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# Articles

## From Commons to Claims: Property Rights in the California Gold Rush

Andrea G. McDowell\*

### I. INTRODUCTION

Scholars have long been interested in the emergence of a system of property rights in the California gold mines in 1848 to 1850, when California experienced a complete disintegration of its government,

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\* Willard Hurst Legal History Research Fellow, University of Wisconsin Law School. I would like to thank Morris Cohen for first suggesting the research topic of law in the California gold rush. John Reid helped me narrow this down to property law in the gold mines and then generously gave me full access to the voluminous quotations, references, and ideas that he had collected for a book on the subject some years ago. This, and the insights he gave me in conversation, have smoothed the way immensely. A number of friends and colleagues have read the manuscript in various stages and discussed problems with me, particularly Anne Alstott, Robert Ellickson, Bill Ewald, Robert Gordon, Sally Gordon, Jane Larson, Robin McDowell, Art McEvoy, Donald Pisani, and Jim Whitman. I am also grateful to the Beinecke Library at Yale University for granting me the Archibald Hanna, Jr. Fellowship in American history, which enabled me to spend a month using their collection; and to the staff of the Huntington Library in San Marino and the Bancroft Library in Berkeley, who were all extremely helpful.

law, and social order.<sup>1</sup> At the end of the Mexican War in 1848, the region was left without a legislature, without bureaucracy, without a law code except in theory, and without police or jails. Its non-native population numbered about 15,000. By the end of the next year, however, 100,000 gold-seekers—all men, all hoping to strike it rich, and almost none having a long-term interest in California—had poured into the mining region from every corner of the globe.<sup>2</sup> Though many had traveled in companies formed in their hometowns, these split up upon reaching the mines; and although family, friends, and immigrants from the same state frequently dug near one another, most of the miners in any given camp were strangers to each other.

This was as close to a state of nature as Americans would ever come. Not only were there no institutions to enforce the laws, there were no laws.<sup>3</sup> Certainly there were no laws governing property rights in mineral lands;<sup>4</sup> and because this was America's first gold

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1. See RODMAN W. PAUL, *CALIFORNIA GOLD: THE BEGINNING OF MINING IN THE FAR WEST* 116 (Univ. of Nebraska Press 1965) (1947). The first flush period, when gold could be picked up with relatively little labor, lasted until 1851. From 1851 onwards it took capital and labor to extract the gold: "The man who lives upon his labor from day to day, must hereafter be employed by the man who has in his possession accumulated labor, or money, the representative of labor." *The Cause of the Depression in Trade—The Cure*, ALTA CALIFORNIA (San Francisco), Feb. 14, 1851, at 2.

2. See Doris Marion Wright, *The Making of Cosmopolitan California: An Analysis of Immigration, 1848-1870* (pt. 1), 19 CAL. HIST. SOC'Y Q. 323, 323 (1940). See also THOMAS BUTLER KING, REPORT OF HON. T. BUTLER KING, ON CALIFORNIA, CONG. DOC. SER. 577, H. EXEC. DOC. NO. 59, 31st Cong., 1st Sess. 7 (Mar. 26, 1850). King estimated a population of ten to fifteen thousand at the end of the Mexican War, exclusive of Indians, and immigration into California of eighty thousand Americans and twenty thousand foreigners in 1849. It was impossible to estimate the number of Indians, King wrote. "In fact, the whole race seems to be rapidly disappearing." *Id.*

3. When California became an American territory, Mexican civil law remained in force but no copies of the laws were available. Moreover, the northern part of California was not inhabited by Mexicans and could reasonably be described as without local law. General Persifer F. Smith wrote on April 19, 1849 that he could not even find a copy of the laws of the United States in California. See CALIFORNIA AND NEW MEXICO, CONG. DOC. SER. 573, S. EXEC. DOC. NO. 18, H. EXEC. DOC. NO. 17, 31st Cong., 1st Sess. 698 (1850).

4. The United States acquired California under the terms of the Treaty of Guadalupe Hidalgo, signed on Feb. 2, 1848, shortly after gold was discovered. Article IV, section 3 of the U.S. Constitution provides that Congress shall make all rules and regulations concerning U.S. territories. However, Congress did not create a territorial government for California, because of fears that either sanctioning or forbidding slavery in the new territory would upset the balance between slave and free states. The military governors of California, General Kearney and Colonel (later General) R.B. Mason, acted as de facto civil governors; but their successor, General Riley, was appointed after the end of the war, and therefore could not serve as civil governor. California at this time was thus without a government and without laws. When the citizens of Sonoma met to select delegates to the Territorial Convention on February 5, 1849, they declared that "by treaty, Upper California has been ceded to the United States of America, thus depriving the people of the benefit of the laws of Mexico and Congress not having provided them with any other government, they are without laws or officers." *Meeting at Sonoma*, ALTA CALIFORNIA (San Francisco), Mar. 1, 1849, at 1. General Riley assumed the position of civil governor on his own authority on June 3, 1849. See CALIFORNIA AND NEW

rush, the Americans had no experience or customs to fall back on. American miners created, codified, and enforced a new system of property rights based on mining claims—not fee-simple—with extraordinarily tight restrictions on claimholders’ rights. The genesis of this regime, the nature of the rights it created, and the principles and expectations on which it was based are the subject of this article.

Mining claims are an ancient institution based on the civil-law rule that the sovereign holds title to all mineral deposits. Miners did not own the land they worked, nor did landowners always hold mining rights in their own property; instead, the first miner on the site acquired the usufruct through discovery, notice, and continuous use. This system was known to Spanish-speaking miners, Cornish and German miners, and lead miners from Missouri, Wisconsin, and Illinois, among others who came to California.<sup>5</sup>

The Californians undoubtedly borrowed from earlier mining rules and customs, but their choice of a claim system was a real choice. England and America had relatively little experience in gold and silver mining (as opposed to the mining of baser metals),<sup>6</sup> and the laws of Mexico concerned gold mining in veins or loads almost exclusively—the rules of placer mining were left to the discretion of the miners themselves.<sup>7</sup> The early mining traditions were also varied and adaptable; they left room to maneuver and opportunity for the American miners to choose between options and to inject their own values. Moreover, the miners in California were free from all authority and could have done as they liked. In their own recent past, the U.S. government had decided to sell the mineral lands of what is now

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MEXICO, *supra* note 3, at 752. The people of California elected delegates to draft a Constitution and adopted their draft by general vote on November 13, 1849. At no time was there any detailed mining code in America, nor was there any federal policy or statute. Mexican mining law was abolished by the American military governor, R.B. Mason, on February 12, 1848. See CALIFORNIA AND NEW MEXICO, *supra* note 3, at 452-53.

5. The California miners drew on the experience of miners in several parts of the world rather than relying on any one system. See PAUL, *supra* note 1, at 212-13. Some of the issues raised by mineral deposits on the public lands had been faced before in milder versions. See, e.g., JAMES E. WRIGHT, THE GALENA LEAD DISTRICT: FEDERAL POLICY AND PRACTICE 1824-1847, at 19 (1966) (noting that Martin Thomas, Superintendent of the U.S. Lead Mines, opposed the sale of lead mining claims in a letter to the Secretary of War in 1826 for the same reason that Thomas Hart Benton would oppose the sale of gold mining claims: because capitalists would become the primary land owners). See *infra* note 168 and accompanying text.

6. See J. ROSS BROWNE, REPORT ON THE MINERAL RESOURCES OF THE STATES AND TERRITORIES WEST OF THE ROCKY MOUNTAINS, CONG. DOC. SER. 1289, H. EXEC. DOC. NO. 202, 40th Cong., 2d Sess. 226 (1867) (stating that “mining for gold and silver is a business new in Anglo-Saxon life and not provided for in our laws”). On the history of gold mining in America, see CHARLES HOWARD SHINN, MINING CAMPS: A STUDY IN AMERICAN FRONTIER GOVERNMENT 37-46 (Rodman Wilson Paul ed., photo. reprint 1970) (1885).

7. See BROWNE, *supra* note 6, at 257-64 (providing extracts from the original Spanish ordinance of 1793). The section concerning placer mining (ch. 8, § 10) left the regulation of these mines to territorial deputations of miners.

the mid-West after an unsuccessful attempt at leasing, and the miners could have drawn on this model of ownership for their mining codes.<sup>8</sup> In fact, newspaper editors, military officers, and U.S. presidents would have preferred a regime that created greater security of title; they suggested that the land in the gold region should be sold or leased, eliminating the requirements of notice and continuous use. The miners not only protested vociferously against all such proposals, but also placed tighter restrictions on claimholders than did any earlier system.

Indeed, it is not obvious that miners had to have any rights in the ground they worked. They managed without private property rights in land during 1848, the first year of the gold rush, when the mining region remained a commons. This was not because, to paraphrase Locke, there was still enough and as good mineral land left. Rather, the first miners, mostly soldiers and sailors, grabbed what they could and moved on without staying anywhere long enough to form a community that could devise and enforce property rights.

In 1849, when property rights in mineral lands became the rule, the miners did not fight each other to a standstill, as Hobbes might have proposed; they did not apply Locke's theory that one acquires a permanent interest in land by mixing one's labor with it; nor did they try to devise a property regime that would maximize wealth production.<sup>9</sup> Instead, I suggest, the miners developed and codified rules that are striking for the restrictions they placed on claimholders' rights. These restrictions—strict limits on claim size, notice and work requirements, and, in many cases, prohibitions against holding more than one claim at a time—benefited not only the current claimholders, but also miners who hoped to get a claim.

The miners' objections to fee-simple anticipated Henry George's famous indictment of property in land as unnatural and unjust. Indeed, George's *Progress and Poverty* was largely informed and inspired by the California experience, though more by that of the settlers than that of the miners. He argued that Locke's theory of property applies only to things that the owner has produced personally or acquired from the producer. Land cannot be owned, he said,

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8. Various statutes in 1846 and 1847 opened for sale lands containing "copper, lead, or other valuable ores." See, e.g., Act of Mar. 1, 1847, ch. 32, 9 Stat. 146 (1847). See also CURTIS H. LINDLEY, A TREATISE ON THE AMERICAN LAW RELATING TO MINES AND MINERAL LANDS § 35 (3d ed. 1914).

