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# How the Border Crossed Us: Filling the Gap between *Plume v. Seward* and the Dispossession of Mexican Landowners in California after 1848

Kim David Chanbonpin

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HOW THE BORDER CROSSED US:<sup>1</sup> FILLING THE GAP  
BETWEEN *PLUME v. SEWARD* AND THE DISPOSSESSION OF  
MEXICAN LANDOWNERS IN CALIFORNIA AFTER 1848

KIM DAVID CHANBONPIN<sup>2</sup>

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<sup>1</sup>See Rodolfo Acuña, *The Treaty of Guadalupe Hidalgo: My Take on the Possible Implications for Today*, 5 SW. J. L. & TRADE AM. 109, 119 (1998) [hereinafter Acuña, *Treaty Implications*]. Professor Acuña comments:

For me, the Treaty is a symbol. It is a reminder when I look at my students who wear shirts that say ‘The border crossed us,’ it tells me that we were always right, that Reies López Tijerina was right. And it doesn’t take Newt Gingrich to tell us that we are not crazy.

*Id.*

<sup>2</sup>J.D., 2003, University of Hawai‘i at Manoa, William S. Richardson School of Law. I would like to thank Professors Chris Iijima, Doug Codiga, Eric Yamamoto, and Guadalupe T. Luna for their time and insight. Thank you also to LatCrit, Inc. for providing me the opportunity to publish this paper.

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#### I. INTRODUCTION

This land is your land, this land is my land. . .  
In the squares of the city--in the shadow of the steeple  
Near the relief office--I see my people  
And some are grumblin' and some are wonderin'  
If this land's still made for you and me.<sup>3</sup>

In 1854, the California Supreme Court concluded that although neither party to an ejectment suit could claim to be the true owner, the plaintiff, who could trace his ownership to a prior possessor, had a stronger claim than the defendant, who was in actual possession of the land.<sup>4</sup> Taught to many first-year law students, *Plume v. Seward* is meant to illustrate the basic rule that when no legal title exists, property rights of first possessors trump the rights of those currently occupying the land.<sup>5</sup> When examined in a full historical context, however, the *Plume* decision is evidence of the uneven treatment of California landowners based solely on race.<sup>6</sup>

At the end of the Mexican-American War, the United States gained 529,189 square miles of land.<sup>7</sup> Subsequently, Congress created the Board of Land

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<sup>3</sup>WOODY GUTHRIE, *This Land Is Your Land* (TRO-Ludlow Music, Inc. 1956). Woodie Guthrie was born in Okemah, Oklahoma, the son of a cowboy-land speculator-politico father. During the Great Depression, Woodie traveled west in search of land and employment, eventually finding himself in California. See Woody Guthrie Foundation and Archives, *Woodie Guthrie's Biography*, at <http://www.woodyguthrie.org/biography.htm> (last visited Sept. 13, 2003).

<sup>4</sup>*Plume v. Seward*, 4 Cal. 94 (1854).

<sup>5</sup>See J. GORDON HYLTON ET AL., *PROPERTY LAW AND THE PUBLIC INTEREST: CASES AND MATERIALS* 27 (1998). The *Plume* opinion is reproduced in its entirety in the Hylton casebook, which I used in my first-year Property course. *Id.* at 24-25.

<sup>6</sup>See *infra* Section III.

<sup>7</sup>See Frederico M. Cheever, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe-Hidalgo*, 33 UCLA L. REV. 1364, 1369 n.25 (1986) (citing J.J. Bowden, *Spanish & Mexican Land Grants in the Southwest*, 8 LAND & WATER L. REV. 467, 468 (1973)).

Commissioners to settle land claims in California.<sup>8</sup> At the time, social tensions were running high between resident Mexican landowners and Anglos (English-speaking white Americans) who wanted land in order to settle new U.S. territory.<sup>9</sup> Congress intended the Board to be a neutral system of registering and adjudicating land claims.<sup>10</sup> The adjudication of Mexican land claims by the Board did not conform to the Treaty of Guadalupe Hidalgo,<sup>11</sup> however, nor did it conform to California legal precedent regarding possession and property rights.<sup>12</sup>

The legal archaeology movement provides some useful tools for a study of the *Plume* case. Legal archaeologists are scholars who scrutinize case law to discover the full story behind the stated legal rationale. As one legal archaeologist asserts:

Cases need to be treated as what they are, fragments of antiquity, and we need, like archaeologists, gently to free these fragments from the overburden of legal dogmatics, and try, by relating them to other evidence, which has to be sought outside the law library, to make sense of them as events in history and incidents in the evolution of the law.<sup>13</sup>

Discoveries made by legal archaeologists bring a fuller context to the terse appellate court decisions read by students and taught by law professors.<sup>14</sup> Law students are alerted to the complexities that surround a case in litigation, and professors are reminded that the rhetorical tools they employ--bright-line rules and legal doctrines--originate within a larger set of intersubjectivities.<sup>15</sup>

*Plume* must be understood as part of a larger historical and political context, implicating race relations and substantive justice. Invoking Critical Race Theory, LatCrit Theory,<sup>16</sup> and Legal Archaeology, this paper will confront the questions: who

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<sup>8</sup>An Act to ascertain and settle private Land Claims in the State of California, 9 U.S. Stat. 631 (1851) [hereinafter California Land Act].

<sup>9</sup>See Rebecca Tsosie, *Sacred Obligations: Intercultural Justice and the Discourse of Treaty Rights*, 47 UCLA L. REV. 1615, 1630-31 (2000). Citing the work of Guadalupe T. Luna and Richard Griswold del Castillo, Tsosie asserts that an atmosphere of racism and violence adversely influenced relations between Mexican landowners and Anglo settlers in the West. *Id.* See also FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 158-60 (David J. Weber ed. 1973) [hereinafter FOREIGNERS IN THEIR NATIVE LAND].

<sup>10</sup>See California Land Act, *supra* note 8.

<sup>11</sup>Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

<sup>12</sup>See *infra* Sections II, B-C.

<sup>13</sup>Debora L. Threedy, *A Fish Story: Alaska Packers' Association v. Domenico*, 2000 UTAH L. REV. 185, 188 (2001) (quoting A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287 (1987)).

<sup>14</sup>*Id.*

<sup>15</sup>See PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 7 (1991).

<sup>16</sup>See Francisco Valdés, *LatCrit: A Conceptual Overview*, available at <http://personal.law.miami.edu/~fvaldes/latcrit/overview.html> (last visited Apr. 5, 2003) (describing LatCrit theory as a movement in outsider jurisprudence and a "close cousin" to Critical Race Theory).

writes history and law and, how are those media used to inscribe and reproduce the economic and political status quo.<sup>17</sup> A study to investigate the causes of the dispossession of Mexican landowners is important because the history of the double conquest of Mexican Americans<sup>18</sup> remains obscured from law and history textbooks. Historian Robert Blauner calls this sin of omission “academic colonization.”<sup>19</sup> As Professor Guadalupe T. Luna explains, “[o]mitting land alienation from legal history and education promotes Chicanas/Chicanos’ status as outsiders and renders their history invisible.”<sup>20</sup> Most of the U.S. population, for example, is unaware that the United States invaded and conquered Mexico in the late nineteenth century and then seized over half of Mexico’s land as spoils of war.<sup>21</sup>

The taking of their lands and alienation from membership in the southwestern United States had several immediate and numerous long-lasting consequences for new Mexican Americans. For instance, many Mexican Americans, dispossessed of their rural property, were forced to take up work as agricultural workers in Anglo enterprises.<sup>22</sup> This severely limited their input and participation in the burgeoning American society.<sup>23</sup> Therefore, although an investigation into the adjudication of land grants is important, it needs to be understood within the larger contextual

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<sup>17</sup>See, e.g., Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 840-44 (1997) (describing the process by which popular ideas of cultural difference and notions of racial inferiority are reified in legal texts). Yamamoto submits that this process of inscription and reproduction has led to the “cultural derogation” of ethnic minority groups in the United States. *Id.* at 843.

<sup>18</sup>In this paper, I use “Mexican American” to describe both Mexican nationals who found themselves under U.S. rule after the Treaty was signed and their descendants who today continue to inhabit the U.S. Southwest. See also Guadalupe T. Luna, *En el Nombre de Dios Todo-Poderoso: The Treaty of Guadalupe Hidalgo and Narrativos Legales*, 5 SW. J. L. & TRADE AM. 45, 46 n. 5 (1998) [hereinafter Luna, *Narrativos Legales*].

