constitutional reform, Delivered in the Senate of California, Feb. 7, 1856* (Sacramento: Office of the Democratic State Journal, 1856).
[113] Ibid, 5.
[114] Ibid, 9-12.
[115] Plank 7: "That we are in favor of calling a convention of delegates elected by the people, to amend the constitution of the state, as the only mode of creating a system of government at once harmonious and efficient, and are therefore opposed to the amendments to the constitution proposed." Davis, *History of Political Conventions*, 351-2.
[116] An Act to provide for a Convention to frame a new Constitution for the State of California (Chapter 490, Statutes of 1877–78).
[117] Census of 1880.

relative to its share of the population, but its delegation dwarfed any other – the next largest delegations were from Nevada, Sacramento, Santa Clara, and San Joaquin counties with just five delegates each.

With the state's largest city and its 29 delegates in the thrall of Kearney and the Workingmen, the Republicans and Democrats moved to counter the "communistic" new party by creating a non-partisan ticket, which they announced after a meeting of the state committees on April 24th.[118] They called for the selection of the "ablest, fittest, and best known gentlemen" regardless of party affiliation. The vast majority of the state press applauded. For example, the *Santa Rosa Democrat* called for men, "whose nerve will enable them to stand up in the face of the now existing Communistic organization, and propose and urge the adoption of such clauses in to the fundamental law, as shall hereafter place it beyond the power of this Communistic element, foreign to the spirit of our institutions, to disturb the peace and render insecure the life and property of this people."[119]

As the Democrats and Republicans joined, the Workingmen divided. Shortly after the announcement of the non-partisan ticket, Roney and his allies ousted Kearney from his position as president on charges of corruption. The coup did not work. The Kearney and anti-Kearney factions held dueling conventions on May 16th and 17th with Roney's "slimly attended" and Kearney in full control over the slate. George had put himself forward as a candidate from San Francisco and was initially nominated by the Workingmen – until he refused to back Kearney (Life of George, 298-300). Though his influence over the convention was strong, he was trounced on the regular Democratic ticket. The Kearney platform differed substantially from that written by Roney four months earlier. Gone was the challenge to vested rights. Indeed, the Workingmen resolved that "Vested rights in property must be respected, but land monopoly must be restricted, and in the future prohibited."[120] This newfound respect for the rule of law reflected the constitution of the party which, despite the name of "Workingmen," Roney wrote, was comprised of small property holders and men who hoped to become small property holders (Roney, 300). With this split, the Workingmen functionally became an anti-Chinese party. Despite their moderation on the property question, the Workingmen refused to budge from their anti-legalism, with only eight of their 50 delegates practicing lawyers.

All told, the people elected 75 Non-Partisan delegates, 50 Workingmen, 10 Straight Democrats, 11 straight Republicans, and two Independents. Of the Non-Partisans, 36 were Democrats and 39 Republicans, making the "real" partisan breakdown: Democrats 46, Republicans 50, Workingmen 50, and 2 Independents.[121] The Workingmen took evenly from their rivals: 20 of their delegates were formerly Democrats, 23 Republicans, and 4 Independents (1 unlisted). By chief employment, a plurality, 59 (38 percent), of the delegates worked in law. Agriculturalists made up the second largest group with 40 (25 percent). Various trades from carpenter to telegraph operator, overwhelmingly from the Workingmen Party as might be imagined, constituted the third largest group at 27 (18 percent). 17 (11 percent) Delegates worked as merchants and in other commercial professions and the non-legal professions –

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[118] Davis, *History of Political Conventions*, 381-3.
[119] "The Convention," DAC, 12 April 1878
[120] Davis, 384.
[121] Davis, *History of Political Conventions*, 390-392.

physicians, teachers, and journalists – accounted for 10 (6 percent) delegates. In the section to follow, delegates will be identified by (Electing Party (Former Party), profession).

The Convention began on September 28 and the first struggle was the election of a President. Battle lines were clear. In a long-winded nomination speech, Clitus Barbour (Workingmen (R), lawyer) defined the contest between monopoly and antimonopoly. "When I say 'monopoly,'" Barbour clarified, "I mean any and all of those means whereby one man, or one combination of men, protected and governed by laws, or by the constructions that are placed upon laws, appropriate to themselves and hold as against the balance of mankind that common stock given by the Creator for the preservation of their lives."[122] It was all a prelude to nominating Henry Larkin (Workingmen (D), farmer) of El Dorado county for the Presidency. Though Davis recorded Larkin as a "farmer," he was also a lawyer, frequent petty officeholder, and perpetual candidate. Larkin had found himself politically homeless in the mid-1870s. As the Democratic Candidate for Congress in a losing district in 1875, the political writers at the *Daily Alta* said of Larkin's career, "the patriarchs of Democracy have never done very much for him."[123] Larkin had been the Collector of anti-Chinese "Foreign Miners' Tax" for El Dorado in the early 1850s, a Census Marshall, Sheriff candidate, and State Senator from 1869-1872, during which time he was considered an "anti-monopoly" man.[124] After the Convention he was one of the Workingmen's candidates for Railroad Commissioner.[125] His nomination was seconded by Charles Beerstecher (Workingmen (R), lawyer) who made a plea for his whole Party: "We came here for the purpose of making a crusade against the Chinese, and for the purpose of reforming the taxation system, and the interest system, but we do not come here for the purpose of taking away any property that any man has honestly acquired. We do not come here for the purpose of confiscating the property of any man…I repel and repudiate the idea that I am a communist and disorganizer."[126] The two lawyers, though representing those settlers "robbed of everything that God Almighty provided for the comfort of man," immediately took a conservative stance on the property question. Some Workingmen delegates, it appeared, were willing to trade property law reforms for their other interests.

Delegates from the Non-Partisans had less speechifying to do. The Southern Californians nominated Los Angeles attorney, and longtime member of the land bar, Volney E. Howard (Democrat (D), lawyer) for the position, noting his "parliamentary tact and good judgement" as his principal qualifications. The anti-monopoly Democrats nominated W. J. Tinnin, a lawyer from northern, rural Trinity County who was Assemblyman from 1871-4 and State Senator from 1875-6 (though described as a "merchant" by Davis).[127] During the partisan rupture of 1874 Tinnin said, "that before I would vote for a monopoly, or as they are usually termed, a railroad Democrat, that I would vote for Governor Booth, and I repeat the same now, and assert that I do

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[122] E. B. Willis and P. K. Stockton (sten.), *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878* (Sacramento: J. D. Young, Supt. State Printing, 1880). Vol. 1, 18.
[123] "Political Squibs," *DAC*, 4 July 1875
[124] "Important Decision," *DAC*, 9 October 1853; "The Last Legislature and the Next," SDU, 3 July 1873; Davis, 320-1, 401.
[125] Davis, *History of Political Conventions,* 401.
[126] *Debates and Proceedings* Vol. 1, 18-9.
[127] Davis, *History of Political Conventions,* 359, 389.

not believe any man *is a Democrat* unless he is an advocate of the anti-monopoly principle."[128] Grabbing the last word of the nominations, Thomas Laine (Non-Partisan (D), lawyer) of Santa Clara County began, "We should have a President of this Convention…whose age and experience we should reverence, and whose learning and ability should challenge our admiration, because I have seen, in the short exhibition that we have had here, that there will be storms and whirlwinds in this Convention."[129] Laine put forward elder Democratic statesmen and conservative lawyer Joseph P. Hoge.