9. As will be discussed at greater length below, John Umbeck has theorized that the property regime was an equilibrium based on violence. See JOHN UMBECK, A THEORY OF PROPERTY RIGHTS: WITH APPLICATION TO THE CALIFORNIA GOLD RUSH (1981). In contrast, Richard O. Zerbe and C. Leigh Anderson submit that efficiency determined the standard claim size. Richard O. Zerbe, Jr. & C. Leigh Anderson, *Culture and Fairness in the Development of Institutions in the California Gold Fields*, 61 J. ECON. HIST. 114 (2001).

because it is not the product of labor; the property rights in land that we know today were originally created by force or by declaration, neither of which can be defended under natural law. Moreover, George maintained, private property in land is unjust because those who control the land effectively control the others who are landless; fee-simple in land will always generate an aristocratic, landholding class and a class of laborers who are effectively their slaves.<sup>10</sup> George blamed the poverty and unemployment in San Francisco on monopolists who held most of the surrounding land at speculative prices, and he pointed to the diggings of 1849 and 1850 as rare examples of communities that did not recognize fee-simple and thus escaped the otherwise ubiquitous monopoly and exploitation. According to George,

Labor was acknowledged as the creator of wealth, was given a free field, and secured in its reward. . . . No one was allowed to play the dog in the manger with the bounty of the Creator. The essential idea of the mining regulations was to prevent forestalling and monopoly.<sup>11</sup>

George believed that because the camps mushroomed almost overnight and the question of property rights was approached *de novo*, the miners were able to preserve the mineral region as common property.

I submit that George's account of property law in the mines was not merely an *ex post facto* explanation of the miners' motives and results. The first mining claims probably emerged as a practical solution to the pressure of numbers at rich diggings, but very soon the custom that evolved in the first months of 1849 was codified, with variations, in various camps. These mining codes maintained the stringent restrictions on claimholders' rights that were first imposed by custom. Over time, the miners and their representatives in Congress came to associate title in land with monopoly, and restricted

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10. See HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS, AND OF INCREASE OF WANT WITH INCREASE OF WEALTH* (New York, Robert Schalkenbach Foundation 1942) (1879). George's powerful exposition of widespread poverty amidst spectacular material progress won him a wide readership among the general public and inspired many future reformers. His proposed solution, a single-tax on land value that would capture rent for the community, has drawn steady fire from economists. See, e.g., *CRITICS OF HENRY GEORGE: A CENTENARY APPRAISAL OF THEIR STRICTURES ON PROGRESS AND POVERTY* (Robert V. Andelson ed., 1979). George's theories have recently been the subject of renewed interest, however. See, e.g., Stewart E. Sterk, *Nollan, Henry George, and Exactions*, 88 COLUM. L. REV. 1731 (1988); Timothy Beatley & Richard Collins, *Smart Growth and Beyond: Transitioning to a Sustainable Society*, 19 VA. ENVTL. L.J. 287, 313.

11. GEORGE, *supra* note 10, at 386.

property rights with the interests of labor, and they consistently resisted attempts to introduce fee-simple into the mines.

Even claimholders regarded themselves as laborers rather than as property holders. Indeed, it was they who passed the rules restricting property rights in favor of those waiting to jump a claim. I suggest that claimholders voluntarily restricted their own rights because they knew that they would soon exhaust their present claims and would need to stake, jump, or buy others. If it was possible to hold title to mineral lands, they might find that a few rich individuals had bought up most of the diggings and had shut out others. The claimholders codified a system that balanced the interests of those who held property (themselves) and those who were propertyless, because they could imagine that they, too, would soon be looking for a new claim.

In other words, the miners drafted their codes from behind a Rawlsian “veil of ignorance” about their own future positions as property holders. John Rawls posits a hypothetical situation in which free and equal persons agree upon the basic structure of a new society without knowing where they will stand in that society, or what talents, ambitions, or social position they will hold.<sup>12</sup> Fair terms of social cooperation are those to which its members would agree if they were in this original position. Rawls says that this original position is non-historical, “since we do not suppose that the agreement has ever, or indeed actually could ever be entered into.”<sup>13</sup> The mining codes, however, were just such agreements made by free and equal persons, although they covered only a few elements of the basic structure of society—namely, property and criminal law. The miners’ inability to predict their success during the coming season explains their decision to impose work requirements, notice requirements, and above all, prohibitions on accumulation of claims—which operated in many, perhaps most, of the diggings. Each of these characteristics made more claims available to those who did not yet have one.

The terms of the mining custom and codes also made effective and speedy self-government possible. In light of Henry Hansmann’s study of worker-owned industries,<sup>14</sup> I will suggest that a large-scale, fully participatory democracy, like that of the diggings, was possible because the miners had very similar interests in the diggings. Restrictions that required one claim per person, claims of equal size, and

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12. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 14-18 (Erin Kelly ed., 2001) [hereinafter RAWLS, JUSTICE AS FAIRNESS]; RAWLS, POLITICAL LIBERALISM 24-25 (1993).

13. RAWLS, JUSTICE AS FAIRNESS, *supra* note 12, at 16-17. Rawls adds that even if such an agreement could be entered into, “that would make no difference [to his theory].” *Id.*

14. Henry Hansmann, *When Does Worker Ownership Work?*, 99 YALE L.J. 1749 (1990).

work requirements that tended to keep claim-owners on their claims helped to ensure the homogeneity without which the system of self-government would have collapsed.

Previous studies of property law in the mines have overlooked the crucial point that every claimholder expected soon to become an outsider. The earlier interpretations of the mining codes, and especially of their restrictions on property rights, are therefore quite different from mine.<sup>15</sup> The first modern analysis, by Charles Umbeck, was in the law-and-economics tradition.<sup>16</sup> Umbeck suggested that violence or the threat of violence determined claim sizes and other provisions of the code; miners maximized their incomes by balancing factors such as time spent digging, time spent fighting to defend their claims or to acquire more land, and the richness of the diggings. Umbeck further suggested that restrictions such as work requirements and accumulation restraints made it costly for miners to leave the diggings, and thus kept miners on their claims and available to join in the enforcement of the original contract.<sup>17</sup>

Umbeck's premise has recently been refuted by Richard Zerbe and Leigh Anderson, who note that there was little or no violence in the gold-mining camps of 1848 to 1850.<sup>18</sup> Zerbe and Anderson theorize that American cultural norms facilitated the development of legal institutions in the gold mines.<sup>19</sup> On that view, these norms served as focal points, which simplified the task of agreeing upon and enforcing a new property regime. One set of norms included the practice of holding meetings and respecting majority rule, which enabled American miners to organize themselves and to enact rules effectively. Other norms, which Zerbe and Anderson call "Lockean fairness" and "producerism," shaped the content of the codes. I will argue below that in the peculiar conditions of the California gold mines, there emerged new norms of egalitarianism and anti-capitalism that made sense in that context but did not conform to

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15. The first studies of property regimes in the gold mines were written by Charles Howard Shinn. CHARLES HOWARD SHINN, *LAND LAWS OF MINING DISTRICTS* (Johns Hopkins Univ. Stud. in Hist. and Poli. Sci., 2d ser., No. XII, 1884) and SHINN, *supra* note 6. Shinn had been a school teacher in a mining camp in 1878 and had observed the local mining code in action and had spoken with the many old pioneers. Unfortunately, he does not document his statements. He does, however, make the useful point that Americans of every class were accustomed to holding meetings, electing officials, voting, and abiding by majority rule, a point that Zerbe and Anderson develop in their analysis.

16. UMBECK, *supra* note 9.

17. *See id.* at 99-132.

18. *See Zerbe & Anderson, supra* note 9.

19. Zerbe and Anderson use Reid's theory of behaviorism based on law as their point of departure. *See id.* at 125. *See also* JOHN PHILLIP REID, *LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL* (1980).



standard American views on property.<sup>20</sup> I will also present evidence that the desire to maximize overall productivity played a minimal role in determining claim sizes.<sup>21</sup>

Both Umbeck's work, on the one hand, and that of Zerbe and Anderson, on the other, offer the usual, broad outline of what happened in the mines—namely, that when there were enough miners, they held a meeting and passed rules. The evidence fully sustains this account. However, when one tries to describe in detail how and when and by whom the rules were enacted, a number of further questions arise. What was the state of affairs in a camp before the mining code was enacted? As I argue below, miners who were beyond the jurisdiction of a mining district abided by the customary law of the diggings. Could the camps have managed without a code, by using the customary law instead? The latter was very sketchy, but then so were many of the early codes; it was unwritten, but this was also true of many early codes. What did the written rules contribute? Codes were usually passed only after enough miners had arrived at a diggings to raise the possibility of conflicts of interest. By that time, many had already staked out claims and invested labor. A change in the maximum claim size or limits on accumulation could be disruptive; and why, exactly, should those with claims attend to the demands of the outsiders? Once the new rules were introduced, how were claims distributed? Was passing rules a smooth process, or did some of the early claimholders resist? If they resisted, how did they do it and did they ever succeed? Did all miners comply with the rules or did some try to subvert them? The answers to these lesser questions do not merely help to answer the big question of how and why the law codes were passed; they are the answer to the big question. Any account of the development of property law in the mines that is not based on the actual sequence of events in the diggings is at best a

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20. By egalitarianism, I mean a principle of distributive justice by which everyone receives an equal share of a scarce resource. In this case, the resource is ground, the value of which is an opportunity of finding gold; the egalitarianism in the gold mines thus boiled down to equal opportunity. The various different theories which could be designated "egalitarian" are reviewed in Elizabeth Hoffman & Matthew L. Spitzer, *Entitlements, Rights, and Fairness: An Experimental Examination of Subjects' Concepts of Distributive Justice*, 14 J. LEGAL STUD. 259, 263-64 (1985).