<sup>19</sup>ROBERT BLAUNER, RACIAL OPPRESSION IN AMERICA 166 (1972).

<sup>20</sup>Guadalupe T. Luna, *Chicana/Chicano Land Tenure in the Agrarian Domain: On the Edge of a “Naked Knife”*, 4 MICH. J. RACE & L. 39, 50 (1998) [hereinafter Luna, *Naked Knife*].

<sup>21</sup>Acuña, *Treaty Implications*, *supra* note 1, at 117-18. Acuña points out:

Under our national lore, it is common knowledge that the United States acquired from Native American tribes some two million square miles of territory by conquest and by purchase. Not as common is the knowledge that the United States conquered Mexico in 1848 and took over half its then-existing territory. The states of California, Nevada, and Utah, as well as portions of Colorado, New Mexico, Arizona, and Wyoming were carved out of that 529,000 square mile cession by the Republic of Mexico.

*Id.*

<sup>22</sup>MATT S. MEIER & FELICIANO RIBERA, MEXICAN AMERICANS/AMERICAN MEXICANS: FROM CONQUISTADORS TO CHICANOS 79 (11th prtg. 2001).

<sup>23</sup>*Id.*

framework of contemporary issues affecting Mexican Americans.<sup>24</sup> These issues include racism, language rights, immigration, and human rights.

The goal of this paper is to show how the rule in *Plume* and the actual practice of the Board of Land Commissioners in California at the time are not in synch. The rule of law and its application cannot be reconciled unless one examines the racial conflict between Anglo settlers and Mexican landowners in California at that time. Landowners with legal title derived from sovereigns were treated differently by the Board, depending solely on race. The landowners who did not benefit from the rule espoused in *Plume* were different from those who did benefit in two important ways: they were Mexican and they were non-citizens. The ruling announced by the California Supreme Court in *Plume v. Seward* reveals a racial bias in adjudicating land claims. Acknowledging this injustice may provide a basis for establishing some sort of racial justice for the affected communities today.

In Section II, I provide the historical background to the United States imperialist goal of Manifest Destiny. This section also gives a factual introduction to *Plume* and the procedure of the Board of Land Commissioners. Section III contrasts the result in *Plume* with the outcomes in the Board's decisions in factually similar land claims. Section IV analyzes the Guadalupe-Hidalgo Treaty Land Claims Act proposed to Congress in 2001 and asks whether its proposals provide a just form of repair for those adversely affected by post-Treaty claims adjudication. I also argue in this section that the racially-biased handling of Mexican land claims after the Treaty has far-reaching effects, implicating many issues facing Mexican Americans today.

## II. BACKGROUND

### A. *The Colonization of Alta California, New Spain*

Private land claims in California originated in the Spanish colonial government that instituted a program of colonial settlement of the area.<sup>25</sup> Religious missions were established to Christianize and civilize the natives.<sup>26</sup> Military outposts called presidios<sup>27</sup> were built at the same time to protect the missions and their inhabitants against outside threats.<sup>28</sup> The Spanish government promoted agriculture in the

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<sup>24</sup>See, e.g., Guadalupe T. Luna, "This Land Belongs to Me:" *Chicanas, Land Grant Adjudications, and the Treaty of Guadalupe Hidalgo*, 3 HARV. LATINO L. REV. 115, 122 (1999) [hereinafter Luna, *This Land Belongs to Me*].

<sup>25</sup>See Luna, *Naked Knife*, *supra* note 20, at 61.

<sup>26</sup>Cris Perez, *Grants of Land in California Made By Spanish or Mexican Authorities*, BOUNDARY DETERMINATION OFFICE, STATE LANDS COMMISSION, BOUNDARY INVESTIGATION UNIT (1982), available at <http://www.lib.berkeley.edu/EART/rancho.html> (last visited Sept. 13, 2003). The pueblos were located in some of the most fertile lands in Alta California--San Francisco, Los Angeles, Sonoma, and San Jose. *Id.*

<sup>27</sup>N.B. Words, phrases, or sentences in languages other than English are not italicized in this paper. See also Kim D. Chanbonpin, *Holding the United States Accountable for Environmental Damages Caused by the U.S. Military in the Philippines, A Plan for the Future*, 4 ASIAN-PAC. L. & POL'Y J. 321, 321 n.4 (2003) (explaining why I choose not to employ italics to signal the use of a different language in my writing).

<sup>28</sup>Perez, *supra* note 26.

pueblos in order to provide the missions and presidios with food supplies.<sup>29</sup> These rich pueblo lands eventually became the subject of claims between Mexican grantees and the U.S. government. Mayors of presidios and pueblos were vested with the authority to make modest land grants to “encourage settlement, reward patrons of the Spanish government, and create a buffer zone to separate hostile Native American tribes from the more populated regions of New Spain.”<sup>30</sup> The rancho grants were mainly distributed in lots of eleven leagues, although many were smaller and some larger.<sup>31</sup> Mexico gained independence from Spain in 1821,<sup>32</sup> and continued the rancho grant program initiated by the Spanish.

The city of Marysville can be taken as a representative example of how the land grant system worked in California from the Mexican era to after the Treaty was signed. The land that later became Marysville was on a Mexican land grant.<sup>33</sup> Its original lessee, John A. Sutter, had become a naturalized citizen of Mexico so that he could benefit from the colonization scheme of the Mexican government.<sup>34</sup> The Sutter rancho encompassed what are now Sacramento and Marysville.<sup>35</sup> Also included was Sutter’s Mill, where John Marshall discovered gold in 1847.<sup>36</sup>

That same year, Sutter entered into a nine-year agricultural lease with Theodor Cordura.<sup>37</sup> In 1848, Cordura sold half his interest in the lease to a French trapper, Charles Couvillaud, the originator of George Plume’s interest.<sup>38</sup> Michael C. Nye and William Foster, Couvillaud’s brothers-in-law, bought the remaining half from Cordura the following year.<sup>39</sup> They subsequently sold their interest to Couvillaud.<sup>40</sup> The “others” mentioned in the *Plume* opinion were Couvillaud’s partners--Chileans Jose Ramirez and John Sampson, and Frenchman Theodore Sicard.<sup>41</sup> More

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<sup>29</sup>*Id.*

<sup>30</sup>U.S. Gen. Acct. Off., Treaty of Guadalupe Hidalgo: Definition and List of Community Land Grants in New Mexico: Exposure Draft 5, GAO-01-330 (Jan. 2001) [hereinafter GAO-01-330].

<sup>31</sup>One league is approximately 4,400 acres. See WEBSTER’S NEW WORLD DICTIONARY 768 (3d ed. 1988).

<sup>32</sup>See RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 40 (4th ed. 2000) [hereinafter ACUÑA, OCCUPIED AMERICA]. The Mexican War of Independence lasted eleven years during which Mexico lost ten percent of its population. *Id.*

<sup>33</sup>See PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING AMERICAN LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 26 (1997).

<sup>34</sup>*Id.*

<sup>35</sup>See CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 89 (1963).

<sup>36</sup>See KENS, *supra* note 33, at 26.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>The Key to the City’s Page, *Marysville’s Golden History*, available at <http://www.syix.com/yubacity/msvlhistory.html> (last visited Sept. 13, 2003).

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

intriguing than how fast the lands were transferred after the original grant and to whom, however, was the quality of ownership rights held by Couvillaud and his partners.<sup>42</sup> The Couvillaud partnership held the interests to a lease; a lease that would expire in two years.<sup>43</sup> With impunity, Couvillaud & Co. Proprietors had the leased land surveyed and lots laid out and prepared for sale.<sup>44</sup> As one historian summarized, “they were selling and delivering title to land they did not own.”<sup>45</sup>

#### 1. Manifest Destiny and the Spread of American Influence Westward

Historical records suggest that as early as 1767, Benjamin Franklin had designs on Mexico and Cuba as sites for future U.S. colonization.<sup>46</sup> To achieve this larger goal, the United States first took aim at Texas. Anglos began to settle in Texas while it was still part of the Mexican nation.<sup>47</sup> By the 1830s, there were 25,000 Anglos and only 4,000 Mexicans in Texas.<sup>48</sup> The United States then annexed Texas in 1845.<sup>49</sup> Mexico never legitimized this action and severed diplomatic relations with the United States after Texas was admitted into the Union.<sup>50</sup> The United States later offered to purchase California and New Mexico, but Mexico refused.<sup>51</sup> Finally, an armed conflict between Mexican and American troops near the Río Grande provided the impetus for Congress’ declaration of war against Mexico.<sup>52</sup> President James K. Polk ordered General Zachary Taylor of the U.S. Army to occupy disputed territory in between the Nueces River and the Río Grande--an action that incited Mexico to war, in order to maintain the integrity of its borders.<sup>53</sup> In May 1846, General Taylor entered into the Río Grande area to claim it for the United States.<sup>54</sup>

During all of the mounting war preparations, one idea remained constant. At the end of the nineteenth century, many Americans were of the belief that God had intended that the vast western expanse of the North American continent should be occupied and governed by the United States.<sup>55</sup> Historian Reginald Horsman records

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<sup>42</sup>See KENS, *supra* note 33, at 26.