It would be little exaggeration to say that Hoge *was* the institutional Democratic Party in California. From 1856 to 1879 he had, with some minor interruptions and reshuffling, been the Chairman of the State Committee, President of the mainline Conventions, and a feature of the Committees on Resolutions.[130] He backed Douglas in the Breckenridge split over slavery, essentially warning out the Southerners who he considered disunionists, writing that he would "continue to act with the regular democratic committee, and the organization of the party in this state, as I have done all my life, here and elsewhere."[131] The election of an elder statesman like Hoge as President would essentially turn the 1879 Constitutional Convention into a convention of the California Democratic Party. In addition to being a lifelong Democrat, Hoge was a stalwart of the bar. As the lead attorney for the Democratic speculators in *Hart v. Burnett*, as discussed in Chapter 2, Hoge decried the disturbance of vested rights in that case as "nothing short of judicial confiscation!"[132]

Other, symbolic nominations for the presidency came in, but the main candidates were Hoge and Howard for those of a conservative persuasion versus Larkin and Tinnin for the radicals of the Workingmen and anti-monopoly Democrats respectively. The candidates needed 74 votes to win. None won on the first ballot, but the total of conservative votes, Hoge (67) and Howard (11), exceeded the radical votes of Larkin (49) and Tinnin (17) by a clear margin. On the second ballot, Hoge increased his total to 70, picking up some defectors from Howard and symbolic nominees. On the third ballot, Hoge picked up votes from Tinnin but remained 3 votes short. On the Fourth ballot, Hoge edged up to 72 votes. Larkin had stayed at 49 Workingmen stalwarts through the voting and Tinnin continued to hover around 17. In a last-ditch attempt to thwart the conservatives, Barbour withdrew Larkin's nomination and threw the Workingmen votes to Tinnin. The proceedings do not record what transpired next on the floor, but for reasons of ideology, internal party politics, or personal grudge Howard threw his own weight behind Tinnin and the antimonopoly faction. It was not enough to defeat the stalwarts: Hoge eked out Tinnin by a single vote, 74 to 73.[133]

Hoge's remarks were nonpartisan and open-handed, but the conservative direction he wished to steer the new Constitution was clear. The key portion of his short speech began with a note on the context of the moment, "We have met, gentlemen, at not the most favorable time for making a Constitution. For many causes there seems to be very great depression in the business

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[128] "W. J. Tinnin Explains," *SDU,* January 9, 1874.
[129] *Debates and Proceedings* Vol. 1, 19.
[130] Davis, *History of Political Conventions,* 70, 79, 88, 104, 111, 176, 224, 264, 289, 350.
[131] Ibid, 118.
[132] Papers pertaining to case in California Supreme Court, Hart vs. Burnett, et al, concerning land in San Francisco, 1860. BANC MSS C-I 24. Portfolio 1, 8.
[133] *Debates and Proceedings Vol. 1*, 20-1.

and industrial enterprises of the country. To some extent we have fallen upon evil times." He continued, revealing his conservative idea of their constitutional moment, "while I do not believe that Constitutions will make men rich, or that laws will prevent men from becoming poor, yet, with a Constitution which is based upon justice, and which bears equally upon all interests throughout the entire state…I think we may safely…commend our country and our State to the common parent of us all."[134] In underlining state neutrality Hoge offered a rebuke to the anti-monopolists who saw the Constitution as their best, and perhaps only, chance to use law to redistribute wealth and power within society. Of course, in practice, President Tinnin might have made little difference as the work of the Convention was siphoned off into committees, but Hoge's election was significant in two respects. First, the conservative Democrats had placed their most experienced Party operator in the President's chair, the man who had dictated the direction of the California Democracy for over two decades. Second, this was a show of strength for a conservative theory of property law.

On October 10, the land debate began in earnest. Abraham C. Freeman (Non-Partisan (R), lawyer) laid out a liberal plan of land limitation which provide that after the passage of the new constitution "no person or corporation" could hold more than one thousand acres; however, Freeman added a rather large number of exceptions to his general policy.[135] The exceptions of inheritance, grant from the United States, judicial sale, and eminent domain essentially excluded only the buying and selling of land. This was something of an outer limit on how far the lawyers would go in accommodating the Workingmen. The same day, James O'Sullivan (Workingmen (D), printer) gave the starting position of the Workingmen, a 640 acre cap with no exceptions enforced by the regulation of inheritance – the heirs would split the profits from an auction for land in excess.[136] From these starting points the groups spent the next 3 months reaching a compromise.

The decisive moment on the property issue came with the minority report of the Committee on Land and Homesteads, which came before the Convention on Thursday January 23, 1879. As expected, the minority report, influenced by O'Sullivan, had the backing of the Workingmen. The minority report recommended an article of 6 sections. The first, declared "Perpetuities and monopolies are contrary to the genius of a free Government…" and no primogeniture or entailments would be legal. Similarly, the second section declared all California lands "allodial," prohibited "feudal tenures," and voided any reservations to that effect (on alienation for example).[137] These two were considered unnecessary by the opponents. Section three, certainly popular among the anti-Chinese, declared that non-citizens could not own real property, in trust or otherwise, and on the death of any such owner the land would escheat to the state. This provision failed but was not controversial. Section six, which provided that no more than 160 acres could be granted or patented by the State to any one person and no grant would be legal except upon settlement and use. This provision would be adjusted and haggled over but was generally in keeping with the legal vision of the convention as anti-subsidy.

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[134] Ibid, 22.
[135] *Debates and Proceedings* Vol. 1, 96.
[136] Ibid, 100.
[137] *Debates and Proceedings* Vol. 2, 1136.

Two provisions, however, were radical. The first of the two controversial provisions dealt with land limitation and regulated devises. Section 4 read: "No person shall forever hereafter be permitted to acquire, in any manner, more than six hundred and forty (640) acres of land…No person who dies possessed of landed property in this State shall have the right to will or devise more than… [640] acres to any one heir." Excess land would be sold at public auction to the highest bidder "for cash" and the proceeds divided equally among the heirs. The second controversial provision struck right to the heart of property law and hoped to restore the radical Lockean, equity law of property in the new Constitution. It read: "Actual occupation and continuous use for agricultural purposes during a period of one year shall constitute a title to ownership of land in this State."[138] Any land (in excess of 640 acres) unused for a year would be open to occupation, though with compensation if the previous title holder came forward.

