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When in 1848 the United States acquired California from Mexico by the Treaty of Guadalupe-Hidalgo, the Americans promised that the private-property rights of the Mexicans would be "inviolably respected."[1] By this guarantee, the United States bound itself to absorb a vast system of Spanish and Mexican land grants based on a conception of land ownership radically different from the American notion of precisely defined, carefully documented, and intensively developed estates.

By the time that the United States took possession of California, Spanish and Mexican officials had made approximately 750 land grants to individuals—grants totalling between thirteen and fourteen million acres.[2] Individual grants were as large as eleven square leagues, or about forty-nine thousand acres.[3]

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[1]Treaty With the Republic of Mexico, February 2, 1848, article 8, 9 Stat. 922 [hereafter cited as Treaty With the Republic of Mexico].

[2]Paul Wallace Gates, "Adjudication of Spanish-Mexican Land Claims in California," *Huntington Library Quarterly* 21 (1958), 213, 215 [hereafter cited as Gates, "Adjudication of Spanish-Mexican Land Claims"].

[3]Section 12 of the Mexican Colonization Law of 1824 stated that no one person would be allowed to obtain more than one square league of irrigable land, four square leagues of land "dependent on the seasons," and six square leagues of land for raising cattle. Decree of August 18, 1824, respecting colonizations, Section 12, in John Arnold Rockwell, *A Compilation of Spanish and Mexican Law* (New York, 1851), 454 [hereafter cited as Rockwell, *Spanish and Mexican Law*].

The vast majority of them had been made in the 1830s and 1840s by Mexican governors of California. The ten square leagues that John C. Frémont acquired constituted a grant made in 1844.

In order to determine the status of each of the Spanish and Mexican land grants, on March 3, 1851, Congress passed "An Act to ascertain and settle the private Land Claims in the State of California."[4] This law established a commission, consisting of three commissioners appointed by the president, before which every person claiming land under a Spanish or Mexican grant was required to appear in order to defend his or her claim against the United States. Either the claimant or the United States could appeal an unfavorable decision to the United States District Court, and then to the United States Supreme Court. All claims that were finally rejected, as well as claims that were not presented to the commissioners within two years of the act's passage, would become part of the public domain of the United States.

Congress listed a number of criteria by which the commission and courts should evaluate the validity of the grants: "[T]he commissioners herein-provided for, and the District and Supreme courts, in deciding on the validity of any claim brought before them under the provisions of this act, shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."[5]

Of all the proposed versions of the law, the one that passed was the least favorable to the claimants, and thus most favorable to the new American settlers in California, who desired the land themselves.[6] It compelled all grantees, even those with long-standing and indisputably valid claims, to defend their grants against the United States government, potentially all the way to the Supreme Court on the other side of the continent.

Nevertheless, the criteria by which the tribunals were to evaluate the claims were not weighted against the claimants. The Treaty of Guadalupe-Hidalgo guaranteed the security of Mexican private-property rights in the United States' newly acquired territories.[7] The law of nations—the unwritten, cus-

[4]An Act to ascertain and settle the private Land Claims in the State of California, ch. 16, 9 Stat. 631 (1851) [hereafter cited as 1851 Land Claims Act].

[5]Ibid.

[6]See note 39 infra.

[7]The treaty stated that "Mexicans now established in [American territories acquired from Mexico by the treaty] . . . shall be free to continue where they

tomary law that regulates relationships between countries—similarly protected the rights of private-property holders in the defeated nation.

Neither source of law, however, resolved which claimants had valid property interests in the first place. In order to make this determination, the commissioners and judges were compelled to turn to the other criteria enumerated by the Land Claims Act of 1851: "the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States."[8]

The act thus generated a critical tension between written law, on the one hand, and equity, usage, and custom, on the other. This tension would define the legal history of the Mexican land claims in California. The essential weakness of the 1851 act was its failure to provide more detailed guidance to the commissioners and judges on how to apply these often conflicting legal notions. Whether a decision was made for or against a claimant often depended entirely on which of these criteria were emphasized.

The tension had two facets, one cultural and the other temporal. The cultural aspect was rooted in the distinct difference between American and Spanish-Mexican approaches to land titles, land grants, and land use in the New World. The statutes regulating the United States' allocation of its public lands to private citizens through preemption rights required careful surveys, accurate descriptions, and full records of all the proceedings.[9] When disputes arose concerning title to public lands in the United States, judges resolved them by turning to these

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now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof and removing the proceeds wherever they please." Art. 8. It also promised, "In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States." Art. 8. The treaty also stated that Mexicans in the territories who chose to become American citizens would, while they were waiting, "be maintained in the free enjoyment of their . . . property." Art. 9. Treaty With the Republic of Mexico, supra note 1.

[8]The Supreme Court decisions to which the statute refers are primarily those arising under an 1824 act concerning French and Spanish land claims in Arkansas and Missouri and those arising under later laws extending the 1824 act to Florida, Louisiana, Alabama, and Mississippi. See text accompanying notes 42-47 infra.

[9]See, e.g., An Act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights, ch. 16, 5 Stat. 453 (1841); An Act to provide for the Survey of the Public Lands in California, the granting of Preemption Rights therein, and for other purposes, ch. 145, 10 Stat. 244 (1853).

statutes and to prior court decisions interpreting and applying them.

Similarly detailed Spanish and Mexican laws had regulated the distribution of land grants in California.[10] During the Mexican era, when most of the grants were made, the Colonization Law of 1824 and the Regulations of 1828 governed the process in all of its particulars.[11] These laws delineated the precise procedure the governor and the grantee were required to observe in order to complete a valid land grant.

The Regulations of 1828 required a private person soliciting land to address a petition to the territorial governor. The petition was to state the petitioner's name, nationality, and profession and to describe, by means of a map (a *diseño*), the land requested. The governor, either himself or through consultation with the local municipal authority (the *alcalde*), was then to determine whether the petitioner and the land satisfied the various requirements of the Colonization Law of 1824, including requirements that the land be vacant and that the petitioner be a person of good standing in the community. If the governor were satisfied that the requirements were met, he could then issue the grant (the *concedo*). The grant was to designate the time within which the grantee was bound to cultivate or occupy the land. This period was typically one year.

The grant was not definitely valid until it received approval from the territorial deputation or the departmental assembly, to whom the governor was required to send the documents. If the deputation or assembly failed to approve the grant, the governor could appeal its decision to the supreme government at Mexico City. If the grant were approved, the governor was to sign and deliver to the grantee a formal document to serve as the title. Finally, the colonist, having fulfilled the grant's cultivation and occupation requirements, could go to the *alcalde* to receive final delivery of possession of the land, in a public ceremony. The Regulations required that a record (*expediente*) of all the petitions and grants be preserved in the government archives.[12]

Although the Mexican statutes were as clear and detailed as American public land laws, written law did not play the same role in the Mexican legal system as it did in the American one. Spanish and Mexican officials generally did not treat written

[10]See R. Aviña, *Spanish and Mexican Land Grants in California* (Salem, N.H., 1976).

[11]Colonization law of 1824, supra note 3; General rules and regulations for the colonization of territories of the republic—Mexico, November 21, 1828 [hereafter cited as Regulations of 1828] (Rockwell, *Spanish and Mexican Law*, supra note 3 at 453).

[12]Colonization Law of 1824, and Regulations of 1828, supra note 11.

law with the same degree of sanctity that their American counterparts did, instead relying heavily on customary law, a largely unwritten body of principles derived from ethical and practical considerations and from prior responses to similar problems. One scholar explains how Spanish and Mexican authorities applied customary law to the granting of land in California: "Customary law was made up, not only of the decisions of *alcaldes* and governors in litigation, but also of the acts of these officials in response to petitions for land. Customary law was the totality of what was actually done in response to a conflict or a petition, not what was supposed to be done. Sometimes the laws and customs coincided and there was no conflict between the two. But many times there was a conflict, often because the local authorities did not know about the law in question."[13]

The most striking aspect of the use of customary law in Spanish and Mexican jurisprudence was the manner in which custom could trump written law when a conflict between them occurred. According to a nineteenth-century authority on Spanish law, "Legitimate custom acquires the force of law not only when there is no law to the contrary, but also when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. Hence it is said that there may be custom without law, in opposition to law, and according to law."[14]

The Spanish and Mexican authorities in California had never rigorously observed the regulations governing the land-grant procedures. As noted by William Carey Jones, an attorney who prepared a report on the Mexican land grants for the Department of the Interior, "the law of custom, with the acquiescence of the highest authorities, overcame . . . the written law."[15] The historian Hubert Howe Bancroft also recognized this fact, albeit from a typically Anglo-American view:

> In few if any cases were all these formalities complied with, for lands were plentiful and cheap, and the people and authorities indolent and careless of details. . . . Sometimes there was no diseño . . . no approval of the assembly. . . . There was usually no formal act of juridical possession, often no survey, and never a careful or accurate one. Boundaries were very vaguely described, if at all. . . . There was no definitely prescribed

[13]Malcolm Ebright, Introduction, in *Spanish and Mexican Land Grants and the Law* 5 (1989).

[14]Escriche's *Derecho Español*, quoted in *Slidell v. Grandjean*, 111 U.S. 412, 421 (1884).

