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The End of Free Land:

The Commodification of Suscol Rancho and the Liberalization of American Colonial Policy

"It is just as legitimate to buy and sell a tract of land for a profit as it is a horse or a milch cow…just as long as there is fee a simple title to land, just so long will it be subject to speculation."

– William S. Green, *The Land Monopoly Question*, GREEN'S LAND PAPER, February 3, 1872.

"California is very important for me because nowhere else has the upheaval most shamelessly caused by capitalist centralization taken place with such speed."

— Karl Marx to Friedrich Adolph Sorge, Nov. 5, 1880.[1]

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[1] KARL MARX ET AL., LETTER TO AMERICANS 1848-1895: A SELECTION, at 126 (1953).

Abstract: This article analyzes the processes of land commodification and the collapse of Free Land as the dominant policy framework for American settler colonial policy. Through an excavation of case records relating to an ownership dispute between Pre-Emptors and capitalists on the Suscol Rancho in Northern California, ending in US Supreme Court case Frisbie v. Whitney (1869), I show how key elements of liberal legality –the anti-redistributive state and formalism – emerged on this colonial periphery in response to a dangerous and violent contest of legalities among settlers. While Lockean "use and improvement" provided a justification for expropriating Native lands, it also justified the expropriation of the unproductive land of white landlords. To the California bar this was a disturbing result. In this way, the Suscol cases cut to the heart of the basis of property: would it be delimited by wastage or by the state? Guided by substantive concerns or form alone? Each side was willing to kill for their land and their vision of law. In the end, Suscol demanded a choice, a choice which reflected a larger transformation in American Empire.

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By the beginning of the Civil War, the colonial policy of "Free Land" had organized a generation of conquest and settlement from Iowa to California. Passed into law in 1841, the first Pre-Emption Act epitomized Jacksonian colonization policy in the United States. In brief, the Act provided for citizen householders to purchase, at the government minimum price of $1.25 per acre, up to 160 acres of Federal land after a year of use, improvement, and residence, with proof and payment taken by the Register and Receiver of the relevant land district.[2] Though only applicable to surveyed land in the original act, later statutes opened unsurveyed land to squatters. Various conditions and exceptions applied. The Act, for example, provided that "Indian title" needed to be "extinguished" at the time of settlement. Land offices enforced these conditions unevenly.

This new "Free Land" policy, a departure from the revenue-generating land offices of the Early Republic, represented a compromise between colonial squatters and imperial bureaucrats.[3] It was, in essence, a statutory legalization of adverse possession. However, squatterdom and officialdom had fundamentally different conceptions of the law. To the former, the Act was the realization of a radical, working-class push for land reform decades,

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[2] The Preemption Act of 1841, 27th Congress, Ch. 16, 5 Stat. 453 (1841); See also, Dexter, Ripley, Nickolls, & Co., The Pre-Emption Laws of the United States. Acts of 1841 and 1843. Together with Directions to the Actual Settlers (1856).

[3] Malcolm Rohrbough, The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837 (1968); Paul Frymer, Building an American Empire: The Era of Territorial and Political Expansion (2017); Julius Wilm, Settlers as Conquerors: Free Land Policy in Antebellum America (2018).

if not centuries, in the making.[4] To the latter, it was but the latest of hundreds of land statutes, the newest layer of accretion that characterized an era of detailed Congressional administration.[5] Pre-Emption was simply a way for citizens to buy public land with more steps. As described by historian Paul W. Gates, the "incongruity" between these legalities produced technical problems.[6] The rift, however, extended to the level of meaning, the normative world of law.[7] It cut to the purpose of colonization and the foundation of property itself. In this way, the Pre-Emption Law stood as the legal basis and means of a new era for American colonization in general, granting it outsized importance in the settler imagination.

For the two decades that followed the birth of "Free Land" policy, the balance of power favored the colonials, especially on the Pacific Coast, a three-week journey by sea from Washington. Oregon colonization, from which California settlement ideologically developed, was anarchic and organized by Pre-Emption and its statutory kin, the Armed Occupation Act (1842) and the Donation Land Claim Act (1850), which operated through a quasi-Lockean framework of usage, occupation, and security in the "State of Nature."[8] In California, however, Pre-Emption produced adverse titles to lands which already had multiple title claims by Mexican Californios and Americans. Indeed, "extinguishment" of Native title was not a pre-requisite of Pre-Emption, rather Pre-Emption provided a means of extinguishing Native title.[9] So too did Pre-Emption challenge the land titles of Californios, the Mexican elite of Alta California. In both cases, Pre-Emption provided a *justification* for taking land and re-allocating it to its "true" and morally worthy

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[4] M. Beer, The Pioneers of Land Reform: Thomas Spence, William Ogilvie, Thomas Paine (1920); Tamara V. Shelton, A Squatter's Republic: Land and the Politics of Monopoly in California, 1850-1900 (2013).

[5] See, William Wharton Lester, Decisions of the Interior Department in Public Land Cases and Land Laws Passed by the Congress of the United States Together with the Regulations of the General Land Office, Vol. 1 (1860). On the character of nineteenth-century administration in general see, Jerry L. Mashaw, Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law (2012) and Nicholas R. Parrillo, Against the Profit Motive: The Salary Revolution in American Government, 1780-1940 (2013).

[6] See, Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 Am. Hist. Rev. 652-681 (1936); Sean M. Kammer, *Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850-1903*, 35 L. & His. Rev. 391-432 (2017).

[7] Robert Cover, *Nomos and Narrative*, 97 Harv. L. Rev. (1983-4).

[8] See, An Act to Provide for the Armed Occupation and Settlement of the Unsettled Parts of the Peninsula of East Florida, 5 Stat. 502 (1842); An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands 76-9 Stat. 496 (1850). Gray H. Whaley, Oregon and the Collapse of Illahee: U. S. Empire and the Transformation of an Indigenous World, 1792-1859 (2010). On the anarchic nature of Oregon settlement, contemporary jurist J. Q. Thornton Wrote, "being without arms and ammunition, in the midst of savages clamorously demanding pay for their lands, and not unfrequently committing the most serious injuries, by seizing property and by taking life, in consequence of the people having neither the ability nor the right to buy." Jessy Quinn Thornton, Oregon and California in 1848, Vol. 2 at 37 (1849).

[9] See, e.g., George Harwood Phillips, Bringing Them Under Subjection: California's Tejon Indian Reservation and Beyond, 1852-1864 (2004).

owners – the American Yeoman colonist.[10] In supporting, per Genesis 3:19, those who ate bread by the sweat of their own brow, Pre-Emption had the imprimatur of moral legitimacy that outright purchase or grant did not.[11]

Heading into the Civil War, the Pre-Emption concept remained popular with the settler public and was further bolstered by the Free Soilers' beloved Homestead Act (1862) and the Justice Department's systematic escheatment of 2.8 million acres in Californio titles in the US Supreme Court between 1859 and 1862 – a campaign waged on behalf of Pre-Emptors on the public domain.[12] Far from a repudiation of Jacksonian colonization policy, the Union-Republican governments retrenched it. But not all was as it seemed, for the balance of power began to shift, at first by degrees and then in a sudden lurch. Just seven years after Free Land reached its high-water mark in 1862, the Supreme Courts of California and the United States declared Pre-Emption a dead letter, enabling the forcible ejectment of hundreds of Yeomen squatters from the lands of Suscol Rancho in Napa and Solano Counties[13] – squatters who had been encouraged to settle the land by those very courts in 1861.[14] In a contemptuous repudiation of Lockean property, and the entire moral justification for settler colonization in the Pacific, Justice Miller ruled, "There is nothing in the essential nature of [going upon the land and building and residing on it] to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right."[15] This was a startling, if inadvertent, rebuke to the foundations of settler thought, which justified the expropriation of Native lands precisely on these grounds.