The Workingmen, fighting a losing battle, put on the record several long speeches over the next several days, in which they laid out the legal case for land limitation. O'Sullivan framed the issue as one of American principles versus feudal, Mexican ones. "It is true, that [land monopoly's] foundation was laid before our American settlement of California, in the Mexican grant system…being diametrically opposed to the prevailing system of limited land-holding, which has grown up under our institutions, is best suited to the principles and customs of our people, and which, in the homestead and preemption Acts, has been adopted as part of the supreme law of the land."[139] Yet the "land piracy" of the Americans continued the "bastard feudalism" cursing the land. O'Sullivan underscored his point with government statistics on landholding in the state: Miller & Lux held 343,000 acres; Bixby, Flint, & Co., 440,000; W. S. Chapman, 250,000; James Ben Ali Haggin, 200,000; and so on.[140] In land limitation upon devises, O'Sullivan argued the Workingmen articulated a constitutionally sound way to deal with land monopoly: "It is a proposition that fully respects presented 'vested' rights, even though some of what are called so are notoriously 'vested frauds'…it proposes no confiscation of property…Every one now owning more than the amount specified in the limitation would have full notice and time to enable him to dispose of his surplus acres, pocket the proceeds, or invest them in some other business."[141] For authority O'Sullivan drew from J. G. Fichte's "The Science of Rights" (1869), and the experiences of other Anglo-American colonies:

> Land limitation…is not a new thing. It has been partially adopted in Australia, and it has become the general law in Prince Edward's Island…An Act was passed by the Government of that province on [April 27, 1875], by the terms of which it was agreed to purchase all the large landed estates in the island exceeding five hundred acres in the aggregate, for the purpose…of converting "the leasehold tenures into freehold tenures, upon terms just and equitable to the tenants as well as the proprietors." Shall we be less liberal, less favorable to reform, than colonies of the British Empire? I hope not.[142]

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[138] Ibid.
[139] Ibid, 1139.
[140] Ibid, 1137.
[141] Ibid, 1139.
[142] Ibid. See, "Land Confiscation in Prince Edward's Island," *Sacramento Daily Union*, January 8, 1876. "The same injustice and dishonesty which they have herein perpetrated will presently rend them asunder, and they will find when it is too late that the inviolability of vested rights and the sacredness of property are not mere fanciful relics of an effete condition of things, but the foundation stones upon which the structure of civilization must rise…"

O'Sullivan understood land limitation as a part of liberal reform in Anglo-American law writ large. Other colonies, young and old, confronted similar problems. Without feudal leases, however, invoking liberalism to inhibit commercial rights in California likely struck all but the most dedicated Workingmen as unpersuasive. Another Workingmen delegate, Mr. N. G. Wyatt (Workingmen (D), lawyer) of Monteray, accused opposition to the minority report on the corruption of the major parties which were "as completely in the hands of the land monopolists as it is possible for them to be."[143] (1140).

On the next day, Walther Van Dykev (Non-Partisan (R), lawyer) made the obvious rejoinder regarding vested rights: "we are, nevertheless, met with this obstacle, that they have their lands. That, according to our notion of rights, and the duties of Government, we cannot divest them of their property. It can only be taken from them for public uses, upon just compensation being given." Van Dyke argued the Georgist taxation scheme and the revived Board of Equalization would do enough to fix the issue – it would have to be enough. "That, I think, is as far as we can go," Van Dyke concluded.[144] Delegate Joseph Brown (Democrat (D), farmer) from Tulare spoke next and decried the minority report as confiscatory. "What kind of anarchy would result," he asked, if such laws were adopted?[145] Quoting from the Constitution of Kentucky, Brown declared, "'The right of property is before and higher than any constitutional sanction.' It exists without law even." Taxation was one thing, emboldening adverse possessors was another. Another conservative, P. B. Tully (Non-partisan (D)), lawyer for the immense landholders Miller & Lux, then offered a hostile amendment to underscore the radical nature of the proposals.[146] James M. Shafter (Non-Partisan (R), lawyer) Oscar Shafter's brother, thought even the tax scheme was too far: "To take his property open and above board is confiscation; to take it by taxation is like sneaking in at the back-door and stealing your hat and coat while you are at dinner. That is the only difference."[147] George V. Smith (Non-Partisan (R), lawyer) surfaced the class subtext of the day's discussion: "There seems to be one class clearly opposed to these propositions, and call them extremely radical and wild, and another class who think they are not." He disagreed with Van Dyke, and therefore the absent George, that taxation would be sufficient. Assessors would still have discretion and the rich "have always succeeded in shifting taxation."

H. C. Wilson (Democrat (D), farmer) laid out the land monopoly issue in partisan terms. "Prior to the coming in of this Republican Party," he asked, "who ever heard tell of a subsidy being granted?"[148] Settlers like himself, Wilson continued, "fought back the Indians" and won the country for themselves while the now-Workingmen voted Republican "for a glass of whisky." Wilson's fellow partisans applauded this jibe. Thomas McFarland (Non-Partisan (R), farmer) challenged Wilson's characterization, declaring "When in [1849] immigration set in from the East, those who came here found a sort of virgin world. They had this Pacific world before them." Wilson retorted that "I am not at all surprised that after legislating one half of our

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[143] Ibid, 1140.
[144] Ibid, 1142.
[145] Ibid, 1143.
[146] "The Legislature is hereby directed and orders to build a house upon said land, and furnish seed and provision for the first year…and, furthermore, that Judge Shafter be required to furnish at least twenty good milk cows, in order to keep said family from perishing." This addition was ruled out of order.
[147] Ibid, 1145.
[148] Ibid, 1144.

domains away you want our land."[149] To the Democrats of an antebellum bent, this was merely a political division of spoils. Later in the debate, William Grace (Workingmen (R), carpenter) of San Francisco countered that the principle of land limitation and division derived precisely from the 49ers, they simply did not want to be on the other foot[150] Barbour warned the Democratic partisans that "they will not be able to explain to the people how it was…that they can find no way to do anything about land monopoly. They can find law to regulate the Chinese; they can find power to put them in ships and send them away from this coast; they can curb corporations; but they cannot curb this great evil of land monopoly."[151] John S. Hager (Non-Partisan (D), lawyer) dismissed this complaint – everyone had been free to buy the lands in question and some had chosen not to. The proposals of the radicals were sour grapes.[152]