[15]William Carey Jones, *Report on the Subject of Land Titles in California* (1850), 38 [hereafter cited as Jones, *Report on Land Titles*].

> form for grants, nor was there any uniformity of conditions, which were sometimes omitted. Notwithstanding the apparent irregularities and imperfections of land tenure, . . . it seems clear that under Mexican law and usage the grants were practically held as valid.[16]

When the 1851 Land Claims Act decreed that the commissioners and the courts, in determining the validity of the claims, should be guided by "the laws, usages, and customs of the government from which the claim is derived," it required them to perform a task that most were ill prepared to perform. The problem transcended their lack of knowledge of the Spanish language and their limited exposure to the civil-law tradition. Trained in the definite and precise field of Anglo-American property law, they found it exceedingly difficult to overlook clear violations of written statutes and to approve grants in accordance with Mexican customary law. Moreover, they were entrenched in a positivistic legal tradition in which a spontaneously evolving custom could never abrogate the clear word of the sovereign.[17] They found it much easier, and much

[16]Hubert Howe Bancroft, *History of California* (San Francisco, 1888), 532-33 [hereafter cited as Bancroft, *History of California*].

[17]Custom has been a source of law in the United States since the birth of the country. The most obvious field in which custom creates law is international law. The Supreme Court long ago explicitly recognized that customary "[i]nternational law is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Moreover, custom has played a vital role in the development of the common law since the dawn of English legal history. See Theodore F.T. Plucknett, *A Concise History of the Common Law* (New York, 1956), 307-314 . Indeed, Blackstone defined the common law as an aggregate of "1. General customs . . . . 2. Particular customs . . . [and] 3. Certain particular laws; which by custom are adapted and used by some particular courts." William Blackstone, *Commentaries on the Laws of England*, 4 vols. (Oxford, 1768) 1:67. When the United States absorbed and adapted the English common law, it maintained the notion that custom and usage could identify and create contract and property rights. As recently as 1992, the U.S. Court of Appeals for the District of Columbia Circuit held that "property interests . . . may be created or reinforced through uniform custom and practice." *Nixon v. United States*, no. 92-5021, slip op. at 13 (D.C. Cir., November 17, 1992).

Custom has a noteworthy place in regard to gold in California's history, for the state's 1851 Civil Practice Act contained the provision that "in actions respecting 'Mining Claims,'. . . customs, usages, or regulations, when not in conflict with the Constitution and Laws of this State, shall govern the decision of the action." Civil Practice Act of April 29, 1851, §621. The qualifying clause in this provision is critical, however; while Americans could countenance the formation of law through custom, they could not, with their positivistic, Austinian outlook, imagine custom's abrogating written law. On rare occasions, nineteenth-century American jurists permitted customary rules to trump the common law. See, e.g., *Ghen v. Rich*, 8 Fed. 159, 162 (D. Mass. 1881). Never, however, did they allow custom or usage to void positive

more familiar, simply to cite a section from the Colonization Laws than to research and apply the customary law on the matter.[18]

American judges' disapproval of Mexican customary law was probably symptomatic of the general distaste that nineteenth-century Americans had for both Mexican culture and the Mexican "race." Leonard Pitt has brilliantly described the contemptuous ideas Anglo-Americans had about the Latin-American culture and people they encountered in California.[19] Of the litany of disparaging adjectives that Americans routinely hurled at Mexicans—"thieving," "cowardly," and "lascivious" among them—the most common was "indolent."[20] It is therefore not surprising that some American judges, as well as the historian Bancroft, viewed the priority of custom over written law in Mexico not as a facet of an alternative legal system, but rather as "the lax administration of her laws" and "careless[ness] of details."[21]

The Mexican land-grant system was also characterized by strikingly imprecise borders. Neither the Spanish nor the Mexican government had ever made an official survey of California. Grants were often described in vague terms and by reference to obscure or impermanent landmarks, such as piles of stones or clumps of cactus. Sometimes the governors conveyed a certain amount of land at an unspecified location somewhere within a much broader area. It was to one of these "floating grants" that Frémont laid claim.

If the Mexican authorities were almost nonchalant in their demarcation of land in California, it was because there was

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statutes. This approach persists today. The District of Columbia Circuit, in the decision cited above, found that custom and usage controlled only in the absence of "directly controlling constitutional, statutory or common law requirements." *Nixon v. United States* at 15.

[18]As noted, the 1851 Land Claims Act also directed that adjudicators be guided by "the principles of equity." The inclusion of equity among the guides to decision worked, with Mexican usages and customs, to free the commission and the courts from adherence to strict legal construction of the Mexican laws and grants. In other words, it indicated that the tribunals were not required to invalidate Spanish and Mexican grants when all the technical requirements were not met, if it seemed fair to excuse the requirements. In the context of the Mexican land-grant disputes, the concept of equity largely merged in the decision makers' minds with Mexican usages and customs, and rarely took on independent significance.

[19]Leonard Pitt, *The Decline of the Californios* (Berkeley and Los Angeles, 1970), 14-18 [hereafter cited as Pitt, *Decline of the Californios*].

[20]Ibid.

[21]*Frémont v. United States*, 58 U.S. (17 How.) 542, 576 (Campbell, J., dissenting) [hereafter cited as *Frémont v. United States*]; Bancroft, *History of California*, supra note 16 at 532-33.

simply no reason to be meticulous and precise. Land was abundant and cheap and there were few settlers seeking to tame it. Immigrant American farmers accused the Californios of using the land uneconomically, of "wasting rich pasture land for unchecked herds."[22] The Mexicans, however, who lacked the American urge to strive, to conquer, and to accumulate, responded that they were quite satisfied with their comfortable and relaxed existence.[23] They consequently found no need to bicker over boundaries.

As noted above, there was a chronological as well as a cultural aspect to the tension between written law and custom. The temporal aspect is rooted in the fact that, in 1848, one dramatic moment in California history—its cession to the United States by the signing of the Treaty of Guadalupe-Hidalgo on February 2—was immediately preceded by another—John Marshall's discovery of gold at Sutter's mill on January 24.

After the discovery of gold, an enormous wave of land-hungry settlers poured into the new American territory. These new arrivals, wanting their own property to cultivate or mine, found it unjust that so few grantees should possess so much suddenly valuable territory, much of it unimproved and unoccupied. Moreover, the new Californians, accustomed as they were to the American approach of careful surveys and exact boundaries, bristled at the vagueness of the ranchos' borders. This indeterminacy made it impossible for them to know which land in the vicinity of the grants was public land available for settlement and which land was private property belonging to the grantees.

The conflict between law and custom was thus complicated by the fact that Mexican customs, developed over years of slow growth and minimal pressure on resources, seemed anachronistic after the discovery of gold, the huge influx of people, and the consequent rise in land values. The enormous, vaguely defined, and procedurally imperfect grants were much less troublesome when land in California was not so valuable and highly sought-after. It is possible, if not likely, that the Mexicans' approach to land grants and land use would have radically changed in the years after the discovery of gold, if they had retained the territory.

The law of nations dictated that private citizens in California should have the same property rights under their new rulers that they would have had if they had continued to live under their former sovereign.[24] The Treaty of Guadalupe-Hidalgo and

[22]Pitt, *Decline of the Californios*, supra note 19 at 87.

[23]Ibid. at 12.

[24]Emmerich de Vattel, *The Law of Nations; Or Principles of the Law of Nature*, trans J. Chitty (Philadelphia, 1852), 3: ch. 8, §200.

the 1851 Land Claims Act seemed, in fact, to embrace this principle.[25] But the task of donning the mantle of the Mexican authorities proved to be an extraordinarily challenging (and often distasteful) one for American judges. Not only did they have to apply a system of law that included notions of custom in radical conflict with their own legal philosophy, but they also had to imagine how that legal system would have responded to changes that occurred in California after the Americans assumed power.

THE MARIPOSA GRANT AND JOHN C. FRÉMONT

The controversy surrounding John C. Frémont's Mariposa grant epitomizes the tensions inherent in the scheme that the United States devised to settle the ownership of the Spanish and Mexican land grants in California. The grant was obviously procedurally flawed; there was no *diseño*, no survey, no assembly approval, no definite grant from the governor to serve as a title, and no delivery of judicial possession. Moreover, the conditions of occupation and improvement remained unfulfilled for years after the initial conveyance. The borders were completely indeterminate, for Mariposa was a "floating grant"—a grant whose total area and general location were indicated but whose precise boundaries were not specified.

To add to the controversy, Mariposa was one of the few Mexican grants with substantial mineral wealth and one of only three located on the gold-rich "mother lode."[26] In the 1850s it was considered "one of the most valuable tracts of land, for its size, in the world."[27] The publicity surrounding the Mariposa grant led many Americans, according to Bancroft, "to picture the whole extent of California as a succession of gold mines,"[28] and consequently increased their distaste for the entire Mexi-

[25]In the Senate debates on the 1851 Land Claims Act, the senators seemed generally to accept the principle that "Under the operation of the principle of the law of nations and the stipulations of the treaty, [the Government of the United States] acquired only what was the domain of the ceding Government." *Congressional Globe*, 31st Cong., 2d sess., 372 (statement of Sen. Berrien). "All that we have stipulated for [in the treaty] is, that the rights which they have acquired under the Mexican government should be preserved to them by the United States." Ibid. at 375.

