Western Courts and the Privatization of Hispanic Mineral Rights Since 1850: An Alchemy of Title

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I. INTRODUCTION

While ancient alchemists attempted vainly to change base metals into precious gold and silver,1 western state supreme courts of the late nineteenth and early twentieth centuries actually succeeded in creating new wealth through the transformation of legal doctrine. These courts reconfigured Hispanic mining law, which in the pre-1846 Southwest had protected public access to minerals,2 into a privatized property regime giving exclusive—and invaluable—subterranean rights to the owner of the soil above. This jurisprudential shift began with decisions involving John C. Frémont’s Las Mariposas land grant in the Sierra Nevada foothills of central Cali-

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2. An area embracing the present states of California, Arizona, New Mexico, Texas, Nevada, Utah, and portions of Colorado, Oklahoma, Kansas, and Wyoming was governed successively by Spain from the sixteenth century to 1821, and by Mexico from 1821 to 1846 (to 1836 in the case of Texas). DAVID J. WEBER, THE MEXICAN FRONTIER, 1821-1846 xv (1982).
ifornia, and later holdings extended privatization to New Mexico, Arizona, and Texas. The lawyers and judges who participated in unifying the surface and mineral estates did so despite their awareness that the doctrine was inconsistent with the Spanish and Mexican property rights guaranteed by the Treaty of Guadalupe Hidalgo, and with Anglo-American common law as well. This disregard for applicable precedent promoted industrial entrepreneurship at the expense of public resource access and of the environment.4

In contrast to the current rule giving surface proprietors absolute subsurface rights, the Hispanic legal regime assumed sovereign ownership of all precious minerals.5 The medieval Spanish law code, the Siete Partidas, considered that a royal land grant did not convey mines to the grantee unless they were expressly included in the patent conferring the grant.6 To promote mining operations in the New World, the crown conceded prospecting and usufruct of ores to Spanish subjects in return for a fifth (later a tenth) of output.7 This system encouraged production while relieving the government of costs,8 and served the larger purpose of supporting imperial expansion.9 By the mid-eighteenth century, Spanish mineral law had developed an elaborate procedure for the discovery and official registration of subterranean rights,10 which the crown expressly enacted in New Spain (colonial Mexico, including the future American Southwest).11 The power of royal officials to moni-

3. See discussion infra Parts III-V.
4. See discussion infra Part VI.
6. LAS SIETE PARTIDAS 370 (Samuel Parsons Scott trans., Commerce Clearing House, Inc.) (1931).
8. Id.
9. BERNSTEIN, supra note 5, at 89.
10. FRANCISCO XAVIER DE GAMBOA, COMENTARIOS A LAS ORDENANZAS DE MINAS 7-8, 100-101 (1761) [hereinafter GAMBOA, COMENTARIOS], translated in FRANCISCO XAVIER DE GAMBOA, COMMENTARIES ON THE MINING ORDINANCES OF SPAIN 10-11, 139-41 (Richard Heathfield trans., Longman, Rees, Orme, Brown & Green 1830) [hereinafter GAMBOA, COMMENTARIES] (summarizing and commenting on excavation and registry method that had evolved up to 1761).
11. REALES ORDENANZAS PARA LA DIRECCIÓN, RÉGIMEN Y GOBIERNO DEL IMPORTANTE CUERPO DE LA MINERÍA DE NUEVA ESPAÑA (1785) [hereinafter REALES ORDENANZAS], translated in A COMPILATION OF SPANISH AND MEXICAN LAW IN RELATION TO MINES, AND TITLES TO REAL ESTATE 25-111 (John A. Rockwell, trans., John S. Voorhies 1851). See, e.g., Domingo Jirona Petris de Crusate, Grant of a Mine to Pedro de Albaños (William G. Ritch trans.)
tor mining concessions closely was in accordance with the Spanish communal policy of controlling and allocating natural resources for the common good. After 1821, independent Mexico maintained government ownership and the usufruct process, both in law and customary practice. Coincidentally, traditional English and American common law also considered precious minerals to be sovereign property.

Most scholarship on these western mining decisions has merely summarized them, ignoring the flouting of Hispanic law and the cultural forces militating towards judicial imposition of absolute subsurface title. The one historical analysis discussing these cases' incompatibility with Spanish and Mexican tradition does not attempt to explain why judges ignored U.S. treaty obligations nor whether they did so intentionally.

A deeper look at the mineral privatization process would be in line with contemporary legal historians' focus on the significance

(March 26, 1685) (original in Huntington Library, San Marino, California, catalogued as Manuscript # R 16) (granting a mining concession near El Paso in exchange for working the mine in accordance with a prior version of the Real e Ordenanzas).


13. TRODOLO LARES, LECCIONES DE DERECHO ADMINISTRATIVO 92-93 (1852); MEXICO, ORDENANZAS DE MINERÍA 68-88 (1846) [hereinafter MEXICO, ORDENANZAS].


15. Queen v. Earl of Northumberland, 75 Eng. Rep. 472 (1568); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 284 (1765); 3 JAMES KENT, COMMENTARIES ON AMERICAN LAW 378n (1844).


17. Hall, supra note 14, at 1-15—1-16.
of precedential distortion. Judge Richard Posner has called on scholars to compare judicial opinions with lawyers’ briefs, in order to determine jurists’ “scrupulousness with respect to the facts of record and the arguments of the parties.” In a study of early nineteenth-century judge and commentator Chancellor James Kent, Professor Alan Watson shows how Kent often inaccurately cited Roman law to provide impressive “window dressing” for his opinions and treatises. And my own work on Hispanic water law in state courts has demonstrated that judges consciously mischaracterized communal water-sharing traditions to mandate exclusive municipal and landowner control. Similarly, an analysis of the American treatment of the prior mineral law regime in the Southwest can help us understand why public subsurface access was abandoned, and the implications of that abandonment for more intensive exploitation of the western landscape.

Using primary sources, including case files, personal memoirs, and newspaper accounts, this Article explains the historical reasons for western supreme courts’ willingness to disregard applicable Hispanic and common law precedent. Part II considers how cultural influences, exemplified by the outlook of the Frémont family, may have affected judicial thinking. Part III examines the California Supreme Court’s initial receptiveness to the Spanish and Mexican tradition of government mineral ownership. Part IV analyzes the reversal of this trend, despite judges’ knowledge that surface and mineral estate unity was inconsistent with Hispanic legal doctrine. Part V explains how this privatization doctrine spread to other states. In Part VI, I conclude that in the Frémont cases and their progeny the courts knowingly violated the Guadalupe Hidalgo treaty to justify exclusive mineral use, and I discuss the historical impact of these decisions on land use and the environment.

II. GOLDEN FANTASIES AND THE NEW GRANDEES

After the 1848 U.S. annexation of Mexico’s northern territories, the new Anglo elite idealized an aristocratic, Arcadian “Spanish”

past in popular histories and fiction. Such an idyllic myth was inconsistent with the reality that most Hispanic people remained economically and socially subordinate. But this cultural attitude of American transplants to mid-nineteenth-century California and the Southwest fostered judicial manipulation of Hispanic mining law.

The work of journalist, novelist and poet Bret Harte, who lived in California from 1854 to 1871, epitomized this romantic notion. His writings depicted a pageant in which the energetic Spanish conquistadores gave way to the effete Californios (native-born Hispanic Californians), who were unable to exploit the region’s mineral and agricultural potential, and who were finally displaced by vibrant, acquisitive Americans. Harte described how “[t]he proprietors of the old ranchos ruled in a patriarchal style . . . ignorant even of the treasure they were sent to guard,” until their world was rent by “[a] political and social earthquake.” In fact, much of this account of a feudal ranchero lifestyle was fabrication: most ranch owners were not wealthy enough for ostentation, and generally worked long days with their families.

Though indulging a nostalgic wistfulness for the Hispanic period, Harte considered contemporary Californios currently degenerated and incapable of capitalizing upon the new state’s mineral wealth. One of his characters states, “Show to me now the Mexican that has ever made a real of a mine in California.” Other writers expressed similar racial sentiments as well as class prejudices. In an 1871 short story, “El Tesoro” (the treasure), a legendary Spanish mine is discovered by a common Anglo cowhand, who conveniently dies and wills it to a young lady from a wealthy American ranching family, his ideal of beauty and refinement.