The learned land lawyers weighted in next and did so decisively. Howard stated the trouble with fixing land monopoly was that even if the delegates "go as far as we have the power, and as far as justice will admit…we cannot go far."[153] Justice Marshall, in *United States v. Percheman* (1832), ruled private rights protected by the law of nations.[154] *Fletcher v. Peck* (1810), and many cases since, Hoffman argued, ruled that grants were contracts. "We can not touch any of these grants." Drawing the old redemption line, Howard argued that any remaining fraudulent titles could be dealt with by the Federal Courts. Finally, he warned, "it must be perfectly obvious that if you adopt [a rule restricting inheritance] you inaugurate the system that they have in England, where estates are tied up by deeds of trust and long leases, and you make a monopoly ten times worse than it is now. Better to leave this free as to the laws of the country have left it."[155] John McCallum (Non-Partisan (IR), lawyer) of Alameda supported Howard. Though he had "been almost universally connected with the settlers" against the grantees, the law could not be changed. McCallum hoped a recent order by the Secretary of the Interior, aggressively enforcing conditions of the railroad grants, would remedy the worst abuses of the railroads. Tully, holding down the conservative flank of the land bar, dismissed the whole land monopoly agitation as "a miserable humbug" and he lambasted his fellow attorneys for even entertaining land limitation. (To which Howard interjected "What cheek!")[156] William White (Workingmen (D), farmer), of Santa Cruz, plaintively asked for "some of the legal gentlemen here to propose something that will be effectual."[157] No one responded to this last call. Sections 4 and 5 of the minority report, land limitation and use title, died ignominious deaths. Only the prospective limits on land from the state and the Georgist taxation scheme made it past the lawyer's scrutiny.

The language of the final article reflected the compromises of the Convention and the legalistic reading of property law:

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[149] Ibid, 1145.
[150] Ibid, 1152.
[151] Ibid, 1155.
[152] Ibid, 1154.
[153] Ibid, 1146.
[154] *United States v. Percheman*, 32 U.S. 7 Pet. 51 51 (1832).
[155] *Debates and Proceedings* Vol. 2, 1147.
[156] Ibid, 1152.
[157] Ibid, 1150.

> Section 1: "The Legislature shall protect, by law, from forced sale a certain portion of the homestead and other property of all heads of families."
> Section 2: "The holding of large tracts of land, uncultivated and unimproved, by individuals and corporations, is against the public interest, and should be discouraged by all means not inconsistent with the rights of private property."
> Section 3: "Hereafter lands belonging to this State, which are suitable for cultivation, shall be granted only to actual settlers, and in quantities not exceeding three hundred and twenty acres to each settler, under such conditions as shall be prescribed by law."[158]

Section 2, of course, represented the clearest disjuncture. In the end, the land monopoly revival had not pushed the critique past its antebellum form except with regard to taxation. Indeed, the movement had foundered on the same rocks of vested rights as the anti-renters.

Radicals claimed victory in any case. Kearney, in a speech at Santa Clara, denounced land monopoly and praised the new Constitution. The reporter from the *Daily Record- Union* was not persuaded, "The absurdity of his position consists in the fact that the new Constitution contains no remedy for land monopoly whatever, the Convention which framed it having carefully omitted to deal with that question in any way."[159] "The Proposed Constitution Reviewed in an Address to the Reformers of California," was similarly infuriated. "We demanded limitation on land monopoly," the pamphlet read, "and we proposed several plans" among them the cap on devising 640 acres per person. "[Alphonese] Vacquerel and [Raymond] La Vigne, workingmen, proposed the French system" of inheritance which allowed only 2/3 of an estate to be willed. But the Convention rejected this attempt to limit devises as well.[160] Far from ending land monopoly, the Constitution would perpetuate it through its scheme to "destroy the Legislature" and empower the "aristocratic non-partisan lawyers."[161] As to the great hope of the Georgists, that taxation would resolve the inequality in land ownership, the pamphlet expressed skepticism, noting that power still resided in the assessor.[162] Judge Horace C. Rolfe, "the ablest tax lawyer in the Convention" decried the rule of assessment by sections as a "harvest for lawyers."[163] Despite the misgivings of the radicals and of conservative elements the New Constitution was ratified by the people by a vote of 77,959 to 67,134.[164]

Pickett, as ever, lent his pen to the cause.[165] In a $.25 pamphlet in which he compared himself to French Revolutionary Jean-Paul Marat, Pickett predicted that the "*bourgeoisie* oligarchy" would institute martial law if they won the first election under the new Constitution. The capitalist class, he wrote, would respond by "discharging employees, getting up a business panic, depressing all values, and increasing the money scarcity, in hopes of yet compelling the masses to succumb to them."[166] However, Pickett turned toward the philosophical – conducting

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[158] *Debates and Proceedings* Vol. 3, 1486.
[159] "Kearney and Land Monopoly," *The Daily Record-Union*, March 8, 1879.
[160] "The Proposed Constitution Reviewed in an Address to the Reformers of California" (1879), 3.
[161] Ibid, 4, 8-9, 19.
[162] Ibid, 39
[163] Ibid, 41.
[164] Davis, *History of Political Conventions,* 393.
[165] Charles E. Pickett, *Philosopher Pickett's Anti-Plundercrat Pamphlet. Dedicated to the Partially Disenthralled People of California* (San Francisco, June 1879).
[166] Ibid, 4.

"an exegesis or unfolding of legal axioms and economic principles."[167] The resulting analysis was openly Marxist. The Proletariat and Agricultural classes had banded together over the new Constitution, but soon would be under assault by the Bourgeoisie.[168] This analysis, of course, mischaracterized the conservative principles of the new Constitution. The Republican Party understood perfectly, however. A they resolved in the leadup to the 1879 election "The Republican Party, claiming to represent the principles of justice, honesty, and moral sentiment, declares its fidelity to the law and its unalterable opposition to any attempt on the part of any class to disturb the ownership of property; and while it would disfavor the accumulation of great landed estates…it would as firmly protect all the rights of all persons to all the wealth that they may legally and honestly acquire."[169]

His tax scheme in place, George decamped for New York in 1880, finally ending his sojourn through the Pacific world. The 1879 Constitution marked an ending for the natural law of property as a viable discourse in American law.

**Conclusion**

"The distinction between Natural Law and Positive Institution is indeed a distinction not to be neglected. But it is one of the very deepest subjects in all philosophy, and there are many indications that Mr. George has dipped into its abysmal waters with the very shortest of sounding lines." – George Douglas Campbell, Duke of Argyll, 1884.[170]

Radical democrats in the Workingmen's Party had used the second Constitutional convention to entrench anti-Chinese racism in the state's organic law at the expense of pushing the property question. This was a singularly bad use of their influence at the Convention. One might say the nativists lost the battle but won the war, securing the Chinese Exclusion Act three years later, but in the 1879 Constitution they helped construct a liberal bulwark against property redistribution and the retrenchment of the commodity form. Yes, the radicals secured passage of George's tax theory in principle – the equal assessment of improved and unimproved land – but the new Constitution did not change the fundamental mechanics of taxation, nor did it rise to the "single tax" scale envisioned by George, a legislative rather than constitutional issue. This was not entirely the fault of the Workingmen. George had difficulty *ever* resolving the impracticalities of his scheme. In a dialogue with David D. Field in 1885 we find the following exchange: "Field: How are you to ascertain the value of land considered as waste land? G: by its selling price. The value of land is more easily and certainly ascertained than any other value. Land lies out of doors, everybody can see it, and in every neighbourhood a close idea of its value can be had."[171] Consensus market value was hardly an airtight scheme of assessment. Radicals secured the *prospective* changes to land distribution policy, supported by every major party, but as many noted this was akin to locking the barn door *after* the horse had been stolen. Vested wrongs remained. In a sense, the land limitation program failed before the convention even