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>See ACUÑA, OCCUPIED AMERICA, *supra* note 32, at 43.

<sup>47</sup>See ANZALDÚA, *infra* note 166, at 6.

<sup>48</sup>See MEIER & RIBERA, *supra* note 22, at 56.

<sup>49</sup>See ACUÑA, OCCUPIED AMERICA, *supra* note 32, at 48-49.

<sup>50</sup>*Id.*

<sup>51</sup>MEIER & RIBERA, *supra* note 22, at 61-62.

<sup>52</sup>*Id.* at 62.

<sup>53</sup>See Richard Griswold del Castillo, *Manifest Destiny: The Mexican-American War and the Treaty of Guadalupe Hidalgo*, 5 SW. J.L. & TRADE AM. 31, 34 (1998) [hereinafter Griswold del Castillo, *Manifest Destiny*].

<sup>54</sup>*Id.*

<sup>55</sup>This ideology became known as “Manifest Destiny” after John O’Sullivan wrote, “the American claim is by the right of our manifest destiny to overspread and to possess the whole



that by the time of the Mexican-American War, Anglo Americans had developed a clear racial hierarchy. “While the Anglo-Saxons were depicted as the purest of the pure--the finest Caucasians--the Mexicans who stood in the way of the southwestern expansion were depicted as a mongrel race, adulterated by extensive intermarriage with an inferior Indian race.”<sup>56</sup> The imperialist notions that urged the expansion of U.S. borders were grounded by a firm conviction in racial hierarchy.<sup>57</sup>

## 2. The Mexican-American War and the Treaty of Guadalupe Hidalgo

In 1846, U.S. armed forces invaded and soon conquered Mexico.<sup>58</sup> The combatants ceased fighting on February 2, 1848 when the United States and Mexico signed the Treaty of Guadalupe Hidalgo. Under the terms of the Treaty, Mexico ceded about half of its land to the United States.<sup>59</sup> Although the United States paid a \$15 million indemnity on the lands, the Treaty heavily favored the United States.<sup>60</sup> The history of the Treaty reveals a desire on the part of the United States to speed the transfer of Mexican-owned lands to Anglo settlers.<sup>61</sup> Aware of these designs, Mexico negotiated what protections it could in what became Articles VIII, IX, and X of the Treaty.<sup>62</sup>

The terms of Article VIII focused on questions regarding citizenship of those Mexicans now living in U.S. territory.<sup>63</sup> The aim of Article VIII was to give the Mexicans living in the newly acquired U.S. territories the choice to continue their Mexican citizenship or to become United States citizens.<sup>64</sup> By virtue of these citizen rights, Article VIII also implicated property issues. Article VIII of the Treaty of Guadalupe Hidalgo promised,

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of the continent which Providence has given us for the development of the great experiment of liberty.” See Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties, and the Treaty of Guadalupe Hidalgo*, 26 N.M. L. REV. 201, 208 (1996) (citing to RICHARD WHITE, *IT’S YOUR MISFORTUNE AND NONE OF MY OWN: A HISTORY OF THE AMERICAN WEST* 73 (1991)). John Louis O’Sullivan was the editor of the “United States Magazine and Democratic Review.”

<sup>56</sup>REGINALD HORSMAN, *RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLLO-SAXONISM* 208-213 (1981).

<sup>57</sup>*Id.* See also ALBERT CAMARILLO, *CHICANOS IN CALIFORNIA: A HISTORY OF MEXICAN AMERICANS IN CALIFORNIA* 15-18 (1984) (describing racial tensions between Mexican residents and Anglo settlers in California during the years 1848-1900).

<sup>58</sup>See ANZALDÚA, *infra* note 166, at 7.

<sup>59</sup>See *id.*

<sup>60</sup>Tsosie, *supra* note 9, at 1625.

<sup>61</sup>See FOREIGNERS IN THEIR NATIVE LAND, *supra* note 9, at 141.

<sup>62</sup>See RICHARD GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT* 38-42 (1990). The negotiators from Mexico had feared that Mexicans left behind in the ceded lands would be relegated to the status of Black slaves in the U.S. South without specific protections written into the Treaty. See MALCOLM EBRIGHT, *LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO* 33-34 (1994).

<sup>63</sup>See Treaty of Guadalupe Hidalgo, art. VIII.

<sup>64</sup>*Id.*

in the said territories, *property of every kind*, now belonging to Mexicans not established there, shall be inviolably respected. The present owners, the heirs and all Mexicans who may hereafter acquire said property by contract shall enjoy ample as if the same belonged to citizens of the United States.<sup>65</sup>

The Mexicans were given one year from the date of the Treaty to make their choice regarding citizenship.<sup>66</sup>

The most controversial part of the Treaty was Article X. Article X would have guaranteed that pre-existing land titles would be honored by the United States.<sup>67</sup> Article X originally provided:

All grants of land made by the Mexican government or by the competent authorities, in territories previously appertaining to Mexico, and remaining for the future within the limits of the United States, *shall be respected as valid*, to the same extent that the same grants would be valid, if the said territories had remained within the limits of Mexico.<sup>68</sup>

President Polk, however, recommended that Article X be excised from the Treaty.<sup>69</sup>

In order to mollify the protests of Mexican representatives after the removal of Article X, the United States issued the Protocol of Querétaro.<sup>70</sup> The Protocol guaranteed only the preservation of titles that conformed to U.S. land law.<sup>71</sup> During the land disputes that ensued, President Polk and his Cabinet did nothing to preserve the original intent of the Protocol--the protection of property rights for Mexican landowners living in the newly ceded lands.<sup>72</sup> Secretary of State James Buchanan discounted the Protocol, insisting that it “lacked the force or effect of law.”<sup>73</sup> Polk actually hid the terms of the Protocol from the Senate until it had suspended their

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<sup>65</sup>*Id.* (emphasis added).

<sup>66</sup>*Id.* While the language of Articles VIII and IX suggested that the Mexicans would be “incorporated into the Union” and enjoy “all the rights of the citizens of the United States,” the fact that Congress was given the power to determine when these benefits would be transferred shows U.S. officials had reservations about allowing a group of mixed-Indian heritage to become full-fledged United States citizens. See Tsosie, *supra* note 9, at 1626-27.

<sup>67</sup>Tsosie, *supra* note 9, at 1626.

<sup>68</sup>Treaty of Guadalupe Hidalgo art. X, available at <http://southwestbooks.org/treaty.htm#articlex> (last visited Sept. 13, 2003) (emphasis added). The original Article X was deleted from the version of the Treaty ratified by Congress in 1848, so it is not included in the UNITED STATES STATUTES AT LARGE, 9 Stat. 922.

<sup>69</sup>See Tsosie, *supra* note 9, at 1627. Among other considerations, Polk feared a revival of land claim disputes in Texas that had already been settled with annexation in 1845. See GAO-01-330, *supra* note 30, at 8.

<sup>70</sup>Hereinafter “the Protocol.” Available at <http://southwestbooks.org/treaty.htm#protocol> (last visited Sept. 13, 2003).

<sup>71</sup>See Tsosie, *supra* note 9, at 1627.

<sup>72</sup>See ACUÑA, OCCUPIED AMERICA, *supra* note 32, at 54-55.