25. Federico Sánchez, Rancho Life in Alta California, in Regions of La Raza: Changing Interpretations of Mexican American Regional History and 213, 229-29 (Antonio Ríos-Bustamante et al. eds. 1993).
27. Mrs. F. F. Víctor, El Tesoro, 42 Overland Monthly (1871). See also Charles E. Brim-
According to the mythmakers, Anglo landowners were the proper inheritors of the treasure that Hispanics never fully appreciated or developed.

Romantic tales about lost mines awaiting rediscovery were not limited to California, but flourished throughout the formerly Mexican Southwest. In 1864 the *Arizona Miner* characterized local silver prospecting as a revival of earlier, abandoned efforts, claiming that "when the Pilgrim fathers were struggling with barbarism upon the shores of New England, Spain established an empire amidst her newly found wealth and drew millions from the very region where the Anglo-Saxon is now erecting a second era of civilization." 28 Similarly, an 1874 promotional pamphlet for New Mexico Territory asserted that the eighteenth-century Jesuits had "carefully covered up the traces" of their mining efforts, leaving "tons of hidden treasure . . . buried within the bosoms of [New Mexico's] majestic mountains." 29 And as late as 1908, the *Fort Worth Telegram* in Texas reported that "an old Mexican on his deathbed" had divulged the secret location of a gold and silver mine worked briefly under Spanish rule. 30 Such accounts of once-productive but now deserted mines were vastly overblown, for modern historians have found that mining in the Hispanic Southwest had always been meager, due to capital shortage and Indian hostility. 31 Yet as in the case of California, these tales fed the desires of American entrepreneurs to develop the subterranean wealth of their recently acquired realm. 32

The archetypical post-Conquest Anglo grandee was John C. Frémont, explorer, politician, and owner of the Las Mariposas estate, a former Mexican land grant in California’s gold rush country. Frémont’s reputation as a military surveyor of the Far West in the 1840s was boosted by his marriage to the former Jessie Benton,

blecom, *A Masque at an Old Mission*, 17 OVERLAND MONTHLY (2d Series) 482 (1891) (telling of a priest who hides gold dust and nuggets in an old mission, ultimately revealing his cache to an American).


29. ELIAS BREVOORT, NEW MEXICO, HER NATURAL RESOURCES AND ATTRACTIONS 82, 169 (1874).


31. WEBER, supra note 2, at 142. See also Thomas E. Sheridan, *Arizona: A History* 147 (1995) ("Then as now, promoters were selling an Arizona that never was.").

32. See, e.g., Charles W. Polzer, S.J., *Legends of Lost Missions and Mines*, *The Smoke Signal*, Fall 1968, at 170, 182-83 (discussing the Aztec Mining Syndicate of Arizona, which in the 1870s fabricated myths of Spanish mining to encourage investors).
daughter of powerful Missouri senator Thomas Hart Benton. During the California phase of the Mexican War, the young officer assisted the "Bear Flag" rebellion of Anglo settlers and accepted the local forces' surrender at Cahuenga in 1847. Following the end of hostilities, Frémont enjoyed a long career in public life, which included a brief stint as a senator in 1850, an unsuccessful presidential bid as an antislavery Republican in 1856, a generalship during the Civil War, and a term as governor of Arizona Territory from 1878 to 1881. Pertinent to our discussion, he purchased the Las Mariposas rancho in 1847 from its original grantee, former governor of Mexican California Juan Bautista Alvarado. Two years later, gold-bearing quartz was discovered on the site, and extraction operations were begun with milling and amalgamation machinery.

But John and Jessie Frémont were more than prominent landowners. They consciously generated about themselves an image of aristocratic entitlement which partook of the prevailing cultural notion that the new Anglo elite were the natural successors of the Hispanic landholding dynasties. John C. Frémont wrote of the Californios that "each one had the old Spanish pride in his personality, for every ranchero was a grandee of the country." And the Frémonts fully and purposively embraced this same outlook.

For example, on her way to meet her husband at Las Mariposas in 1849, Jessie Frémont rested in Panama, where, according to her reminiscences, she stayed with one of the "old Spanish families...[that] retained unspoiled the traditions of their mother land." She corresponded, in Spanish, with General Mariano Guadalupe

34. Id. at 78-90.
35. Id. at 134-257.
37. Id. at 38. Alvarado was originally granted the land in 1844, but never occupied or surveyed it. Id. at 14. In keeping with local custom, the grant was for a definite amount, but was "floating," i.e., the grantee could locate his tract anywhere within certain boundaries, which Alvarado never did. Id. at 13-14.
38. Id. at 50-51, 165-73. See generally RODMAN WILSON PAUL, MINING FRONTIERS OF THE Far West: 1848-1880 30-35 (1963) [hereinafter PAUL, MINING FRONTIERS] (describing quartz mining technology; stamp mills crushed the ore, which was then ground further with mercury to separate out the gold).
39. JOHN CHARLES FREMONT, MEMOIRS OF MY LIFE 573 (1887).
Vallejo, one of the wealthiest Californio landowners and a former military opponent of her husband. Once settled on their estate, the Frémonds established a lavish lifestyle, dressing either as southern plantation owners or as old Californios, and entertaining such popularizers of Hispanic California as Richard Henry Dana and Bret Harte. Their mining operations were carried out by Sonoran prospectors, characterized in John C. Frémont’s 1856 presidential campaign biography as “respectable Spaniards—many of them already wealthy.” In fact, these workers were simply gambusinos, or practical miners; there is no evidence that any of them were particularly affluent.

The Frémonds augmented their identification with “Spanish” landowning elites with the belief that they possessed an absolute property right to their estate’s underlying gold, which assertedly could not be “exhausted in centuries.” Ironically, they presumed this alleged mineral title in disregard of actual Hispanic law, which provided that subsurface precious metals did not run with the land, and of the U.S. Supreme Court, which expressly declined to resolve the mineral ownership issue when it confirmed the Las Mariposas grant in 1854. So when Anglo miners occupied portions of the tract in 1858, claiming the right to prospect under Mexican and California state law, Jessie Frémont accused them of having only “vague ideas as to rights in property,” and of using “the color of law for robbery.”

According to biographer Andrew Rolle, the Frémonds took on the trappings of chivalry as a psychological defense against perceived threats to their upper-class status. They felt reassured by

41. Letter from Jessie Benton Frémont to Mariano Guadalupe Vallejo (Apr. 8, 1848) (original in Huntington Library, San Marino, California, catalogued as Manuscript # FAC 667). See generally Rolle, supra note 33, at 80-83 (discussing John C. Frémont’s capture of Vallejo during the Mexican War).
43. Frémont and Frémont, supra note 40, at 215-16.
44. John Bigelow, Memoir of the Life and Public Services of John Charles Fremont 386 (1856).
45. Crampton, supra note 16, at 37. See also Walter Colton, Three Years in California 387 (1850) (“I have been in a camp of five hundred Sonorans [sic], who had not gold enough to buy a month’s provisions . . .”).
46. Bigelow, supra note 44, at 386.
49. Rolle, supra note 33, at 184. See also T.J. Jackson Lears, No Place of Grace: Antimodernism and the Transformation of American Culture, 1880-1920 188 (1981) (discussing nineteenth-century elites’ recourse to genealogy and heraldry as emblems of
pretending, in Rolle’s words, that John C. Frémont “was the knight; the squatters were mere peasants.” In addition, his fantasies may have originated as compensation for his illegitimate parentage in the antebellum South, where such descent was considered scandalous. Whatever the basis for the Frémont family’s myths, their elitist identification and claim to exclusive gold ownership drew upon the prevailing romanticism about Spanish dons and their unexploited treasure. As I will demonstrate, this cultural climate also influenced the lawyers and judges involved in litigation over the mineral rights to Las Mariposas. What is less immediately obvious is the extent to which the courts knowingly distorted Hispanic law for policy purposes.