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[167] Ibid, 6.
[168] Ibid, 6-7.
[169] Davis, *History of Political Conventions*, 406.
[170] George Douglas Campbell, Duke of Argyll, *Property in Land: A Passage-at-Arms Between the Duke of Argyll and Henry George* (New York: Funk & Wagnalls, 1884), 16.
[171] "Land and Taxation: A Conversation Between David Dudley Field and Henry George (1885)" in George, *Our Land and Land Policy* (1911), pp. 221-239, 222.

began, when Kearney committed his party to respecting vested rights. As the *Marysville Appeal* wrote prior to the Convention, "There will be an attempt on the part of a few Radicals who gain seats in the Convention to engraft their pet ideas on land tenure into the fundamental law, but it will fail."[172]

Lawyer Samuel B. Clarke wrote a fitting epitaph for the Land Monopoly critique of property in the first issue of the *Harvard Law Review* in 1888.[173] Clarke defended Georgist theory on the grounds of morality and justice. Did every human being have a natural right to land? "This simple deduction of a right to land belonging to every human being as against all other human beings becomes more forcible and convincing if placed in sharp contrast with the sources of the title to land which the positive laws now uphold," Clarke argued, testing his sounding line before plunging into the abysmal waters.[174] In positive law, California land titles extended from the "Government of Mexico, who took from the Spanish King, who took from the Pope…or, if you please, they rest upon conquest." As George wrote in *Progress and Poverty* "Everywhere not to a right which obliges, but to a force which compels."[175] Force provided a shaky ground for defending positive property law, Clarke wrote, because "no one can base a title of right upon [force] alone without admitting that mere force, whether of ballots or of bullets, can to-day rightfully wipe out existing titles and confer others in their stead."[176] The practical fallback of the defenders of private property, vested rights, which would fix property law in place "except by bloody revolution," did not address or refute George's core natural rights claim, Clarke reasoned, but merely proposed to move on from the question.[177] This was precisely what the lawyers of California decided to do in 1879. As a class, they put aside the moral question of "who should own the land," which had justified conquest in the first instance, animated so much antebellum strife, and benefitted them handsomely, to put property law on a formal, scientific, and political-economic basis. It was a kind of disarmament that made property law not just private but inert.

The Duke of Argyll misunderstood what George's opponents were doing – they were not deeper into the abysmal waters of morality and law with a surer sounding line – they had stopped plumbing the depths at all. For lawyers, property law had become a secular discourse, a technical and bureaucratic field. The legal radicalism of the New California project was but a fading memory, a specter that haunted the "utopian" colony.

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[172] "The Convention," DAC, 12 April 1878.
[173] Samuel B. Clarke, "Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice," *Harvard Law Review* 1.6 (1888), pp. 265-293.
[174] Ibid, 273.
[175] Henry George, *Progress and Poverty: Inquiry Into the Cause of Industrial Depressions, and of Increase of Want With Increase of Wealth. The Remedy*, 5th Edition (London: Kegan Paul, Trench & Co., 1883), 307.
[176] Clarke, "Criticisms," 274.
[177] Ibid, 289.

## Conclusion

"Moses saw that the real cause of the enslavement of the masses of Egypt was, what has everywhere produced enslavement, the possession by a class of the land upon which and from which the whole people must live." – Henry George, "Moses," (Glasgow: Land Values Publication Department, 1884), 12.

"The spirit of industrialism…will not acknowledge the rights of any people to possess desirable regions of the earth without making proper use of them." – H. H. Bancroft, *The New Pacific* (New York: The Bancroft Company, Publishers, 1900), 587.

Late in *The Octopus* (1901), the first book of novelist Frank Norris's planned Epic of the Wheat, the character Presley, a struggling poet, has a chance to confront the novel's unseen antagonist Shelgrim, the (barely fictional) President of the Pacific and Southwestern Railroad, in the latter's office in San Francisco.[1] The novel concerns a violent property dispute between the Railroad and a Settlers League over the ominously named Rancho de Los Muertos. Following an adverse decision by the US Supreme Court, no reasoning given, the Settlers were dispossessed, nearly all rejecting the Railroad's offer to lease the lands – they would rather die landless and free than rent. Arriving at the office of the Railroad, Presley reflects, "the stronghold of the enemy – the centre of all that vast ramifying system of arteries that drained the life-blood of the State; the nucleus of the web in which so many lives, so many fortunes, so many destinies had been enmeshed. From this place – so he told himself – emanated that policy of extortion, oppression, and injustice that little by little had shouldered the ranchers from their rights, till, their backs to the wall, exasperated and despairing they had turned and fought and died."[2]

Presley enters Shelgrim's "large, well lighted, but singularly barren office" to find the President, a massive older man with an "iron-grey beard and a mustache that completely hid the mouth…His eyes were pale blue, and a little watery."[3] At somewhat of a loss, Presley tentatively explains that he lived on the Rancho de Los Muertos, "Magnus Derrick's Ranch." Shelgrim interrupts: "The Railroad's ranch *leased* to Mr. Derrick," and before Presley can respond the President continues:

> "Believe this, young man," exclaimed Shelgrim, laying a thick powerful forefinger on the table to emphasise his words, "try to believe this – to begin with – that Railroads build themselves. Where there is a demand sooner or later there will be a supply. Mr. Derrick, dos he grow his wheat? The Wheat grows itself. What does he count for? Does he supply the force? What do I count for? Do I build the Railroad? You are dealing with forces, young man, when you speak of Wheat and Railroads, not with men. There is the Wheat, the supply. It must be carried to feed the People. There is the demand. The Wheat is one

[1] Frank Norris, *The Octopus: A Story of California* (New York: Penguin Books, 1994 [1901]), the events described take place in Chapter VIII from 561-614.
[2] Ibid, 569.
[3] Ibid, 571.