21. Zerbe and Anderson suggest that there was an optimal size for claims, a size that could be worked most productively. Zerbe & Anderson, *supra* note 9, at 130. A third modern discussion of property rights in the California gold rush is Andrew Morriss, *Miners, Vigilantes & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law*, 33 LAND & WATER L. REV. 581 (1998). Morriss describes the basic features of property rights and lynch law in the mines as examples of privately produced law as opposed to law provided by the state; he does not focus on the transition from anarchy to property or the miners' reasons for choosing their particular system of mining claims as opposed to other possible property regimes.

lucky guess. The first sections below therefore address the circumstances surrounding the passage of the first codes.

This Article begins with a discussion of the gold-mining region in 1848, before the appearance of mining claims—that is, when the diggings were treated as a commons. It then turns to the introduction of private property rights in mineral land—and in particular, to the circumstances in which claims first appeared and the nature of the rights represented by a mining claim. I note that the customary law gave the miners very limited rights in their claims, and that the claimholders themselves later voted for mining codes that included these same restrictions on their rights. In the culture of the diggings, I argue, fee-simple in mining claims came to be associated with capitalism and the exploitation of labor, and, for that reason, was perceived as ideologically suspect and as contrary to the current claimholders' long-term interests. Finally, I suggest that the miners drew up their rules and regulations from behind a veil of ignorance about their future success or failure in the mines, and that under these circumstances, they chose to maintain a regime in which property would not become concentrated in the hands of the few—a regime that in some respects resembles Rawls's property-owning democracy.

## II. CALIFORNIA IN 1848

In 1848, while Europe was in the throes of revolutions against kings, princes, and aristocrats, the social hierarchy of California simply dissolved. The gold was there for the taking. Labor and labor alone could generate the new wealth; education, rank, and connections were suddenly irrelevant. Almost all employees rushed off to the mines, as did almost all employers. The governor himself lost his servants and had to make his own bed and cook his own breakfast. In the mines, all of society, high and low, worked shoulder to shoulder with picks and pans. As one of the earliest miners observed, "In a short time after gold digging became a remunerative calling, society was reduced to a level."<sup>22</sup> Capital had become nothing and labor was everything. Egalitarians were amazed and exhilarated by the revolution, by which "labour ha[d] obtained the upper hand of capital, or rather, ha[d] become capital itself."<sup>23</sup>

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22. James H. Carson, *Life in California*, reprinted in DORIS SHAW CASTRO, JAMES H. CARSON'S CALIFORNIA, 1847-1853, at 74, 87 (1997).

23. WILLIAM THURSTON, ESQ. GUIDE TO THE GOLD REGIONS OF UPPER CALIFORNIA 35 (1849) (quoting "a correspondent in New York"). See also *The Gold Mine*, CALIFORNIAN (San Francisco), Aug. 14, 1848, at 2 ("The laboring class have now become the capitalists of the country."). This edition of the *Californian* was intended for circulation back in the States. Both of these remarks were intended to encourage immigration and raised the expectations of

Meanwhile, those who believed that concentrations of capital and a supply of wage-labor were necessary for progress—that is, for effective gold mining, road building, and the growth of industry—agreed that nothing of the kind could take place until the placers were exhausted. These traditionalists guessed correctly that they had to be patient for a few years, but that their time would come. As one observer noted in 1849, “When this gold mania ceases to rage, individuals will abandon the mines; and then there will be a good opportunity for companies with heavy capital to step in, and it is then that the country will enter on a career of real progress.”<sup>24</sup> Even Thomas Hart Benton, who opposed the sale of mineral lands on the ground that it would inevitably result in monopoly, thought that the sooner the gold rush was over, the better it would be for California. “Then the sober industry will begin which enriches and ennobles a nation.”<sup>25</sup> This prediction proved to be correct. The leveling effect of the gold mines that was so striking in 1848 continued to a lesser degree in 1849 and even 1850. By 1851, the placers were yielding only a fraction of their former riches, and those who had only labor to contribute were again obliged to work for capital.<sup>26</sup>

Labor’s zenith occurred in 1848, the year in which an individual could collect one or two ounces a day with a pick and pan. Many made their fortunes. Because anyone could earn this kind of money in the mines, workers in every other occupation commanded the same exorbitant wages, or broke their contracts and left for the diggings. It became impossible to employ a white man.<sup>27</sup> The pre-

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those who set out for the mines. See DAVID GOODMAN, *GOLD SEEKING: VICTORIA AND CALIFORNIA IN THE 1850S*, at 46-63 (1994) (comparing American and Australian reactions to the discovery of gold in their respective countries). The Australians associated the leveling of the class hierarchy as a collapse of order, whereas the Americans viewed the gold rush through the lens of egalitarian republicanism, celebrating the equality of miners while deploring the corrupting effects of wealth.

24. “F.P.W.” [Felix Paul Wierzbicki], *The California Gold Region*, ALTA CALIFORNIA (San Francisco) (Steamer Edition), Aug. 31, 1849, at 3. These words appear again in FELIX PAUL WIERZBICKI, *CALIFORNIA AS IT IS AND AS IT MAY BE* 34 (George D. Lyman ed., Grabhorn Press 1933) (1849). Henry Carter wrote in the summer of 1849 that when wages dropped to two dollars per day, then “mining will be done here as in other parts of the world, and capital and science employed to advantage, and all bars and diggings now neglected will be worked at a profit.” Henry Carter, *Journal*, April 1849–February 1850, at 24 (unpublished typescript copy, Bancroft Library, Univ. of California, Berkeley, catalogued at Banc MSS 92/903 C) (entry for July 1849).

25. CONG. GLOBE, 30th Cong., 2d Sess. 257, col. 3 (1849). Benton delivered his speech in the Senate on January 15, 1849.

26. PAUL, *supra* note 1, at 116-17.

27. A number of Californians made fortunes by employing large numbers of Indians, who did not yet know the value that the immigrants set on gold. The most spectacular earnings reported for 1848 represented the work of up to 100 Indians. In 1849, Indians no longer worked for hire but either dug for themselves or withdrew from the area.

eminence of labor in 1848 served as an ideal that the miners of later years always kept in mind.

In 1848, there were also no property rights in land of any sort, whether by discovery or signaling, and hence land could not be acquired by purchase or other transfer. “Claims,” in the sense of exclusive rights to exploit certain parcels of gold-bearing ground under certain conditions, were unknown in many districts through the whole of this year. Instead, the discoverer of a rich spot simply had to grin and bear it when other miners flocked in and helped themselves; and yet there appears to have been no fighting over such treasure troves. The absence of property rights in land in 1848 is interesting both in itself, as an unusual phenomenon, and as a reminder that property rights do not appear spontaneously—they must be created.

Before the introduction of claims, the mining region was treated as a commons from which anyone could gather gold, so long as he did not interfere physically with other miners. The *Californian* of May 3, 1848, reported that many assumed there would eventually be some kind of preemption right, “but as yet every person takes the right to gather all they can, without regard to claims.”<sup>28</sup> In the richest diggings, this meant that the miners dug almost shoulder to shoulder. “I began to work at mining when there was not even a custom,” reported one old miner to Charles Howard Shinn, “so that a man hardly objected to your digging close beside him so long as you gave him room to swing a pick.”<sup>29</sup>

The ramifications of this lack of property rights in land are illustrated by Edward Gould Buffum’s experience in the neighborhood of Weaver’s Creek (also called Weberville, in El Dorado County).<sup>30</sup> As late as January or February 1849, there was still no such thing as a claim at Weaver’s Creek, and hence no discoverer’s right to a double share.<sup>31</sup> When a miner found gold in a new location, others swarmed in, dug it out, and departed in a matter of days. Buffum, who was a particularly successful miner, hoped to find a place of his own, away from the crowds, where he could work in peace; and he did indeed find an isolated little ravine, about thirty feet long, where he gathered \$190 on his first day. The next day, unfortunately, he was followed:

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28. *Gold Mines of the Sacramento*, CALIFORNIAN (San Francisco), May 3, 1848, at 2.

29. SHINN, *supra* note 6, at 166. This statement was presumably made from memory in the early 1880s, but the informant, C.T. Blake, was a Yale graduate.

30. For the location and a brief description of each mining camp, see ERWIN G. GUDDE, CALIFORNIA GOLD CAMPS (Elizabeth K. Gudde ed., 1975).

31. A miner who discovered new diggings was entitled to two claims in all later mining codes. *See infra* Part IV.D.

I found myself suddenly surrounded by twenty good stout fellows, all equipped with their implements of labour. I could say or do nothing. Pre-emption rights are things unknown here, and the result of the matter was, that in three days the little ravine, which I had so fondly hoped would be my own property, was turned completely upside down. About ten thousand dollars worth of gold dust was extracted from it, from which I realized a little over a thousand.<sup>32</sup>

Buffum was clearly annoyed by the invasion of “his ravine,” not just because it cost him money, but also because he felt there ought to be a pre-emption right. Since no such right was recognized in the mines at the time, the “twenty good stout fellows,” who are made to sound like bullies, were acting in accordance with the custom of the neighborhood. They did not push Buffum out, and they did not take away his gold; indeed, they left him a generous amount of room to work, to judge by his earnings, which were twice as much as those of the average interloper.

A possible explanation for the absence of claims in 1848 is that the hit-and-run nature of mining was incompatible with settled communities of the sort that could enact and enforce property law. The miners swarmed to a new diggings, took the most accessible gold, and moved on. As much as a talented prospector like Buffum might have preferred to settle down and work out his “own” patch of ground, there was no hope of keeping it his own until a large enough number of like-minded miners stayed long enough to form an assembly and vote for a system that would protect his interests—or, rather, that would create and then defend a property right in the ground. Respect for private property depends on a shared understanding of what can be property and what has in fact been converted to private property. While the mining region was treated as a commons, Buffum would have been a maverick if he had tried to enforce his claim to the ravine; it was the creation of his property that was an act of theft from the community. His case supports John Stuart Mill’s contention (coincidentally also published in 1848) that property exists only by the consent of society.<sup>33</sup> A year later, when custom or common law had evolved in the various regions of the mines, setting claim sizes at ten feet or fifteen feet and allotting the discoverer an extra claim, the newcomers would have respected these rights or

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32. EDWARD GOULD BUFFUM, *SIX MONTHS IN THE GOLD MINES* 91 (1850).

33. JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY*, book II, ch. 1, §1 (1848). The idea that private property is a creation of positive law goes back at least as far as Hobbes. See RICHARD SCHLATTER, *PRIVATE PROPERTY: THE HISTORY OF AN IDEA* 138-40 (1951).

voted for new rules establishing a smaller claim size—though almost certainly not less than ten feet.<sup>34</sup>

A Belgian miner's recollection of his first sight of a claim-notice shows how meaningless a claim was without a community consensus about acceptable forms of property rights. "I only half understood what it meant," he said. "I saw very clearly, according to the notices, that the right of working the claims belonged to those who had signed them, but I wondered on what they based the right to make these their territories, and what would happen if another came to work there."<sup>35</sup> These were the right questions.

The precise time and manner in which claims were introduced are not documented.<sup>36</sup> There is, of course, no reason to believe that property rights in mineral lands appeared throughout the diggings simultaneously and in the same form. In fact, there are scattered references to claims in 1848, long before they became ubiquitous, and these varied in detail from place to place. The earliest datable reference to something resembling a "claim" occurs in a letter by Charles Bolivar Sterling, dated July 9, 1848. Sterling reported that at "Mormon Diggings" he and his companions started out on rather poor ground, which was the best they could get; then they "bought a rich prospect from a Mormon and had a prospect given us by Sinclair."<sup>37</sup> (The Mormons were about to move on to Salt Lake City and were evidently selling their holdings.) From the Mormon prospect, they got two to three ounces in part of an afternoon. Sterling does not say how large his "prospect" was, how much he paid for it, or how his right was protected. We do know that all of the best spots were taken, since the newcomers were obliged to start on poor ground. Given the large quantity of gold that they took out of one prospect in the course of a few hours, it is possible that the "prospects" they bought and were given were leads or pockets of gold rather than sections of ground or even holes. If this is so, then evidently the miners of Mormon Diggings recognized a property right

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34. See *infra* Part IV.B.

35. JEAN-NICOLAS PERLOT, *GOLD SEEKER: ADVENTURES OF A BELGIAN ARGONAUT DURING THE GOLD RUSH YEARS* 104 (Howard R. Lamar ed., Helen Harding Bretnor, trans., Yale Univ. Press 1985) (original title: *VIE ET AVENTURES D'UN ENFANT DE L'ARDENNE* (1897-98)).

36. See, e.g., MARY FLOYD WILLIAMS, *HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE OF 1851*, at 69 (Univ. of California Publications in Hist., No. XII, 1921) (listing at least four different references to the "earliest" mining claim, ranging from the summer of 1848 to early 1849).

37. Letter from Charles Bolivar Sterling to Thomas O. Larkin (July 9, 1848, San Francisco), *in* 7 *THE LARKIN PAPERS: PERSONAL, BUSINESS, AND OFFICIAL CORRESPONDENCE OF THOMAS OLIVER LARKIN* 312 (George P. Hammond ed., Bancroft Library, Univ. of California Press 1960).

in the gold that a miner discovered, even though it was still in the ground.

Perhaps the first clear reference to a claim as a plot of ground occurs in a letter by Moses Schallenberger, written on August 16, 1848: “The digings [sic] are pretty much all taken up on Yuba, but I think I have found a pretty good claim joining Longley & Dent who are doing vary [sic] well.”<sup>38</sup> Schallenberger was not at the diggings when he wrote this letter; he was laying in provisions at Sutter’s Fort, and had sent one of his associates ahead to hold the claim he had “picked out.”<sup>39</sup> Schallenberger’s statements that he had picked out the claim, and that he thought it was good, suggest that he had not yet done much work on it, and point to a piece of land rather than a hole.

However, another reference in November 1848 to diggings on the Yuba, at what was later called “Foster’s Bar,” describes a different kind of claim. The gold here lay very deep, “the excavations being sometimes made to a depth of twelve feet before the soil containing the gold, which was a gravelly clay, was reached.”<sup>40</sup> Here the “claims” were simply the holes in which miners were actually at work. “[A]ll the bars upon which men were then engaged in labour were ‘claimed’” this way, Buffum tells us, “a claim at that time being considered good when the claimant had cleared off the top soil from any portion of the bar.”<sup>41</sup> The advantages of property rights are obvious enough where miners had to invest a considerable amount of time and labor before they could expect any return. Without such a right, the miner might find when he reached bedrock that half a dozen interlopers jumped into his hole to share the rich pickings. Buffum states that the holes were four to six feet square (that is, four by four feet to six by six feet)—quite small compared to their depth of twelve feet—but he does not say what the miners did with the dirt they extracted or whether bulkheads were left between the holes to allow others to move between their claims and the water. We must suppose that this was all worked out between neighbors.<sup>42</sup>

The final first-hand account of claims in the fall of 1848 also refers to the Yuba River. Peter H. Burnett and his associates purchased a

38. Letter from Moses Schallenberger to Thomas O. Larkin (Aug. 16, 1848, New Helvetia), *in* 7 THE LARKIN PAPERS, *supra* note 37, at 338-39.

39. Letter from Moses Schallenberger to Talbot H. Green (Aug. 18, 1848, New Helvetia), *in* 7 THE LARKIN PAPERS, *supra* note 37, at 341.

40. BUFFUM, *supra* note 32, at 52-53 (Nov. 1848, on Yuba, at what was later Foster’s Bar).

41. *Id.* at 53. Buffum’s description of claims is irreconcilable with his statement that Foster, a storekeeper after whom the Bar was named, had at this time “a claim on a large portion of the bar.” *Id.* at 50.

42. *Id.* at 51.

claim on credit on “Long’s Bar” on the Yuba, twenty feet along the river and reaching back fifty feet.<sup>43</sup> The size and shape of this river claim correspond to the norm established in later mining codes; moreover, it was recognized as a form of property that could be bought and sold. The miners of the Yuba River were clearly well on their way to the property regime characteristic of 1849 and later.<sup>44</sup>

The basic rules of that new, post-1848 property regime became so widely accepted that they could be called the common law or customary law of the diggings.<sup>45</sup> In late 1849, these were summed up in the following terms by one miner:

As a general rule, it is a practice among the miners to leave each digger a sufficient space for a hole, upon which nobody has a right to encroach; from four to ten feet they allow among themselves to be sufficient for each, according as they may be more or less numerous and as digging may be more or less rich. A tool left in the hole in which a miner is working is a sign that it is not abandoned yet, and that nobody has a right to intrude there, and this regulation, which is adopted by silent consent of all, is generally complied with.<sup>46</sup>

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43. PETER H. BURNETT, RECOLLECTIONS AND OPINIONS OF AN OLD PIONEER 273 (New York, D. Appleton & Co. 1880). Burnett states that he purchased the claim on November 6, 1848; he may have written this account as late as 1879.

44. Shinn writes that oral laws were passed at a mass-meeting in 1848 and that the laws set claim sizes at ten feet square; he adds that many of these yielded \$10,000. SHINN, *supra* note 15, at 11. Shinn does not state his source of information; he may have misread the *Miners & Businessmen’s Directory* for 1856, which provides these details concerning the size of claims and the income they yielded, but which says nothing about a law code in 1848. See J. HECKENDORN & W.A. WILSON, MINERS & BUSINESSMEN’S DIRECTORY FOR THE YEAR COMMENCING JANUARY 1ST, 1856, at 80 (Columbia, Cal., Clipper Office 1856) (discussing the history of Jackass Gulch).

45. Senator Stewart of Nevada called the basic rules of mining claims “a sort of Common Law of the miners” in a speech that was reprinted by the Reporter in an appendix to *Sparrow v. Strong*, 70 U.S. (3 Wall.) 97, 100, n.\*, 777-80 (1866). For the full text of Senator Stewart’s speech, see CONG. GLOBE, 39th Cong., 1st Sess. 3225-29 (1866). See also WILLIAMS, *supra* note 36, at 69-71.

46. WIERZBICKI, *supra* note 24, at 57. Wierzbicki was in the mines from the time of the discovery of Mokelumne Hill. It is not clear from his account whether the claim took the form of the hole or of a square large enough to contain the hole (and perhaps also the dirt taken from it). See also 1 BAYARD TAYLOR, ELDORADO, OR, ADVENTURES IN THE PATH OF EMPIRE 101-02 (ch. 10, “Gallop to Stockton”) (New York, Putnam 1850) (stating that in 1849, “[a] man might dig a hole in the dry ravines, and so long as he left a shovel, pick, or crowbar to show that he still intended working it, he was safe from trespass. His tools might remain there for months without being disturbed”). There are so many editions of Taylor’s book, each with its own pagination, that I give both the page numbers of the original and the chapter number and name of later editions. See also C.W.T. BALLENSTEDT, BESCHREIBUNG MEINER REISE NACH DEN GOLDMINEN CALIFORNIENS 51-52 (Schöningen, Druck von J.C. Schmidt in Helmstedt 1851) (stating that, while he has never seen it happen, if one has left tools on his claim, and someone else digs and is caught in the act, the neighbors will hang him).



By the time of this account, it was generally recognized that a miner could have a “claim,” that is, exclusive use of a certain portion of ground for mining purposes; that the claim would be small—just large enough to accommodate a hole, which might be no more than four feet across in crowded diggings; and that tools left on the ground constituted sufficient notice that it was claimed. Even individuals in the wilderness staked out claims and expected miners who arrived after them to respect their property.<sup>47</sup> It hardly seemed necessary for a party to mark its boundaries before a second party arrived, but on the other hand, why wait? The notion of a claim was at this point so ingrained that it appears to have been both necessary and sufficient to establish property rights as a unilateral act.

Two points about the customary law or default rules remain obscure. It is not clear whether there were time limits on how long tools would hold a claim—that is, whether custom included a work requirement. Bayard Taylor wrote that a pick would hold a claim for months,<sup>48</sup> but it is difficult to believe that miners expected their claims to hold good forever if they were not present themselves.