III. THE PUBLIC OWNERSHIP PHASE IN CALIFORNIA, 1848-58

When the United States annexed the Southwest following the Mexican War, the initial American legal structure recognized the existing law of the newly conquered area. The 1848 Treaty of Guadalupe Hidalgo, by which Mexico formally relinquished its northern territories including California, guaranteed that rights to property previously under Mexican jurisdiction would be respected. To implement the treaty, Congress passed the California Land Act of 1851, which set up a three-member commission to adjudicate the validity of private land claims “by virtue of any right or title derived from the Spanish or Mexican government.” In making these determinations, the land commissioners were to be governed by the Guadalupe Hidalgo treaty, the law of nations, “the laws, usages, and customs of the government from which the claim is derived,” equity principles, and U.S. Supreme Court decisions.

The legislative history of the Land Act indicates the intended authority, class unity, and exclusiveness).

50. Rolle, supra note 33, at 184.
51. Id. at 6, 281.
narrow scope of the confirmation process. One senator commented that the treaty guaranteed the Californios “exactly that property to which they were entitled” under Hispanic law, and did not “enlarge the rights of claimants.” 56 Another senator considered that the Land Act was “not a bill the design and intention of which is to confer titles, but to ascertain who is in possession of titles.” 57 If a land grant confirmation could pass only an interest valid under Spanish or Mexican law, this limitation would preclude a surface owner’s claiming subsurface rights.

The question of mineral ownership in the new state of California was brought to the fore by conflicts between miners and agriculturalists over access to land. 58 Establishing the parameters of acceptable land use in the early 1850s, the California legislature tended to favor mining interests, 59 at this point largely individual prospectors and small partnerships. 60 In the Possessory Act of 1850, settlers were allowed to preempt 160 acres of public land, but settlement was prohibited on “lands containing mines of any of the precious metals.” 61 This statute was amended two years later to authorize prospecting on land already preempted for grazing or agriculture. 62 The implicit message of the Possessory Acts, consistent with Hispanic law, was that mining was a privileged economic activity deserving government protection.

In line with the thrust of this legislation, the 1853 California Supreme Court decision of Hicks v. Bell 63 gave judicial sanction to public mineral ownership. Hicks involved two groups of miners, a prior and a later contingent, who contested the rights to a claim on the Yuba river. 64 After the trial court ruled for the first arrivals, the second group appealed, arguing that the disputed portion of the premises had been occupied, and was public land open to all claimants. 65 The prior miners replied that the federal government had ceded all minerals in streambeds to the state. 66 They also

60. Rodman W. Paul, California Gold 50-56 (1947).
63. 3 Cal. 219 (1853).
64. Id. at 219-20.
65. Id. at 222-23.
66. Respondents’ Points and Authorities at 8, Hicks v. Bell, 3 Cal. 219 (1853).
maintained that according to local mining custom, partial possession of a claim constituted possession of the whole, and that the state had authority to enforce such rules under its police power.

Writing for a majority of the state supreme court, Justice Solomon Heydenfeldt affirmed, broadly holding that "[t]he mines of gold and silver on the public lands are as much the property of this State, by virtue of her sovereignty, as are similar mines in the lands of private citizens." California legislation had thus properly allowed local custom to be applied to the resolution of claim disputes, so the earlier prospectors should prevail. Heydenfeldt's public mineral access position was completely consistent with Hispanic sovereign proprietorship, although he cited only common law sources such as Blackstone in the opinion. Journalists quickly grasped the meaning of the ruling, with one asking rhetorically, "Should not the people congratulate themselves upon the acquisition of so splendid a heritage, and that its proprietorship had been placed in their own hands and subject to their own control?"

California Supreme Court cases subsequent to Hicks followed that decision's holding that the state owned precious minerals. In Stoakes v. Barrett and McClintock v. Bryden, the court held that state sovereignty over gold mines permitted any individual to prospect on public lands, even if these were already occupied for agricultural or grazing purposes. As in Hicks, the justices did not rely directly on Hispanic law, although one of the Stoakes parties cited the Guadalupe Hidalgo treaty and the McClintock court stated generally that control of valuable metals had been "the admitted policy of the different governments of the world." These cases left open the question whether, notwithstanding the state's ownership of the gold, prospectors could enter private land to extract it.

67. Hicks, 3 Cal. at 223.
68. Respondents' Points and Authorities at 6, Hicks v. Bell, 3 Cal. 219 (1855).
69. Hicks, 3 Cal. at 227.
70. See Act of April 29, 1851, 2 Cal. Stat. 51, §621 (1851) (admitting proof of local mining custom in actions respecting claims).
71. Hicks, 3 Cal. at 227.
72. Id. at 225 (quoting 1 BLACKSTONE, supra note 15, at 294 (1765)).
73. PLACER TIMES AND TRANSCRIPT, Aug. 19, 1853, at 2.
74. 5 Cal. 57 (1855) (Heydenfeldt, J.).
75. 5 Cal. 97 (1855).
76. Appellants' Points and Authorities at 2, Stoakes v. Barrett, 5 Cal. 37 (1855).
77. McClintock, 5 Cal. at 98.
78. See Stoakes, 5 Cal. at 99 (stating that "although the State is the owner of the gold and silver found in the lands of private individuals as well as the public lands, yet to authorize an
When the Las Mariposas litigation reached the state's highest court, the justices initially relied on Spanish and Mexican law and articulated a broad vision of public mineral rights. Pursuant to the California Land Act, John C. Frémont's title to the estate was confirmed by the Land Commission in 1852, and this finding was upheld by the U.S. Supreme Court in 1854. Writing for the majority, Chief Justice Roger B. Taney expressly avoided the subsurface issue, stating that "whether 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." Two years later, President Franklin Pierce issued Frémont a patent for the property.

It was the 1855 resurvey of the grant, embracing gold-bearing areas not within the original 1849 survey, that triggered conflict with local prospectors. One group of the latter, organized as the Merced Mining Company, obtained an injunction against Frémont and his agents entering the company's claim, which included the valuable Mt. Ophir quartz reduction works. Attempting to acquire possession of Mt. Ophir, which was within Las Mariposas as resurveyed, Frémont leased that portion of the property to his caretaker, Biddle Boggs, who initiated an ejectment action in April, 1857. At a public meeting in the town of Mariposa, Merced's attorney, S.W. Inge, condemned Frémont for "seeking fraudulently to monopolize the mines, which are the property of the people." Despite this popular opposition the trial court ruled that Boggs was entitled to possession, based on the premises being within his les-

invasion of private property, in order to enjoy a public franchise, would require more specific legislation than any yet resorted to.

80. Frémont, 58 U.S. at 505.
81. Crampton, supra note 16, at 234.
82. Crampton, supra note 16, at 232-34. The survey was carried out by the state surveyor general's office, which consulted with the Las Mariposas estate manager, J.E. Clayton, in locating the boundaries of the tract. Id. at 231. See also Newell D. Chamberlain, THE CALL OF GOLD 62 (1956) (asserting that although the survey may have been influenced by Frémont's agents, it was conducted without his personal knowledge).
83. Merced Mining Co. v. Frémont, 7 Cal. 517 (1857). See also Crampton, supra note 16, at 242 n.2 (summarizing the course of this litigation).
84. Crampton, supra note 16, at 232.
86. Fremont Grant—Interesting Correspondence, DAILY ALTA CALIFORNIA, June 23, 1857, at 2.
sor's patented land grant. 87
On appeal, attorney Inge argued for Merced that under Hicks and its progeny, gold and silver mines were state property, which could be occupied and appropriated by any person willing to work them. 88 Inge's co-counsel, the Cook & Fenner firm, supported state ownership with references to Mexican and English sovereign mineral rights. 89 Frémont lawyers Joseph Baldwin and former California Supreme Court Justice Solomon Heydenfeldt countered with their own characterizations of Hispanic and common law doctrine. They contended that Mexican land grants passed precious metals to the grantees—a position at odds both with Hispanic law and with Heydenfeldt's own state sovereignty holding in Hicks. Baldwin and Heydenfeldt also cited Blackstone to the effect that English land grants conveyed minerals, 91 but conveniently neglected to mention that the Commentaries clearly stipulated that all gold and silver mines belonged to the king. 92 Finally, they maintained that even if the state had title, it had never licensed entries onto private property for prospecting, a position which disregarded the 1852 Possessory Act's categorical authorization of just such mining. 93
In January, 1858, a majority of the supreme court reversed the trial judge and held for Merced in the first Biddle Boggs v. Merced Mining decision, strongly asserting public subsurface rights. Going beyond Hicks, Stockes, and McClintock, Justice Peter H. Burnett's opinion explicitly referenced Hispanic as well as common law, finding that Mexico had reserved minerals, leaving a right of property in the nation. 95 Deviating somewhat from the California precedents, the justices went on to rule that the gold had passed from Mexico to the U.S. Government, rather than to the state. 96 They concluded by addressing the scope of entry issue left open by the previous decisions, squarely holding that federal authority had cre-