[26]Paul Wallace Gates, "The Frémont-Jones Scramble for California Land Claims," *Southern California Quarterly* 56 (1974), 13, 24 n.33.

[27]John Bigelow, *The Life and Public Services of John Charles Frémont* (New York and Cincinnati, 1856), 379 [hereafter cited as Bigelow, *John Charles Frémont*].

[28]Bancroft, *History of California*, supra note 16 at 535.

can land-grant system, with its apparently carefree distribution of enormous plots of priceless land to a privileged few people.

The area long known as "Las Mariposas" was about 120 miles east of San Francisco, in a mountainous area west of what is now Yosemite National Park, along the banks of the Agua Fria and Mariposas rivers. Until the end of California's Mexican era and the invasion of thousands of rapacious gold seekers, this sublimely beautiful region remained the unspoiled domain of the Chauchiles Indians.[29] In the words of the editor of the *California Courier*,

> There the waters are as bright as moonbeams, and come down from the mountain springs as cool as the sheeted snow. Pine trees, six or eight feet through, run up as straight as an arrow, two hundred to the sky, and the wide-spreading oak will shelter a whole tribe under its branches. Although the hills are covered with heavy snows, the temperature of the valleys is as mild as those of Switzerland, and the streams are full of salmon, and the crimson clover fills the whole air with a sweet perfume.[30]

In 1844 Manuel Micheltorrena, the Mexican governor and commandant-general of the department of the Californias, granted Juan Alvarado, his predecessor, ten square leagues, or almost seventy square miles, of land in the Mariposas valley. In his petition, Alvarado did not specify the precise borders of the land he was requesting, because "the difficulty of being a wilderness country on the confines of the wild Indians" made it impossible to prepare an adequate survey and map.[31] Without the benefit of a *diseño*, Micheltorrena granted Alvarado "ten square leagues within the limits of the Snow Mountain, and the rivers known by the names of the Chanchilles, of the

[29]The Chauchiles Indians were known alternately as the Cauchiles, Chauchila, Chauchili, Chaushila, or Chaushilha. The name and its variations were apparently used to designate both a Yokuts tribe and a division or group of the Miwok Indians living in the region of the Chowchilla (or Chanchilles) River. See A.L. Kroeber, *Handbook of the Indians of California* (1925; reprint, St. Clair Shores, Mich., 1972), 43, 484-85.

After the annexation of California, Americans began to confiscate the lands of the Indians of the region. A few groups of Sierra Miwok were removed to the Fresno area, but most remained in rancherias scattered throughout the foothills of the Sierra Nevada. William C. Sturtevant, ed., *Handbook of North American Indians*, vol. 8, *California*, ed. Robert Heizer (Washington, 1978), 401.

[30]Quoted in Bigelow, *John Charles Frémont*, supra note 27 at 381.

[31]Petition from Juan Alvarado to Governor Michael Micheltorrena (February 23, 1844), reprinted in *Frémont v. United States*, 58 U.S. (17 How.) 542, 544 (1854).

Juan Alvarado was the original grantee of Mariposa, but never fulfilled the conditions to perfect the grant. (California State Library)

Merced and the San Joaquin."[32] The area embraced by these exterior boundaries contained nearly one hundred square leagues.

Micheltorrena made the grant subject to the approval of the departmental assembly and to a number of conditions, which included the following:

> 2. [The grantee] shall enjoy the same freely and without hindrance, destining it to such use or cultivation as may most suit him; but he shall build a house within a year, and it shall be inhabited.

[32]Grant of the Mariposas from Micheltorrena to Alvarado (February 29, 1844), reprinted in *Frémont v. United States*, 58 U.S. at 545-46.

> 3. He shall solicit, from the proper magistrate, the judicial possession of the same, by virtue of this patent, by whom the boundaries shall be marked out, on the limits of which he (the grantee) shall place the proper landmarks.
> 4. The tract of land granted is ten sitios de ganado mayor (ten square leagues), . . . The magistrate who may give the possession shall cause the same to be surveyed according to the ordinance, the surplus remaining to the nation for the proper uses.
> 5. Should he violate these conditions, he will lose his right to the land, and it will be subject to being denounced by another.[33]

Because of the dangers posed by the Chauchiles, Alvarado never even set eyes on the tract, let alone settled it. According to Alvarado's later testimony, in 1844 Micheltorrena agreed to establish a military post near the land in order to take it from the Indians by force. The Indians forced the soldiers to flee the post. Alvarado further testified that in 1845 he, himself, organized the cavalry to take the Mariposas, but that he abandoned this plan in order to devote his attention to the imminent war against the United States.[34]

Alvarado thus never occupied the land. He never solicited judicial possession from the *alcalde*, who, consequently, never had the land surveyed. The assembly never approved the grant, since the governor could not submit it without a *diseño*. In short, Alvarado did not fulfill any of the conditions required to perfect the grant by the Mexican colonization laws and by the terms of the grant itself.

In 1847 Frémont, who, in his own words, "had always intended to make my home in the country,"[35] decided to purchase a plot for the purpose. By that time Frémont, who would later be a presidential candidate and serve as a major general and commander in the Union Army in the Civil War, was already something of a celebrity. He had conducted three acclaimed explorations of the Far West for the American government. During his third expedition, war with Mexico had broken out, and Frémont, who was then a captain in the army, had helped to conquer California. Commodore Robert Stockton, the ranking United States officer in California, had promoted him

[33]Ibid.

[34]*United States v. Frémont*, Hoffman's Land Cases at 20, 21 (N.D. Cal. 1853) [hereafter cited as *United States v. Frémont*].

[35]Frémont to Jacob R. Snyder (December 11, 1849), reprinted in Bigelow, *John Charles Frémont*, supra note 27 at 392.

John Charles Frémont, c. 1850 (Library of Congress)

to lieutenant colonel, and then to governor of California. When General Stephen Kearny challenged Stockton's supreme authority, Frémont had chosen to side with Stockton. The federal government had then officially confirmed Kearny's authority, and Frémont had been arrested and ordered to Washington to face a court martial.[36]

Before he left, Frémont picked out a lot in the hills behind San Francisco, overlooking the bay, where he intended to build

[36]In 1848 Frémont was found guilty of mutiny, disobedience, and conduct prejudicial to military discipline. President Polk canceled the punishment, but Frémont, bitter, resigned his commission.

a house and cultivate a farm. He gave three thousand dollars to his friend Thomas Larkin, the American consul at Monterey, and asked him to purchase it for him. However, Larkin was so impressed with the site that he decided to buy it himself, and used the sum Frémont had left to buy the Mariposa estate for him, instead. On February 10, 1847, Alvarado executed a general warranty deed for the property to Frémont.

At the time, Mariposa was an isolated and apparently worthless tract patrolled by Indians.[37] Frémont was outraged by Larkin's betrayal, and consulted his father-in-law, Senator Thomas Hart Benton of Missouri, about instituting a lawsuit. In the meantime, he apparently employed an agent to cultivate and inhabit the estate, but the Indians drove the agent away three times in the spring and summer of 1847. Frémont made no other effort to survey, occupy, or cultivate his new property for the next two years.

Soon after the signing of the Treaty of Guadalupe-Hidalgo, Frémont learned that gold had been discovered on the Mariposa estate. Larkin's duplicity suddenly turned out to be an extraordinary stroke of luck. Frémont halted his plans to annul the purchase and in 1849 settled on the land, where he began to develop mines. Unfortunately, some two or three thousand miners had the same idea. By the end of the year they were swarming over Mariposa, either disregarding Frémont's claim, or gambling that they were establishing themselves outside what would eventually be the official boundaries of his floating grant. Frémont did not disturb them, at least for the time being. He remarked:

> They have worked [the mines] freely; no one has ever offered them the slightest impediment, nor have I myself, ever expressed to anyone or entertained an intention of interfering with the free working of the mines in that place [Mariposa]. . . . I have always supposed that at some future time the validity of the claim would be settled by the proper courts. I am satisfied to await that decision . . . and in the meantime to leave the gold, as it is now, free to all who have the industry to collect it.[38]

California was admitted to the Union on September 9, 1850. The next day, Frémont and William Gwin presented their cre-

[37]Frémont passed through the Mariposas on his third expedition in 1845. On the night he was encamped there, the Chauchiles killed six men from another party encamped nearby.

[38]Frémont to Snyder (December 11, 1849), supra note 35.

dentials as the state's first senators. The two senators' terms were to be staggered, and Frémont had drawn the lot for the short term, which would last only until the end of 1851. In the twenty-one days until the end of the session, he introduced a number of bills concerning his state, including his own version of the Land Claims Act.[39] When the session ended, he went back to California, where he caught a fever that prevented him from returning to Washington for the next session. In 1851 he ran for the Senate again, supported by the antislavery Free State Party, but the pro-slavery forces succeeded in defeating him. He retired to Mariposa and dedicated himself to developing the estate.