<sup>73</sup>Tsosie, *supra* note 9, at 1627.

ratification deliberations.<sup>74</sup> Afterwards, the President maintained the Protocol did not have the restorative effect of reinstating the deleted Article X.<sup>75</sup>

Data on land ownership in California after the Treaty provide an exact mathematical view of the state of affairs. Before 1860, Californios owned all the land valued over \$10,000.<sup>76</sup> Just ten years later, most Mexican ranchers had been forced to sell their lands or farm rented property.<sup>77</sup> By the 1870s, Californios owned only one quarter of their former lands.<sup>78</sup> The Treaty, as ratified by the U.S. Senate, left little protection for Mexican land grantees. An explanation for the statistics listed above may be found in investigating how the shortcomings of the Treaty were exploited by lawmakers for the benefit of Anglo settlers.

*B. A California Land Case: Plume v. Seward*

The dispute centers around a lot of land in Marysville, California.<sup>79</sup> In an ejectment action to recover the lot, George Plume sought to prove that his predecessors-in-interest, Mr. Couvillaud and some others, had been in prior possession of the lot in question, as well as to a larger tract of land encompassing it.<sup>80</sup> Although Couvillaud and the other predecessors-in-interest had laid out town lots and exercised other acts of ownership, the defendants, Thomas Seward and James Thompson, had established physical occupation of the lot.<sup>81</sup>

Plume argued that Couvillaud and the others possessed a tract of land starting at the Yuba River running to the mountains.<sup>82</sup> The land was later plotted into lots and streets, and recorded on the official map of Marysville.<sup>83</sup> Many of these lots were sold by Couvillaud and his partners.<sup>84</sup> Plume presented evidence that showed that Couvillaud had asserted title and exercised continuous ownership over all of the

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<sup>74</sup>*Id.*

<sup>75</sup>*See id.* at 1627.

<sup>76</sup>*See* ACUÑA, OCCUPIED AMERICA, *supra* note 32, at 144. The term “Californios” describes the colonists who settled the province of California in New Spain. These colonists were not Spanish aristocrats, but were a combination of mixed race Spanish subjects from Mexico and Mexican convicts. *Id.* at 132-33.

<sup>77</sup>*See* ACUÑA, OCCUPIED AMERICA, *supra* note 32, at 144.

<sup>78</sup>*Id.*

<sup>79</sup>*See Plume*, 4 Cal. at 95. This case comes to the California Supreme Court on appeal from a decision in the Fifth Judicial Circuit of the California courts. The decision of the lower court is not available in any reporter, but according to the appellate decision, the trial court had ordered Plume be non-suited. *Id.*

<sup>80</sup>*Id.*

<sup>81</sup>*See Id.* Counsel for Seward and Thompson argued that actual possession of wild lands must be shown, if recovery is sought upon prior possession alone, so presumably, they were in actual possession. *Id.*

<sup>82</sup>*Id.* at 97.

<sup>83</sup>*Id.* at 95.

<sup>84</sup>*Id.* *See also* Section II, at A.

lots.<sup>85</sup> The specific lot in question here was included in the larger premises, owned by Couvillaud and identified by its location next to a wheat field and a corral.<sup>86</sup>

No valid grant of title from a sovereign is mentioned in the Court's opinion, which, if it existed, would have settled the dispute. Plume could not prove that his predecessor was the "owner" of the land in 1849. The only way to prove such ownership would have been to show a certificate of title from the sovereign; in this case, either the Spanish, Mexican, or U.S. governments. But Plume did not advance this argument. Plume argued only that Covillaud had *possession* of the land; that Covillaud was the *first* to claim possession to this land; and that this was shown through the various improvements that Covillaud had made to the land.<sup>87</sup> Seward and Thompson, in their defense, argued that Plume was a trespasser.<sup>88</sup> In the end, the Court found for Plume. In these types of cases, the California courts consistently ruled in favor of the paper owner rather than squatters.<sup>89</sup> The Court affirmed its rule that possession of real estate is *prima facie* evidence of title and is sufficient to maintain a suit for ejectment.<sup>90</sup> Although there was no record of title that could be traced back to a sovereign grantor, the Court found that because Plume proved Couvillaud's prior possession, his claim to the lot was stronger and prevailed over that of Seward and Thompson who were in actual, current possession of the lot.

*C. A Different Outcome for Mexican Landowners Under California's  
Board of Land Commissioners*

Most Mexican claimants were in substantially the same position as Plume when his case appeared before the California Supreme Court. Mexican grantees before the Board claimed up to eleven leagues of land, some of which was held as community property.<sup>91</sup> Meanwhile, land speculators and squatters were flocking to the West, tempted by the riches of the Gold Rush.<sup>92</sup> The main difference between George Plume and the Mexican grantees was that the Mexican grantees had proof of legal transfer from a sovereign.<sup>93</sup> While under the United States Supreme Court's rule in *Johnson & Graham's Lessee v. M'Intosh*, title deriving from Mexico would have

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<sup>85</sup>*Plume*, 4 Cal. at 96.

<sup>86</sup>*Id.* at 95.

<sup>87</sup>*Id.* at 95-96.

<sup>88</sup>*Id.*

<sup>89</sup>See SWISHER, *supra* note 35, at 90. "It was a general rule of law that a claimant could win a suit only on the strength of his own title, and not on the weakness of that of his adversary. Hence, since in these suits neither party possessed title, it would seem that they had no status in court. However, the rule of law had to be adjusted by the courts to meet the demands of new situations." *Id.*

<sup>90</sup>*Id.*

<sup>91</sup>See EBRIGHT, *supra* note 62, at 266-67.

<sup>92</sup>Griswold del Castillo, *Manifest Destiny*, *supra* note 53, at 37.

<sup>93</sup>See EBRIGHT, *supra* note 62, at 210.

been enough evidence of bona fide ownership, the laws were not applied equally for the new Mexican Americans.<sup>94</sup>

To adjudicate the uncertain land titles in California, Congress created the Board of Land Commissioners.<sup>95</sup> As several scholars have noted, Congress substantively breached the terms of the Treaty of Guadalupe Hidalgo when it enacted the California Land Act of 1851.<sup>96</sup> While the terms of the Treaty implied unlimited protections, the Act reduced those protections to a period of two years.<sup>97</sup> The Board placed an almost impossible burden of proof on the Mexican claimants.<sup>98</sup> Quite simply, the sponsors of the Act aimed “to force Mexicans off the land by encouraging squatters to invade them.”<sup>99</sup>

The Board was a three-man commission that oversaw every claim in California that originated from grants by the Spanish or Mexican governments.<sup>100</sup> The burden of proving land claims was placed on the Mexican claimants.<sup>101</sup> Section 8 of the California Land Act provided:

[t]hat each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the [land] commissioners . . . together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims.<sup>102</sup>

Mexican land grantees were given a period of only two years to gather and present evidence in support of their claims.<sup>103</sup> Failure to conform to the two-year deadline resulted in a disproportionate penalty. If at the end of the two-year period no claim was filed, the property would be deemed public domain, the property of the United States of America.<sup>104</sup>

The process of filing claims had significant hurdles for the Mexican grantees to overcome. Claimants had to fill out forms that were in English, and were required to

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<sup>94</sup>Johnson v. M’Intosh, 21 U.S. 543 (1823). See also Klein, *supra* note 55, at 206-10 (acknowledging that Mexican claimants derived title from grants issued by sovereign governments, either Spain or Mexico).

<sup>95</sup>See 9 U.S. Stat. 631. The Board of Land Commissioners dealt solely with land claims in California. *Id.*

<sup>96</sup>See Luna, *This Land Belongs to Me*, *supra* note 24, at 141.

<sup>97</sup>Klein, *supra* note 55, at 220.

<sup>98</sup>See Luna, *Naked Knife*, *supra* note 20, at 79.

<sup>99</sup>ACUÑA, *OCCUPIED AMERICA*, *supra* note 32, at 141.

<sup>100</sup>*Id.*

<sup>101</sup>See Luna, *Naked Knife*, *supra* note 20, at 79. “In stark contrast to American obligations under the Treaty, Congress imposed upon grantees the burden of proving the validity of their claims of ownership.” *Id.*

<sup>102</sup>9 U.S. Stat. 631, Section 8.

<sup>103</sup>Griswold del Castillo, *Manifest Destiny*, *supra* note 53, at 39.