> force, the Railroad, another, and there is the law that governs them – supply and demand. Men have only little to do with the whole business."[4]

After this monologue, Presley stumbles back into the street "stupefied." Yet he "could not deny it. It rang with the clear reverberation of truth."[5] Presley cannot escape the logic of political economy, of the forces of supply and demand, nor can he summon his former rage against the railroad, the titular octopus. At this moment of revelation, Presley has crossed a threshold from which he cannot return – the full disenchantment of law. Presley, a poet like the 1841 projector of Texan Empire in California William Kennedy, represents the romantic past of the Settler's League and their conceptions of equitable justice.[6] But after his revelation in Shelgrim's office, that past becomes both inaccessible and meaningless. In the shadow of the elemental forces of the world, Presley can only see the short lives of "human insects."[7]

Similar moments struck Presley's real counterparts as they faced the octopus. Squatter advocate B. B. Newman, in an 1872 brief for a group of Pre-Emptors in Alameda County, offered the following:

> No such assignment [of lands to the railroad] has been offered in evidence, and it is no weak presumption to suppose that, if such assignment existed, it would have been offered in evidence in this most important case, involving as it does the homes of so many families, and such vast pecuniary interests — vast, at least, in the estimation of the preemption claimants hereto, but perhaps insignificant in the estimation of overbearing and over-reaching monopolies, and over-awing bodies, destitute of spirit or soul, hence irresponsible to heaven, and undreaded of hell.[8]

Though Newman referred to the corporations as destitute of spirit or soul, he might as well have been referring to the bureaucratic legal apparatus in charge of adjudication.[9] In a terse ruling against Newman and his clients, the General Land Office decided for the railroad on the legal forms of an 1854 land survey. Tellingly, the bureaucrats justified the result as pro-settler, writing that a ruling for the Pre-Emptors would "tie up and suspend from entry, for indefinite periods of time, immense portions [of the public domain] under the thin guise or pretense that they were once embraced in some Mexican grant."[10] The purpose of property law, in other words, was not to reach a substantively just outcome in an individual case but to create the infrastructure of rules to keep lands "untied" from the legal system and in the land market. The moral economy of antebellum California had given way, in a relatively sudden lurch, to a liberal political economy

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[4] Ibid, 575-6.
[5] Ibid, 576.
[6] William Kennedy, *Texas: The Rise, Progress, and Prospects of the Republic of Texas* (London: R. Hastings, 1841).
[7] Norris, *The Octopus*, 651.
[8] In the U.S. Land Office at San Francisco, California, Arthur St. Clair, et al. preëmption claimants, vs. the Western Pacific Railroad Company, contestant. B.B. Newman, attorney for the pre-emptors. (1872), 31-2.
[9] See, Sean M. Kammer, "Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850-1903," *Law & History Review* 35 (2017), pp. 391-432.
[10] Decision of the commissioner of General Land Office, in the case of Arthur St. Clair vs. the Western Pacific Railroad Company; involving the right of St. Clair to purchase, under the pre-emption laws, certain lands claimed to have been within the reserved (1873), 8.

of *laissez-faire*. To use the language of Michel Foucault, property had become a tool of governmentality, a means of ordering whole populations and economies.[11]

In some ways, the stories reflected in the fiction of Norris and the litigation of Newman, and thereby this dissertation, are not surprising. Narratives of demystification, bureaucratization, and commodification of law all derive from 19th-century social thought in the writings of Marx, Maine, Weber, and others.[12] What, then, does this work reconfigure in the current historiography?

First, it is useful to examine the real, empirical, and specific work of legal transformations in a focused study. This both denaturalizes the history of property law and American colonization, and highlights unexpected characteristics of that history. The degree and pace of change in property law was one such characteristic. Up to the beginning of the Civil War, property law in California remained a meaningful and moralistic discourse of colonization. Some settlers were "true" and others "fraudulent," and law provided the means of distinguishing between them. It also provided a language for dispossessing Native Peoples and Californios. However, the energetic operation of property law in resolving ownership disputes, both in the periphery and in the highest levels of the General Government, created uncertainty in the scramble for True Ownership. In the 1850s and early 1860s, law was disruptive to the property market far more than it facilitated the exchanging of property. Relativity of title, combined with the *nemo dat* rule, assured an (effectively) endless inquisition into the validity of ownership claims. Bold claims of "quiet titles" in California, a hallmark of the settler guide literature, were exaggerations meant to assuage European investors and potential emigrants – to the detriment of those on the downside of several antebellum "busts" and "frauds." As the first two Chapters show, radicals in the Land Bar had a coherent plan, represented by the Protection Act of 1856, to set property law on the equitable basis of "use and improvement," a fulfillment of seventeenth-century Anglo colonial thought set in positive law. While the California Supreme Court struck down the Protection Act in *Billings* (1857), on Lockean grounds no less, the settlers seemed to "redeem" their plans in the *Hart* (1860) ruling which gave ownership of the San Francisco waterfront to gentlemanly squatters. Attorney General Black's escheatment of millions of acres of Mexican grants, approved by the US Supreme Court, was still more striking – an enormous act of expropriation carried out for "the People."

The sudden reversals engineered by conservative liberals during the 1860s, in response to the exigencies of war and the unrest at places like Suscol, stood in sharp contrast against this backdrop. The change to a liberal regime was not gradual but revolutionary. In the written discourse, the ruthless liberalism of William Green seemed to emerge from thin air. The speed of commodification – the explosion of wheat production, the extent of railroad grants, the securitization of mortgages – was historically notable. Marx was not exaggerating when he claimed California was experiencing capitalist centralization faster than anywhere else on the globe. In this environment, the cure of law had become worse than the disease of unworthy owners. As Republican railroad lawyer T. G. Phelps argued in an 1875 speech before the Committee on Private Land Claims of the US House, the legal culture of the 1850s should not be

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[11] Michel Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978* (Picador, 2009)
[12] Max Weber and S. N. Eisenstadt (ed.), *On Charisma and institution Building* (Chicago: University of Chicago Press, 1968). [Expand fn]

revived under these new conditions.[13] Since the patent was issued for Las Pulgas Rancho, in modern-day San Mateo County, for example, 748 sub-purchasers now owned approximately 7/8 of the Rancho with a total assessed value of over $2 million.[14] Provisions of the bill before Congress that exempted third parties, "unless they purchased with full knowledge of the fraud perpetrated or the wrong done and they must be held to have done so until the contrary appears," were a "farce," Phelps argued.[15] This was the ultimate logic of the conspiratorial politics of property law: the presumption that every one of those 748 people knew about the great fraud, even though the land had been approved and confirmed by the US Supreme Court, until *they* could positively prove honest purchase. "What I have said in regard to the Las Pulgas would apply to nearly all the slandered land-grant titles of California," Phelps continued, "However earnestly persons who are little acquainted with the history of these grants may denounce them as fraudulent, it will be found, on a thorough examination of the facts, that the courts and law officers of the Government gave them a very scrutinizing examination."[16] In addition to a remonstrance signed by the "leading lawyers of San Francisco," the Land Bar, Phelps also introduced one from the savings banks of San Francisco in which they reported to have $60 million in deposits from "the laboring people of San Francisco" loaned out as mortgages covering the land grants Congress was threatening to re-open.[17] In other words, Congress was threatening the wealth of several classes of people in California *with* property law.