87. Biddle Boggs, 14 Cal. at 282-87. See also Chamberlain, supra note 82, at 63-66 (describing the trial proceedings).
88. Appellants' Brief at 7, Biddle Boggs.
89. Biddle Boggs, 14 Cal. at 299.
90. Id. at 289.
91. Id. (quoting 2 Blackstone, supra note 15, at 18 (1765)).
92. Blackstone emphasized that "those mines, which are properly royal, and to which the king is entitled when found, are . . . those of silver and gold." 1 Blackstone, supra note 15, at 284. See also Hicks v. Bell, 3 Cal. 219, 225 (Heydenfeldt, J., quoting this passage).
93. Biddle Boggs, 14 Cal. at 292.
94. See supra text accompanying note 62.
95. Biddle Boggs, 14 Cal. at 311.
96. Id. at 312.
ated a “general license” to mine on private land, and that Merced could therefore prospect within Las Mariposas. 97 In a brief concur-
rence, Chief Justice David S. Terry commented that it was not nec-
essary to decide whether subsurface rights were retained by the
United States or by California, for in neither instance would the
gold belong to Frémont. 98
Reactions to the case differed according to the interests affected.
The former sheriff of Mariposa County, John Boling, sided with the
miners. He maintained that they were merely trying to prevent
Frémont “from wrenching, by force or otherwise, the hard earned
labor of those men who have in good faith acquired their posses-
sions.” 99 But a Frémont partisan lamented that the ruling dealt “a
heavy blow to the prosperity of a large portion of the county.” 100
Landowning interests were now concerned not only with traditional
agricultural uses, but with extractive opportunities as well, as they
eyed underground veins “of fabulous richness, besides placers
not yet half wrought, beyond calculation.” 101
In the face of bitter ideological conflict, the state supreme court
had placed Hispanic and common law doctrine behind its affirma-
tion of public mineral ownership. But government sovereignty
over the subsurface estate had reached its high-water mark. After
the decision, the high court’s personnel changed: Justices Burnett
and Terry resigned and were replaced by Joseph Baldwin, who had
represented Frémont (via Boggs), and by W.W. Cope. 102 The third
justice was Stephen J. Field, the lone dissenter in the first Biddle
Boggs case, and this new composition must have appeared propi-
tious to the losers. Indeed, Frémont attorney Solomon Heyden-
feldt filed a rehearing petition in March, 1858, dramatically warn-
ing that “civilization itself” depended “upon the security of
property,” which if destroyed would result in “the barbarian life of
the wilderness.” 103 The rehearing was granted, and by July the par-
ties were back in court.

97. Id. at 314.
98. Id. at 314.
99. Letter from John Boling to Governor John B. Weller, in The Bear Valley Troubles, DAILY
ALTA CALIFORNIA, August 2, 1858, at 4.
100. Letter from Mariposa from an Occasional Correspondent, DAILY ALTA CALIFORNIA, May 24,
1858, at 1.
101. Id.
102. SWISHER, supra note 16, at 85-86.
103. Petition for Re-hearing at 2, Biddle Boggs.
IV. PRIVATIZATION IN CALIFORNIA, 1859-61

The rehearing of *Biddle Boggs v. Merced Mining Co.* resulted in a judicial reevaluation of pre-Conquest precedent and a move towards the privatization of mineral wealth. In this second case the litigants intensified their dispute over the content and applicability of Hispanic subsurface doctrine. For Merced, the San Francisco firm of Halleck, Peachy, & Billings\(^\text{104}\) defended Burnett's ruling with exhaustive citations to Spanish and Mexican legal sources, detailing the separate nature of surface and mineral estates and the government reservation of the latter from land grants.\(^\text{105}\) Hispanic law also supported a general prospecting license, because sovereign gold and silver ownership was subject to the "right of the public to search and dig."\(^\text{106}\) Merced's brief considered that these doctrines were not altered by the change to U.S. sovereignty,\(^\text{107}\) and noted that Congress's 1851 California Land Act was not intended to confer any new titles on land grantees.\(^\text{108}\) The brief concluded with socioeconomic policy arguments, urging the court not to benefit "the unjust pretensions of rich landed proprietors" at the expense of nine-tenths of the state's inhabitants, i.e., smaller mining companies and independent prospectors.\(^\text{109}\)

The Frémont interests countered, in a brief by D.W. Perley, with an entirely novel contention. Civil, or Roman, law had originally considered minerals within private grants to belong to the landowner, but "the mines were seized under various pretenses by the sovereigns of Spain," and Mexico perpetuated these "despotic ordinances."\(^\text{110}\) Perley went on to assert that "these prerogative laws" were inconsistent with U.S. policy, that they were "annulled by the

\(^{104}\) See WINEK, supra note 16, at 44-50 (describing the firm's founding and expertise on Hispanic law).

\(^{105}\) See Argument on Rehearing of the Case, Brief for Appellant at 2-3, *Biddle Boggs* (citing 2 *JOAQUÍN ESCRÍBES*, DICCIONARIO RAZONADO DE LEGISLACIÓN Y JURISPRUDENCIA 589-99 (1847); 1 GAMBOA, COMMENTARIES, supra note 10, at 25, 30, 139; 2 GAMBOA, COMMENTARIES, supra note 10, at 255-85; LARES, supra note 13, at 87, 98; MEXICO, ORDENANZAS, supra note 13, at 69-70, 72-75, 79, 114; ROCKWELL, supra note 11, at 50-51, 72, 76, 135, 170).

\(^{106}\) Id. at 10-11 (citing LARES, supra note 13, at 91-99; Mexico, Decretos, Oct. 7, 1823, March 11, 1842; MEXICO, ORDENANZAS, supra note 13, at 68 passim).

\(^{107}\) Id. at 11-12.

\(^{108}\) Id. at 7 (citing CONG. GLOBE, supra note 57, at 427).

\(^{109}\) Id. at 99.

\(^{110}\) *Biddle Boggs*, 14 Cal. at 337. It should be noted that ancient civil law did not clearly give ownership of what lay beneath the surface owner; during some periods of Roman history mines were in private hands, and at other times were under the control of the emperors. See J.A. CROOK, LAW AND LIFE OF ROME, 90 B.C.—A.D. 212 161 (1967).
conquest," and that "[t]he civil law became necessarily revived," but cited no authority other than the supposedly obsolete Hispanic legal sources.111 He then maintained that Frémont’s U.S. patent for Las Mariposas not only confirmed the land, but also relinquished the government's title to "anything the land contains."112 Finally, Perley nebulously invoked the Guadalupe Hidalgo treaty's property guarantee, which he claimed would be violated if Frémont were "divested of a single square foot within the area of his patent."113

In a reply brief, Merced attorney S.W. Inge rebutted some of these contentions. Perley's characterization of Roman law, whatever its accuracy, was irrelevant, for both sides now agreed that the Spanish and Mexican regimes considered gold mines to belong to the government.114 Since no civil law principle of private subsurface ownership had ever obtained in Mexico, Inge queried as to "how . . . that could be revived that never had existed?"115 And on the policy issues, Frémont’s assertion of absolute property rights was merely an "iniquitous attempt . . . to monopolize the mineral wealth of the state."116