<sup>104</sup>Klein, *supra* note 55, at 220.

pay surveying costs, litigation fees, and form fees, not to mention, attorneys' fees.<sup>105</sup> Many failed to meet the two-year cutoff because of mistrust of the distant federal government, because they believed that their grants had already been perfected, or simply because of the language barrier.<sup>106</sup> The heavy legal and financial burden resulted in many unjust decisions, with the Board ruling mainly in favor of the government.<sup>107</sup> While the average wait for a final patent to be issued was seventeen years, "some took as long as thirty-five to forty years."<sup>108</sup> The costs of land surveys commissioned by the Board throughout the confirmation process were charged to the claimant.<sup>109</sup> Eventually, many of those whose grants were actually confirmed were forced to sell the property because of debts incurred in the land grant process.<sup>110</sup>

Although the court in *Plume* relied on the theory of custom to assist in defining the character of possession, the Board ignored the custom of Mexican and Spanish property law altogether.<sup>111</sup> This is true, although the theory of possession expounded in *Plume* was very similar to the Mexican understanding of land claims. Under the Mexican legal system, possession was the main proof of ownership.<sup>112</sup> The Mexican system valued communal lands and relied on natural markers to demarcate boundaries.<sup>113</sup> Recall that the *Plume* court did not require any particular type of rigid enclosure "where a party is in possession of land marked by distinct monuments of boundary, *whether the same be a natural or artificial inclosure* [sic]."<sup>114</sup> The Mexican landowners had legal title, originating from a sovereign, yet their lands were taken away by the Board of Land Commissioners and the federal Possessory Act.<sup>115</sup> As a result, settlers received squatted land, whether it was public domain land claimed by the federal government or tracts of land owned by private individuals.<sup>116</sup>

Initial confirmation by the Board was not the last hurdle in obtaining a land patent. The Board's approval was subject to endless and time-consuming appeals to the federal District Court, the Circuit Court of Appeals, and sometimes, to the Supreme Court of the United States.<sup>117</sup> The standard of review on these appellate challenges was *de novo*. "In authorizing courts to rehear every question 'as truth and

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<sup>105</sup>See Luna, *This Land Belongs to Me*, *supra* note 24, at 125-26.

<sup>106</sup>See Berta Esperanza Hernandez Truyol, *Building Bridges -- Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994).

<sup>107</sup>See Luna, *This Land Belongs to Me*, *supra* note 24, at 125-26.

<sup>108</sup>See Perez, *supra* note 26.

<sup>109</sup>See Luna, *This Land Belongs to Me*, *supra* note 24, at 82.

<sup>110</sup>See Griswold del Castillo, *Manifest Destiny*, *supra* note 53, at 39.

<sup>111</sup>See Tsosie, *supra* note 9, at 1639.

<sup>112</sup>*Id.* at 1630.

<sup>113</sup>*Id.*

<sup>114</sup>*Plume*, 4 Cal. at 96-97 (emphasis added).

<sup>115</sup>See California Land Act, *supra* note 8.

<sup>116</sup>See HYLTON, *supra* note 5, at 26.

<sup>117</sup>See Luna, *This Land Belongs to Me*, *supra* note 24, at 84.

justice may require,' the land acts essentially promoted land challenges against grantees of Mexican descent."<sup>118</sup> Ultimately, even the minimal protections purportedly established by the Protocol of Querétaro were destroyed.<sup>119</sup> In 1889, the United States Supreme Court ruled that the Protocol did not apply to land claims in California.<sup>120</sup> The cases originating from the Treaty should be understood as part of the results-driven jurisprudence of the Court.<sup>121</sup> The discovery of gold in California just before the end of the war had raised the stakes considerably.<sup>122</sup> Drove of Anglo American settlers were entering California during this time.<sup>123</sup> The Anglo settlers "believ[ed] that they had special privileges by right of conquest. To them, it was 'undemocratic' that 200 Mexican families owned 14 million acres of land. Armed squatters forced the Mexicans off their land."<sup>124</sup> Expansionists had all the more reason to drift into the West. The abundance of natural resources, not the least of which was gold, spurred on the settlers' need for land.

### III. THE PROBLEM: GIVEN A SIMILAR SET OF FACTS, THE LEGAL SYSTEM PRODUCED DIFFERENT RESULTS DEPENDING ON THE RACE OF THE CLAIMANTS

The historical information presented above serves as the contextual background to evaluating the basic problem presented by this paper. Why were there different outcomes in California property disputes when the facts were basically the same? This question can be answered in several different ways. In this Section, first I uncover the personal motives of a man who was influential in creating the *Plume* decision. Then, I suggest that alternative procedures were available to the Board to ensure a fair adjudication of the Mexican land claims.

#### A. *The Archaeological Dig: Questioning the Motives of the Decision-Makers*

Legal archaeologists urge that the study of case law must be infused with the understanding of the historical events that produced it. As Professor Patricia D. White points out, "[a]ny lawyer knows that the full story of a case on which he or she has worked is not reflected in its judicial opinion. . . . [T]he course and often the outcome of a case is affected, sometimes, indeed determined, by [external]

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<sup>118</sup>*Id.* (citing *United States v. Chaves*, 159 U.S. 452 (1895)). *Chaves* held that "upon any appeal . . . the Supreme Court shall retry the cause, as well as the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open" *Chaves*, 159 U.S. at 455 (emphasis added).

<sup>119</sup>*See* *Griswold del Castillo*, *supra* note 53, at 36.

<sup>120</sup>*Cessna v. United States*, 169 U.S. 165 (1898).

<sup>121</sup>*See, e.g.*, *Botiller v. Dominguez*, 130 U.S. 238 (1889).

<sup>122</sup>As the Supreme Court noted in *Botiller v. Dominguez*, a California rancho grant case, "in 1846, it was discovered that rich mines of the precious metals were abundant in that country, and a rush of emigration almost unparalleled in history to that region commenced." *Id.* at 244.

<sup>123</sup>*See* *CAMARILLO*, *supra* note 57.

<sup>124</sup>*ACUÑA, OCCUPIED AMERICA*, *supra* note 32, at 141.

(“strategic” omitted) considerations.”<sup>125</sup> Those who make or mold legal decisions need to be scrutinized because evidence of their biases provides reason and opportunity to re-evaluate the force and effect of the law.<sup>126</sup>

Plume’s lawyer, Stephen J. Field, later became Chief Justice on the California Supreme Court, and was eventually appointed to the United States Supreme Court.<sup>127</sup> Field had a vested interest in arguing for a favorable decision for his client in *Plume*. He was a founding father of Marysville, whose own status as a legitimate landowner depended on that case. Upon his arrival in Marysville in 1850, Field bought sixty-five town lots for a total purchase price of \$16,250.<sup>128</sup> Field would later capitalize on his initial investment in Marysville, using his position as a Justice on the California Supreme Court to protect his economic interests.<sup>129</sup>

Soon after its founding, Field was elected the first mayor of the City of Marysville.<sup>130</sup> One biographer characterized him as an alcalde--“the only law northwest of the Yuba.”<sup>131</sup> As for his skill in negotiating the differences between Mexican and U.S. laws, Field himself admitted: “I knew nothing of Mexican laws; did not pretend to know anything of them.”<sup>132</sup> Upon his election to the California

<sup>125</sup>Patricia D. White, *Afterword and Response: What Digging Does and Does not Do*, 2000 UTAH L. REV. 301, 301 (2000).

<sup>126</sup>At the time he authored the *Plume* opinion, Chief Justice Hugh C. Murray had to have been aware of the newly established California Board of Land Commissioners. In performing this act of legal archaeology, it is critical to examine the information upon which the Chief Justice was operating when he wrote *Plume*. The *Plume* decision was published in 1854. The Board of Land Claims Commission was established in 1851 with the passage of the California Land Act. See Section II.C.

The Court’s decision in *Plume* was not unprecedented. In fact, Chief Justice Murray’s opinion records that the issues of constructive possession and land claims had arisen repeatedly in the new southwestern part of the United States. The *Plume* opinion states:

This question has been frequently decided in most of the Western states, where entries have been made upon public lands by persons unable to reduce the whole of the lands to actual occupation by fencing and cultivation. These entries have for the most part been made by settlers claiming 160 acres under the preemption laws, or some local custom on the subject.

*Plume*, 4 Cal. at 96. Chief Justice Murray apparently refers to the land speculating of Anglo settlers following the Mexican-American War. See STEPHEN J. FIELD, PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA 35 (1887). This passage is crucial because it reveals the Court’s cognizance of the social politics surrounding land claims at the time. Chief Justice Murray was acutely aware of the influx of gold miners, land speculators, and other settlers to California.