More importantly for the discussion below, I have not been able to discover whether custom permitted miners to hold multiple claims; however, the first rule of the *Miners’ Ten Commandments* was that “Thou shalt have no other claim than one,” suggesting that this was a customary rule.<sup>49</sup> This was a humorous composition, but its jokes were considered funny because they hit close to home. When codes were passed, some prohibited miners from holding more than one claim at a time, while others stated explicitly that miners could hold only one claim by location but any number by purchase.<sup>50</sup> Most of the

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47. See Letter from George McKinley Murrell to Sandy A. Gossom (Apr. 24, 1850, El Dorado County, “between the middle & north forks of the American river & near Burds store”), in Murrell Collection (unpublished manuscripts, Huntington Library, catalogued at 36338-36403) (stating that he and his companions took up a claim in a “wild and romantic place” where there were few other miners). See also FARISS & SMITH, *ILLUSTRATED HISTORY OF PLUMAS, LASSEN & SIERRA COUNTIES, WITH CALIFORNIA FROM 1513 TO 1850*, at 151, 287 (San Francisco, Farris & Smith 1882) (stating that in June 1850, the first individuals at Rich Bar, in what was later Plumas County, staked off claims and then left to get provisions; their claims were recognized even while they were gone and while the diggings were filling up). The *History* was written in 1882, however, and is not a first-hand account.

48. 1 TAYLOR, *supra* note 46, at 101.

49. J.M. HUTCHINGS, *THE MINERS’ TEN COMMANDMENTS* (San Francisco, Sun Printing 1853). Hutchings’s leaflet is the source of the picture on the front cover of this journal, which illustrates this first “commandment.” The date of *The Miner’s Ten Commandments* is relatively late, but it concerns well established customs. This text was reprinted endlessly. Rodman Paul, the first modern expert on the gold rush, wrote that “it was usually permissible to add to one’s holdings by buying out other locators.” PAUL, *supra* note 1, at 215. I suggest, however, that the limited evidence points rather to one claim per person as the default rule. See *infra* Part IV.B.

50. The Yuba County Mining Laws passed April 11, 1852 are most explicit on the question of limited holdings: “6th Resolved, That all persons mining may hold one claim by purchase

published codes are silent on this point, however. Custom could, of course, have varied regionally.

In sum, the moment of transition from commons to private property at some diggings in 1848 (but not others) is not documented. We know that there were some claims in 1848, but the great change may have happened over the winter of 1848-49, when the mining population retreated to the cities, compared notes, and realized that the next year would bring a flood of new immigrants. It appears that the mineral lands were transformed from common property to private property almost instantaneously in 1849—a sort of Big Bang of property rights. Possibly, when enough people at one diggings asserted claims, the whole area crystallized; what had been commons became a rigid grid of private claims.

The complete absence of property rights could not have lasted long into 1849 in any case. With the arrival of the forty-niners—some 80,000 men—competition for good mining locations became intense.<sup>51</sup> The newcomers were also of a different character from those who had been in California when gold was discovered in 1848. The latter were either soldiers and sailors who had no intention of saving their earnings and settling down, or Americans who had already settled in California and who knew the lay of the land. Some made huge sums in 1848 by exploiting their knowledge of the area and the goodwill of the Indians with whom they had traded in the past; in 1849, they turned to other profitable endeavors, such as operating gambling salons and speculating in town lots. Those who set out from the United States in 1849 were farmers and wage-earners who

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and one claim by Location. 7th. No person shall hold any more than as specified in the foregoing Resolution.” CLARENCE KING, *THE UNITED STATES MINING LAWS AND REGULATIONS THEREUNDER, AND STATE AND TERRITORIAL MINING LAWS: TO WHICH ARE APPENDED LOCAL MINING RULES AND REGULATIONS 277* (Washington, D.C., Government Printing Office 1885) (compiled as part of tenth census, 1880). In the debate in the Senate about temporary provision for the working of California gold mines on September 24 and 25, 1850 (which came to nothing), several senators argued in favor of rules allowing miners only one claim at a time while they were actually at work there. See *CONG. GLOBE*, 31st Cong., 1st Sess., Appendix 1370 (1850) (Sen. Fremont of California); *id.* at 1368 (Sen. Felch of Michigan); *id.* at 1363 (Sen. Ewing of Ohio). All three were seeking, as Senator Fremont put it, “to prevent the possibility of monopolies by moneyed capitalists—and to give to natural capital, that is to say, to labor and industry, a fair chance to work, and the secure enjoyment of what they find.” *Id.* at 1370 (Sen. Fremont).

51. An article titled *The Gold Region* in the *Californian* of July 15, 1848 estimated that there were then 3,000 people, including Indians, digging for gold; another article on the same page estimates about 2,000 persons collecting gold and many more on their way to the mines. See *The Gold Region*, *CALIFORNIAN* (San Francisco), July 15, 1848, at 3. On August 14, 1848, the *Californian* estimated that there were about 4,000, not including Indians, at work in the mines. See *The Gold Mine*, *supra* note 23, at 2. The mining population of 1848 was thus much smaller than that of 1849. The miners of that year collected in a relatively small number of diggings, however; no one had experience in prospecting or knew how big the gold region might be.

invested vast amounts of money and time in what they hoped would be a successful business endeavor. In December 1849, for instance, a prospective miner arrived from Arkansas at the end of an eight-month journey that cost him \$700.<sup>52</sup> These immigrants could not afford the risk they had taken; some of the most heartbreaking accounts from the mines were written by those who stumbled into Placerville, having barely survived the horrors of the overland trail, and realized that they would never make money in the diggings. (Placerville, also called Dry Diggings and Hangtown, was the point of entry to the mining region for most of the overland emigrants.) They were family men, not adventurers, to whom clear rules and boundaries would have been more congenial.

Consider the demographics of the immigration of 1849. Roughly 39,000 young men arrived by sea in that year and some 42,000 overland.<sup>53</sup> They came from every state in the Union, from Europe, from South America, and from Hawaii; some 76% were native-born Americans, while 24% were foreign.<sup>54</sup> The northern and western states (Illinois, Kentucky, Missouri, Tennessee) were particularly well-represented. Passenger lists of ships that sailed from the Isthmus of Panama to San Francisco reveal the range of occupations of the immigrants. The Brig Copiapo carried 137 passengers from sixteen states, including twenty-six farmers, sixteen traders, eleven clerks, seven physicians, and a variety of other tradesmen, as well as a mathematical instrument maker.<sup>55</sup> The immigrants on the overland

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52. See William Franklin Denniston, Journal (unpublished manuscript, Huntington Library, catalogued at HM 50660) (entry for Dec. 4, 1849). See also *Ho! For California*, ALTA CALIFORNIA (San Francisco), Mar. 1, 1849, at 1 (stating that the five-month sea passage from New York to San Francisco, around Cape Horn, cost \$300 to \$400). Stephen Woodin, from Genoa, spent \$680.33 to get to California and expected his return journey to cost \$350; he would have had to make over \$1,000 in the mines to recover his traveling expenses, not to mention his opportunity costs. See Letter from Stephen Woodin to His Wife and Children (Dec. 15, 1849, North Fork of the American River), in *A CALIFORNIA GOLD RUSH MISCELLANY* 17 (Jane Bissell Grabhorn ed., 1934). Woodin believed that not one in twenty would make any money from his expedition. See Letter from Stephen Woodin to his wife and children (May 17, 1850, North Fork American River) (unpublished manuscript, Huntington Library, catalogued at 19369-19381). Another miner estimated in 1850 that only one man in forty would earn enough to pay for his journey to California. See Letter from George McKinley Murrell to John Grider (Aug. 18, 1850, Humbug Point, South Branch of the North Fork of the American River), in Murrell Collection, *supra* note 47.

53. See Wright, *supra* note 2, at 341-42. These estimates are very rough because no one kept a record of the immigrants arriving via the overland trail; note also that thousands of Americans left California in 1850 and later, to return to the United States.

54. See *id.* at 332.

55. See Number of Passengers on Board Brig Copiapo, Summer, 1849 (unpublished manuscript, Bancroft Library, catalogued with William Penn Abrams Diary, 1849-1850, at Banc MSS C-F 65:2). There are many such lists of members of companies formed for the voyage to California. See, e.g., Richard Brown Cowley, Journal of a Voyage on the Barque "Canton" . . . (Mar. 29, 1849-Nov. 9, 1851), at 103v (unpublished manuscript, Huntington Library, catalogued at Banc MSS HM 26652).

trail were drawn from a similar variety of honorable professions.<sup>56</sup> In short, the miners represented a cross-section of the trades and professions then practiced in America—that is, of those who had the money or credit to pay for the journey but who longed to earn enough to make them independent of employers or creditors. In age and sex they were overwhelmingly young and male: 73% of the population of California in 1850 were between twenty and forty years of age, and 92% were men.<sup>57</sup>

It is not surprising that property rights in land, however ephemeral, should flourish in soil so fertile as American communities. What is unusual, and requires explanation, is the miners' practice of setting limits on property rights—but just as we have no account of the introduction of mining claims, so too we lack information about how these first claims were limited. My best guess is that the basic restrictions, including the one-claim rule, were introduced at rich, crowded diggings where outsiders were eager to take over claims as soon as they were abandoned, while claimholders needed some recognition of their claims that would enable them to be away for short periods of time without being dispossessed.<sup>58</sup> Differences of opinion were inevitable, and yet there is no evidence of violence during this period. Miners perhaps jostled for places, reached an informal consensus, and possibly even resorted, American-style, to a general meeting, after which, again American-style, majority rule governed.

In short, I suggest that the first claims may have emerged as a compromise between those who were at work at rich diggings and those who wanted to move in. I shall argue below that the miners soon adopted an ideology and a conception of self-interest based on their experiences. Their position can be summed up as a rejection of a fee-simple interest in mining claims on the grounds that this would result in the monopoly of the diggings by capitalists and the exclusion of individual miners from the chance to strike it rich. That conviction then played a role in the drafting of later mining codes.

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56. See REID, *supra* note 19, at 11-19.

57. See Doris Marion Wright, *The Making of Cosmopolitan California: An Analysis of Immigration, 1848-1870* (pt. 2), 20 CAL. HIST. SOC. Q., 65, 73 (1941).