Stephen J. Field, now Chief Justice, wrote for a two-judge California Supreme Court in a move towards limiting public access. Because Justice Baldwin had argued the case as one of Boggs' attorneys, the court postponed consideration of the mineral ownership question—an issue "of great magnitude and importance," but not essential to the resolution of the appeal—until it could be presented to the full bench.117 Nevertheless, Field went on to hold that, even if the gold were federally or state owned, neither government could license miners to enter private land to extract it.118 Disregarding the parties' extensive briefing on the Hispanic open prospecting laws, the Chief Justice considered any U.S. interest sub-

111. Biddle Boggs, 14 Cal. at 337 (citing, inter alia, 2 ESCRICH, supra note 105, at 593, 596; MEXICO, ORDENANZAS, supra note 15, arts. 1, 2, 9, art. 6, art. 14; ROCKWELL, supra note 11, at 53, 112).
112. Id. at 344. To support this proposition, Perley referenced an 1845 Georgia Supreme Court decision relating to state land grants to Native Americans, rather than to Hispanic law. See State of Georgia v. Canaoo, DAILY NAT’L INTELLIGENCER, OCT. 24, 1845, at 2, cited in Biddle Boggs, 14 Cal. at 343.
113. Biddle Boggs, 14 Cal. at 345-46.
114. Appellant’s Brief in Conclusion at 4, Biddle Boggs.
115. Id. at 9.
116. Id. at 23.
117. Biddle Boggs, 14 Cal. at 373-74. The court on this occasion comprised Justices Field and E.W. Cope.
118. Id. at 374-76.
ject to the regulatory power of the state, which had not legislatively authorized public mining on private premises. Finally, Field reflected the romantic pretensions of the Frémonts and their lawyers about absolute property prerogatives when he asked rhetorically, "What value would there be to a title in one man, with a right of invasion in the whole world?" In addition to ruling on the license issue, the Court found no basis for Merced's allegations that Frémont had fraudulently surveyed the estate, and that he was estopped from asserting title due to repeated disclaimers, but these holdings are not pertinent here.

Why did the California Supreme Court reverse itself so soon? In a contemporaneous pamphlet entitled The GOLD KEY COURT OR THE CORRUPTIONS OF A MAJORITY OF IT, the anonymous author, an "Ex-Supreme Court Broker," alleged that after the first Biddle Boggs ruling, Frémont gave Justice Baldwin $100,000 to have the case reheard and gave Field $50,000 to obtain a favorable result. These bribery allegations have been repeated by Field biographer Carl B. Swisher, but are ultimately unprovable. And although it is apparent that twenty years after the decision, Field and Frémont corresponded as friends regarding their earlier days in frontier California, there is no direct evidence that their relationship influenced the outcome in second Biddle Boggs.

Clearly, however, Hispanic law had been distorted in Perley's brief for Frémont, and ignored in Field's holding. These misinterpretations were likely deliberate, for the Merced briefs cited Spanish and Mexican legal sources correctly, and these works were easily accessible in libraries to California attorneys and judges of the day. Accurate portrayal of the previous sovereign's law had to

119. Id at 375-76.
120. Id at 379.
121. Id at 356-73.
122. EX-SUPREME COURT BROKER, THE GOLD KEY COURT OR THE CORRUPTIONS OF A MAJORITY OF IT (approx. 1860) (original in Huntington Library, San Marino, California, catalogued as Rare Book # 1647).
123. See SWISHER, supra note 16, at 85-86.
124. Letter from Stephen J. Field to John C. Frémont (July 21, 1880) (original in Huntington Library, San Marino, California, catalogued as Manuscript # HM 38200).
125. Both public and private law libraries contained the relevant Hispanic law books. See, e.g., W.C. STRATTON, CATALOGUE OF THE CALIFORNIA STATE LIBRARY 67, 137, 139 (1866) (listing Rockwell, supra note 11; Seete Partidas, supra note 6; Escrache, supra note 105); JAMES E. WAINWRIGHT & CO., CATALOGUE OF A VALUABLE LAW LIBRARY, CONTAINING THREE THOUSAND VOLUMES, BEING THE ENTIRE LAW LIBRARY OF MESSRS. HALLECK, PEACHE & BILLINGS 15-16 (1861) (listing "Spanish and Mexican Law Books"). See also MEXICO,
give way to the overriding policy goal of stabilizing land titles. As Field commented near the end of his opinion, if the license theory were to be upheld, "the proprietor would never be secure in his possessions, and without security there would be little development..."  

Mining as well as landowner advocates immediately recognized the implications of the Biddle Boggs decision. In a four-part article in San Francisco's Daily Alta California, G. Gilchrist criticized the Court for running roughshod over Hispanic law, the Guadalupe Hidalgo treaty, and public mineral access. Aware of the prior land tenure system, Gilchrist attacked Field for clothing "conditional and restricted Mexican grants with 'alodial privileges.'" He considered that the Guadalupe treaty and the Land Act guaranteed landowners "only the interests that Mexico gave them." The result was a policy that "aggrandizes the large holder at the cost of the working occupant."  

On the other side, an Alta editorial noted that, although the justices limited themselves to denying the general public a right of entry for prospecting, "there [was] plainly manifest ... a leaning toward the declaration that the title to the land possesses the title to the precious metals which it contains." The Alta urged the federal and state governments to relinquish explicitly all mineral rights, in order to encourage economic stability and investment. But Stephen J. Field and the California Supreme Court did not wait for legislative action, and shortly forged the last link in the chain of privatization.

This final step was taken by Field in his 1861 decision, Moore v. Smaw and Frémont v. Flower. Here, Frémont was joined by R.B.  

ORDENANZAS, supra note 15 (title page inscribed with dedication to U.S. District Judge Ogden Hoffman, San Francisco, May 10, 1852; original in Rare Book Collection, Boalt Hall School of Law, U.C. Berkeley).  
126. Biddle Boggs, 14 Cal. at 579.  
129. Id., Dec. 9, 1859, at 1.  
131. The Rights of Miners, DAILY ALTA CALIFORNIA, Nov. 18, 1859, at 2.  
132. Id.  
133. 17 Cal. 199 (1861).
Moore, a Butte County landowner, also asserting title derived from a Mexican grant, when both brought ejectment actions against gold miners. The trial court ruled for the plaintiffs, and on appeal both proprietors attempted to justify absolute subsurface title by referring to Hispanic law.

Briefing Frémont’s case, attorney C.T. Botts claimed that the Spanish royal ordinances opened the mines to private ownership via discovery and registry. But rather than citing specifically to the ordinances, Botts merely alluded to an argument characterizing them in the contemporaneous New Almaden litigation, probably because the original source, Gamboa’s Commentaries, explicitly stated that mineral rights always remained with the crown.

Similarly, Botts’ brief for Moore extravagantly analogized the Hispanic system to American preemption, because the former invested individuals “with an exclusive and indefeasible title to the mines of gold and silver.” Botts cited no authority whatsoever for this proposition, which was flatly contradicted by the scholarly Halleck, Peachy & Billings brief in Biddle Boggs which Botts himself had quoted two pages previously. In response to these arguments, Flower simply maintained that Spanish and Mexican mineral sovereignty either passed to California, according to Hicks, or alternatively resided in the United States.

Now writing for a full three-justice supreme court, Field accepted Flower’s description of pre-Conquest Hispanic law, but then pronounced the novel theory that precious metals ultimately became

134. Transcript on Appeal at 1-2, Frémont; Transcript on Appeal at 3-4, Moore.
137. Id. at 10 (citing Judah P. Benjamin). Cf. KENNETH M. JOHNSON, THE NEW ALMADEN QUICKSILVER MINE 36-74 (1963) (discussing the 1856-63 federal court cases involving claims to the New Almaden mine near Santa Clara, California).
138. 1 GAMBOA, COMMENTARIES, supra note 10, at 24, 27. See also ROCKWELL, supra note 11, at 151, 153 (a widely available reference work transcribing the above passages).
139. Argument of Respondent at 7, Moore. Cf. Pisani, supra note 58, at 285-86 (summarizing antebellum preemption statutes in various states, by which land occupants could obtain title or restitution for improvements).
140. Id. at 5.
141. The Halleck, Peachy & Billings brief, drawing on Gamboa, stated that individual mineral ownership “was of the nature of a conditional limited title which was subject to de

142. Moore and Frémont, 17 Cal. at 203. No appellate brief for Smae has survived in the original case file or accompanying the published decision.
the surface owner's property. Revealing a thorough understanding of the Spanish and Mexican authorities, including the *Siete Partidas*, Gamboa, and Lares, Field admitted that gold and silver were vested in the sovereign and not conveyed by ordinary land grants. With the Guadalupe Hidalgo treaty, he continued, these minerals passed with all other Mexican national property to the United States. The Chief Justice considered, contrary to *Hicks*, that subsurface rights did not devolve to the state, and that in any event the resolution of the mineral ownership question was unnecessary for the disposition of that case.