How had the legal system turned so quickly on its favored colonists? More importantly, *why* did the Pre-Emption regime crumble? And *what* legality replaced it? I endeavor to answer these questions through an analysis of case records related to the Suscol Rancho conflict – executive correspondence, administrative decisions, and judicial opinions, as well as corporate papers and contemporary newspapers. Suscol Rancho has been studied before, by

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[10] As Whaley described an 1843 case between a Pre-Emptor and an employee of the Hudson's Bay Company, "Reverend Waller positioned the case as a clash between good and evil empires, Jefferson yeomen versus monarchical hirelings… he petitioned Chief Justice Roger Taney that a hireling 'of a foreign monopoly' had no constitutional right to American land." Whaley, *supra* note 8, at 125-6.

[11] For a contemporary usage in land reform discourse see, Isaac S. Tingley, *Letter from a Young Reformer*, Young Am., Sept. 27, 1845.

[12] See, Paul Gates, *The California Land Act of 1851*, 50 Cal. Hist. Q., 395-430 (1971). For contemporary account see J. S. Black, Expenditures on Account of Private Land Claims in California, H. Ex. Doc. 84, 36th Cong. (1st Sess. 1860).

[13] Frisbie v. Whitney 76 U.S. 187 (1869); Hutton v. Frisbie 37 Cal. 475 (1869).

[14] United States v. Vallejo, 66 U.S. 541 (1861).

[15] See Frisbie v. Whitney 76 U.S. 187 (1869) at 194.

Gates, as representative of the large centralization of estates in California created by a combination of official cupidity and the manipulations of landowners.[16] In providing a re-assessment of Suscol, this article argues that Suscol should be understood within a framework of commodification – what historian Patricia Limerick termed "the evolution of land from matter to property."[17] A more fundamental transformation of land and meaning occurred at Suscol than Gates imagined, driven less by individual landowners and officials and more by the ideological force of liberalism and the global commodities market.

In some ways the answers I have found were clear and functional. It was near impossible to sell mortgages on lands with credible adverse possessors and contested titles.[18] Over the 1860s, the Suscol lands underwent a process of triple commodification – as alienable real estate, as secured debt, and as industrial wheat farms. With land, mortgages, and wheat circulating in international markets, Pre-Emption threatened the security of wealth based in land.[19] However, this essentially simple story is not sufficient in itself, for law imposes its own visions on the world. Legal historians have long shown the incongruities and contingencies of legal change and capitalist development in the nineteenth century.[20] In particular, this article converses with Horwitz's famous account of property and formalism in the Atlantic States.[21] While similar in important respects, the change of property law in California was fundamentally conditioned by the settler colonial context. This manifested in a radically different temporality than Horowitz's history – at the edge of American Empire it was not evolution but revolution that characterized legal change. Here, rights had been vested for years not centuries – if they had vested at all. The problem of violence, both between colonist and Native peoples and among colonists, was central to the Suscol

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[16] Paul W. Gates, *The Suscol Principle, Preemption, and California Latifundia*, 39 Pac. Hist. Rev., 453-471(1970).

[17] Patricia Nelson Limerick, The Legacy of Conquest: The Unbroken Past of the American West at 27 (1987).

[18] We might call this the Primitive Accumulation argument. Karl Marx & Frederick Engels, Capital: A Critical Analysis of Capitalist Production, 3rd Ed. At 740-757 (1889). On the mortgage market see also, Jonathan Levy, Freaks of Fortune: The Emerging World of Capitalism and Risk in America (2012). For a contemporary account see James de Fremery, Mortgages in California. A Practical Essay (1860).

[19] For example, see, Ernest Seyd, California and its Resources. A Work for the Merchant, the Capitalist, and the Emigrant (1858). On the California wheat trade see, Rodman W. Paul, *The Wheat Trade Between California and the United Kingdom*, 45 Miss. Valley Hist. Rev., 391-412, at 394 (1958).

[20] See, e.g. Richard Bensel, The Political Economy of American Industrialization, 1877-1900 (2000); Richard White, Railroaded: The Transcontinentals and the Making of Modern America (2011); Gregory S. Alexander, Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970 (Chicago: University of Chicago Press, 1997)..

[21] Morton Horwitz, The Transformation of American Law, 1780-1860 (1979).

crisis. As jurist Samuel B. Clarke characterized the problem at the closing of the nineteenth century, "no one can base a title of right upon [force] alone without admitting that mere force, whether of ballots or of bullets, can to-day rightfully wipe out existing titles and confer others in their stead."[22] Like force, usage ceased to be a stable basis for property over the 1860s. The Suscol crisis revealed that "improvement" had too much potential for redistribution from large landholders to the landless. Enter a relatively new, and dreadfully unpopular, conception of property, one that disavowed the colonial past upon which it stood, and would transform the face of American Empire: Liberalism. Yet, as this article reveals, the road from waste to commodity, from Free Land to Cheap Land, was not slow, clear, or predictable, rather it was a radical disavowal of the past and the sudden birth of a new regime.

THE VALLEJO DEMESNE

The case that would mark the end the Pre-Emption regime began in 1843, in the far northern "wilderness" of the Mexican department of Alta California or, to put it more accurately, the lands of the Pomo, Wappo, Wintun, and Miwok Peoples. The recent political history of Alta California had been characterized by civil conflict between Californios, Missions, and the Mexican Government. In 1842, Manuel Micheltorena deposed Governor Juan Bautista Alvarado, architect of an abortive independence movement in 1836, the same year as the Texas Revolution. As colonial policy, and perhaps canny political maneuver, Micheltorena began the process of granting massive tracts of land (up to 11 Square Spanish Leagues) to powerful Californio families, who would hopefully prove more loyal to the regime.[23] Micheltorena granted the greater portion of Alta California's northern frontier to the Vallejo Family as their private property. Mariano Guadalupe Vallejo, who was incidentally late Governor Alvarado's uncle, received a grant to a (roughly) 100,000-acre tract bounded "on the north by lands named Tulucay [rancho] and Suisun [tribe], on the east and south by the Straits of Carquines, Ysla del a Yegua, and the Estero de Napa."[24] This tract, combined with another purchase by Vallejo, became known as the Suscol Rancho. To the west, laid Mariano's extensive Petaluma Rancho acquired

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[22] Samuel B. Clarke, *Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice*, 1 Harv. L. Rev., 265-293, at 274 (1888).

[23] Maria Raquél Casas, Married to a Daughter of the Land: Spanish-Mexican Women And Interethnic Marriage In California, 1820-80 (2009).

[24] United States v. Vallejo, 66 U.S. 541, at 550 (1861).

in 1834. Mariano's brother Salvador likewise received a land grant to "Lop Yomi," the local "Indian name" meaning "town of stones," that covered the Clear Lake region, well north of Suscol, and several estates in Napa that lay between (granted from his nephew in 1838).[25] As some of the first European settlers in this waste and wilderness, Vallejo ownership was, to a great degree, nominal. Estimates differ, but the Native population stood around 150,000 in 1846, and though smallpox epidemics had exacted a large toll in Northern California, Native Peoples throughout the state outnumbered Europeans 15:1.[26] This northern borderland was no exception. What's more, contrary to European thought, the Peoples whose lands the Vallejos now "owned" had general conceptions of property quite like those of the Mexican settlers.