58. This explanation finds some support in Kimball Webster's story about taking over a claim even though the claimholder had left an old rocker there; Webster and his partners ignored the rocker because they had heard that the claimholder was up the river building a cabin. "We thought they were not entitled to hold a claim here and one in the mountains at the same time," Webster wrote, so they moved the cradle out of the hole and started work. KIMBALL WEBSTER, *THE GOLD SEEKERS OF '49: A PERSONAL NARRATIVE OF THE OVERLAND TRAIL AND ADVENTURES IN CALIFORNIA AND OREGON FROM 1849 TO 1854*, at 113 (George Waldo Brown ed., 1917). This narrative is said to be based on a journal that the author kept in the mines.

Wherever property in land was introduced, claims appear to have become the norm at once and to have been enforced by the community. From the moment that claims were recognized, no reasonable man would try to take another's claim by force, because his victim (if he were alive), his partners, his friends, and probably some other third parties, would throw him off.<sup>59</sup> Ultimately, the rules were backed by the threat of force, but by community force rather than violence between individuals.

This story is very different from the one offered by Umbeck, who supposes that the miners' readiness to fight over claims explains the terms of even the later codes of the 1850s and 1860s. Many of the weaknesses of Umbeck's theory are listed by Zerbe and Anderson; they note that it fails to account for the observance of majority rule in the mines, for the miners' own accounts of their motivations, and for the almost complete absence of violence among Americans in the early gold rush as opposed to the many examples of conflict between Americans and other ethnic groups.<sup>60</sup> Readers of Umbeck may also contrast his picture of the diggings with John Reid's meticulous analysis of journals written on the overland trail, which revealed that the emigrants regarded one another's property rights as all but inviolable.<sup>61</sup> Since these emigrants *were* the forty-niners on whom Umbeck based his study, the onus is on Umbeck to show that, in the mines, a man's property was nothing more than what he was able to take and defend against all challengers.

Zerbe and Anderson argue that Americans brought with them shared norms that enabled them to create and sustain a generally acceptable property regime without resorting to violence. The authors point out, first, that the Americans were able to organize quickly and effectively because they shared a public culture of meetings and respect for majority rule. Zerbe and Anderson further

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59. Miners were reluctant to settle disputes by force even in isolated areas, at some distance from a community that might choose to involve itself in their affairs. *See, e.g.*, David Cosad, *Journal of a Trip to California by the Overland Route and Life in the Gold Diggings During 1849-1850* (unpublished manuscript, California Hist. Soc., microfilm in Bancroft Library, catalogued at Banc MSS C-F 50, pt II, reel 2:10) (entry for Oct. 1, 1849). Cosad describes an incident in which two parties claimed the same stretch of river for a damming operation, a situation that was more likely to become violent than a dispute over a placer claim. Some members of Cosad's party wanted to use force, but in the end, "one of their men went to the village & left it to Disinterested persons and they brought in that It must be settled by casting lots which was done & the Michigan men won it which took [sic] all of that day." *Id.*

60. Umbeck himself notes that the mining codes anticipated conflicts between "group members" (presumably those who had voted for the code) and not with outsiders. UMBECK, *supra* note 9, at 148 n.23. He also notes that there was in fact very little violence in 1849 and 1850. *Id.* at 142-43 n.37. For contemporary evidence of the absence of violence in the mines, *see* REID, *supra* note 19, at 5.

61. *See* REID, *supra* note 19.

suggest that miners willingly abided by and enforced the rules because the rules were “fair” by some standard that the miners brought with them from elsewhere in America, or even in some absolute sense. They characterize this fairness as “Lockean,” that is, “a moral concept of the relationship between what one earns and what one receives.”<sup>62</sup>

Zerbe and Anderson’s first point about the importance of the American training in self-government is clearly right. I submit, however, that the other norms on which they believe property rights in the mines were based are too broad to have explanatory force. They describe these norms as Lockean fairness and Jacksonian democracy.<sup>63</sup> By Lockean fairness, they mean first, that one deserved what one worked for, and second, that no one should hold more property than he could use. They use the term Jacksonian democracy to describe the ideal of the autonomous free producer. Zerbe and Anderson predicted that a property regime founded on these norms would favor the individual producer over wage labor, as that in the diggings did.

It seems to me, however, that Lockean property norms are not well represented in the mining codes. In the first place, the principle that one deserves what one works for is ambiguous, especially since “what one earns” and “just deserts” are cultural constructs. Second, the idea that no one should hold more than he can use was fundamental to the property regime in the mines, but it was neither Locke’s position nor that of the majority of Americans. Locke wrote that the rule against holding more than one can use only applied before the introduction of money, to which, he assumes, everyone tacitly consented.<sup>64</sup> Locke’s own opinion about the rightness or wrongness of the vast inequalities of wealth in the modern world has been the subject of much debate,<sup>65</sup> but he did, at any rate, recognize a right to alienate and accumulate property.<sup>66</sup> Whatever his views, the right to property that one has acquired by purchase or gift, however much that might be, has always been an important element of fairness in the United States and is fundamental to the common law of property.

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62. Zerbe & Anderson, *supra* note 9, at 121.

63. *Id.* at 122.

64. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 50 (1690) (“Men have agreed to disproportionate and unequal Possession of the Earth, they having by a tacit and voluntary consent found out a way, how a man may fairly possess more land than he himself can use the byproduct of, by receiving in exchange for the overplus, Gold and Silver, which may be hoarded up without injury to any one.”).

65. See A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 298-306 (1992).

66. *Id.* at 231.

The miners rejected the right of accumulation, however, at least in part, and stressed one of the other aspects of fairness—that described by Zerbe and Anderson as “producerism.”<sup>67</sup> In other words, the miners selected and adapted some eastern property norms and played down others. The rules hammered out in the first flush camps of 1849 then became the baseline for “fairness”; they were internalized as new norms. Miners moving from one camp to another took with them their ideas of the rights and wrongs of property in mineral lands. Of course, there were limits to the normative power of rules forged in the heat and pressure of a few mining camps in late 1848 and 1849. Newcomers to the mines showed great deference to the customs of experienced miners, but it is unlikely that they would have submitted to the rules worked out in the early mining camps unless they believed them to be tenable, practicable, and in the newcomers’ own self-interest. I shall argue that the ideology of the miners did indeed correspond to their perceived self-interest.

Zerbe and Anderson go on to discuss three particular details of the property regime in the mines: claim size, work requirements, and the first-come, first-serve rule of allocation.<sup>68</sup> By their account, the “producerism” idea of fairness, on its own, can at most explain the existence of work requirements. The rules for claim size and allocation, Zerbe and Anderson argue, were based on efficiency as well as fairness. In fact, they suggest that the fairness of the rule-making procedure by majority vote was sufficient to fulfill the fairness requirement of the rules themselves, a position that significantly reduces the role of fairness in determining the nature of the property regime. The main problem with this part of Zerbe and Anderson’s analysis is that they draw most of their data from the preserved codes, which date to the 1850s and later.<sup>69</sup> By this time, the mining communities had become larger and more diverse, and also more disorderly and violent, than they were at first. The ideals and interests of the miners are better reflected in the rules and regulations of the early diggings, as I hope to demonstrate.

The next two sections will examine the process by which the miners reached a consensus about property rights in land and the nature of the rights they created. I shall then turn to the question of the values and concerns reflected in the codes. The great mystery is why claimholders did not vote to give themselves full property rights in their claims—assuming they outnumbered the outsiders at the

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67. See Zerbe & Anderson, *supra* note 9, at 122.

68. See *id.* at 128-35.

69. Zerbe and Anderson rely in part on the data collected in *A Theory of Property Rights*, UMBECK, *supra* note 9, which was drawn from the published codes.

meeting and were able to have their say—instead of restricting their own rights in so many respects. The first key to the mystery, I shall argue, is the ideological argument made for restrictions. The rhetoric of egalitarianism and of the triumph of labor over capital, which had been used to describe the events of 1848, acquired normative force in 1849. The second element is self-interest. The miners who held claims at any given diggings could easily imagine themselves in the position of the propertyless; indeed, they were quite likely to have exhausted their claims and to be propertyless themselves in the near future. They knew that they would not be able to acquire further claims if others had managed to buy up most of the diggings in the interim. Because claimholders and non-claimholders were thus effectively behind a veil of ignorance when they drafted their codes, they were determined not to promote one group at the expense of the other.

A further advantage to the strict limits on property rights, of which the miners may or may not have been aware at the time, is that they facilitated self-government. Major decisions such as whether to pass a mining code were made by all of the miners assembled in mass meetings. Henry Hansmann has argued persuasively that direct democracy of this kind is most likely to succeed if the participants have equal interests.<sup>70</sup> Here, too, the miners may have learned a lesson from the several different kinds of property interests on the agricultural land of California (squatters' rights and those derived from Mexican land grants) and the almost inevitable clashes among those who held different interests. Newcomers to the mines were all the more likely to accept the rules as they found them when they became aware of these advantages.

### III. MINERS' MEETINGS

We have seen that in the course of 1849, probably very early in that year, a common law or customary law of mining either emerged spontaneously or sprung from the earliest, verbal codes, and that this custom in turn influenced the subsequent written codes. The customary law dealt with the big questions: there should be claims, they should be small, the claimholder must give notice. Such rules were based, evidently, on experience and a sort of natural logic. However, custom was terribly fuzzy around the edges; there was no natural solution to the number of claims one could hold, to the amount of time one had to work land, to how one marked the boundaries of

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70. Hansmann, *supra* note 14.



one's claim, and so on. The codes were designed to settle some of these essential details.

The first question to address is when and how miners held a meeting and defined their property regime. None of our sources bothers to describe meetings in any detail, perhaps because they were too ordinary (these authors do give vivid accounts of unfamiliar events such as lynching). We have little information about who called the meetings, who attended, what views were expressed, or by what majority the resolutions were eventually passed. The little evidence there is suggests that the first law codes were enacted in various circumstances, and not just when a certain critical mass of miners had been reached in the diggings.