According to Field, the legal basis for privatization was established by the California Land Act of 1851. The Land Act, he asserted, set up a grant confirmation and patenting process which did not depend upon the character of the claims—they could be legal, equitable, specific tracts, or "floating" amounts within larger boundaries. Field could now also find that there was nothing in the Land Act "restricting the operation of the patents... to the interests acquired from the former Government" since the patents were to issue "without words of reservation or limitation." The Chief Justice concluded that the U.S. patent of a confirmed Mexican land grant conveyed both the surface and the precious metals beneath, which would "pass with the transfer of the soil in which they are contained." He defended this interpretation as consistent with the goal of the Land Act: to settle private land claims "by placing them, so far as the Government is concerned, beyond controversy." And indulging his absolutism about property rights, Field quoted Blackstone's statement that land included "not only the face of the earth, but everything under it or over it."

In *Moore and Frémont*, the Court went beyond *Biddle Boggs* to unite the surface and mineral estates explicitly, and did so by distorting applicable precedent. First, Field incorrectly described *Hicks* as mere *dicta* on mineral ownership. In fact, that decision's finding of state sovereignty was central to its conclusion that California had...

143. Id. at 213-17.
144. Id. at 217.
145. Id. at 217-18.
146. Id. at 224.
147. Id.
148. Id. at 225.
149. Id. at 223.
150. Id. at 224 (quoting 2 BLACKSTONE, supra note 15, at 19).
the authority to regulate the mines. More significantly, while the Chief Justice was clearly knowledgeable about Mexican subsurface doctrine, he ignored the implications of the Guadalupe treaty and the 1851 California Land Act. Field was certainly aware of the treaty’s property guarantee, and had been presented in Biddle Boggs with the Halleck, Peachy & Billings brief’s legislative history of the Land Act showing that the statute was not intended to confer any new titles. In fact, his reminiscences show he knew that the reality of Mexican land titles and his privatization holding were inconsistent: he conceded that “the court had no discretion to enlarge or contract such grants to suit its own sense of propriety.” Finally, Field mangled common law as well, for while quoting from Blackstone on a surface owner’s absolute mineral rights, he disregarded that authority’s insistence that gold and silver mines always belonged to the king.

As for public sentiment, the generally pro-landowner Daily Alta California lauded the Moore and Frémont decision, trumpeting that the surface proprietorship of minerals was now “authoritatively established.” Indeed, Field’s ruling marked the culmination of California mining law’s movement from the Hispanic principle that gold under private land was a public resource to the doctrine that precious minerals were the preserve of the surface owner. Throughout this process, many litigants, lawyers, and judges were influenced by romanticized views of pre-Conquest California’s auriferous wealth and estate-based society—views that contrasted sharply with the more accurate accounts and legal authorities available.

Initially, the Supreme Court had validated Spanish and Mexican public mineral rights, considering them within state jurisdiction in Hicks, and later deeming them federally administered in the first Biddle Boggs decision. Under Field, however, the Court changed di-

151. Hicks v. Boll, 9 Cal. 219, 224, 227. Field also alleged that in Hicks, subsurface proprietorship was not even raised by counsel. But this contention is rebuffed by one of the parties’ briefs, which maintained that the United States had ceded all minerals in streambeds to the state. Respondent’s Points and Authorities at 8, Hicks.
152. See Argument on Rehearing, Brief for Appellant at 7 (citing CONG. GLOBE, supra note 57, at 427). See also text accompanying notes 56-57 (demonstrating Congress’ intention that the grant confirmation process not enlarge claimants’ rights beyond their entitlements under Hispanic law).
154. 1 Blackstone, supra note 15, at 285-86.
rection, prohibiting the mining public from entering private land in the second Biddle Boggs, and firmly establishing the surface owner's exclusive title to precious metals in Moore and Frémont. In writing the latter opinions, the Chief Justice intentionally disregarded applicable Hispanic law, the Guadalupe treaty, and the Land Act, preferring to emphasize the sanctity of property and the policy of stabilizing land tenure.

Surface proprietorship of minerals is still the rule in California today, having been most recently affirmed in the 1955 federal district court decision of Blue v. McKay,156 which applied state law. In Blue, the court held that the U.S. Interior Department properly refused to issue a lease for the oil and gas beneath a former Mexican land grant, because the grant patentees' successors still owned the subsurface rights.157 The judge acknowledged that "under Spanish and Mexican law, no interest in the minerals passed by grant from the Mexican government . . . without express words,"158 and that the California Land Act "only confirmed the title of the claimants to the agricultural land."159 But following Moore and Frémont, the court decided that U.S. patents divested the nation of the subsurface property acquired from Mexico, and that to hold otherwise would "do violence" to the Land Act's purpose of settling claims.160 Significantly, Blue went beyond Field's ruling that a patent relinquished the federal title to gold and silver, and applied the doctrine to oil and gas as well.

V. PRIVATIZATION IN NEW MEXICO, ARIZONA, AND TEXAS

Despite its rather transparent misconstruction of prior law, the doctrine established by Field in 1861 ultimately took hold in New Mexico and Arizona as a result of mineral title litigation, and in Texas via statutory enactment. In 1854 Congress established the Office of the Surveyor General of New Mexico, the southwestern counterpart of the California Land Commission, which was charged with ascertaining "the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain.

157. Id. at 321.
158. Id. at 319.
159. Id.
160. Id.
The Surveyor General’s authority to adjudicate the validity of Hispanic land grants extended over New Mexico and Arizona, which together comprised New Mexico Territory until 1868, when Arizona was organized separately.

Significantly, the 1854 Act was silent on the question of mineral ownership, an omission which opened the door to legal conflict between land grant owners and prospectors. For more than thirty years, the question was left unresolved, as Anglo mining promoters lured investors with the romantic history and current potential of New Mexico, where “old mines ... are now constantly being rediscovered [sic] and reopened.”

In 1888, the territorial supreme court took an initial position adverse to surface owners, holding in *U.S. v. San Pedro & Canon del Agua Company* that a land grant patent did not convey any mineral title. After a former Mexican citizen sold his immense tract near Santa Fe, containing gold, silver, copper, and a mining town, to several Americans, they formed a corporation and erected extensive stamp and reduction works. The federal government sued to invalidate the grant’s U.S. patent as fraudulent, maintaining that it was unlikely that the Mexican government would have allowed one individual to monopolize an entire town and region, since many of the local inhabitants were already prospecting and there was a longstanding Spanish and Mexican policy favoring general economic development. The New Mexico Supreme Court agreed, setting aside the patent (thus returning the land to the public domain) and stating further that Mexican land grants did not include the minerals below. Demonstrating their knowl-


162. HOWARD ROBERTS LAMAR, THE FAR SOUTHWEST, 1846-1912: A TERRITORIAL HISTORY 432-34 (2d ed. 1970). New Mexico and Arizona had territorial status during the years 1846-1912 and 1865-1912, respectively. Id. at 501, 504.

163. § 8, 10 Stat. at 309. See, e.g., Letter from Unknown Author to John S. Watts (April 18, 1854) (original in Huntington Library, San Marino, California, catalogued as Manuscript # RI 638) (requesting advice from an attorney as to whether a grant from the Mexican government in New Mexico included minerals).

164. TERRITORIAL BUREAU OF IMMIGRATION, RESOURCES OF NEW MEXICO 50 (1881).

165. 17 P. 337 (N.M. 1888), aff'd on other grounds 146 U.S. 120 (1892).