Before the coming of the Vallejos, Pomo tribes warred with one another over well-defined territories. As historian William J. Bauer, Jr. writes, incorporating an oral history from a Pomo man named Francisco, "One day the People from K'e bāy Cho k'lal went to K'ŏ,ŭlK'ŏy … to harvest 'grain,' likely indigenous oats or ryes, in order to make pinole. The People from the town of P'hŏ,ŏl, K'ŏy … observed the K'e bāy People harvesting grain at K'ŏ,ŭl-K'ŏy and attacked because the K'e bāy People had not asked for permission. Pomos possessed a finely tuned sense of their territory's limits. In the right circumstances borders could be fluid. It was not unheard of for People to ask for approval to use resources within another group's territory. If one did not ask for clearance or offer a payment, as appears to have occurred in Francisco's story, violence and conflict followed."[27] Through a combination of language barrier, simple prejudice, and self-interest, however, both Spanish-Mexican and American colonists conceived of this land as "unowned."[28] This was obviously a fiction. Elsewhere in the 1840s, Oregonian settlers found Native People demanding payment for their lands – a confusing situation indeed.[29] While Native definitions of place, like the town of Lop Yomi, were declared legitimate in determining the bounds of Mexican grants, Native title was a nullity in law. The Vallejos had few qualms about exercising sole dominion over this place.

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[25] H. F. Teschemacher, et al., claiming the Rancho of Lup Yomi v. the United States in Ogden Hoffman, Reports of Land Cases Determined in the United States District Court for the Northern District of California: June Term, 1853 to June Term, 1858, Inclusive at 36 (1975).

[26] Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873 at 3, 50 (2016).

[27] William J. Bauer, Jr., California Through Native Eyes: Reclaiming History at 75, citations omitted (2016).

[28] See Stuart Banner, Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska at 163-194 (2007).

[29] See *supra* note 8 at 37.

The Vallejos began to change the land and the people who lived on it. Over the 1840s, Mariano, commonly known as Don Guadalupe, enslaved hundreds of Miwok People, a relationship Mariano understood as benevolent and based in kinship.[30] Likewise, Salvador "improved" his Rancho and "put upon [Lop Yomi] large numbers of horses and cattle and hogs…built several houses" and cultivated "corn, beans and watermelons."[31] Salvador leased part of his land to American settlers Charles Stone and Andrew Kelsey. As historian Benjamin Madley writes, the American tenants treated the Eastern Pomo and Clear Lake Wappo as serfs that ran with the land.[32] For the next several years, Stone and Kelsey operated a brutal and lethal system of unfree labor. Scores died of starvation, exposure, disease, and, in some especially cruel cases, torture. In December 1849, with California now under American military rule and in the throes of gold mania, five Native men – Shuk, Xasis, Ba-Tus, Kra-nas, and Ma-Laxa-Qe-Tu – killed Stone and Kelsey. News of these killings triggered a punitive expedition by the US Army in San Francisco. (This was not the last time the Army would be called upon to put down a restive population on Suscol.) As Madley writes, the expedition had a "pseudo-judicial rationale for both the indiscriminate killing of California Indians…and the theft or destruction of their property" – the concept of collective guilt.[33] The flimsy legal logic for the expedition was not for lack of lawyers: Major General Persifor Smith, the engineer of the expedition, was a college-educated lawyer from Philadelphia.

The subsequent killing campaign brought with it a major figure in the commodification of the land: Captain John B. Frisbie, Esq, originally of Buffalo, New York. On May 5, 1850, Frisbie and 75 armed men set off on their expedition to from the town of Benicia to Clear Lake. It took the party ten days to cross the Vallejo demesne, and they arrived at Clear Lake on May 15. Though accounts differ as to what followed, Madley and other historians estimate the US Army detachments killed between 500 and 800 people from several Pomo and Wappo communities in a single day, one of the deadliest massacres in the bloody history of US colonization. In Captain Frisbie's own account of the slaughter, published in the *Daily Alta California*, the Army killed Native men, women, and children indiscriminately. Felled, Frisbie wrote,

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[30] Andrés Reséndez, The Other Slavery: The Uncovered Story of Indian Enslavement in America at 248 (2016). The population is simply referred to as "Suscol Indians" in *The Indians of Napa Valley*, Daily Alta California, February 1, 1860, which remarked they had been largely "swept away."

[31] See, *supra* note 25 at 34.

[32] See, *supra* note 26 at 103-144.

[33] *Id.* at 127

"as grass before the sweep of the scythe."[34] The Army promptly disputed Frisbie's account, and under pressure from fellow officers, Frisbie recanted.[35] Whether Frisbie regretted his participation in the massacre, or his retraction, is not extant, but we do know he had something else entirely on his mind as he travelled the Suscol Rancho. Frisbie looked out on the changing, bloodied landscape and saw capital.

The following Autumn, Frisbie left the military and settled in Benicia, having realized that the Suscol grant land represented a tremendous speculative opportunity. So began a new career as a booster and land speculator. He wasted little time. Quickly elevated to the office of President of Board of Directors of Benicia, Frisbie purchased ads in the *Sacramento Transcript* that ran regularly for the next year. In this advertisement, Frisbie advocated for adjacent Vallejo to be made the state capital, citing its potential for a commercial harbor, "inexhaustible" quantity of fine stone for building, "unsurpassed" topography, and "several bold mineral springs."[36] The skeptical reader did not have to take Frisbie's word for it: "The Surveyor-General of the State…having made careful reconnoisance [sic] of this place, fully confirms the facts herein set forth, and the proprietors publish them with a view of inviting public attention to the same. The subscriber is authorized to dispose of a limited number of lots upon liberal terms, and he invites the attention of capitalists and the public generally to the new city."[37] To this small, colonial town amidst princely, personal estates worked by unfree laborers – a thoroughly feudal landscape – Frisbie invited modern capital. His grand ambition of securing the capital briefly succeeded before it failed in favor of Sacramento – the Eastern portion of Alta California's Northern frontier, which had been granted to John Augustus Sutter. Despite this failure, Frisbie hit upon another speculation at the same time. He successfully courted one of the most eligible women in the state: Epiphanra "Fanny" de Guadalupe Vallejo, eldest daughter of Mariano. The two married on April 2, 1851, at the Vallejo estate.[38] It became the Frisbie estate shortly thereafter when Don Guadalupe gifted the Suscol lands to his daughter and new son-in-law. In one short year, Frisbie had gone from Captain in a killing campaign to scion of one of California's most prominent and wealthy families.

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[34] *Horrible Slaughter of Indians*, Daily Alta California, May 28, 1850.

[35] *Supra* note 26 at 129-30.

[36] *Vallejo*, Sacramento Transcript, September 16, 1850.

[37] Advertisement that ran (nearly) daily from September 16 to May 1851. "Vallejo," *Sacramento Transcript*, September 1850 to May 1851. *Id.*

[38] *Married*, Sacramento Daily Union, April 15, 1851.