Why the change of heart for the leading lawyers of San Francisco who had made so much money on litigating these land disputes? For one, they had quite enough ongoing work for the railroads. As historian Sean Kammer writes of the bureaucratization of land litigation during the period, the "Northern Pacific [Railroad] alone was party to more than 3000 formal land contests."[18] Frederick Billings, the prominent San Francisco attorney who won the case bearing his name, was for some time President of the Northern Pacific (hence the name of Billings, Montana). Further, there was a real sense that the work of allocating ownership had been completed, that the land had been redeemed to its True Owners. Phelps reported that, as far as the land officials were concerned, no more than eight grants out of the nearly 800 confirmed still had any question regarding their validity, and none of those eight were being "attacked" by Congress or the Justice Department. Once the Board of Commissioners, the Federal Courts, the United States Supreme Court, and the General Land Office had spoken on an issue – to say nothing of California courts and land officials – who else was there to appeal to? Settled adjudication became a bulwark against relativity of title, though plenty of contests remained, especially in Southern California, which was only fully colonized by Americans beginning in the 1880s. (In this sense, the 1879 Constitution marked the end of a phase of Anglo colonization in Northern California.) At a conceptual level, the reign of the state of nature had ended and the reign of positive law had begun. That the countermovement of anti-monopoly radicals failed to produce substantial changes in property law or to halt the capitalist advance should perhaps not be surprising given the real force and robust political economic logic of the liberals. Like Presley,

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[13] T. G. Phelps, "Argument of T. G. Phelps, of California, Before the Committee on Private Land Claims of the House of Representatives: Against Opening the Renewed Litigation of Mexican Land Grant Titles Which Have been Finally Adjusted," (1875?)
[14] Ibid, 21.
[15] Ibid, 22
[16] Ibid, 23.
[17] Ibid, 27.
[18] Kammer, 393.

California had crossed a political economic threshold that could only be reversed with mass violence.

On violence, this dissertation has endeavored to highlight force in the narratives of demystification and commodification of property. Throughout the period covered in this work, California colonization was genocidal with respect to Indigenous Californians. The process of commodification, at Suscol for example, included that logic of elimination, the removals of Native Peoples, and the nullification of their claims to land. Genocidal policy was not incidental to the white egalitarian vision of New California but central to it. Their plans depended on a lack of law and of people in the State of Nature. After 1880, some settlers still organized and fought to the death, as in the incident at Mussel Slough in 1880 which killed seven and served as inspiration for Norris's fictional struggle, but no volcano ever erupted among white settlers. Large-scale violence did continue between Native Californians and Americans through the Modoc War of 1872-73. However, as historian Benjamin Madley argues, this represented the end of organized California Indian resistance to Anglo colonization and was also the last of the large killing campaigns directed by the US Army or the California Militia. Order now reigned. As the journalist Charles Nordhoff wrote of Indigenous Californians in 1872, while staying on the privatized Tejon Rancho run by Indian Agent E. F. Beale, "These people, of whom California has still several thousand, are a very useful class."[19] The "hostile Indians" of property jurisprudence had been eliminated. As discussed in Chapter Three, the legitimacy of reservations as such continued to be disputed and consolidation and privatization continued. Indeed, with the Federal policy of allotment through the Dawes Act of 1887 commodification became the stated policy of the Government with respect to Native property.[20]

As discussed at the close of Chapter Four, force presented a conceptual legal problem in property law. If force could establish legitimate ownership claims, then it could continue to establish them as a matter of course. With mobs of unemployed Workingmen roaming San Francisco this was a frightening possibility to the legal establishment, card-carrying members of the bourgeoise and the avowed enemies of anti-legal radicals since the 1840s. Use and improvement – "the spirit of industrialism" to quote Bancroft – provided a more principled grounds for Pacific colonization, as it had for Atlantic colonization two hundred years prior, but it was also destabilizing, the very grounds for redistributive plans. Thus, the California constitution of 1879 explicitly rejected occupation and improvement as a direct source of title (without an authorizing statute for example) and the *Frisbie* (1869) case brought Federal Pre-Emption law fully under bureaucratic control. Naked squatting was no longer a legitimate method of land acquisition. What, then, was left to ground property? Legal positivism and the market. While this view found acceptance among the judicial establishment, usage and natural law continued to hold outsized importance in the settler *nomos*, not only in California but throughout the Angloworld where George's ideas were popular and in wide circulation during the close of the nineteenth-century.

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[19] Charles Nordhoff, *California, for Health, Pleasure, and Residence: A Book for Travellers and Settlers* (New York: Harper & Brothers, 1874 [1872]), 155.

[20] See, e.g., Valerie Sherer Mathes and Phil Brigandi, *Reservations, Removal, and Reform: The Mission Indian Agents of Southern California, 1878-1903* (University of Oklahoma Press, 2018). For a discussion of allotment in Oklahoma see Frymer, *Building an American Empire* (2017).

As suggested by the epigraph above, George took several lecturing/preaching tours through Scotland, supported by the Scottish Land Restoration League, a Georgist political party opposing enclosures.[21] In 1881-2, George pitched his support behind the Irish Land League Movement, speaking for a body of Irish radicals in Dublin despite some fear he would be arrested by British authorities – which he eventually was.[22] "It is not merely a despotism," George wrote of the British government in Ireland, "it is a despotism sustained by alien force, who look upon the great masses of the people as intended but to be hewers of their wood and drawers of their water."[23] Soon, copies of George's pamphlet "The Irish Land Question" and a cheap edition of his book *Progress and Poverty* circulated widely throughout the "masses" of Great Britain, and soon spread further through the British Empire. As George noted in September 1882, "The cheap edition is going off well. One house in Melbourne took 1,300 copies and 300 went to New Zealand."[24] A twenty-thousand-unit printing of *Progress and Poverty* soon followed, just as George returned to New York. One notable characteristic of George's lectures abroad was their overtly Christian nature. In a lecture on Moses given in Glasgow in 1884, George linked modern Land Monopoly to the Exodus story. "Everywhere in the Mosaic institutions is the land treated as the gift of the Creator to His common creatures, which no one has the right to monopolise," George wrote, "Everywhere it is, not your estate, or your property, not the land which you bought, or the land which you conquered, but 'the land which the Lord thy God giveth thee.'"[25] These were old themes in land reform literature, but quite notable for their great difference with George's secular and political economic single tax plan. While still resonant with the Anglophone public, the *nomos* of natural legalism held little sway in legal circles leaving a disconnect between the means, taxation, and the ends, justice. In this way, one can see how political and legal developments in the Pacific Rim returned from the colonial periphery to the metropole.