FRÉMONT'S CLAIM IN THE DISTRICT COURT

On January 21, 1852, Frémont filed his claim before the board of land commissioners in San Francisco. On December 27, the board confirmed the claim. In September 1853, United States Attorney General Caleb Cushing informed the commissioners that the government would appeal their decision to the United States District Court for the Northern District of California. On January 7, 1854, Judge Ogden Hoffman of the district court reversed the commissioners' decision, rejecting Frémont's claim.[40]

District Attorney S.W. Inge, arguing the case for the government, maintained that the claim was invalid because its boundaries were so vague that the grant was never segregated from the public domain, and asserted that Alvarado had failed to perfect his title by fulfilling the grant's condition that "he shall build a house within a year, and it shall be inhabited."[41]

[39]The Land Claims Act that finally passed was sponsored by Frémont's co-senator from California, William Gwin. Frémont offered a bill that permitted claimants to appeal adverse decisions, but not the United States. When Senator Foote, from Mississippi, accused Frémont of acting to protect his interest in Mariposa, Frémont demanded a retraction, and a small scuffle ensued. Senator Thomas Hart Benton, Frémont's father-in-law, offered his own bill, which provided for easy confirmation of most claims by a recorder of land titles and the adjudication of only suspicious grants in court. In order to demonstrate Frémont's, and his own, disinterestedness, Benton provided in his bill that all judicial decisions in favor of the claimant would be conclusive against the United States except for a decision in favor of Frémont. *Cong. Globe*, 31st Cong., 2d sess., 1851, 633.

[40]*United States v. Frémont*, supra note 34 at 20.

[41]Ibid. at 23. Among the attorneys representing Frémont was William Carey Jones, his brother-in-law, who had, in 1850, written the already-mentioned Report on the Subject of Land Titles in California. In it, he declared that the claims were "mostly *perfect titles* . . . and those which are not perfect . . . have the same *equity* as those which are perfect." Idem, *report on Land Titles*, supra note 15.

In his opinion, Hoffman retreated from the challenge of interpreting and applying Mexican "laws, usages, and customs" himself. Instead, he relied almost entirely on another, more familiar criterion enumerated by Congress in the 1851 Land Claims Act, namely, "the decisions of the Supreme Court of the United States."[42] This provision referred primarily to the Court's decisions arising under an 1824 act regulating the settlement of French and Spanish-derived private claims in Missouri and Arkansas, and subsequent laws that extended the act's provisions to Louisiana, Florida, and parts of Alabama and Mississippi.[43]

The 1824 act differed from that of 1851 in that it did not require all claimants to test their claims. Instead, it compelled only those had not yet perfected their titles when the United States assumed sovereignty to establish the validity of their claims. Furthermore, it did not create a board of commissioners, but assigned all the cases to the district court, with an appeal to the Supreme Court.[44]

Despite these distinctions, however, the cases that arose under the 1824 act were similar enough to the California disputes for the precedential value of the older Supreme Court decisions to be apparent. The grants in the Southeast, particularly the Spanish ones, were similar to the Spanish and Mexican grants in California, and the Court had evaluated these claims using essentially the same criteria as those listed by the 1851 act.[45]

Unfortunately for the claimants, the Supreme Court had been no better equipped to evaluate Spanish customary law regarding grants in Louisiana or Florida than it was regarding claims in California. In its first opinion applying the 1824 act,

[42]1851 Land Claims Act, supra note 4.

[43]Act of May 26, 1824, ch. 173, 4 Stat. 54 (Missouri and Arkansas Land Claims) [hereafter cited as 1824 Land Claims Act]; Act of May 23, 1828, ch. 70, 4 Stat. 284 (Florida); Act of June 17, 1844, ch. 95, 5 Stat. 676 (Louisiana, Mississippi, Alabama).

[44]1824 Land Claims Act, supra note 43 at §§ 1, 2.

[45]It is not clear that the 1824 act actually required the courts to consider the usages and customs of the government under which the grant had originated. The statute instructs them to "settle and determine the question of the validity of the title, according to the law of nations, the stipulations of any treaty, and proceedings under the same; the several acts of Congress in relation thereto; and the laws and ordinances of the government from which it is alleged to have been derived." 1824 Land Claims Act, supra note 43 at § 2. The statute referred to the "laws, usages, and customs of the government under which the [claim] originated," in a different section and a different context. Ibid. at § 1. Nonetheless, in the first case in which it considered a claim under the 1824 act, the Supreme Court held that it was bound to consider customs and usage, as well as written law. *United States v. Arredondo*, 31 U.S. (6 Pet.) 689, 714 (1832) [hereafter cited as *United States v. Arredondo*].

the Court stated that it was "bound to notice and respect general customs and usage, as the law of the land, equally with the written law," and indicated that it would, in accordance with custom, confirm grants despite violations of Spanish written law.[46] As time passed, however, the Court became quite stringent. Although it made frequent references to its obligation to consider Spanish customs, it rejected many claims for their vague boundaries or for the claimants' failure to fulfill conditions of occupation and development, even though the Spanish government customarily did not void the grants for these reasons.

For example, in *Heirs of Don Carlos de Vilemont v. United States*, two former aides to the governor and a former judge "before whose eyes probably thousands of such claims have passed" had testified about the customs and practices of the land-grant system. They stated that "these conditions [of inhabitation and improvement] were mere matters of form and mechanically inserted," and that "no land was ever forfeited under the Spanish government on account of a non-compliance with these conditions."[47] Nevertheless, the Supreme Court rejected the Arkansas claim at issue, because De Vilemont did not settle and develop the land within the time designated by the grant. The Court rejected his excuse that Indian hostilities prevented him from doing so. It simply stated, "[I]t was undoubtedly necessary, that an establishment should be made within three years—such being the requirement of the concession, in concurrence with the regulations."[48]

In the Frémont case, Hoffman relied almost entirely on these Supreme Court decisions, accepting unquestioningly their disregard of customary law. He cited *De Vilemont* for the principle that a claim should be rejected "notwithstanding the evidence of the uniform usage of the Spanish authorities."[49] Hoffman was either unable or unwilling to adopt the perspective of a Mexican authority in evaluating the Mariposa grant. Perhaps he felt that Mexican customary law was no longer appropriate, given the changes that had occurred since the grant was made. More likely, he may simply have felt more comfortable using the familiar tools of Supreme Court precedent and written law.

Hoffman did not hold that the vagueness of the borders nullified the grant. He agreed that, under prior decisions of the

[46]*United States v. Arredondo*, supra note 45 at 714.

[47]*Heirs of Don Carlos de Vilemont v. United States*, 54 U.S. (13 How.) 261, 262 (1851).

[48]Ibid. at 266.

[49]*United States v. Frémont*, supra note 34 at 26.

Supreme Court, the grant would be void for uncertainty if there were no indication as to which ten square leagues Micheltorrena intended to convey. However, he continued, "From the testimony taken, it appears that within the general limits mentioned in the grant a smaller tract, situated on the Mariposas creek, is well known, and seems to have been understood to be the tract granted to Alvarado."[50] Citing several Supreme Court precedents, he held that description of the tract was specific enough to make the grant valid.

Hoffman's reasons for finding the Mariposa grant invalid were based on Alvarado's failure to fulfill the inhabitation condition contained in the grant.[51] Relying entirely on Supreme Court decisions based on the 1824 act, the judge declared that "the cases of Glen [*sic*], of De Villemont [*sic*] and of Boisdoré, lay down for me rules of decision applicable to this case, and from which I am not at liberty to depart."[52] These cases all invalidated grants based on the grantees' failure to satisfy conditions of settlement and improvement. *De Vilemont* and *Boisdoré* both held that the presence of Indian hostilities was no excuse if the danger existed to substantially the same degree when the claimant requested the grant in the first place. In Hoffman's eyes, these cases were so similar to Frémont's that they controlled the decision.

In view of the fact that the 1851 Land Claims Act could have led Hoffman into strange and exciting intellectual territory, *United States v. Frémont* was a strikingly ordinary opinion.[53]

FRÉMONT'S CLAIM IN THE SUPREME COURT

Frémont appealed the district court's decision to the Supreme Court of the United States. As at the district court, his potent legal team was led by his brother-in-law, William Carey Jones, whose law firm was building a fortune representing California land claimants. Attorney General Cushing himself argued the case for the government.

[50]Ibid. at 22.

[51]Grant of the Mariposas, supra note 32.

[52]*United States v. Frémont*, supra note 34 at 27. Cases referred to are *Glen et al. v. United States*, 54 U.S. (13 How.) 250 (1851); *Heirs of Don Carlos de Vilemont v. United States*, 54 U.S.(13 How.) 261 (1851); *United States v. Boisdoré*, 52 U.S. (11 How.) 63 (1850).

[53]For an insightful and comprehensive discussion and analysis of Hoffman's treatment of the Mexican land grants, as well as his jurisprudence generally, see Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851-1891* (Lincoln, Neb., 1991) [hereafter cited as Fritz, *Federal Justice in California*].

Frémont had some reason to be optimistic. The Supreme Court had heard only one previous California land-claims case, and had unanimously found for the claimant.[54] The justices seemed likely to be well disposed toward Frémont, who had served the country bravely during his western expeditions and the Mexican War. Furthermore, it appeared that he would benefit from his inextricable association with his powerful father-in-law, Thomas Hart Benton. The former senator from Missouri was by then serving his only term as a representative, and was, in his own words, on the "kindest possible terms" with all the justices of the Supreme Court.[55] He and Roger Taney, the chief justice at the time, had been close friends since they had battled together to prevent the rechartering of the second Bank of the United States in the early 1830s.[56]

Yet Frémont had cause to worry. The very notion of the abrogation of written law by custom was foreign to American jurisprudence.[57] Furthermore, the Court was occupied largely by Jacksonian Democrats,[58] a breed characterized generally by hostility to the "aristocracy," opposition to large landholding, suspicion of public largesse, and revulsion to all things Mexican (except Mexican territory).[59] An orthodox Jacksonian him-

[54]*United States v. Ritchie*, 58 U.S. (17 How.) 525 (1854).