Though mired in the general legal wrangling over Mexican grants throughout the 1850s, Frisbie's estates escaped the scrutiny of the Board of Land Commissioners and the Northern District Court unscathed.[39] Few seriously doubted the validity of the claim, yet it remained shadowed by litigation. Squatters circled the rich Rancho lands like vultures, hoping for a chance, however slim, of a Court voiding the claim.[40] Despite the clouded title, Frisbie alienated and leased parcels to over 150 individuals, many prominent men like former chief Justice of the California Supreme Court S. C. Hastings.[41] Frisbie's farmlands then became immensely profitable in the California wheat boom of the late 1850s. As English political economist Ernest Seyd wrote in 1858, "It is nothing unusual in California to see a wheat-field bear 60 bushels to the acre, and there are instances of 100 and 120; and the average run of good and bad yields is estimated at from 25 to 35 bushels, which is double and treble the yield in Europe and elsewhere…. These extraordinary results are obtained with comparatively little labor… and one man can easily cultivate from twenty to twenty-five acres."[42] In 1860, the *Daily Alta* estimated Frisbie's land was worth $50 an acre because of its "wonderful" grain output, the best in the state.[43] As the Frisbie-Vallejo family benefited from the economic boom, they retained social and political prominence. Don Guadalupe had been a member of the 1849 Constitutional Convention and a state senator from 1849-50; Frisbie was an active, if minor, Democratic Party functionary.[44]

Not all was well for the Frisbie estate, however. The sheer size of the property, in large part unimproved and left for cattle raising and wheat monoculture, worked by dubiously "free" Indigenous labor, and sold for speculation to other colonial grandees, drew the ire of radical settlers who viewed the family's ownership of Suscol as illegitimate, unrepublican, and fraudulent. Their strongest argument drew on Lockean usage and fit the Pre-Emption regime perfectly. Why should unfenced, unimproved land be withheld from *bona fide* settlers? And so, despite the family's social and political connections

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[39] Confirmed by the Board May 22, 1855 and Confirmed on appeal by the District Court March 22, 1860. *Supra* note 25 at Appendix 40.

[40] "While strolling over the hills last Sabbath, the writer discovered persons running to and fro – here and there – driving small stakes into the earth, which it appears were to be the boundaries of ranches, lots, &c., taken up under the impression that the land title embraced in the Suscol claim will not be confirmed." *Vallejo*, Daily Alta California, April 8, 1857.

[41] See *supra* note 16 at 460.

[42] See *supra* note 19 at 129.

[43] *Notes of a Trip to Solano County – No. 2*, Daily Alta California, July 15, 1860.

[44] Winfield J. Davis, History of Political Conventions in California, 1849-1892 (1893) at 659. Frisbie was Assemblyman from Solano from 1867-8 and vied for multiple other offices, at 624.

and the successful efforts of their lawyers in shoring up the title, the confirmation of the claim was appealed by US Attorney General Black in 1860-1. This was part of a politically motivated push to return 2.8 million acres of land from 25 disputed grants to the General Government, and therefore Pre-Emptors, who had much more voting clout than their absentee landlords.[45]

VOIDED

In December 1861, months into the Civil War, Black brought the Suscol grant before the US Supreme Court in *United States v. Vallejo*.[46] Even at this late moment the claim seemed likely to survive. The Vallejo case was distinguishable from the other 24 cases before the court. Unlike, say, the infamous Limantour case, an elaborate forgery, the Government produced no evidence for fraud in Vallejo's case – no antedating of the original grant or forged signatures. Indeed, the *genuineness* of the grant was generally accepted in California, but no original copy of the grant and patent could be found in the Mexican archives. In Washington a majority on the US Supreme Court sought to make an example of this missing form. Justice Samuel Nelson, writing for the majority, ruled against Vallejo and his 150 assigns. Given the extent of the Suscol land, Nelson ruled, the improvements were "slight" – establishing little equity by way of use and improvement. It did not accord with the prevailing moral economy of Free Land. The grant had violated conditions subsequent in the Mexican colonization laws: Suscol was too close to the coast and exceeded the maximum number of leagues in a single grant. While these may seem valid reasons for voiding a property, the Court's decision was a major reversal of law. Following the infamous *Fremont* case (1854) covering Mariposas Rancho, to which Nelson had added his signature, Mexican grants with these same deficiencies had breezed through the courts in deference to the equitable property rights of grantees.[47] How would the Court explain their obvious reversal of law?

Most damning, the Court declared, was the archival absence. The Court ruled that it would not accept a claim so deficient in form regardless of whether that lack of form was fraudulent or accidental. Nelson explained the logic of the Government's newfound formalism: "Without this guard,

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[45] See *supra* 16 at 454 and *supra* note 4 (2013) at 37-50.

[46] United States v. Vallejo, 66 US 541 (1861). Black had been replaced as Attorney General by his deputy from the land grant cases Edwin Stanton.

[47] Fremont v. U.S., 58 U.S. 542, at 560 (1854).

the officers making the grants…would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the Government without the means of information on the subject till the grant is produced from the pocket of the grantee."[48] Therefore, the entire Suscol grant – all one hundred thousand acres of it – was *voided*. No property right had existed, and therefore none could have been passed on to the assignees. Whether the majority recognized it (there was a war going on), *Vallejo* was a radical decision; on the surface, a decisive victory for the value of usage and the Pre-Emption order. The equitable stance of federal law toward grantees' property was reversed sotto voce.

This legal formalism, without shadow of fraud, earned the majority an aggrieved dissent on the dangers of property "confiscation." Justice Robert Grier, a Jacksonian Democrat, understood how radical the *Vallejo* decision really was. This was Don Guadalupe Vallejo, Grier wrote, not "some obscure person, such as…[the priest] Santillan [in the *Bolton* case]" another of Black's 25 cases where fraud was obvious and well documented.[49] Grier continued, "I cannot agree to confiscate the property of some thousand of our fellow-citizens, who have purchased under this title and made improvements to the value of many millions, on suspicions first raised *here* as to the integrity of a grant universally acknowledged to be genuine in the country where it originated."[50] As historian Paul W. Gates notes, Grier had been misled – as stated above the number of "fellow-citizens" stripped of property was nearer 150 – and the extent of improvements was debatable. As a matter of jurisprudence, however, this hardly mattered. The rights of Suscol's owners had vested – it had been, after all, *17 years*. Grier was not finished eviscerating his fellows. He accused the majority of reasoning backward from their opposition to large property holdings as such: "Now that the land under our Government has become of value these grants may appear enormous; but the court has a duty to perform under the treaty [of Guadalupe-Hidalgo], which gives us no authority to forfeit a *bona fide* grant because it may not suit our notions of prudence or propriety."[51] Furthermore, far from providing predictability and rationality the Court's formalism would throw Suscol into chaos. By default, the former Rancho entered the public domain, and was thus opened to the vultures. When news arrived from Washington, nearly 200 squatter families, clearly vindicated by

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[48] United States v. Vallejo at 556.

[49] United States v. James R. Bolton, 64 U.S. 341 (1859).

[50] Vallejo at 556-7. This was not the "correct figure," and the Justices were likely knowingly mislead as discussed in *supra* note 16 at 455.

[51] *Vallejo* at 556-7.

the nation's highest court, wasted no time in seizing the opportunity to erect dwellings on unimproved portions of the Rancho. Equity, the "right and good," had triumphed over the feudal remnant.