The most straightforward case is that in which the miners drafted their rules before the land became available. Such a situation might arise, for example, when miners enacted a code as the first step towards taking over claims held by foreign miners.<sup>71</sup> Here, the purpose of the code was first to create a legal sanction for what the miners were about to do; and, second, to create a property regime for the Americans who took over the foreigners' territory. The men knew very little as yet about the terrain, where their claims would be, or how much gold there was. It seems obvious that in this case most men would participate in the meeting and that most would vote for a regime of equal shares; fairness and self-interest lead to the same result. In one case where Americans passed a code before throwing out the foreigners, namely the "Mokelumne Hill" incident, the land in question was exceptionally rich—perhaps the richest in the history of the California gold rush. In this case, the code called for ten-foot-square claims, which were too small to work effectively;<sup>72</sup> evidently, all of the miners who participated in the "war" against the French wanted a piece of the pie.<sup>73</sup> This is a perfect example of a code drafted behind a Rawlsian veil of ignorance. The information available was limited to the amount of land and the number of miners; no one knew which parcel would be assigned to him.

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71. See, e.g., John Hovey, Historical Account of the Troubles Between the Chileans & American Miners in the Calaveros Mining District (unpublished manuscript, Huntington Library, catalogued at HM 4384) (Iowa Log Cabin incident) (entries for Dec. 6, 1849–Jan. 4, 1850) [hereinafter Hovey, Historical Account]. This is a transcription written by Hovey himself from his journal, which includes the same account. See Hovey, Journal of a Voyage 84-89 (unpublished manuscript, Huntington Library, catalogued at HM 322) [hereinafter Hovey, Journal].

72. See *infra* Part IV.B. for a discussion of claim sizes.

73. See, e.g., Hovey, Journal, *supra* note 71, at 129-39 (Mokelumne Hill incident, March 1851) (describing how American miners drove French miners from their very rich diggings at Mokelumne Hill, after voting that claims would henceforth be marked off at ten feet square). Hovey writes that the claims were so close together that they had "to wait for one another so as to make room for the Dirt and Stones." *Id.* at 139.

Another situation in which miners had to reach decisions about claim sizes, and about the rules for holding claims before the land became available, occurred when the miners gathered around an area that was known to be rich, but that was underwater at the time they passed their code.<sup>74</sup> For example, miners set up their tents in Big Canyon on the Middle Fork of the American River (probably in El Dorado) as early as February 1850, many months before it would be possible to mine there. Based on limited prospecting at the end of the 1849 season, the fourteen-mile long canyon was believed to be rich. By May, there were thousands of miners there waiting for the waters to recede. Each was entitled to a twenty-foot claim, which could be registered with a clerk for one dollar.<sup>75</sup> Quite possibly, each arriving miner took the claim abutting the one last registered; in that case, he would have no choice about the position of his claim and would also know nothing about its potential.<sup>76</sup>

The transition from commons to claims was more complex—and often more underhanded—when a small group of miners discovered promising diggings as yet unknown to the rest of the population. Here there was a temptation to exclude others by fair means or foul. It was possible to do this so long as the new arrivals came along in twos and threes—that is, so long as the group in possession outnumbered the other parties that came by. This is the state of affairs that one might have expected to find across California—the situation that Umbeck postulates as the norm.

One way to keep diggings private was to pass rules granting one's own party very large claims or very many claims. Daniel B. Woods provided a particularly full account of how he and his companions were excluded from a diggings by the sham "rules" of the miners who were already there. The newcomers started to dig at an untouched and unmarked spot, but the older miners drove them off. Asked "why they had not left their pick or spade there, according to the custom" to mark their claims, the miners replied, essentially, that they had divided the diggings up amongst themselves and were prepared to defend them. Woods writes, "All the miners there were

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74. See, e.g., "J.M.E.," *Letter from the Mines*, ALTA CALIFORNIA (San Francisco) (Steamer Edition), Aug. 31, 1849, at 1 ("I am told there are thousands encamped on the banks of the Tuolumne waiting the falling of the waters . . . who are anxious to make an early selection and appropriation of the ground.")

75. See "Gold Hunter," *From the Middle Fork*, PLACER TIMES (Sacramento), May 3, 1850, at 4.

76. This is how claims were later made along a quartz vein, although the situation there was different in that no one knew what dips and turns the vein might make. See 1 *Placer County Records: Mining Notices, 1850-1856* (unpublished manuscript, Bancroft Library, catalogued at Banc MSS C A 293 (in which quartz claims were numbered and evidently taken up sequentially as claimants presented themselves)).

bound to stand by each other in maintaining their claims, which were known to each other . . . . [M]ost of the ground is held in this way, without being marked off or designated.”<sup>77</sup> Their magistrate (called an *alcalde*)<sup>78</sup> was as bad as the rest and was reported to hold thirty claims.

It took Woods and his partners some time to get the message that “comparatively a few persons have undertaken to monopolize most of the gold soil in the gulch.”<sup>79</sup> They were ejected from five places before they finally moved on. This area was probably not very rich, although Wood and the others never worked long enough on any one claim to get down to the gold layer. If it had been profitable, enough miners might have streamed in from all sides to push the current claimants down to one claim apiece.

There are several further examples from the earliest years of the gold rush of miners trying to keep diggings for themselves in this way, and in later years, according to James Carson, this was often done by miners who “knew nothing of the evils of which they were laying the foundation.”<sup>80</sup>

Miners who voted themselves extra-large claims knew that late-comers might later push them down to shares of a more reasonable size. For instance, in May 1850, miners who had opened new diggings in El Dorado County held a meeting and resolved that they should each have thirty feet along the river. “That is sufficient to give us a whole season’s work if we can hold it,” one of them wrote, “but should the stream prove as rich as I think it will I am afraid they will cut claims down to 15 feet.”<sup>81</sup> “They” were presumably the other miners who would flock to the bar if it proved profitable. Crowds did

77. See DANIEL B. WOODS, SIXTEEN MONTHS AT THE GOLD DIGGINGS 115-16 (New York, Harper 1851) (Feb. 21-26, 1850, French Bar/Mormon Gulch, Tuolumne).

78. See *infra* notes 106-109 and accompanying text.

79. WOODS, *supra* note 77, at 115.

80. Letter from James H. Carson, *To the Miners of California*, SAN JOAQUIN REPUBLICAN, Mar. 12, 1853, reprinted in CASTRO, *supra* note 22, at 172, 174. Carson adds, “As an instance—if there is a new discovery made at present, the few who make it call in their relations and friends; then measure the best of the ground off, and divide it into claims of such size as will cover it, let it be five or five hundred feet, and then proclaim that the rule of those diggings. . . . [Almost all of] these claimants have numerous claims elsewhere, and have taken up these for the sole purpose of selling them to the highest bidder.” *Id.* at 175.

81. Letter from George McKinley Murrell to Robert F. Strange (May 5, 1850, El Dorado County), in Murrell Collection, *supra* note 47. Another miner recalled that when the mines were opened around Nevada City, one man claimed all the diggings as far as his rifle carried. Faced with this problem, “[t]he miners saw that something must be done.” CHARLES D. FERGUSON, EXPERIENCES OF A FORTY-NINER DURING THIRTY-FOUR YEARS’ RESIDENCE IN CALIFORNIA AND AUSTRALIA 157 (Frederick T. Wallace ed., Cleveland, Williams 1888). Umbeck cites Ferguson as saying that there was at first no limit on claim size, and that the first party in a ravine had the exclusive right to mine it. UMBECK, *supra* note 9, at 90 n.11. Ferguson’s recollections were written down forty years after the gold rush, and so I have not used them as a primary source.

in fact overwhelm the discoverers of Stewart's Diggings at Yreka. There, four or six men managed to take out 120 pounds of gold before they were disturbed, but a month after news of their discovery leaked out, there were 1,000 men on the spot. At some early point, the newcomers presumably agreed that the first-comers held too much, and called a meeting to set limits on just how much each individual could hold.<sup>82</sup>

It is not clear how the diggings were distributed, or redistributed, when the miners' meeting set a new maximum claim size. One possibility is that claimholders had to indicate which claim or portion of a claim they wished to keep, and the rest of their former holdings became jumpable. This is apparently what happened at Murphy's Diggings when the miners resolved "that from and after this date no person shall hold more than one claim"; the *Sonora Herald* advised miners who were absent from their claims at Murphy's to hurry back lest their claims be jumped.<sup>83</sup> An account by Daniel Woods suggests that smaller parcels of ground between two full-sized claims were sometimes worth working—or jumping. Woods says that two neighbors asked a newcomer to arbitrate for them in a dispute over the boundaries between their ten-foot claims. The newcomer measured off their claims and took the narrow strip between them for his trouble; this strip yielded him \$7435.<sup>84</sup> When the miners reduced the maximum claim size, therefore, the claimholders may simply have given up part of their existing claims. On the other hand, a relatively late source states that after a meeting standardizing claim sizes, the land was marked out by the alcalde or a specially elected committee.<sup>85</sup> The first arrivals then had the first choice of claims, while the others were allowed to make their selections in the order of the date of their arrival. In some such cases, the miners who voted for the code may have been behind a veil of ignorance, not knowing in advance where their land would be, let alone whether it would be rich or poor.

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82. I have not encountered contemporary accounts of newcomers outvoting the first workers, but see the description of crowds rushing to new diggings in the summer of 1850 in FARISS & SMITH, *supra* note 47, at 151 ("In many cases where the first workers had measured off generous-sized claims, the newcomers called a meeting, made laws reducing the size of claims, and proceeded to stake out their locations.")

83. *Mining News*, SONORA HERALD, Aug. 10, 1850, at 2.

84. WOODS, *supra* note 77, at 57 (July 9, 1849, Salmon Falls, El Dorado County).

85. See FARISS & SMITH, *supra* note 47, at 287; UMBECK, *supra* note 9, at 93-94. There was an opportunity for favoritism here. Richard Brown Cowley, who arrived at the St. Antonia diggings in about February 1851, before the ground was workable, said that he got a particularly good claim. "I had a little difficulty in securing this claim, but being acquainted with the Alcalde or Justice of the Peace and having a few friends, I had the preference." Cowley, *supra* note 55, at 96r.