167. TERRITORIAL BUREAU OF IMMIGRATION, supra note 164, at 51.


edge of Hispanic law, the justices supported their opinion with the standard translations, as well as with the early California case supporting public subsurface access, *Hicks v. Bell*. 170

Prospectors on the San Pedro grant appreciated the significance of the decision, celebrating by firing cannons into the surrounding mountains, while the grant owners frantically attempted to buy up the individual mining claims. 171 The ruling encouraged miners on other New Mexico land claims, who now no longer had to lease or pay royalties. 172 Congress also acknowledged *San Pedro* in its 1891 statute revising grant validation procedures, which declared that “[n]o allowance or confirmation of any claim shall confer any-right to any gold, silver, or quicksilver mines” unless the grant specifically included the minerals or the grantee had “become otherwise entitled in law and in equity” (leaving states free to add mineral ownership to the surface estate if they so chose). 173 Several years later, the U.S. Supreme Court recognized in *dicta* that Mexican law as well as the 1891 Act prevented minerals from passing automatically with grants of land originating prior to the American annexation of the Southwest. 174

Yet despite the general awareness of Hispanic precedent, and of the benefits of public mineral access, the New Mexico Supreme Court reversed itself in 1903. The occasion for the change was quiet title litigation initiated by Thomas Benton Catron, a wealthy Anglo attorney accumulating land grants, who was extremely knowledgeable about Spanish and Mexican law, but wanted untrammeled control over his property. 175 In *Catron v. Laughlin*, 176 the

170. Id. at 404, 406 (citing ROCKWELL, supra note 11, at 124-27, 130-31, 411; FREDERIC HALL, THE LAWS OF MEXICO §§ 1210-1213, 1235 (1885); Hicks v. Bell, 3 Cal. 219, 220 (1858)).


175. See VICTOR WESTPHALL, THOMAS BENTON CATRON AND HIS ERA 26, 138-39 (1973) (discussing Catron's immersic.: in New Mexican history and law, and his extensive law library). At one time Catron owned in excess of 3 million acres of land grants. Id. at 71. Catron was part of the group of Anglo land grant speculators who politically dominated late nineteenth-century New Mexico and were collectively known as the "Santa Fe Ring." LAMAR, supra note 182, at 136-70).

176. 72 P. 26 (N.M. 1903).
justices accepted the California privatization rationale of *Moore v. Smau*, holding for Catron that his U.S. patent operated "as a quit-claim and transfer of any possible interest which our government might have in and to the lands alleged to be within the grants."

After the *Catron* decision, minerals beneath a land grant were available for public prospecting only if the surface claimant had failed to perfect the interest under Spanish, Mexican, or U.S. law.

By 1990, the New Mexico (now state) courts assumed that subsurface rights were included in properties disputed between a land grant community's board of trustees and individual landowners within the grant.

The judicial distortion of Hispanic mining law in the interest of large landowners has been so thorough in New Mexico that the state's official guide to mineral regulation now considers mines on Spanish land grants to be "part of the area granted."

Ultimately, the New Mexico Supreme Court expanded the privatization doctrine set out in *Catron* to encompass public access to pasture, water, timber, and roads on land grant "common lands."

In the 1940 case of *H.N.D. Land Co. v. Suazo*, the owner of the Tierra Amarilla grant (previously the property of land baron Thomas Catron) sued to quiet title against neighbors who claimed customary rights to use common lands within the grant boundaries.

The parties stipulated at trial that the original 1832 Mexican grant and subsequent conveyances guaranteed free use of certain pastures, wood, water, and roads, and that the 1881 U.S. patent explicitly disavowed affecting third party rights.

Nevertheless, the court cited *Catron* and ruled that the patent vested absolute title to

177. *Id.* at 32.
182. 105 P.2d 744 (N.M. 1940).
185. *Id.* at 45.
the common lands in the grantee. In a related 1956 decision involving the Tierra Amarilla grant, *Martinez v. Mundy*, the court held that the neighbors had not acquired any of their claimed use rights by prescription. Thus, following the mineral privatization trend, New Mexico courts eliminated the common land privileges that had been public under Hispanic law.

Like New Mexico, Arizona was subject to the 1854 Act establishing the Surveyor General's Office, which left the subsurface ownership question unresolved. Prospectors pouring into the territory were aware of Hispanic law's relevance for mineral access. In an 1864 speech, Arizona governor John Goodwin waxed romantic about Mexican mining law, extolling its anti-monopolistic and pro-development qualities, and suggesting that while Mexico had never prospered because of that country's "distracted condition," adoption of its mineral ordinances would give "full scope to the enterprise and energy of our people." The territorial legislature went so far as to incorporate certain portions of Gamboa's *Commentaries* into Arizona's first mining statute, allowing public prospecting on private land as long as the surface owner was compensated for any damage. Perhaps because universal mineral access was guaranteed, no nineteenth-century cases dealt with the issue, and the federal 1891 Act simply acknowledged Arizona law by stating that

188. Id. at 214. See also EBRIGHT, supra note 183, at 26-27 (criticizing the reasoning in *Martinez*).
190. § 8, 10 Stat. at 309.
194. Cf. *Murray v. Wickenburg* (Ariz. Territory 1864), *quoted in The Vulture Lode, ARIZ. MINER*, Oct. 26, 1864, at 1, 3 (holding that a mining claim was invalid unless registered in accordance with Mexican law, but does not address the subterranean rights question).
grant confirmations did not include minerals.\footnote{195}

But when the Arizona Supreme Court finally focused on subsurface proprietorship, it followed the privatization doctrine established in California and New Mexico. Matters came to a head in the 1925 case of \textit{Gallagher v. Boquillas Land & Cattle Company},\footnote{196} when the corporate owner of a Mexican land grant attempted to quiet title against prospectors excavating gold and silver on its tract. Appealing from an adverse trial court judgment, the miners maintained that under Mexican law it was "early settled" that ordinary land grants did not include gold and silver,\footnote{197} citing Gamboa,\footnote{198} and noting that the 1891 Act incorporated this principle.\footnote{199} The justices, however, ignored Hispanic law and construed the 1891 Act narrowly, ruling that the latter only reserved from a U.S. patent those mines already "known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them \ldots."\footnote{200} Since there was no evidence that the mines in question were being worked when the patent was issued, they became the property of the grant owner along with the surface estate.\footnote{201} The court considered that \textit{Moore and Frémont} had disposed of "the so-called regalian theory \ldots whereby minerals in the ground are reserved to the government \ldots,"\footnote{202} and thus brought Arizona in line with Field's approach.

Texas saw a parallel shift from public mineral sovereignty to privatization, accomplished legislatively, although some courts have limited the scope of private control. In 1840, after Texas revolted from Mexico and became an independent republic (1836-45), its congress adopted the common law but expressly retained Mexican law relating to land grants, colonization, and minerals.\footnote{203} The maintenance of government control over land and minerals may have reflected the knowledge lawyers and judges during this period had of Hispanic law.\footnote{204} Familiarity with Spanish and Mexican legal

\footnote{195} § 15, 26 Stat. at 860.
\footnote{196} 238 P. 395 (Ariz. 1925).
\footnote{197} Brief of Gallagher, Appellant at 4, \textit{Gallagher} (No. 2946).
\footnote{198} Id. at 5 (citing Gamboa, \textit{Commentaries}, \textit{infra} note 10 at 132).
\footnote{199} Id. at 11.
\footnote{200} \textit{Gallagher}, 238 P. at 399.
\footnote{201} Id.
\footnote{202} Id. at 396 (citing Moore v. Smaw and Frémont v. Flower, 17 Cal. 199 (1861)).
\footnote{203} Law of Jan. 20, 1840, § 2, 2 H. Gamble, \textit{Laws of Texas} 178 (1898).
sources, including mining collections, continued after Texas’s 1845 annexation and U.S. statehood, as demonstrated by an 1848 memorial referencing the 1783 *Reales Ordenanzas de Minería.* This awareness would become relevant as many settlers moved to the state, some to exploit its reportedly “vast mineral wealth.”