[55]Thomas Hart Benton, *Historical and Legal Examination of. . . the Dred Scott Case* (New York, 1857), quoted in W.N. Chambers, *Old Bullion Benton; Senator From the New West: Thomas Hart Benton, 1782-1852* (New York, 1956), 434 [hereafter cited as Chambers, *Old Bullion Benton*].

[56]In the early 1830s, Taney was first attorney general and then secretary of the treasury, under President Andrew Jackson. During the struggle against the bank, he and Benton, who was then a senator, worked together closely and corresponded frequently. They acquired a great deal of mutual fondness and respect. In 1834, when Taney temporarily retired to private life in Baltimore, Benton made the principal speech at a banquet held in his honor. When Benton was reelected for a fourth term in 1838, Taney rejoiced, declaring that he "should almost of despaired of the Republic" had his friend lost. Quoted in Bernard C. Steiner, *Life of Roger Brooke Taney, Chief Justice of the United States Supreme Court* (1922; reprint, Westport, Conn., 1970), 251. See generally Chambers, *Old Bullion Benton*, supra note 54; Carl Brent Swisher, *Roger B. Taney* (Hamden, Conn., 1935); Elbert B. Smith, *Magnificent Missourian; The Life of Thomas Hart Benton* (New York, 1958).

[57]See note 20 supra.

[58]Taney was a Maryland Democrat appointed by Jackson, Wayne a Georgia Democrat (Jackson), Catron a Tennessee Democrat (Van Buren), Campbell an Alabama Democrat (Pierce), and Daniel a Virginia Democrat (Van Buren). Grier was a Pennsylvania Democrat (Polk), and Nelson a New York Democrat (Tyler). Curtis was a Massachusetts Whig (Fillmore). McLean (Jackson) was an Ohio Democrat who soon joined the new Republican Party. (Frémont was a Democrat until 1856, when he became the first Republican candidate for the United States Presidency.)

[59]See generally Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston, 1945) [hereafter cited as Schlesinger, *Age of Jackson*]; Marvin Meyers, *The Jacksonian*

self, Taney had long stressed the necessity "to guard against the unnecessary accumulation of power over . . . property in any hands,"[60] and many of his Democratic brethren on the Court doubtless agreed with him. Moreover, in the celebrated *Charles River Bridge Case*, Taney had held that public grants should be narrowly construed.[61] The chief justice, with other current members of the Court, had also written or joined in many of the opinions invalidating Spanish grants under the 1824 Land Claims Act.

The justices, particularly the five who were Southern Democrats (and who all owned or had once owned slaves), may by 1854 have become irritated by the antislavery stance of Frémont and Benton.[62] The same group of justices would, three years later, produce the notorious pro-slavery decision in *Dred Scott v. Sanford*, with only two complete dissents.[63] The jurists' racist attitudes also called into question their ability and willingness to adopt the legal outlook of a people, the Mexicans, widely viewed by Americans as a "thieving, cowardly, dancing, lewd people, and generally indolent and faithless."[64]

Nonetheless, the Court, in 1854, held for Frémont.[65] Taney

Persuasion (Stanford, 1957); Harry L. Watson, *Liberty and Power: The Politics of Jacksonian America* (New York, 1990).

[60]Taney's report on the removal of the deposits from the second Bank of the United States, *Register of Debates*, 23d Cong., 1st Sess., Appendix 68 (1834), quoted in Schlesinger, *Age of Jackson*, supra note 59 at 105.

[61]In the *Charles River Bridge Case*, the recipients of a legislative grant to build and operate a toll bridge argued that they had received a monopoly by implication. Taney disagreed, holding that public grants should be strictly construed in favor of the public and that nothing should pass by implication. 36 U.S. (11 Pet.) 420 (1837).

[62]During his brief term as a senator in 1850, Frémont had demonstrated his opposition to slavery by a number of votes, including one in favor of a bill to abolish the slave trade in the District of Columbia. Bigelow, *John Charles Frémont*, supra note 27 at 418. By the time he ran for reelection in 1851, he had become thoroughly identified with anti-slavery policies, and pro-slavery forces mobilized to defeat him. Ibid. at 428.

Benton, who began his career as a slaveholder fully in favor of the institution, was, by the early 1850s, increasingly opposed to slavery and its extension to the territories. In 1854, just months before the Supreme Court decided the *Frémont* case, he delivered a widely discussed speech in the House condemning the Kansas-Nebraska Bill. The speech subjected him to bitter attacks from Southern congressmen and the pro-slavery press. Chambers, *Old Bullion Benton*, supra note 54 at 400-404.

[63]60 U.S. (19 How.) 393 (1857) (denying that any black person could be a citizen of the United States and holding that Congress did not have the power to prohibit slavery in the territories).

[64]*National Intelligencer*, April 1846, quoted in Pitt, *Decline of the Californios*, supra note 19 at 16.

[65]*Frémont v. United States*, supra note 21 at 542.

himself wrote the majority opinion, joined by justices Samuel Nelson, Benjamin Curtis, Robert Grier, James Wayne, and John McLean. Justices John Catron and John Campbell wrote separate dissents. Justice Peter Daniel was absent, but said later that he would have dissented.[66]

Taney's opinion was markedly more complex and thoughtful than Hoffman's had been. In affirming the grant, he considered all the bases of decision listed by the 1851 Land Claims Act. He constructed his opinion carefully, for he recognized that the case was "not only important to the claimant and the public," but that "many claims to land in California depend[ed] upon the same principles, and [would], in effect, be decided by the judgment of the court in this case."[67]

In *Frémont v. United States*, Taney displayed a surprising willingness to depart from the standard Anglo-American approach to property, characterized by strict construction of laws and instruments, untempered by equity. In this, he differed strikingly from Hoffman and from the dissenters in the *Frémont* case itself. Taney's decision hinged on his critical recognition that "in deciding upon the validity of a Mexican grant, the court could not, without doing injustice to individuals, give to the Mexican laws a more narrow and strict construction than they received from the Mexican authorities who were intrusted with their execution. It is the duty of the court to protect rights obtained under them, which would have been regarded as vested and valid by the Mexican authorities."[68]

This was unaccustomed ground for an American judge. He was not only taking notice of foreign law, but also taking notice of the unwritten customs of the officials in the government that drafted the law.[69] Taney recognized that "it was undoubtedly often necessary to inquire into official customs and forms and usages. They constitute what may be called the common or unwritten law of every civilized country. And when there are no published reports of judicial decisions which show the received construction of a statute, and the powers exercised

[66]Paul Wallace Gates, "Pre-Henry George Land Warfare in California," *California Historical Quarterly* 46 (1967), 121, 124 [hereafter cited as Gates, "Land Warfare"].

[67]*Frémont v. United States*, supra note 21 at 552.

[68]Ibid. at 561-62.

[69]Under the classic view, foreign law was a fact to be pleaded and proved as any other fact. The federal courts, however, adopted an exception to this principle, abandoning the proof requirement for foreign law in force in an area before its accession by the United States. Federal courts could instead notice such foreign law. See Arthur Miller, "Federal Rule 44.1 and the 'Fact' Approach to Determining Foreign Law," *Michigan Law Review* 65 (1967), 615, 652.

under it by the tribunals or officers of the government, it is often necessary to seek information from other authentic sources, such as the records of official acts, and the practice of the different tribunals and public authorities."[70]

In order to find that the grant vested Alvarado with an immediate interest in the land that the United States was bound to enforce, the chief justice first found it necessary to distinguish from Frémont's case the 1824 Land Act cases cited by Hoffman and the Supreme Court dissenters. Taney distinguished the grants in *Boisdoré*, *Glenn*, and *De Vilemont* from the Mariposa grant by observing that in those cases the Spanish government made the concessions not as rewards for service, but to promote the settlement and improvement of its territory. Consequently, the grantees in Florida and Louisiana were given no title to the land until they fulfilled the requirements of the grants.[71] These requirements were therefore conditions precedent.

In relation to the Mexican statutes and regulations, Alvarado and Frémont should have been in a position no different from that of the Spanish grantees in the Southeast. The 1824 Colonization Law did not provide for grants in exchange for patriotic services.[72] According to the 1828 Regulations, if the grantee "does not comply [with the conditions], the grant of land shall *remain* void."[73] Nonetheless, the words of the Mariposa grant itself clearly indicated that, in light of his patriotic service, Alvarado was immediately to receive the land "in fee," subject only to conditions subsequent.[74] Taney disregarded the Regulations and turned to the "forms and usages of the Mexican law" as manifested in the grant instrument.[75] The Mariposa grant, he observed, "was not made merely to carry out the colonization policy of the government, but in consideration of the previous public and patriotic services of the grantee."[76] Alvarado thus had a vested title in the tract even before he fulfilled any of the requirements.

Although he relied on Mexican usages in this section of the

[70]*Frémont v. United States*, supra note 21 at 557.

[71]Ibid. at 554-56.