<sup>127</sup>See CHARLES W. MCCURDY, THE FIELDS AND THE LAW 5 (1986). His brother, David Dudley Field, was the author of the Field Codes. *Id.* at 1. See also JOHN NORTON POMEROY, INTRODUCTORY SKETCH, SOME ACCOUNT OF THE WORK OF STEPHEN J. FIELD 8 (Chauncey F. Black & Samuel B. Smith, eds. 1881).

<sup>128</sup>See SWISHER, *supra* note 35, at 30.

<sup>129</sup>See KENS, *supra* note 33 at 20-21.

<sup>130</sup>See *id.* at 21.

<sup>131</sup>*Id.* at 30.

<sup>132</sup>*Id.* at 27.



Supreme Court, Stephen Field also became a pioneer in the law. “He was required to frame a State jurisprudence de novo—to create a system out of what was at the time mere chaos.”<sup>133</sup> In California, with its unique history of conquest, special rules had to be created in order to protect the interests of Anglo settlers.<sup>134</sup> In the context of the Wild West, this meant that the pioneer who got there first had a right to claim the land and use of that land for himself.<sup>135</sup> These policies were designed to encourage settlement of the newly acquired territory.<sup>136</sup> The settlement of Anglo Americans, however, required the displacement of Mexican residents already there.

The status that Field had achieved as a legitimate titleholder biased his legal decisions as a justice. Field’s investments in Marysville were not limited to his sixty-five lots. He had spearheaded many improvements in the town, increasing the value of his own investments. One of these civic projects was bank grading on the Yuba River for safer landing of sailing vessels.<sup>137</sup> Out of this grading enterprise came early experiences dealing with people whom Field called “squatters and sharpers.”<sup>138</sup> The river landing area was choice for business and the property there sold for a premium.<sup>139</sup> As Field remembered in his *REMINISCENCES*,

on account of the squatters, the owners were deprived of the benefit of the open ground of the landing in front of their property, and they complained to me. I called upon the squatters and told them that they must leave, and that if they were not gone by a certain time, I should be compelled to remove them by force.<sup>140</sup>

This exchange sets the tone for Field’s attitude towards the new settlers in his future opinions on the California Supreme Court. While he sat on the court, Field’s opinions bolstered the validity of the Treaty of Guadalupe Hidalgo in land disputes. His discernable bias for titleholders of Mexican or Spanish grants over squatters was a personal one.

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<sup>133</sup>POMEROY, *supra* note 127, at 25.

<sup>134</sup>*Id.*

<sup>135</sup>*Id.* While on the California court, Field became renowned for writing decisions that developed the Western States’ unique approach to riparian and other natural resource rights. *See* KENS, *supra* note 33, at 75. Field’s capture theory, or the right of first appropriation, eventually prevailed in all disputes over ownership to streams, rivers, or coal mines. *Id.* KENS notes: “in conflicts among miners and among settlers [Justice Field] relied upon the presumption that ownership vested in the first person to have appropriated the property. He warned, however, that this presumption would not be applicable against a person who held superior title.” *Id.*

<sup>136</sup>*See* Klein, *supra* note 55, at 222-23. “[The Botiller Court’s] reasoning was influenced heavily by practical concerns created by the discovery of gold in California. The resulting ‘rush of emigration almost unparalleled in history’ created a pressing need to distinguish private lands from those belonging to the government.” *Id.*

<sup>137</sup>*See* KENS, *supra* note 33, at 34.

<sup>138</sup>*Id.* at 35.

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

After *Plume* was decided and Field took his position on the bench of the California Supreme Court, he heard numerous cases based on imperfect land grants.<sup>141</sup> Many of these disputes centered around a massive tract of land called New Helvetia, which encompassed Sacramento and Marysville, including the land which Field owned.<sup>142</sup> In these cases, Field held the grants to be valid, although the confirmation process did not satisfy the standards of the California Land Act.<sup>143</sup> Field was not acting as a disinterested member of the Court. His restrictive interpretations of the Land Act favored Field in two ways.<sup>144</sup> First, he was able to collect large sums in attorney's fees for recording titles.<sup>145</sup> Second, as one of his biographers has commented, "any legitimacy the filing system bestowed on land transfers in general also applied to the sixty-five lots he had purchased from the [Couvillaud] partnership."<sup>146</sup>

The California Supreme Court, led for six years by Field, mitigated the harsh effects of the Land Act's two-year limitation period.<sup>147</sup> In *Minturn v. Brower*, the Court held that only imperfect land titles that derived from the Spanish and Mexican colonial governments required presentation for grant confirmation before the Board.<sup>148</sup> Later, however, the United States Supreme Court held that "no title...to land in California dependent upon Spanish or Mexican [land] grants, can be of any validity" unless it was presented to and confirmed by the Board of Land Commissioners within the two-year limit prescribed by the Land Act of 1851.<sup>149</sup> The *Botiller* ruling reversed the California courts' long-standing interpretation of the Land Act of 1851 that only imperfect titles needed to be presented for adjudication before the Land Claims Commission.<sup>150</sup>

An investigation into the depths of a case requires discovering what is included in the text and what is excluded, and for what purpose. Without knowing more than the facts presented by the court's opinion, a student's capability to fully understand and argue the nuances of the facts is stifled. When *Plume* is contrasted with the way in which the bulk of Mexican claims were adjudicated by the Board, what is important

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<sup>141</sup>See SWISHER, *supra* note 35, at 89.

<sup>142</sup>*Id.*

<sup>143</sup>*Id.* (citing to *Ferris v. Coover*, 10 Cal. 589 (1858); *Cornwall v. Culver*, 16 Cal. 424, (1860); *Moore v. Wilkinson*, 13 Cal. 478 (1859); and *Riley v. Heisch*, 18 Cal. 198 (1861)).

<sup>144</sup>See KENS, *supra* note 33, at 31.

<sup>145</sup>*Id.* Field was the only lawyer in Marysville at the time. *Id.* He was hired to draft the deed that transferred the site of Marysville town from John Sutter to Charles Couvillaud and the others. See KENS, *supra* note 33, at 19. Ten thousand dollars was exchanged and the transaction was completed on January 17, 1850. See SWISHER, *supra* note 35, at 30.

<sup>146</sup>*Id.*

<sup>147</sup>See Klein, *supra* note 55, at 221.

<sup>148</sup>*Minturn v. Brower*, 24 Cal. 644 (1864). See also *Phelan v. Poyoreno*, 74 Cal. 448 (1887) (holding that owners of perfected land titles were not required to submit them for confirmation before the Board).

<sup>149</sup>See *Botiller*, 130 U.S. 238 (1889).

<sup>150</sup>See *Minturn*, *supra* note 148.

to for a student to notice are the inconsistencies of the law. The squatters in the *Plume* case, Seward and Thompson, lost their claim, although they were in actual possession of the lot at that time.<sup>151</sup> After the war ended in 1848, thousands of Anglo American settlers came into California and squatted on the land.<sup>152</sup> The federal government made it easier for these squatters to make land claims by making it more difficult for Mexican landowners to register in U.S. land courts.<sup>153</sup>

*B. Analysis of the Legal Means Used to Systematically Dispossess Mexicans of Their Lands in California After 1848*

The procedures in the Board of Land Commissioners transformed landowners into claimants with unworkable burdens to prove that their property rights should be recognized under the Treaty.<sup>154</sup> Presumptions previously afforded to claimants were abolished, and many unjust decisions resulted. On the rare occasions when the Board found for Mexican claimants, the United States Supreme Court often reversed those rulings on appeal.<sup>155</sup>

The lynchpin of the federal government's plan to take away privately held lands was the legal process, which was specifically designed to impose heavy burdens on the Mexican claimants. The federal government was under tremendous pressure to make these Western lands available for Anglo homesteaders.<sup>156</sup> Yet, alternatives were available which may have ensured a more just distribution of the newly acquired southwestern lands. For instance, the federal government could have borne the burden of disproving the legitimacy of land claims. By granting presumptive legitimacy to all Mexican grantees, the United States would have conformed to its duties to respect land grants under the Treaty. The potential for even-handed justice, however, was quashed by the prevailing mood of the country, that of a "conquering warrior."<sup>157</sup> Also, the government could have created a process mechanism to serve all land claimants, regardless of race, placing them on equal footing before the courts. On such example comes from the California Supreme Court. The *Minturn* rule exempted perfect land grants from the adjudication requirement of the Land Act.<sup>158</sup>

Further substantiation of race-based discrimination in the land grant adjudication process lies beyond examining the claims of Mexican grant holders. Instances of preferential treatment for Anglo claimants abound.<sup>159</sup> While the burden of proof for

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<sup>151</sup>See *Plume*, 4 Cal. at 94.