Vallejo's assigns and the Pre-Emptors acted simultaneously and in a manner that revealed the confused character of the Court's formalism and of the land system in general. During the Civil War, the General Government, understandably, did not have a good sense of what Federal officials in California or state officials were actually doing. At the start of 1862, state and local officials had control over how *Vallejo* would be implemented. Initially, Frisbie, Vallejo, and their prominent assigns acted in a manner the Court would have disapproved, carrying "with them blank forms" to keep the property in its current hands. While the grantees had the same Pre-Emption right to claim 160 acres as the squatters, this was not sufficient to cover their voided holdings of thousands of acres (at $50/acre a tidy sum). The Vallejo assigns therefore resolved to use state School Land Warrants to "cover" the vast remainder – a proposition of dubious legality. "Any other course would have been a serious detriment to the business interests of Solano County," the *Marysville Daily Appeal* wrote approvingly.[52] Per the formalities of the School Land Laws, the General Government granted every sixteenth and thirty-sixth section to the states for funding common schools. When those sections had adverse claims, the state could "select" suitable, alternative Federal lands. These selected lands were limited to those which had been "offered at public sale and [remained] unsold."[53] As a matter of form, these selections needed to be (1) properly surveyed lands and (2) approved by the General Land Office. The Act was drawn to limit any one individual from attaining more than 320 acres (a ½ section), but as the Surveyor General of California later wrote, "the law was drawn so that the restriction amounted to nothing."[54] At the time of drafting, a legislator later recalled, the problem was "not so much how to keep one man from getting too much, but how to get money into the school fund from that source."[55] California land officials happily sold unapproved, unoffered, and unsurveyed selections for School Lands. The state and its officials had little interest in enforcing the acreage cap. In a fee-for-service model of administration, Vallejo and his assigns were confident they could re-purchase their estates through manipulation of existing land laws.

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[52] *Suscol Rancho*, Marysville Daily Appeal, April 26, 1862.

[53] See *supra* note 5 (1860) at 493 – Circular to the Land Officers in the Territories June 25, 1844.

[54] Surveyor-General of California, Statistical Report of the Surveyor-General of California, for the Years 1869, 1870, 1871 at 5 (1871).

[55] *Surveyor-General's Report*, Green's Land Paper, Jan 6, 1872.

Regardless of Frisbie's plotting, the squatters remained on the front foot. It must have seemed a grand chance to establish a truly republican distribution of land. Yet, the nation's highest court was three weeks away; the county sheriff was not. A fraught, violence atmosphere quickly developed. On Frisbie's Point Farm, Sherriff Neville attempted to enforce writs of ejectment issued against the squatters by a certain Justice Dwyer. The settlers did not go quietly. As reported for the newspapers by Mrs. John R. Price, one of the Pre-Emptors, on December 8, 1862, Neville's deputy went to eject the Martin family from Point Farm.[56] The deputy came face to face with Mrs. Martin who, genuinely or as a ruse, was "too ill to be moved." When the deputy's man refused to grant Mrs. Martin privacy, he was thrown down the stairs and a "volley of Cayenne pepper" followed. The well-spiced deputy retreated to form a *posse comitatus*. The posse, "approaching in armed array to eject a sick woman," Price wrote dryly, demanded Mrs. Martin leave so they could destroy the home. Against the advice of a panel of doctors, the posse carried the ill woman in her bed to a waiting wagon and razed the house. Price reported with horror that similar scenes attended the ejectment of the Curley family and the Hanson family, including one death. Price concluded: "so far, the instigators of all this crime have gone unpunished, for they have money to cover their tracks." Here the Pre-Emptors made a claim on *their* law, the True Constitution.

In the face of these ejectments the Pre-Emptors organized into a "Settlers' League" for their common defense and legal interest.[57] Matters only escalated. In January 1863, a month after the Martin ejectment, an ejectment on the lands of another grantee ended when the ejector, one S. Finelle, killed settler Lewis R. Cox – "blowing his brains out" – and wounded another settler in the leg.[58] In May, one Manuel Vera was accused of shooting a squatter in the leg and was duly arrested by the busy Sherriff Neville and confined in an ad hoc jail in Vallejo.[59] On the night of May 6, members of the Settlers' League "disguised by turning their coats and blacking their faces," skulked the streets of Vallejo in search of Vera.[60] The League members, the *Daily Alta California* recounted, "entered the building where Vera was confined, seized the Deputy Sherriff, and then murdered Vera, by

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[56] *Statement of Facts Relative to the Ejectments on the Suscol Rancho*, Daily Alta California, Jan 14, 1863.

[57] Reminiscent of the Pike Creak Claimants Union in J. Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956).

[58] *Shooting Affair at Napa from Squatting on the Suscol Ranch*, Daily Alta California, January 25, 1863.

[59] *Interior Items*, Daily Alta California, December 17, 1863.

[60] A scene straight out of E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (2013).

firing their weapons coward-like, through the door of his room." Still alive after this barrage they "dispatched him," leaving no trace of their identities. Ostensibly fearing separatism, the Army responded – a faint echo of the punitive expedition of 1850. Neville, aided by 39 Light Dragoons, and by the San Francisco Detective Service, labored for the next seven months to identify the men responsible, finally arresting 16 men in an early morning ambush of December 16. In the subsequent trial, the principal, F. A. Preston, was acquitted because the prosecution could not prove his presence at the Vera lynching. A frustrated District Attorney entered "a *nolle prosequi*" for the remainder.[61] One of the leaders of the Squatter's League, and the other man to lend his name to our case, Levi H. Whitney, was briefly arrested for the murder while lobbying for the Settlers in Washington D. C. Whitney was released after the Supreme Court of the District of Columbia found no evidence to hold him.[62]

Violence continued. In June 1863, Neville and US Army detachments arrested four settlers for "trespass, cutting hay, etc."[63] The four men were tried and acquitted "there not being sufficient proof that any resistance had been made," the *California Farmer* explained. Two of the settlers then sued the Sherriff for $5,000 in damages for unlawful arrest. Weary of being branded secessionists, the Settlers' signed an oath of allegiance to the United States which they published in the paper. The writer for the *Farmer* continued: "As we have always said, if a man has a *good, clean title to his land*, one thousand, ten thousand, or a hundred thousand acres, give it to him, let him enjoy it, and protect him in it. But if that title is not good, if it is fraudulent, it then belongs to the United States, and the settlers have a right to it by law and justice, and we say give it to them."

Amidst the growing unrest, the state's large land bar got to work to resolve the impasse through administrative adjudication. The ranks of this group had grown as the California land lobbyist was becoming a feature of some prominence in the nation's capital. These lobbyists acted quickly. The first fruit of their efforts came amidst the "settler trouble" in March 1863, when they secured a special act from Congress giving the Vallejo assigns privileged Pre-Emption claims.[64] The Act called for the tract to be surveyed and "to

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[61] *Interior Items*, Daily Alta California, January 27, 1864.

[62] *A Californian Charged With Murder*, Daily Alta California, March 8, 1864.

[63] *Trouble among the Settlers on the Suscol Grant*, California Farmer, June 12, 1863.

[64] An Act to Grant the Right of Pre-emption to Certain Purchasers on the "Soscol Ranch," in the State of California, March 3, 1863 as published in William Wharton Lester, Land Laws: Regulations and Decisions, Vol. 2 (1870) at 78.

have approved plats thereof duly returned to the proper district land office," but its principle purpose was to grant Vallejo's assigns, for twelve months, the right to pre-empt their former lands for $1.25 an acre *provided* that the land "had been reduced to possession at the time of said adjudication of said Supreme Court [in *Vallejo*.]"[65] Still, the frustrated capitalists ran up against Lockean improvement. It would be up to the local Register and Receiver to determine what that possessory proviso entailed. Crucially however, this Act left unresolved the question of rights of Pre-Emptors established during the period between 1862 and 1863, after the *Vallejo* case but before Congress intervened.