[72]Section 8 of the 1824 Colonization Law declares that in the distribution of lands, preference should be given to people who have rendered "private merit and services" to the country. 1824 Colonization Law, supra note 3. The law does not, however, state that petitioners will receive land *in exchange* for their patriotic services. Rather, it suggests only that their services will be a factor in favor of their petitions.

[73]Regulations of 1828, supra note 11 (emphasis added).

[74]Grant of the Mariposas, supra note 32.

[75]*Frémont v. United States*, supra note 21 at 557.

[76]Ibid. at 558.

opinion, Taney revealed, by his technical discussion of conditions precedent and subsequent, that to some degree he was still a prisoner of traditional modes of legal analysis. The chief justice overlooked the most cogent reason for finding that *Boisdoré*, *Glenn*, and *De Vilemont* did not control Frémont's case—namely, that the Supreme Court failed to apply Spanish customary law properly when it rejected the claims in these earlier cases. The pressure of stare decisis and the habit of close analysis of written law, however, led him to draw the fine distinctions he did.

Taney completely neglected to consider custom when he rejected Cushing's argument that the description of the tract was too vague to pass an interest to Alvarado. Jones's argument on behalf of Frémont noted the customary tolerance of such vagueness by the Mexican authorities, but Taney chose to ignore this point in his opinion.[77] Nor did he defeat the argument by affirming Hoffman's finding that there was a particular tract well known as "The Mariposas," located within the wider area indicated by the grant. Instead, he cited *Rutherford v. Greene's Heirs*, an eighteenth-century Supreme Court case concerning a grant by the state of North Carolina.[78] He cited this case for the principle that a grant of a stated amount of unspecified land within a certain territory gave the grantee an immediate vested interest in that quantity of land, an interest that became particularized after a survey of the grant was made.[79]

When he addressed Alvarado's failure to satisfy the conditions contained in the grant, however, Taney most strikingly demonstrated his willingness to approach the case from the perspective of Mexican customary law. He analyzed whether Alvarado's failure to inhabit the tract, to acquire judicial possession, to have the land surveyed, and to gain approval from the assembly forfeited his right to the land and revested title in the government. Instead of strictly construing the requirements

[77]According to the summary of the attorneys' arguments printed before the opinion, Jones argued, "The laws under which this grant was made did not contemplate surveys or exactness in the definition of the tracts solicited or granted, but only a delineation—necessarily rude, since there was no scientific person in the whole country to make it—of the locality where the quantity was to be granted." Ibid. at 548-49.

[78]15 U.S. (2 Wheat.) 196 (1817). The grant, to General Nathaniel Greene, was one of many made by state legislatures to officers and soldiers who served in the Revolutionary War, as a reward for their patriotic services.

[79]Taney conveniently overlooked his own holding in *United States v. King* that "it has been settled, by repeated decisions in this court . . . that if the description was vague and indefinite . . . and there was no official survey to give it a certain location, it could create no right of private property in any particular parcel of land, which could be maintained in a court of justice." 44 U.S. (3 How.) 773, 787.

of the grant and the colonization laws, Taney considered Mexican "practice and usages" and recognized the Mexican authorities' "discretionary power" to dispense with such requirements.[80]

The chief justice recognized that because of the limited number of settlers during California's Mexican era, the authorities did not bother to annul grants by strictly enforcing the conditions contained in the statutes and in the grants themselves. "The chief object of these grants was to colonize and settle the vacant lands . . . . But the public had no interest in forfeiting them [to the government] . . . unless some other person desired, and was ready to occupy them, and thus carry out the policy of extending its settlements."[81]

Taney next examined whether there was an "unreasonable delay or want of effort" by Alvarado in fulfilling the conditions, which would indicate that he had abandoned his claim. Rather than citing cases that rejected Indian hostilities as an excuse, Taney argued that the Mexican authorities would almost certainly have excused Alvarado's nonperformance of the conditions under the difficult circumstances he confronted. He noted that Governor Micheltorrena dispensed with the regulation requiring Alvarado to file a *diseño* with his petition because Indian aggressions made it impossible to prepare such a map.[82] Taney reasoned that the same problem, as well as the increasing political and military unrest in California, would also have led the Mexican authorities to excuse Alvarado's failure to possess and inhabit the land, to have it surveyed, and to obtain approval from the departmental assembly.

The chief justice did not fully embrace the Mexican approach to customary law. He falsely persuaded himself that his opinion was an exercise in statutory construction rather than statutory abrogation.[83] Justice Stephen Field would later explicitly recognize that, in Spanish jurisprudence, "Legitimate custom acquires the force of law not only when there is no law to the contrary, but also when its effect is to abrogate any former law

[80]*Frémont v. United States*, supra note 21 at 561.

[81]Ibid.

[82]The second section of the Regulations of 1828 clearly requires the person soliciting land to include a map with his petition. Regulations of 1828, supra note 11. Nevertheless, as Taney observes, Micheltorrena excused this requirement. "[A]s the governor deemed himself authorized, under the circumstances, to dispense with the usual plan, and his decision, in this respect, was sanctioned by the other officers intrusted with the execution of the law, it must be presumed that the power he exercised was lawful, and that the want of a plan did not invalidate the grant." Ibid. at 562.

[83]See quoted text accompanying notes 68 and 70 supra.

which may be opposed to it."[84] Taney applied this principle, yet failed directly to acknowledge its existence.[85]

Nonetheless, the unorthodoxy of Taney's approach, with his emphasis on custom and usage, is obvious when his opinion is contrasted with Catron's dissent. Catron did not trouble himself with unwritten legal sources, or even with the words of the grant itself. His dissent is, instead, a series of dispositive citations to "binding" sections of the Colonization Law of 1824 and the Regulations of 1828 and to supposedly controlling Supreme Court precedents.

Catron maintained that occupation of the land was, by law, an absolute condition to gaining title. "The consideration for the grant was a performance of its leading conditions on the part of the grantee; the principal condition being, the inhabitation of the land, in the manner and within the time prescribed."[86] He noted that the eleventh section of the Regulations of 1828 required the governor to "designate to the new colonists a proportionate time within which he [*sic*] shall be bound to cultivate or occupy the land; 'it being understood that if he does not comply, the grant of the land shall remain void.'"[87] He also observed that "by the 12th rule, the grantee was required to prove before the municipal authority that he had cultivated or occupied . . .' in order that he might consolidate and secure his right of ownership, and have power to dispose freely of the land.'"[88] Failing even to consider customs and usages, he declared simply that to affirm the Mariposa claim despite Alvarado's failure to inhabit it "would be to subvert the manifest design of the colonization laws of Mexico."[89]

Catron bolstered his argument with numerous citations to Supreme Court cases arising out of the 1824 Land Claims Act. He himself had written the opinion in some of the more prominent ones, including *United States v. Boisdoré*, *Glenn et al. v.*

[84]*Slidell v. Grandjean*, 111 U.S. 412, 421 (1883) (quoting Escriche's *Derecho Español*).

[85]Justice Daniel, on the other hand, fully understood the implications of Taney's approach. He did not sit for the Frémont case, but in a bitter dissent in a later case affirming a Mexican land grant, he wrote, "An attempt is made . . . to escape from the authority and effect of [Mexican] public laws by setting up a practice in violation of them, and, from the proof of this practice, to establish a different code or system by which the former, regularly adopted and promulgated, and never directly repealed, has been abrogated and disannulled." *Arguello et. al. v. United States*, 59 U.S. (18 How.) 551 (1855) (Daniel, J., dissenting).

[86]*Frémont v. United States*, supra note 21 at 567 (Catron dissenting).

[87]Ibid.

[88]Ibid.

[89]Ibid. at 569.

United States, and *Heirs of Don Carlos de Vilemont v. United States*.[90] In his dissent, he asserted that those cases conclusively established that a Spanish concession was void if the conditions of inhabitation and cultivation were the consideration for the title and were not performed within the designated time.[91] He also stated that those cases settled the point that Indian hostilities were not a valid excuse for nonperformance of the conditions if the danger existed when the grant was made.

By simply citing precedents, Catron, like Hoffman before him, avoided the difficult issues inherent in the controversy over the Mariposa grant. In addressing the question of the vague boundaries, he once again turned to the letter of the law, stating conclusively: "I understand the Mexican law as not to allow any such undefined floating claims. It is impossible to recognize them under the act of 1824. . . . [S]o far from it, the Mexican colonization laws contained more positive provisions, to the end of granting distinct and known tracts of land to colonists, than did any Spanish laws."[92]

Catron was evaluating the land-grant system from the perspective of post-gold rush American California in 1854, rather than pre-gold rush Mexican California in 1844. His dissent illustrates the temporal aspect of the tension between Mexican and American land law. In his view, strictly enforcing the Mexican statutes was imperative, in light of the huge number of settlers flowing into the state, "cultivating the valleys and the best lands." In such circumstances, "Ruin . . . lurks in a floating claim." The settlers, who had expended "much of labor and money . . . on the faith that a preference-right was a safe title, and exempt from floating Mexican concessions," could lose their homes, their farms, and (in the case of Mariposa) their mines, if claimants were now able to locate grants on their lands.[93]

In view of the explosive development of California, Catron

[90]See note 52 supra.