<sup>152</sup>See KENS, *supra* note 33, at 27.

<sup>153</sup>See Sections II.C and III.

<sup>154</sup>See Luna, *This Land Belongs to Me*, *supra* note 24, at 141.

<sup>155</sup>See Griswold del Castillo, *Manifest Destiny*, *supra* note 53, at 39 (citing *Botiller v. Dominguez*, 130 U.S. 238 (1889)).

<sup>156</sup>See Klein, *supra* note 55, at 220. "The accelerated claims adjudication mandated by the Act can be attributed, in part, to the discovery of gold in California and the resultant pressure by gold prospectors to open lands to mining exploration." *Id.*

<sup>157</sup>Perez, *supra* note 26.

<sup>158</sup>Klein, *supra* note 55, at 221.

<sup>159</sup>See Tsosie, *supra* note 9, at 1629-30.

documentation for Mexican claimants was stringent, Anglo claimants somehow evaded these burdens. The records show that the courts and the Board made several exceptions for Anglo claimants who lacked documentary proof, based upon their “credible identity and good character.”<sup>160</sup> This demonstrates that while favorable interpretations of the law were extended to Anglos, similar benefits were denied to Mexican landowners.<sup>161</sup> Professor Luna concludes, “ultimately that favoritism expedited dispossession.”<sup>162</sup>

#### IV. EXAMINING SOLUTIONS: RESULTING EFFECTS ON MEXICAN AMERICANS AND THE NEED FOR REPARATIONS

The effects of the Treaty of Guadalupe Hidalgo and the adjudication of Mexican land claims are still being felt. Therefore, any discussion of the land grants issue must be framed broadly to include the contemporary experiences of Mexican Americans.<sup>163</sup> In order to make connections between race, history, and legal doctrine, a reader must be able to critique the text presented. One way to do so is to “make the implicit explicit,” as the authors of RACE AND RACES suggest.<sup>164</sup> As readers of legal text—or simply as astute observers of society—we must look for the hidden assumptions underlying discussions about or ignoring race and state them. In a traditional law school reading of *Plume*, race is completely ignored. However, once we “remember context,” and re-align the case within the larger historical background, we see that race does indeed matter.<sup>165</sup>

##### A. *The Legacy of the Treaty*

At first glance, *Plume v. Seward* seems like a simple property case, illustrating the principles of possession and ownership. Yet its historical context belies a superficial reading of its legal doctrines. The domination of people of color and aliens in the United States has a long history. Mexican Americans, in particular, have endured a history of double conquest.<sup>166</sup> After the Mexican-American War,

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<sup>160</sup>*Id.* at 1630. The California senator, John C. Fremont, benefited from this discriminatory practice. *Id.*

<sup>161</sup>Luna, *This Land Belongs to Me*, *supra* note 24, at 49.

<sup>162</sup>*Id.*

<sup>163</sup>See Rene Romo, *Mexican War Left a Raw Wound*, ALBUQUERQUE J. (N.M.), Feb. 1, 1998, at B1, available at 1998 WL 11702982; Lalo López, *Legacy of a Land Grab*, HISPANIC MAGAZINE, Sept. 1997, available at [http://www.hispaniconline.com/hh02/hitsory\\_legacy\\_guadalupe\\_hidalgo.html](http://www.hispaniconline.com/hh02/hitsory_legacy_guadalupe_hidalgo.html) (last visited Sept. 15, 2003); see also, Luna, *This Land Belongs to Me*, *supra* note 24.

<sup>164</sup>See JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA 3 (2000). The casebook authors offer seven tools of critical inquiry: (1) look for the hidden norm; (2) avoid we/they thinking; (3) remember context; (4) seek justice; (5) consider the nature of the harm; (6) trust your intuition; and (7) ask, who benefits? *Id.* at 3-4.

<sup>165</sup>See CORNEL WEST, RACE MATTERS 3-13 (1994) (advocating the development of a broader discourse on race relations in the United States, one that takes simultaneous account of racial difference and common humanity).

<sup>166</sup>The term “double conquest” includes reference to the initial conquest of the indigenous peoples by the Spanish conquistadores at the beginning of the sixteenth century. GLORIA

their descendants were dispossessed of their citizenship, identity, and lands. As a result of the operation of the U.S. legal system, “[w]ithin a generation, the Mexican Americans who had been under the ostensible protections of the Treaty became a disenfranchised, poverty-stricken, and terrorized minority.”<sup>167</sup>

The consequences of the conquest continue to play out. One of the most striking examples of these is the fact that California voters passed Proposition 187 in November 1994.<sup>168</sup> This ballot initiative was driven by anti-immigrant sentiment, promoted in the popular media.<sup>169</sup> The image seen over and over again was that of Mexican immigrants running across the Mexico-United States border.<sup>170</sup> Had most provisions not been declared unconstitutional, Proposition 187 would have required law enforcement, teachers, and health care workers to verify a person’s immigrant status when seeking those public benefits.<sup>171</sup> Still, anti-immigrant sentiment is only one of many challenges posed to the Mexican American community today. The struggle for a fair economic foreign policy between the United States and Mexico is another. Affirmative action and bilingual education are more issues in the domestic arena.<sup>172</sup>

In the context of land grant activism, the Treaty and its contemporary effects are important because the land serves multiple purposes. According to Ron R. Ortega, President of the Lower Gallinas Land Grant of New Mexico,

[w]hat is not understood by many individuals in elected positions within out local, state[,] and federal governments is that like our ancestors, we are people of the land -- THIS IS OUR CULTURE!!!! The land is life and the life is the land and is not separable.<sup>173</sup>

Land is home base, it provides the earth for agricultural production, it is a cultural birthright. Land is often passed down through the generations and serves as a symbol of one’s lineage. For those Mexicans who suddenly became Americans in 1848, the land symbolizes “occupied Mexico.”<sup>174</sup> The land represents continuity

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ANZALDÚA, *BORDERLANDS/LA FRONTERA: THE NEW MESTIZA* 5 (1987). “Before the [first] Conquest, there were twenty-five million Indian people in Mexico and the Yucatán. Immediately after the Conquest, the Indian population had been reduced to under seven million.” *Id.*

<sup>167</sup>Griswold del Castillo, *Manifest Destiny*, *supra* note 53, at 43.

<sup>168</sup>See Leo R. Chavez, *Immigration Reform and Nativism: The Nationalist Response to the Transnationalist Challenge*, *IMMIGRANTS OUT! THE NEW NATIVISM AND THE ANTI-IMMIGRANT IMPULSE IN THE UNITED STATES* 61 (Juan F. Perea ed. 1997).

<sup>169</sup>*Id.* at 61-64.

<sup>170</sup>See ACUÑA, *OCCUPIED AMERICA*, *supra* note 32, at 452.

<sup>171</sup>Paul Feldman & Patrick J. McDonnell, *U.S. Judge Blocks Most Sections of Prop. 187 Courts: Jurist Cites Significant Constitutional Questions; Enforcement is Delayed Pending Outcome of Lawsuit*, *L.A. TIMES*, Dec. 15, 1994, at A1.

<sup>172</sup>See Romo, *supra* note 163.

<sup>173</sup>Quoted in Prepared Statement of Roberto Mondragon, Member, New Mexico Land Grant Reform Before the House Resources Committee, National Parks and Public Lands Subcommittee, *FEDERAL NEWS SERVICE*, Mar. 26, 1998.

<sup>174</sup>See Tsosie, *supra* note 9, at 1639.

from the past and preserves the identity of a people. Scholars note that one of the most significant features of the discourse on treaty rights is the link between cultural identity and the land.<sup>175</sup> Land grant activists in New Mexico and elsewhere argue that the land that was stolen, through fraud and other deceptions, must be returned. Any attempts to redress the harms done to Mexican Americans after the Mexican-American War must address this demand for the return of lands.