The apogee of public mineral access in Texas came with litigation over a valuable salt spring near the Colorado River in the central part of the state. In the 1862 decision of *Cowan v. Hardeman* the Texas Supreme Court held that the 1840 Act gave the state a reserved right to the salt superior to the rights of both the grant owner and an alleged trespasser. A concurring justice solidly grounded the result in Hispanic law by citing Rockwell’s translation of the *Reales Ordenanzas* in support of the public license to prospect.

But only four years after *Cowan,* the new Constitution of 1866 included a provision releasing “to the owner of the soil all mines and mineral substances that may be on the same . . .,” ignoring the Hispanic legal tradition and Texas’s 1840 legislative retention of Mexican mineral law. One Texas historian has interpreted the relinquishment amendment as a deliberate attempt to override the Spanish and Mexican government ownership principle, which “was so deeply imbedded . . . that a constitutional change was required to uproot it.” Subsequent constitutions repeated the release provision in 1869 and 1876. When the state supreme court took


207. See WALLACE HAWKINS, *EL SAL DEL REY* 39-43 (1947) (describing the background of the controversy from the spring’s discovery in 1849 through the 1860s).

208. 26 Tex. 217 (1862).

209. Id. at 224.

210. Id. at 222 (Moore, J., concurring) (citing *Rockwell,* supra note 11, at 49, 53, 65).

211. TEX. CONST. of 1866, art. VII, § 39.

212. See supra note 203 and accompanying text.

213. HAWKINS, supra note 207, at 57. See generally id. at 51-60 (discussing the convention debates surrounding the amendment and the desire to settle tide disputes over “El Sal del Rey,” a large salt lake).


up the issue in the 1884 case of State v. Parker,\textsuperscript{116} it ruled that private landowners, rather than the state, had title to a salt lake, without any mention of Hispanic law.

On two occasions the Texas Supreme Court has construed the mineral release narrowly in favor of the government, referring back to Spanish and Mexican precedent on subsurface sovereignty. In 1912, the court held in Cox v. Robison\textsuperscript{27} that the constitutional relinquishment was only retrospective and did not apply to future conveyances of the public domain, so an application for an unconditional patent to public school land was properly refused. The justices cited "the Mexican law," Cowan, and the 1840 statute,\textsuperscript{218} and were lauded by the press for "[p]rotecting the children's legacy."\textsuperscript{219} And in the 1986 decision of Schwarz v. State\textsuperscript{220} the court found that coal and lignite were not included in the relinquishment and thus were still state-owned, invoking the Si\textit{e}t\textit{e} Partidas provision that the King's mineral reservation did not need to be explicit.\textsuperscript{221} To establish its privatization regime, Texas, like California, New Mexico and Arizona, ran roughshod over Hispanic law, but in rare instances has resurrected it in support of the public interest.

VI. CONCLUSION

In the nineteenth-century American West, an idealized view of the Spanish past and a malleable set of legal principles influenced entrepreneurs, lawyers, and judges alike. After initially promoting universal mineral access, courts and legislatures knowingly mischaracterized or ignored Hispanic precedent in order to alienate much of the public domain. Evidence of such distortion casts doubt on the conventional scholarly view of mineral privatization, which has overlooked the issues of inconsistency with pre-Conquest law\textsuperscript{222} and has ignored the possibility of purposeful misinterpretation.\textsuperscript{223}

Privatization is important not only because the courts misused and evaded applicable precedent, but also because they legitimized

\textsuperscript{116} 61 Tex. 265 (1884).
\textsuperscript{117} 150 S.W. 1149 (Tex. 1912).
\textsuperscript{118} Id. at 1151-52.
\textsuperscript{219} Protecting the Children's Legacy, EL PASO MORNING TIMES, Nov. 90, 1912, at 6.
\textsuperscript{220} 703 S.W. 2d 187 (Tex. 1986).
\textsuperscript{221} Id. at 190 (quoting LAS SI\textit{E}TE PARTIDAS, supra note 6, at 370).
\textsuperscript{222} See supra note 16 and accompanying text.
\textsuperscript{223} See supra note 17 and accompanying text.
the environmental damage caused by large-scale mining in the American West. Abandoning the traditional Spanish (and English) policy of tight sovereign control over resource development, Biddle Boggs and its progeny reflected the mid-nineteenth-century perspective that authorizing intensive exploitation by private business would promote an industrial economy. According to legal historian Morton Horwitz, by the end of the antebellum period "[d]ominion over land began to be regarded as an absolute right to engage in any conduct on one's property regardless of its economic value." Thus the doctrine that a property owner had exclusive control over his subterranean as well as his surface estate was well suited to the needs of the mining industry, which required free rein to employ increasingly elaborate, expensive and ecologically harmful extractive techniques.

In California and other frontier regions, simple placer mining by individuals gave way to complex milling operations, as well as to high-pressure hydraulic methods. Quartz or lode mines like Las Mariposas involved timbering tunnels, blasting out roads, crushing ore in stamp mills, and separating out gold or silver with the aid of mercury. Such large-scale extraction deforested the area to provide mine reinforcement and fuel, polluted the air with mills and smelters, and contaminated the water through dumped tailings. Destruction of vegetation, erosion, and debris accumulation from hydraulic mining has also been well documented. While simpler methods had some limited effects in the American West, only the extensive and heavily capitalized enterprises made possible by privatization had a lasting impact on the land.

224. See supra text accompanying notes 5-15.
227. PAUL, MINING FRONTIERS, supra note 38, at 29-33.
228. Id. at 30-33. See also OTIS E. YOUNG, JR., WESTERN MINING 151-233 (1970) (thoroughly describing lode mining processes).
230. Id. at 302, 328-36.
231. Id. at 338. It should be noted that the termination of the government mineral reservation beneath private land was part of a larger picture which involved the alienation of the public domain, both surface and subsurface, to mining interests. By the Mining Law of 1872, public lands "valuable for minerals" were declared available for exploration, occupation, and purchase. Act of May 10, 1872, ch. 152, 17 Stat. 91 (1872) (codified as amended at 30 U.S.C. §§ 22-47 (1976)). See generally JOHN D. LESLY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987) (analyzing the historical development and current status of the
In August, 1860, John C. Frémont completed a railroad on his estate, to carry gold-bearing quartz down from the mountains to be crushed. During the opening ceremony, the supervising engineer proposed a toast to the processing machinery: “The Benton Mills, the modern alchemists, whose magic work extracts gold from stones . . .” Frémont hoped to wrest gold from the rocks of the Sierras, just as the courts were creating private mineral tracts out of the public subsurface domain. But mounting debts and an inability to attract investment ultimately forced him to sell his interest in the property to creditors in 1863.

Thus, although the legacy of the Frémonts’ Las Mariposas was not personal, it prospered in the romantic view that land—and legal doctrine—could be mined for previously unimaginable riches. The jurisprudential perspective of the Frémonts and Stephen Field, that Hispanic law was consistent with private property absolutism, facilitated the loss of the public domain, the concentration of subterranean wealth, and the degradation of the western environment. Rather than learning from another society’s concept of the common good, American decisionmakers encouraged individual aggrandizement at the expense of a more balanced allocation of natural resources.

law). Like the mineral privatization discussed in this Article, the Mining Law had devastating environmental effects. Id. at 184-85.
232. Notes of a Trip Through the Southern Counties, Number IX, DAILY ALTA CAL., August 10, 1860, at 1.
233. Id.
234. Crampton, supra note 16, at 267-70; Rolle, supra note 35, at 188-89.
235. In an interesting parallel to the western American experience, Mexico ultimately departed from the Spanish legal legacy of close government supervision over mining. Attempting to attract foreign investment during the 1880s and 1890s, the Porfirio Díaz regime released fuel deposits and nonmetallic minerals to the surface proprietors, eliminated or reduced various mine taxes, and streamlined registration procedures. Bernstein, supra note 5, at 18-19, 27-29. As in the United States, these laissez-faire policies facilitated deforestation and the pollution of Mexico’s soil and water. Simonian, supra note 12, at 54-55, 63, 245 n.76.