[91]Catron rejected the notion that patriotic services, rather than settlement, were Alvarado's consideration for the Mariposa grant. He correctly observed that the colonization laws did not enable the governor to make such grants in reward for patriotic services. *Frémont v. United States*, supra note 21 at 567 (Catron dissenting).

[92]Ibid. at 571.

[93]Ibid. at 572-73. By an act of 1852, public lands in California were made subject to preemption. That is, each settler could purchase up to 160 acres of land at $1.25 an acre from the United States Government. An Act to provide for the Survey of the Public Lands in California, the granting of Preemption Rights therein, and for other purposes, ch. 145, sec. 6, 10 Stat. 244, 246 (1853). These are the settlers to whom Catron refers. Exasperated by the obstacles posed by the enormous, floating, unconfirmed Mexican grants, they settled upon unenclosed and uncultivated lands without much regard for the claims.

believed that "[t]o hold that the Mexican government designed to leave in force for an indefinite length of time large undefined concessions, that might be surveyed at the election of the claimant at any time and at any place, to the hindrance of colonization and to the destruction of other interests, is an idea too extravagant to be seriously entertained."[94]

Catron had a point, although he did not really understand it himself. Despite his assertion, the Mexican government, in the calm, ranching days of pre-gold rush California, did, indeed, permit such floating grants. But was it fair to assume that the Mexicans would have continued to allow such lax administration of the land-grant system if they had maintained power into the years of gold and mass immigration? Perhaps not. Congress's inclusion of Mexican "usages and customs" in the 1851 Land Claims Act may have been a fair-minded thing to do, but, because of the swiftly changing conditions of California in the early 1850s, it presented the judges with an almost impossible task.[95]

Catron circumvented the issue of customary law by simply not acknowledging it. Campbell, who wrote the other dissent in *Frémont v. United States*, approached the problem differently. He admitted the existence of Mexican customs that varied from the written laws. Nevertheless, he attacked the notion that he was bound to follow Mexican customs and usages, misreading (or ignoring) the clear language of the 1851 Land Claims Act.

> The non-fulfillment of these conditions, it was competent to Mexico to overlook or to forgive. It is probable that, in the lax administration of her laws, in the distant province of California, all investigation would have been avoided, if the cession to the United States had not been made. It is equally within the power of congress to remit the consequences attaching to the omissions, and to concede as a grace what, in [Mexican] California, might have been yielded from indolence or indulgence. But congress has chosen to deal with the subject of titles in California, upon principles of law.[96]

[94]*Frémont v. United States*, supra note 21 at 571 (Catron dissenting).

[95]Catron apparently was also bothered by the very size and value of Frémont's grant. He complained that "We are here called on to award a patent for a floating claim of fifty thousand arpens of land in the gold region in California." Ibid. at 572. Both the large size of the tract and the fact it contained gold were legally irrelevant, but they seemed to rankle Catron.

[96]Ibid. at 576 (Campbell dissenting).

By "law," Campbell meant "the laws of colonization of Mexico" and "the decisions of this court in analogous cases." The former, with the grant itself, specifically required a "plan or design to indicate the place of location . . . [a] survey, delivery of judicial possession, [and] occupancy, or improvement."[97] The latter, according to Campbell, "control this case, and I do not feel at liberty to depart from . . . their clear and manifest import."[98] He thus dissented from Taney's opinion using the same conventional, written legal tools employed by Hoffman and Catron to hold against Frémont.

It is difficult to conclude exactly why the Supreme Court confirmed Frémont's claim. In his interpretive history of California, Howard Dewitt contends that "[t]he recognition of John C. Frémont's Rancho Mariposa . . . was more the result of Frémont's place in California history than of judicial judgment on the legality of the land. . . . It was not coincidental that Frémont's land claim was approved a few months before he began to campaign as the first Republican candidate for the Presidency."[99] In a similar vein, Christian Fritz, in his study of Ogden Hoffman's court, assigns substantial significance to the fact that "[i]n all of the first three California land-grant cases to be decided by the Supreme Court, the claimants were Americans. . . . [I]t might well have been easier to accept Americans who favored and fought for the American possession of California as beneficiaries of the act of 1851."[100]

These theories are not entirely persuasive. As noted earlier, the Court was packed with Southern Democrats who probably despised Frémont's emerging anti-slavery politics and thus were in no mood to grant him favors. Moreover, even if they did choose to reward Frémont, the justices could not have failed to realize that their decision would also determine the fate of other, less celebrated, and darker-skinned claimants. Taney recognized in the first paragraph of his opinion that "[m]any claims to land in California depend upon the same principles, and will, in effect, be decided by the judgment of the court in this case."[101] Indeed, the *Frémont* decision led to the confirmation of numerous imperfect claims belonging to individuals more obscure than Frémont, including many Mexicans. Another possible explanation for the decision is one that was advanced by critics of the Court at the time—that the justices

[97]Ibid. at 573.

[98]Ibid. at 576.

[99]Howard Dewitt, *Readings in California Civilization: Interpretative Issues* (Dubuque, 1979), 137.

[100]Fritz, *Federal Justice in California*, supra note 53 at 152.

[101]*Frémont v. United States*, supra note 21 at 552.

were wealthy men acting in the interests of monopolists and speculators.[102] Some modern commentators agree. Paul Wallace Gates suggests, "[T]he fact that there was a conservative judiciary not at all unfriendly to large land-holdings brought it about from the very beginning that the claims were determined on the basis of equity . . . [which] opened wide the opportunity for confirmation."[103]

Although the "conservatism" of some of the justices may partially explain the *Frémont* decision, this interpretation is too simplistic. While many legal historians in recent years have shown how nineteenth-century judges manipulated the law to serve the interests of a wealthy elite,[104] there is no reason to assume that that is what occurred in this case. After all, many of the justices were old Jacksonians hostile to the "aristocracy." Those in the majority may genuinely have felt themselves bound by the Treaty of Guadalupe-Hidalgo and the law of nations to confirm grants to the same degree that Mexican authorities would have confirmed them. Stephen Field, who was consistently pro-claimant both as a judge on the California Supreme Court and, later, as a justice on the United States Supreme Court, expressed such feelings:

> I assumed at the outset that the obligations of the treaty with Mexico were to be respected and enforced. This treaty had stipulated for the protection of all rights of property of the citizens of the ceded country; and that stipulation embraced inchoate and equitable rights, as well as those which were perfect . . . . [T]he rhetoric which denounced the grants as enormous monopolies or princedoms might have a just influence when urged to those who had a right to give or refuse; but as the United States had bound itself by a treaty . . . the court had no discretion to enlarge or contract such grants to suit its own sense of propriety or to defeat just claims, however extensive, by stringent technical rules of construction to which they were not originally subjected.[105]

[102]Stephen J. Field, who joined the Supreme Court in 1863 and validated many claims, recalled that the Court was subjected to such criticisms in response to the California land-grant decisions. Idem, *Personal Reminiscences of Early Days in California* (1893; reprint, New York, 1968), 126 [hereafter cited as Field, *Personal Reminiscences*].

[103]Gates, "Adjudication of Spanish-Mexican Land Claims," supra note 2 at 226.

[104]See, e.g., Morton Horwitz, *The Transformation of American Law* (Cambridge, Mass., 1977).

[105]Field, *Personal Reminiscences*, supra note 102 at 123.

By acknowledging the role of unwritten usage and custom, the Court demonstrated more respect for Mexican law than it would have by simply enforcing Mexican statutes and regulations.

THE IMPACT AND LEGACY OF THE FRÉMONT DECISION

When the Court, for whatever reason, finally confirmed Frémont's grant, the decision affected many people other than Frémont himself. *Frémont v. United States* was, in the words of Paul Wallace Gates, "an overwhelming precedent."[106] It led the commissioners and, especially, Judge Hoffman to interpret the Mexican colonization laws extremely loosely and to confirm grants even when there were glaring failures by the claimants to satisfy express requirements and conditions. The case "stood out in [Hoffman's] mind like a great landmark and until it was modified or reversed he insisted on abiding by it."[107]