THE LIBERAL TURN

Surely, the General Government's officials resolved, more formalism would help. Commissioner of the GLO James M. Edmunds dispatched a letter of instruction to the Register and Receiver of San Francisco demanding an orderly and bureaucratic administration of the Suscol claims.[66] Subsequent instructions revealed he was less than pleased with the actions of his officials. In March 1864, Edmunds admonished the Register and Receiver, insisting they "require the production of the highest evidence" as to being a *bona fide* purchaser from Vallejo, which they evidently had not done.[67] The Commissioner complained that the officers had not correctly signed affidavits and that the certificates of the Register were undated. For parties claiming to be attorneys, administrators, or executors, the Register and Receiver were to require "written evidence of [their] authority" — an affidavit was insufficient. In a fit of due process, Edmunds demanded the officers give *every* party a right to "cross-question the witnesses of others." "The testimony…must be reduced to writing, and subscribed by the witnesses in your presence, and authenticated by the certificate of the officer administering the oath." The General Land Office included blank notices to be distributed and posted to give "due and full notice" to the parties. It was an effort at bureaucratic control that resisted the government's patronage, profit-motivated form.

In this manner, the hundreds of claims to Suscol ground their way through the land bureaucracy, but beneath these surface squabbles colonial policy began to drift away from the Jacksonian regime. Indicative of these changing

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[65] "Reduced to Possession" was a legal concept much adjudicated. Placing a tenant on land, for example, counted as possession.

[66] J. M. Edmunds to Register and Receiver, April 10, 1863 in Records relating to Suscol Rancho cases, MICROFILM BANC MSS 70/67 c, Reel 2.

[67] J. M. Edmunds to Register and Receiver, March 10, 1864, in *Id.*

tides, the entire California Supreme Court was remade by the Union Party in 1863. Oscar Shafter, Lorenzo Sawyer, John Currey, Augustus L. Rhodes, and Silas Sanderson were all swept into office over a "discouraged and disorganized" Copperhead opposition.[68] The five men were remarkably similar: all were born in Vermont or New York between 1812 and 1824 and all were prominent, respectable members of the land bar. In letters to his father at the time, Shafter explained their electoral fortunes: "The people have…hitherto suffered greatly from incompetent, or dishonest, or partisan Judges, and there is a general disposition just now to select men for judicial positions with some reference to their qualifications."[69] Shafter embodied the landholding lawyer, for he himself owned an enormous Rancho in Marin County, and found liberalism an ever more attractive conception of political economy. As he wrote in the same letter, "This State is prospering beyond all parallel, and in the next ten years will take high rank in the matter of wealth and population." His fellow justices were on their way to embracing similar ideas about property. Sanderson was on his way to becoming a powerful railroad lawyer. As Shafter gossiped to a fellow lawyer in 1867, "Sanderson is getting rich as an attorney of the Central Pacific Railroad Co. With a salary of $1,000 per month, and a good practice besides."[70] After his term, former Justice Sawyer lamented the "sand-lot politics" of the "communistic mob."[71] As historian Michael Ross wrote of the elite bar during the Reconstruction period: "[Stephen] Field's great fear of debt repudiation reflected the widespread sense of uneasiness felt by men of property during the late 1860s and 1870s. Industrialists and financiers amassing great fortunes were terrified that the laboring majority might attack their property both through violence and the ballot box."[72] After all, how "improved" were their properties? After 1871, the Paris Commune loomed especially large in their legal imaginations in much the same way the Haitian revolution haunted the slavocracy. To elite jurists, the squatters of Suscol no longer had the guise of the dear People of a democratic age, but appeared menacing, a kernel of European socialism and a threat to private property in general.

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[68] Oscar Shafter & Flora Haines Loughead, Life, Diary, and Letters of Oscar Lovell Shafter Associate Justice Supreme Court of California January 1, 1864 to December 31, 1868 (1915), Letter to his Father Oct 21, 1863, at 223.

[69] *Id.*, 222.

[70] *Id.*, Letter from J. B. Crockett, at 231.

[71] John McLaren et al., Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West (1992), at 249. See also, L Przybyszewski, *Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit*, 1 W. L. Hist. (1988).

[72] Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era (2003), at 186.

Three Suscol cases were appealed up to this reconstituted Court. In *Hastings v. McCoogin* (1864), an ejectment case against a squatter, Sanderson wrote for the Court in favor of Vallejo's purchasers, noting they had "inclosed" their property "by a fence" and thereby withdrawn it from Pre-Emption.[73] Similarly in *Page v. Hobbs* (1865), Sawyer wrote that the lands were not subject to pre-emption because they had been "reduced to possession" by Vallejo's assigns. Both decisions relied on narrow constructions of the Pre-Emption laws, and a favorable reading of "the facts of possession," but did fit the current regime. In *Page v. Fowler* (1865), which involved the value of hay grown by the squatters (124 tons of it), Rhodes wrote that neither party could make a claim to land title: "The personal action cannot be made the means of litigating and determining the title to the real property, as between conflicting claimants."[75] In other words the squatters could keep the hay, and no ruling was made as to the true owner of the underlying real estate. Crucially, in all three cases the Court was loath to "redistribute" property from one party to the other, whether real (land) or personal (hay), an important articulation of the liberal principle of state neutrality.

A more confused dynamic played out in federal appeals as holdovers of the Jacksonian regime supported the squatters. Here we turn to the decisive contest. From its inception, *Whitney v. Frisbie* evinced a struggle of legalities *within* the land bar. On the initial hearing of the dispute, the Register and Receiver unsurprisingly found in favor of Frisbie; Edmunds reversed the decision and decided for Whitney and the Pre-Emptors. In May of 1866, Attorney General James Speed, reversed the Commissioner and dismissed the equitable claims of the Pre-Emptors on the grounds that no rights vested *until* the land bureaucracy performed the proper procedures: "It is not to be doubted that settlement on public lands of the United States, no matter how long continued, confers no right against the Government…It is compliance with those conditions that alone vests an interest in the land."[76] By contrast, Vallejo's claimants had a right which "no supposed equity, based upon simple settlement" could defeat.[77] The Attorney General favorably cited Justice Grier's *Vallejo* dissent to support the "superior equity possessed by all *bona fide* purchasers from Vallejo."[78] In only four years, Grier's conservative dissent

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[73] Hastings v. McCoogin 27 Cal. 84 (1864), at 86.

[74] Page v. Hobbs 27 Cal. 483 (1865), at 489.

[75] Page v. Fowler 28 Cal. 605 (1865), at 610.

[76] "Opinion of the Attorney-General in the Case of the Suscol Rancho" in *supra* note 64 at 381.

[77] *Id.*, at 284.

[78] *Id.*, at 285.

on "confiscation" had become the policy of the Justice Department. This decision was dutifully appealed to the Supreme Court District of Columbia.