*B. The Proposed Guadalupe-Hidalgo Treaty Land Claims Act of 2001 and Its Implications for Reparative Justice in the Mexican American Community*

1. Current Opportunities for Exploitation

The contemporary possibilities for exploiting the Treaty have not eluded modern-day politicians. In 1998, Newt Gingrich visited voters in New Mexico.<sup>176</sup> He was on a fund-raising tour and met with land grant activists there.<sup>177</sup> Gingrich announced that he planned to support the Guadalupe-Hidalgo Treaty Land Claims Act of 1997.<sup>178</sup> The bill proposed that a community land grant study center be established to determine the validity of the claims.<sup>179</sup> If found valid, the center would recommend that the lands be returned to the original Mexican grantees.<sup>180</sup> Gingrich promised restitution and that the bill would “reimburse families in cash or land for millions of acres that were given to them in Spanish and Mexican land grants, but later taken over by the United States federal government.”<sup>181</sup> This statement by the former Speaker of the House seems to address one concern, the recognition of a harm felt by Mexican Americans as a group. But, is this a whole-hearted apology? Does the Treaty Act truly address the needs of the land grant activists? Or, is this merely a mollifying tactic? As Latinos become the largest growing ethnic minority in the United States, is it mere cynicism to critique Gingrich’s promises as a shrewd political move to garner the Latino vote?

Professor Rodolfo Acuña believes that incentives other than altruism may have motivated the bill’s sponsors. Acuña points out, “Republicans recognize that the best way to achieve their own goals of privatizing land without seeming to give it to the rich is to give it to the poor and let the market do their bidding.”<sup>182</sup> History threatens to repeat itself with this proposed legislation. Under the scheme concocted by H.R. 2538, the probability is that, just as happened in the new southwestern states after the Mexican-American War, Anglo land speculators will eventually obtain the

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<sup>175</sup>*Id.*

<sup>176</sup>Roberto Rodriguez and Patrisia Gonzalez, *Gingrich’s Interest in Land Grants, Part Reason for Concern*, FRESNO BEE, Jan. 26, 1998, at B5.

<sup>177</sup>*Id.*

<sup>178</sup>H.R. 2538, 105 Cong. (1997). This bill was later introduced by New Mexico’s Representative, Republican Bill Redmond.

<sup>179</sup>*Id.* at § 3.

<sup>180</sup>*Id.* at § 4(F).

<sup>181</sup>Acuña, *Treaty Implications*, *supra* note 1, at 113.

<sup>182</sup>*Id.* at 115.

land.<sup>183</sup> Only this time, the speculators will be able to do so under legislation with popular support, in a process overshadowed by pretenses of disinterest.<sup>184</sup>

Although an amended version of H.R. 2538 passed the House on September 9, 1998, it never made it out of the Senate.<sup>185</sup> New Mexico Representative, Democrat Tom Udall, took up sponsorship of the Land Claims Act during the 107<sup>th</sup> Congressional Session.<sup>186</sup> Most recently, Udall spoke in support of this bill before the House membership in February 2001.<sup>187</sup> One month prior to Udall's speech, the General Accounting Office (GAO) issued an Exposure Draft for the public about the community land grants in New Mexico.<sup>188</sup>

## 2. The General Accounting Office Report on New Mexico Lands

The GAO report explains the meaning of "community land grants" and names the land grants in New Mexico that meet the GAO definition.<sup>189</sup> The first Exposure Draft is intended to be the first in a series, addressing the problem of the lands lost in New Mexico by Mexicans after the Treaty of 1848.<sup>190</sup> The goal of the next reports is to describe how the Treaty of Guadalupe Hidalgo was implemented and what resources are available to the government to address concerns about how the Treaty was implemented.<sup>191</sup> However, the GAO report carries an important caveat. The authors declare: "[GAO] identification of a land grant does not constitute our opinion as to the validity of any land grant claim."<sup>192</sup>

New Mexico is an important test case because the terms of its own state constitution refer to the Treaty and assert protections to its citizens under it. Article 2, section 5 of the New Mexico State Constitution states: "The rights, Privileges and Immunities, Civil, Political and Religious Guaranteed to the people of New Mexico by the Treaty of Guadalupe Hidalgo *shall be preserved inviolate.*"<sup>193</sup> Also, the land grants in New Mexico were not adjudicated at the same time as the claims in

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<sup>183</sup>See *id.*

<sup>184</sup>*Id.* See also DERRICK A. BELL, JR., RACE, RACISM, AND AMERICAN LAW 12 (3d ed. 1992). Professor Bell's interest-convergence theory is useful in examining the current motives of politicians, as well as some of the biases that influenced the historical decision-makers. *Id.*

<sup>185</sup>Bill Tracking Report H.R. 2538; Cong. Rec. H 7521, passed in the House, 223-187 (Roll No. 421).

<sup>186</sup>See Bill Summary & Status for the 107<sup>th</sup> Congress, at [http://thomas.loc.gov/cgi-bin/bdquery/R?d107:FLD003:@1\(Rep+Udall+Tom\)I/bss/d107query.html](http://thomas.loc.gov/cgi-bin/bdquery/R?d107:FLD003:@1(Rep+Udall+Tom)I/bss/d107query.html) (last visited Sept. 17, 2003).

<sup>187</sup>2001 Cong. Rec. H207, February 7, 2001.

<sup>188</sup>See GAO-01-330, *supra* note 30.

<sup>189</sup>See GAO-01-330, *supra* note 30, at 6. Although the Spanish and Mexican land grant documents do not directly refer to "community land grants," since scholars as well as land grant activists invoke this term, the GAO also adopts it. *Id.*

<sup>190</sup>*Id.* at 5.

<sup>191</sup>*Id.*

<sup>192</sup>*Id.*

<sup>193</sup>N.M. CONST. art. II, § 5 (1978) (emphasis added).

California. The Public Land Claims Act of 1854<sup>194</sup> created a separate land grant adjudication process for New Mexico under the Surveyor General of New Mexico's office.<sup>195</sup> However, efforts at judicial solutions under this act in the courts have proved unsuccessful. So, many descendants of the land grant families have begun to advocate legislation like H.R. 2358 as the only real solution.<sup>196</sup> In 1998, Professor Acuña criticized Newt Gingrich for his support of the Land Claims Bill.<sup>197</sup> The history of the conquest should also force us to question: what are the real motives behind the GAO and H.R. 2358? Can a similar plan be set out for California? Why doesn't the New Mexico bill include the other conquered territories?

#### V. CONCLUSION

Today, land grant activists are left wondering if this land was really "made for you and me." By the end of the period of Manifest Destiny in American history, the borders of the United States of America stretched from California to the New York Island of Manhattan. This massive conquest was achieved through racism and imperialism, aided and enforced by the legal system. From California to Wyoming, there were two million square miles of territory ceded by Mexico to the United States at the end of the Mexican-American War. In the years following, a Board of Land Commissioners was established in California to adjudicate and confirm Spanish and Mexican land grants. By mounting a heavy burden of proof for the claimant, the Board acted as a conduit for lands to be taken out of private Mexican possession and into the public domain of the United States. This unfair process satisfied the needs of Anglo Americans who came to California in search of gold and land. The Board proved an efficient means of achieving this land transfer. More unfortunate for the future of the expanding United States was that these actions were justified in terms of racial superiority and inferiority.

My main goal in writing this article is to provide law students and professors with a more thorough and precise legal history. I hope that the information I have recorded and the arguments I have made in this paper provide tools for others to question the process by which law is made. Chicana/Chicano legal history must be studied to counter the traditionally simplistic readings of this country's legal past. I believe that this type of scholarly pursuit is a difficult one, but one that is necessary in becoming a critical thinker, a thoughtful student, and a good lawyer.

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<sup>194</sup>10 Stat. 308 (1854). The Surveyor General's office also had jurisdiction over Kansas and Nebraska. *Id.*

<sup>195</sup>See EBRIGHT, *supra* note 53, at 45-50. In 1891, the Court of Land Private Land Claims was created by Congressional legislation. *Id.*

<sup>196</sup>See Tsosie, *supra* note 9, at 1633. See also Jon Michael Haynes, Comment, *What is it About Saying We're Sorry? New Federal Legislation and the Forgotten Promises of the Treaty of Guadalupe Hidalgo*, 3 SCHOLAR 231 (2001) (arguing that the main shortcoming of the proposed legislation is that it fails to hold the United States accountable for breaching the terms of the Treaty).

<sup>197</sup>Acuña, *Treaty Implications*, *supra* note 1, at 115.