Shared legal history provided the logic for Georgist ideas to circulate throughout the world, but their popularity points to the underlying processes of commodification within the globalizing system. As historian Richard Boast writes of New Zealand's Native Lands Acts (1862-3), which extinguished customary titles and created alienable Māori freehold land tenures, "Strikingly similar policies can be found all around the Pacific rim at more or less the same time – in, for example, Hawai'i, the United States, and practically everywhere in the newly-independent Spanish American republics."[26] In the latter states, as in Alta California during the 1830s, this took the form of secularization of mission properties and their liberal dispensation among large grantees, who tended to form a landed oligarchy. As in California, commodification entailed a violent process of dispossession, as in Argentina's long Conquest of the Desert (1867-1883), but also comparatively mundane acts of property reform. For example, in Hawai'i, the major movement toward commodity land was made in 1874 with the passage of a liberal mortgage law that made the *kuleana* homestead titles foreclosable and alienable, bringing them into the market under control of *Haole* (white) capitalists.[27] As one might expect, the direct

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[21] Henry George, "Thy Kingdom Come" (1889) in *Our Land and Land Policy*, 279-293.
[22] George, Jr., *The Life of Henry George* (1900), 358-378.
[23] Ibid, 359, 396.
[24] Ibid, 397.
[25] George, "Moses" (1884), 12.
[26] R. P. Boast, "The Ideology of Tenurial Revolution: The Pacific Rim 1850-1950," *Law & History* 1 (2014), pp. 137-157, 140.
[27] Robert H. Stauffer, *Kahana: How the Land was Lost* (Honolulu: University of Hawai'i Press, 2003).

connections between California and Hawai'i transformations were especially pronounced.[28] (The fact that the 1893 republican revolution in Hawai'i was accomplished by a Vigilance Committee was not incidental.) Similarly, California shared a complicated history with British Columbia, dating to the Fraser River Gold Rush in 1858, in which a young Henry George and thousands of other Californians took part.[29] As argued by Daniel Marshall, the differences between American colonial policy, particularly its genocidal nature, and its British counterpart were pronounced in the Fraser River. However, as the nineteenth-century progressed the legal classes of the regions also shared a common ideology of law. As John McLaren argues, they shared commitments to "political and social conservatism," "economic liberalism," and "a spirit of judicial activism."[30] Racial ideology, particularly anti-Chinese racism, spread along these same channels of people, goods, and ideas.[31] As Boast notes, one could continue indefinitely in this vein.[32]

Countermovements too proliferated, part of the great "double movement" described by Karl Polanyi. Utopian re-colonization efforts of multiple types attempted to escape the processes of commodification or to otherwise control and channel it. Lansford Hastings, for example, reprised his work on California with one on Brazil, where he supported a pro-slavery Confederate colony.[33] Racial socialist William Lane's "New Australia" colony in Paraguay represented a similar impulse.[34] Albert Kimsey Owen's Topolobampo colony in Sinaloa was an unimaginative utopia but nonetheless an effort in the same vein and representative of the tensions in settler colonialism. As Owen wrote in 1897, "I love to dream of a city where the producer will own his or her own products; and where the city will hold in trust all that is common to the happiness and usefulness of all — of a city where private property will be held sacred, and where public property will never be allowed to be monopolized by and for the benefit of a few."[35] Topolobampo dissolved into infighting over the way forward, as capitalists challenged Owen's producerism: "Cheap land, cheap labor, and cheap taxes are the items that can make the colony successful," wrote General A. J. Streeter of the Kansas Sinaloa Investment Company, "The location is also unsurpassed for raising cotton and coffee. One of the rocks on which the Owen's Colony split was the rule requiring that $3.00 should be the price of a day's work. This was suicidal, when Indian labor could be had at 25 cents a day. The new colony will be founded on individual ownership and individual enterprise"[36] Suitably, the colony foundered upon an ownership dispute over an irrigation ditch.

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[28] Henry Knight Lozano, *California and Hawai'i Bound: U.S. Settler Colonialism and the Pacific West, 1848-1959* (University of Nebraska Press, 2021).
[29] Daniel Marshall, *Claiming the Land: British Columbia and the Making of a New El Dorado* (Vancouver: Ronsdale Press, 2018).
[30] John McLaren, "The Early British Columbia Judges, the Rule of Law, and the 'Chinese Question': The California and Oregon Connection" in John McLaren, Hamar Foster, & Chet Orloff (eds.), *Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West* (Regina: University of Regina, 1992), 244-6.
[31] Mae Ngai, *The Chinese Question: The Gold Rushes and Global Politics* (W. W. Norton & Co., 2021).
[32] Should I have the opportunity to turn this dissertation into a monograph it is one of many threads I wish to pull.
[33] Lansford W. Hastings, *The Emigrants Guide to Brazil* (1867).
[34] See, e.g., Gavin Souter, *A Peculiar People: The Australians in Paraguay* (Angus and Robertson, 1968).
[35] Albert Kimsey Owen, *A Dream of an Ideal City* (London: Murdoch & Co., 1897), 9.
[36] The Daily News" Denver, July 22, 1894, Box 2, Correspondence 1880 – n.d., Albert Kimsey Owen Papers, Huntington Library, San Marino, CA.

From this brief and scattered review one can see the scope and reach of the octopus (or, if you prefer, Richard White's "men in octopus suits") as the nineteenth-century neared its end.[37] While accepting that these disparate transformations of property from Ireland to Hawai'i to California were particular, ambiguous, and complex – to use the frame of Critical Legal History – they also shared a great deal both directly and by analogy. This dissertation suggests the continued usefulness of Marxist Legal History as a lens in studying the interplay of law, settler colonization, and capitalist development across sites and temporalities. The latent and realized violence of law, class formation, the wealth distribution, cheap commodities, and the ideology of law, among other themes, all emerged from the history told here. Likewise, the narrative reveals the fundamentally racial conceptions of law and ownership carried by American colonists to their various Promised Lands. Indeed, this was one of several characteristics of property law thought that seemingly did not change over the four decades studied here. For the many egalitarian goals of reformers, they imagined common law as the exclusive regime of the "Teutonic race" and consigned Indigenous peoples to the state of nature, to be eliminated along with their titles. As the obscure reverend James B. Converse wrote in 1889, "[Esau's] title deeds to Mount Seir were written in blood; for they were not the original inhabitants of their country, but they had exterminated their predecessors."[38]

The colonization of New California followed its own, often nightmarish, path that straddled pre-modern law and modern law. It saw the rise, fall, and reformation of natural legalism alongside the rapid consolidation and jurispathic force of liberalism. Materially, the legal conflicts described herein allocated landed wealth, a distribution that in a quite literal sense persists through chains of title. The tremendous inequality of wealth and the persistent "housing crisis" of contemporary California, as well as the conservative force of property law, can be chained, link by link, with the first four decades of American colonization. In the conflicts over taxation, the clearances of homeless camps, and the ever-present, seemingly inescapable, concern with property values and prices, one can see the specters of the past, of killing, using, and owning.

[37] Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: Norton, 2011).
[38] James B. Converse, The Bible and Land (Morristown: Rev. James B. Converse, 1889), 130.

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