Here, Justice Wylie reversed Attorney General Speed in August 1866, making the case that the law was entirely on the side of the Settler's League and that the Attorney General was simply making a political decision. Various legislative Acts had opened even unsurveyed California land to Pre-Emption, the most recent in June 1862, Wylie wrote, and this statute clearly governed when Whitney entered the quarter section in October 1862. Whitney, Wylie ruled, "made the necessary improvements and cultivation…[and] from this date, had acquired as good and valid a right to pre-empt this tract of land, as can ever be obtained by any settler prior to the completion of his title by patent. But after he had thus acquired an inchoate equitable title to the land, Congress…interposed in behalf of the *bona fide* purchasers under Vallejo, to take it away from him and sell the land to them."[79] Unlike the Attorney General, Wylie had decades of case law to support his ruling. Wylie cited *US v. Fitzgerald*, 15 Peters 407 (1841) that no reservation or appropriation could be made after a citizen had "acquired the right of pre-emption," and *Delassus v. US*, 9 Peters 133 (1835) which ruled that "no principle is better settled in this country than an inchoate title to lands is property."[80] Not only did the Attorney General rule against law, but also against colonial land policy which, Wylie wrote, was to "invite immigration, to encourage the growth of the new States."[81] In the end, Wylie ruled, Whitney "acquired a vested interest therein, which the Constitution has placed beyond the reach of even an act of Congress to take from him and grant to another."[82] Wylie's decision was a thorough defense of equitable land law. The remedy asked by Whitney was "to obtain a decree on the ground of fraud and trust, which will prohibit the defendant from obtaining from the Government a patent for the land, which in equity ought to be made to himself."[83] It was well established in equity that requesting a patent for land known to be held according to law, but without patent, by another, as Frisbie was doing by asking for a patent to Whitney's land, was a "constructive fraud."[84] The Vallejo claimants were responsible for their fraudulent "deception" of Congress.[85] Wylie duly enjoined the patent from issuing to Frisbie.

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[79] "Opinion of Mr. Justice Wylie as to the Rights of Pre-Emptors on the 'Suscol Ranch,' in *Id.* at 287.

[80] *Id*. at 288.

[81] *Id.*, at 289.

[82] *Id.*, at 290.

[83] *Id.*

[84] *Id*., at 292. Quoting Justice Story.

[85] *Id.*, at 293.

Ten years earlier Wylie's decision likely would have persuaded the land bar. However, the squatters suddenly faced a hostile and reactionary Supreme Court that was unmoved by Wylie's careful antebellum jurisprudence. Faced with the Gordian Knot of Suscol, the Court cut to the basis of landed property itself.

THE TAMING OF PRE-EMPTION

The Court had created the mess at Suscol in 1861 with formalism, both a quite literal insistence on paper forms and a general legal impulse, and so it was perhaps fitting they used the same logic to get out of their mess in 1869. Writing for the Court, an agitated Justice Samuel Miller had clearly had enough of the "equities" of Pre-Emption no matter how well-supported by antebellum legal thought. Miller's restatement of the facts made plain his distaste for Whitney and the Settlers League in general: "Frisbie having become possessor of the legal title to the land in controversy, the complainant, Whitney, claims that he shall be compelled to convey it to him, because he has the superior equity; for this is a suit in a court of equity, founded on its special jurisdiction in matters of trust. It is, therefore, essential to inquire into the foundation of this supposed equity."[86] Despite being rejected by the land office, Miller wrote, Whitney claimed "that his intrusion on Frisbie's inclosed grounds by violence, and his offer to prove his intention to become a *bona fide* occupant of the land, create[d] an equity superior to Frisbie's, which demand[ed] of a court of chancery to divest Frisbie of his legal title and vest it in him. If there be any principle of law which requires this, the court must be governed by it."[87] Predictably, Miller found no such principle. He concluded by dismantling Lockean use and improvement as a form of property – even as enclosure was a vital fact in the case – echoing the Attorney General. In a lurch toward legal positivism, state recognition became the only legitimate source of property rights.

The redistributive potential of Pre-Emption was central to its rejection. In an 1870 case penned by Justice Chase, on the validity of a Texas contract under Confederate law, the Court ruled that "all just legislation…shall not take from A. and give it to B" a principal prefigured in *Frisbie*.[89] This neutrality was an important pillar of the liberal legality *Frisbie* represented. The *Sacramento Daily Union* described the legal development well: "[The Pre-Emption

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[86] Frisbie v. Whitney, 76 U.S. 187 (1869), at 192.

[87] *Id.*, at 193.

[88] *Id.*, at 194.

[89] Legal Tender Cases 79 U.S. 457 (1870), at 580.

law's] obvious purpose is to settle the country, not to disturb settlements."[90] California, in other words, was no longer a colony and the Lockean principles of original acquisition no longer applied. No justice dissented.

The companion to the federal case at state law, *Hutton v. Frisbie* 37 Cal. 475 (1869), was decided the same year, and found the same conclusion: no rights vested in the Pre-Emptor until they had paid for, *and* received, a patent – a process entirely controlled by land officials rather than equitable principles. Writing for the majority, Justice Sawyer ruled that Congress never intended for the Pre-Emption laws to operate to redistribute lands from colonist to other colonists. Rather the laws were "intended to give those who were pioneers in the unsettled wilds of the public domain the right to purchase the unoccupied lands which they have had the courage and hardihood to settle."[91] In other words Pre-Emption was a vehicle for colonization, for the expropriation of Native lands, but inappropriate for republican government. Sawyer believed the Settlers' League was trying to benefit from the honest labor of others. Sawyer, however, *did* need to address the argument that a contract existed between a Pre-Emptor and the State. To do this he resorted to sheer sophistry. No contract existed for the simple reason that a contract provided too much right. If it was a contract, they would have to find a different result, so it was not a contract.

The two new Democratic appointments on the court, J. B. Crockett and Royal Sprague, preferred the antebellum legal formula of inchoate rights and challenged the flimsy contractual reasoning of the majority.[92] Though Crockett shared the sympathies and prejudices of the men of his class he maintained a legal commitment to the Jacksonian order in form if not substance.[93] The two Democrats defended the free land policy of Pre-Emption and the antebellum order of colonization: "[selling] to actual settlers at a very low price…has been for many years a favorite policy with the government. It was deemed advisable to sell the lands to actual settlers at a low price, and thus promote the rapid expansion of our national wealth and the speedy development of our agricultural resources, rather than to sell, for a higher price, to speculators, who would or might keep it out of the

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[90] *The Soscol Ranch Pre-Emption Rights*, Sacramento Daily Union, July 29, 1869.

[91] Hutton v. Frisbie 37 Cal. 475, at 486 (1869).

[92] They replaced Shafter and Rhodes respectively.

[93] "Instead of loafing about the cities earning a precarious living, often by questionable methods, and daily complaining of a lack of employment, let [the ungrateful wretch] go into the country and rent, if he cannot buy, a small piece of land." California Immigrant Union, All About California, and the Inducements to Settle There (1870), at 49.

market, and thus greatly retard the growth of the country."[94] Note, crucially, Crockett's changing justification of Pre-Emption: not to create an egalitarian property order, but to maximize the amount of land in the market, a liberal aim if ever there was one. The Democratic dissent marked how far the Republican transformation of property had progressed during the 1860s and how far the liberal construction of colonization had taken hold even amongst unreconstructed Democrats.

The ejectments resumed in earnest, and this time the Settlers League was broken, no doubt wondering what new world they had been thrown into.