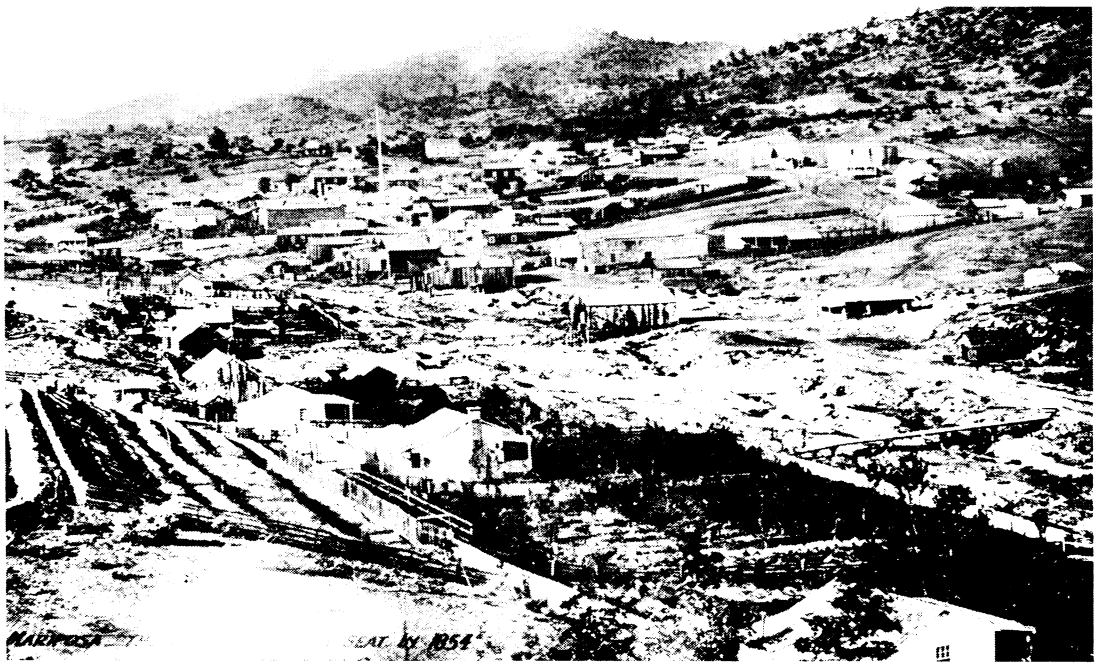
Only when information emerged concerning the fraudulent basis of many of the claims did the tide began to turn. Almost everyone, including, apparently, the Supreme Court justices, developed a skeptical attitude toward the claims. Moreover, the new attorney general, Jeremiah Sullivan Black, selected the talented Edwin M. Stanton to serve as the government's principal attorney in the California land-claim cases, and the claimants' skillful lawyers finally faced some real competition. The *Frémont* decision lost much of its precedent-making significance, and the Court began to subject the claims to much stricter standards.[108] After Stephen Field joined the bench in 1863, however, the case regained much of its lost favor and again began to guide decisions.

The *Frémont* decision plunged Mariposa itself into turmoil. Catron's warnings about the dangers floating grants posed to settlers turned out to be prescient. In accordance with the Supreme Court ruling, Frémont arranged to have his tract officially surveyed under the direction of the United States surveyor-general for California in July 1855. According to an official report on the Mariposa estate prepared by a United States commissioner, he at first requested a long strip in the valley on both banks of the Merced River. The surveyor refused, inform-

[106]Gates, "Land Warfare," supra note 66 at 125.

[107]Ibid. at 126. See also Fritz, *Federal Justice in California*, supra note 53 at 153-55.

[108]Paul Wallace Gates, "The California Land Act of 1851," *California Historical Quarterly* 50 (1971), 395, 404; Fritz, *Federal Justice in California*, supra note 53 at 155-79.



By1854, the influx of goldminers had turned Mariposa into a bustling town. (California State Library)

ing him that the grant had to be in a compact form. The report relates what followed: "[I]nstead of taking a compact area of grazing land and worthless mountain, [Frémont] swung his grant round and covered the valuable Pine Tree and Josephine mines . . . besides a number of others which had been in the undisputed possession of miners, who had long been familiar with Frémont, and had never heard the least intimation from him that he would in any event lay claim to their works."[109]

On February 16, 1856, upon presentation of the survey to the General Land Office in Washington, Frémont received an official patent for the Mariposa estate.

This document, signed by the president, did not settle matters for the hundreds of squatters who had invested thousands of dollars to mine their plots in the Mariposa, and who were now told that Frémont owned their land. They continued to

[109]J.R. Browne, *The Mariposa Estate, Its Past, Present, and Future* (New York, 1868), 6. Frémont's defenders have maintained that he, personally, had nothing to do with the conduct of the survey. One author suggests that Frémont's agents managed to influence the survey without his knowledge. Newell D. Chamberlain, *The Call of Gold, True Tales on the Gold Road to Yosemite* (North Tarrytown, N. Y., 1936), 62. The surveyor general of California, Colonel Jack Hays, approved the survey. It is worth noting that in 1852, Hays himself, along with several partners, had bought a grant from Vincente Peralta at the future site of Oakland. Hays's new land was, like Mariposa, largely occupied by squatters. H.M. Henderson, *Colonel Jack Hays, Texas Ranger* (San Antonio, 1954), 101-102; J.K. Greer, *Colonel Jack Hays* (College Station, Tex., 1987), 284.

jump his claims and trespass on his property. In 1858 a small army of miners tried to capture the Pine Tree Mine and threatened to burn down his house whether or not his wife, Jessie, chose to leave it. The disturbance ended only when the state marshal arrived with five hundred armed men.

The miners were not motivated only by a sense of having been treated unjustly and by disdain for the Supreme Court's decision. They also believed they had the law on their side, for Mexican grants did not convey precious mineral rights with the rights to the surface, but, rather, reserved them to the government. Since the nation owned all mineral rights, the Mexican government had permitted individuals to enter the lands of others to search for mines. Anybody who discovered a mine in this manner acquired the right to work it, paying the owner for damage to the surface and the government a percentage of what he extracted.[110]

The Court in *Frémont* had explicitly avoided addressing the issue of mineral rights, leaving it to the state courts to settle.[111] In two cases pitting Frémont against miners who refused to relinquish their claims to parts of his Mariposa estate, the California Supreme Court, in opinions written by Chief Justice Stephen Field, upheld Frémont's rights to the precious metals on his tract.

In *Biddle Boggs v. Merced Mining Company*, Field rejected the company's argument that the public possessed an unlimited general license to extract the minerals, which were now owned either by California or by the United States. He did not settle the question of whether the state or the nation owned the minerals, but argued that, regardless of who owned the minerals, an individual could not enter the property of another to mine them: "There is something shocking to all our ideas of the rights of property in the proposition that one man may invade the possessions of another, dig up his fields and gardens, cut down his timber and occupy his land, under the pretense that he has reason to believe there is gold under the surface, or if existing, that he wishes to extract and remove it."[112]

In *Frémont v. Flower* (decided with *Moore v. Smaw*), Field

[110]Report of Hon. Thomas Ewing, Secretary of the Interior, December 3, 1849, extracted in Rockwell, *Spanish and Mexican Law*, supra note 3 at 410-415.

[111]"[W]hether there be any mines on this land, and, if there be any, what are the rights of the sovereignty in them, are questions which must be decided in another form of proceeding, and are not subjected to the jurisdiction of the commissioners or the court by the act of 1851." *Frémont v. United States*, supra note 21 at 565.

[112]*Biddle Boggs v. Merced Mining Company*, 14 Cal. 279, 379 (1859). Biddle Boggs had leased from Frémont the mine that the Merced Mining Company claimed.

went a step further. He held that upon the cession of California to the United States, the ownership of the gold and silver in that territory had passed from the Mexican nation to the United States. He then ruled that, even though Mexican grants had passed no interest in valuable minerals to grantees, an American patent for a Mexican grant conveyed the mineral rights as well as the surface rights to the claimant: "[T]he supposition that as the Act of March 3, 1851, provides for the recognition and confirmation of the rights acquired by the grants from Mexico, the patents were only intended as evidence on the part of the United States of such recognition and confirmation. . . is not justified. . . . There is nothing in the act restricting the operation of the patents . . . to the interests acquired by claimants from the former government."[113]

Field thus overlooked Congress's intention neither to diminish nor to enlarge the rights of Mexican grantees by the 1851 Land Claims Act.[114] In general, he acknowledged that claimants possessed precisely the same rights that they would have enjoyed under the Mexican government.[115] When it came to the issue of mineral rights, however, this principle apparently could not overcome Field's devotion to the conflicting principle that a landowner had absolute dominion over his private property.

Frémont thus emerged from this legal maze in 1861, possessing full rights to an estate to which he quite easily could have been deemed to possess no rights at all.[116] It is difficult to declare some judges in this saga to be "right" and others to be "wrong." The Supreme Court justices who confirmed Frémont's claim seemed committed to honoring their duty to up-

[113]*Moore v. Smaw, Frémont v. Flower*, 17 Cal. 199, 223-24 (1861).

[114]During the debates over the act, a number of congressmen voiced their understanding that the law was meant to guarantee the claimants precisely those rights they would have continued to enjoy under the Mexican government, no more and no less. For example, Senator Clay asserted, "We are bound to secure to them, by the treaty made with Mexico, exactly that property to which they are entitled by the laws of the country . . . under which that property has been held. . . . If the intention is not expressed in the laws, in the customs, or in the usages of the Government from which the claims are derived, upon what foundation of justice or propriety shall we introduce a new rule and enlarge the rights of claimants in that country . . . to the prejudice of the hundred thousand Americans who have gone there [?]." *Cong. Globe*, 31st Cong., 2d Sess. (1851), 390.

[115]Field later stated that "the court had no discretion to enlarge or contract such grants to suit its own sense of propriety." Idem, *Personal Reminiscences*, supra note 102 at 123.

[116]Frémont soon developed financial troubles and, by a complicated series of transactions, lost his interest in Mariposa by 1863.

hold the Treaty of Guadalupe-Hidalgo and the law of nations, even if it meant entering the unfamiliar world of Mexican customary law. Hoffman and the dissenting justices on the Supreme Court, on the other hand, were unwilling, if not unable, to apply Mexican customary law, but this unwillingness may have stemmed from their justified sense that the manner in which the Mexicans operated was now terribly anachronistic. The 1851 Land Claims Act ultimately proved itself to be a poorly drawn statute, for it exacerbated, rather than controlled, the confusion that inevitably resulted when Mexican and American law collided during a time of dramatic change.