Having successfully driven not one but two populations of people from his father-in-law's lands, Frisbie finally realized his dream of converting the land to pure capital. In 1871, he sold his lands to a corporation called the Vallejo Land and Improvement Company.[95] It was through this vehicle that Frisbie hoped to make Vallejo a rival to San Francisco in the international commodity trade. Former US Senator Milton Latham and former Governor Leland Stanford joined Frisbie as trustees, along with E. H. Green, a London capitalist and Vice President of the London and San Francisco Bank, and Faxon D. Atherton, "one of the Directors of the California Pacific Railroad," a speculative line that would link Vallejo to Sacramento.[96] At its incorporation, the company had a paper stock of $4 million and, as the *Vallejo Chronicle* breathlessly added, "an unlimited amount of capital" to draw upon.[97] This was a speculative venture of an immense scale. Like many such ventures, however, the Company failed to live up to the booster's imagination. The company's accounts from 1872-3 with the London and San Francisco Bank evince a smaller, though still significant, operation.[98] Commercial revolution it was not, but the records of the company do indicate Suscol's continued production for the booming international wheat and flour markets. To make the land pay, the Company contracted with the "Grain King," Isaac Friedlander, to ship wheat.[99] The land was now thoroughly capitalized, as were its products. In a letter of July 30, 1872, Frisbie corresponded with

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[94] Hutton v. Frisbie 37 Cal. 475, at 508-9 (1869).

[95] *Another Immense Corporation*, Vallejo Chronicle republished in the Stockton Independent, October 20, 1871. "The *Chronicle* asserts that they have already secured possession of nearly all the unimproved and much of the improved property of Vallejo. The object of the incorporation is to improve the facilities of that place as a railroad terminus and shipping point."

[96] *A Reported Great Enterprise*, Sacramento Daily Union, October 20, 1871.

[97] *Another Immense Corporation*, Stockton Independent, October 20, 1871.

[98] "Vallejo Land & Development Co.: Accounts with the London and San Francisco Bank, 1872-3," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[99] Rodman Wilson Paul, *The Great California Grain War: The Grangers Challenge the Wheat King,* 27 Pac. Hist. Rev. (1958), at 331-349.

a local bank to loan "money on wheat" for grain of "no 1 quality and in a good warehouse."[100] On this "wheat loan," as Latham recorded one month later on August 30, 1872, the Vallejo Company secured $80,000.[101] No such loan would have been possible with the cloud of squatter title or Native title hanging over the wheat harvest. It had taken two decades, but Frisbie had finally converted the Suscol Rancho into capital.

CONCLUSION

In that same year of 1872, former Commissioner of the General Land Office Joseph S. Wilson (1860-1, 1866-71) sat down to describe and analyze the changes in property and colonization he had overseen. Writing in a new weekly called *Green's Land Paper*, named after its editor William S. Green, who was a major dealer in swamp lands, Wilson's legal history appeared as "The National Domain – Historical Outline," published in four parts from April 3 to May 1, 1872.[102] Wilson's history was not striking for its analytical ability, though its conclusion was clear and could be summarized in a single sentence: The story of the public domain was the journey from Feudalism to Liberalism. To write this history, Wilson followed the chain of title, beginning with a slog through the English crown grants of the seventeenth century. After a tedious accounting, Wilson concluded "It will be observed that these grants from the Crown were frequently in conflict with and overlapped each other. Not only a want of geographical knowledge, but a disregard of prior grants, often led the capricious mind of the Stuart dynasty to annul their own solemn public acts, and to ignore rights acquired under those acts."[103] Stuart arbitrariness was hardly an original theme, but it established the character of the *ancien régime* – irregular, confused, and productive of injustice. Under American law, by contrast, "Vested rights acquired under former jurisdictions have ever been held sacred."[104] Anticipating the reader's objection, Wilson acknowledged the rather large exception to this sacred policy in the following section titled, "Indian Usufructuary Interests," which were of course founded upon "different principles" that demanded "far different treatment."

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[100] Outgoing from John B. Frisbie, July 30, 1872, and Letter to John B. Frisbie, August 2, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[101] Milton S. Latham to J. K. Duncan, Esq. Aug 30, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[102] Joseph S. Wilson, *The National Domain*, Green's Land Paper, April 3, April 10, April 24, May 1, 1872.

[103] Joseph S. Wilson, *The National Domain*, Green's Land Paper, April 10, 1872.

[104] Joseph S. Wilson, *The National Domain*, Green's Land Paper, May 1, 1872.

To discuss these, "different principles" Wilson employed an extended quotation from *Johnson v. McIntosh* (1823) to deal with the unique rights of conquest. As Chief Justice Marshall wrote, "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim…." However, Wilson wanted to deal with the problem of violence: Did *Johnson* "involve the right of *forcibly* dispossessing [Indians] of that occupancy? This issue has never yet been presented." Wilson provided his answer in a suggestive combination of Locke and the contemporary critique of land monopoly:

> The American people deeply deplore and reprobate the destruction of the Indian tribes, in spite of the utmost efforts of the General Government; but still, the popular insight detects an underlying infraction of the great law of humanity, of common justice, in the Indian monopoly of the continent. As action and re-action are equal and reciprocal no less in the moral than in the physical world, it is not at all surprising that this great fundamental wrong in the social arrangements of our race has been productive of unhappy consequences, or that these have fallen with especial weight upon the heads of their unconscious agents and instruments.[105]

In other words, there *was* a right of violent redistribution, a substantive justification for conquest. Of course, like the courts dealing with Suscol, this idea *needed* immediate repudiation and disavowal for a liberal like Wilson who, as he had insisted mere inches of newspaper column to the left, held property rights sacred. How did Wilson resolve this obvious problem for himself? Well, here he returned to the opening theme of his narrative, to something called "Feudalism," but which was increasingly taking on several incompatible and unorthodox meanings. To the Stuarts, Wilson added "Indian monopoly," escheat, wastage, real actions, tenure, conditional estates, and use rights of all kinds. In an attempt at conclusion, he wrote, "The failure of the first aristocratic efforts at colonization upon the basis of feudalistic social organization now appears as an event giving decisive advantage to the development of freedom."[106] The ultimate legal manifestation of freedom was "allodial tenure," estates with no conditions, which transferred immediately upon grant from the State. Fee simple had emerged as the ultimate achievement of property law. Wilson ended, "It will be seen, from

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[105] *Id.*

[106] Joseph S. Wilson, *The National Domain*, Green's Land Paper, May 1, 1872.

the facts recited, that the liberal principles embodied in our great public-land policy have reconstructed, to a great extent, the legal basis of our social order, by liberalizing the ideas of land ownership. The General Government set this glorious example, and the justice and expedience of its policy in this respect are now universally admitted."

The reader might rightly suspect I have skipped the part of the history where Wilson discussed his own actions or the conflict over California land titles. I have omitted this for the simple reason that Wilson did not discuss it. He was, of course, quite aware of how property law had developed on the Pacific Coast – at that moment he was also writing an advertisement to European investors to purchase railroad lands in western Oregon – but it made no sense in the Liberal regime which had *arrived*, outside of historical time.[107] To tie this regime to history – to blood and morality and crisis – would be to discredit it, and so, like in *Frisbie* and in Locke, Wilson conjured a discontinuity in historical time. This was not a legal change marked by careful technicalities accreted over time, as in Horowitz, but a convulsion in legal thought. Capitalist development fundamentally transformed property in California, and by natural extension the American settler form. Free Land had been replaced by a new term, quite popular in *Green's Land Paper:* Cheap Land. Suscol revealed this slippage, and only in examining a "New Country," a colony, could such a rupture be directly observed and then disavowed.

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[107] Joseph S. Wilson, Railroad Lands in Western Oregon: For Sale at Low Rates and on Liberal Terms: Extraordinary Inducements to Emigrants (1872).