Another way for first-comers to take advantage of their priority was to confirm existing claims while providing that *future* claims should be of a certain maximum size.<sup>86</sup> This appears to be an ideal arrangement from the original claimholders' point of view, and it is surprising that we do not see it more often.

In yet other cases there can hardly be said to have been first-comers, so quickly did the mob arrive. These are the legendary situations in which a small party struck gold and thousands immediately rushed to the scene. Here, indeed, the miners called a meeting within days to pass a code, before much work had been done and before there were strong vested interests to be defended (except for the first-comers' interest in their choice locations). William Reed provided a particularly detailed account of a first miners' meeting under such circumstances at a new site near Kelsey's Diggings in October 1851.<sup>87</sup> Mining was slow at this time; many of the men there had apparently given up on making their pile and going home—they had settled in and were content to make board. Then one day, a Dutchman sunk a hole in an area that no one had tried before, and began taking out one dollar a pan. The miners of Kelsey's flung down their cards, seized their picks, and staked out thirty-foot claims as near to the Dutchman as they could (thirty feet was presumably the maximum claim size at the main camp). On a Friday, Reed reports that claims are beginning to pay. On Monday, he notes that there "is now considerable excitement about the new diggings, and people are flocking to them from all quarters[;] there is not enough chance for them all." Finally, on Tuesday, the miners "had a meeting to form rules and regulations concerning the claims &c. and decided to call the place Deep Ravine; there were some 50 present."<sup>88</sup>

Finally, at some camps, a code was enacted when it was needed—that is, when a dispute arose that could not be resolved by reference to the mining customs.<sup>89</sup> Here the rules were passed *ex post facto*,

86. See, e.g., HECKENDORN & WILSON, *supra* note 44, at 83 (reprinting laws of Chinese Camp, Sept. 17, 1850, including the following provisions: "Art. 1: That all claims now made and worked by the present settlers, shall be held by them. Art. 2: That on and after the present meeting all claims shall be confined to twenty feet square").

87. See William F. Reed, Journal (unpublished manuscript, Bancroft Library, catalogued at Banc MSS C-F 214) (entries for Sept. 29-Oct. 14, 1851).

88. *Id.* (entry for Oct. 17, 1851). In this case, the miners may have wanted to protect their right to hold more than one claim, since we know Reed and his partners later purchased two claims in addition to those they held by preemption. See *id.*

89. See SHINN, *supra* note 15, at 20 (discussing the codes of Saw Mill Flat, Brown's Flat, Mormon Gulch, and Tuttle Town). Saw Mill Flat began its code with the words, "Whereas this precinct is deficient in Mining Laws and Regulations, and disputes arise therefrom. Therefore, resolved, that we the miners of Saw Mill Flat in Convention assembled, do pledge ourselves to adopt, support, and abide by the following laws." HECKENDORN & WILSON, *supra* note 44, at 76.

although, naturally, with an eye to the future. The large body of subsidiary rules that would be necessary in any camp was probably created entirely through individual judgments, which may or may not have been remembered when a similar dispute arose at a later date.<sup>90</sup> In the remaining cases, meetings appear to have been held almost routinely, when there was a feeling that the population was getting large enough to require rigid rules.

What little evidence there is about attendance at miners' meetings suggests that they were open to all Americans, that is, to anglophone American citizens and others who intended to become citizens. It is not surprising that everyone present had a vote; after all, a code enacted solely by claimholders would not carry much weight with outsiders. Nevertheless, the openness of the voting system is significant. Voters included miners who had just arrived, who had no claim, and who had no immediate prospect of a claim.<sup>91</sup> Clearly, outsiders wished the limits on claimholders' rights to be defined as precisely as possible, since those limits marked where the outsiders' rights began. For example, a newcomer who knew the rules would not be "bluffed off" an abandoned hole by another miner who asserted that the claim was his but was not able to prove it.<sup>92</sup>

On the other hand, there is little evidence that attendance at meetings was compulsory, though Charles Howard Shinn states that this was the case in "ten or twelve" camps.<sup>93</sup> It seems that there were always enough people to draft and enact laws; in this sense, transaction costs do not appear to have been a problem. The immigrants were experienced in the routine of self-organization. They could base their own code on customary law and the codes of other districts, so that the meetings need not have taken much time. In any case, those who did not have claims had little else to do. Meetings and elections were also frequently scheduled on a Sunday, a day that

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90. This is one of the complaints of the miner signing himself "Tuolumne": "It is well known that mining laws are often made to suit particular instances—are, in fact, *ex post facto* and often go into disuse as soon as the emergency expires." "Tuolumne," *A Title to the Land—The Present Tenure*, SONORA HERALD, Oct. 23, 1852, at 1. This was the first of "Tuolumne's" two letters on the subject. See *infra* notes 176-182 and accompanying text.

91. See, e.g., Isaac Barker, *Diary of a Voyage around Cape Horn . . . and of Life in the Mines near Mormon Island, Calif. Sept. 18 1849 to Dec. 31 1850* (unpublished manuscript, Huntington Library, San Marino, Cal., catalogued at HM 19366) (diary entries for April 1850, Mormon Island) (indicating that Barker attended a meeting concerning mining claims at Georgetown (El Dorado County) although he had just arrived there and did not have a claim). See also Letter from David Cosad (Aug. 1, 1849), *in* Cosad, *supra* note 59 (stating that Cosad planned to vote at a meeting to pass laws at Coloma, although he had just arrived there and intended to leave immediately).

92. See Barker, *supra* note 91 (entry for Apr. 23, 1850, Ford's Bar) (relating that Barker's party refused to be bluffed off their hole by another miner who could not establish his claim).

93. SHINN, *supra*, note 15, at 20.

many miners set aside for business and chores.<sup>94</sup> Furthermore, the opportunity cost of time taken from mining to attend meetings is difficult to calculate, because any given claim held an unknown but limited amount of gold, which would be used up in two weeks in any event; against this, one must of course set the shortness of the mining season. It is not clear from the sources whether the average miner cared much about the actual terms of the code, except that a number of miners do report specifically that they attended meetings “to exclude foreigners,” an issue that evidently generated some zeal.<sup>95</sup> These individuals do not say why they were so keen to expel non-Americans, but motives probably included patriotism, solidarity, and greed for the land the outsiders would have to abandon. Indeed, solidarity and an assertion of Americanness may well have been primary reasons for attending meetings in general.

It hardly mattered whether all of the miners in a given district attended the meeting to draw up a mining code, so long as they acquiesced in the choices made by the majority who were present. Indeed, the stability of the regime depended on Americans’ propensity not only to hold elections and to draw up resolutions, but also to abide by majority rule.<sup>96</sup> The population of any given diggings was constantly changing, and yet the newcomers conformed to the rules drawn up before they arrived. It was not only Americans who respected the will of the majority, but also those who hoped to be treated like Americans—such as a party of Danes, for example, who never spoke Danish even among themselves except when they suspected someone of deliberately eavesdropping on conversations about work.<sup>97</sup> “As a matter of course,” one wrote, “we were desirous of fulfilling the requirements of the law—which had been passed by

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94. See, e.g., Barker, *supra* note 91 (entry for Sunday, Apr. 14, 1850, describing a meeting at Georgetown); Carter, *supra* note 24 (entry for July 5, 1849, describing a meeting on July 4); Joseph Warren Wood, *Diaries of Crossing the Plains in 1849 and Life in the Diggings from 1849 to 1853* (unpublished manuscript, Huntington Library, catalogued at HM 318) (entry for Sunday, Jan. 20, 1850, recording a meeting at Jacksonville); *id.* (entry for Sunday, Mar. 31, 1850, describing election speeches).

95. Letter from Allen Varner to David Varner (Mar. 5, 1850, Rector’s Bar, Placer County), in Varner, *Letters* (unpublished manuscripts, Huntington Library, catalogued at HM 39980). See also Wood, *supra* note 94 (entry for July 28, 1850, Jacksonville) (“went to Jack[sonville] & voted out foreigners”); Hovey, *Journal*, *supra* note 71 (citing a code passed on Dec. 9, 1849, in which the first article prohibited foreigners from working in the diggings). But see Cosad, *supra* note 59 (entry for Aug. 1, 1849, Coloma) (“It was Election day to chose [sic] some officers, for the people could not live well without law as the people was verry [sic] much mixed with Spanish[.] [T]hey established some laws part Spanish & part American.”).

96. See Zerbe & Anderson, *supra* note 9, at 125-27.

97. See PETER JUSTESEN, *TWO YEARS’ ADVENTURES OF A DANE IN THE CALIFORNIA GOLD MINES* 30 (John Bellows trans., Gloucester, England, Bellows 1865).

mutual agreement of all concerned; and we were anxious to do our part in carrying it out.”<sup>98</sup>

Possessing a claim and observing the code were in themselves closely identified with one’s identity as an American. The miners in general were adamant that foreigners ought not to be allowed to dig, and many codes included provisions excluding non-Americans from the mines. In other words, they identified property rights with citizenship—although they never said so in those terms. Where foreigners had secured particularly rich diggings, the Americans were ready to unite and to drive them out by force. Individuals carried on their own campaigns as well. John Hovey and his partners threw the tools off French claims and simply took them over; they later threatened to shoot two Mexicans whose claims they had apparently jumped.<sup>99</sup> It was to some extent a point of honor not to do that kind of thing to a fellow American.

#### IV. THE MINING CODES

The “mining codes” or “laws” or “rules and regulations” governed the permissible size of a claim, what sort of notice was required, how often it had to be worked, and sometimes the process of dispute resolution. The preserved codes of each district contain only the most fundamental rules governing property. Supplemental rules were often passed at specially convened meetings, often as part of the ruling in a dispute between miners, and were thus hardly distinguishable from legal judgments intended to serve as precedents. Other rules, written or unwritten, went beyond the regulation of property rights to include a basic criminal code.<sup>100</sup> Only the mining regulations were printed, however, and were posted at multiple locations in some camps. The preambles of codes from the mid- to late 1850s indicate that miners in some diggings intended their codes to be a kind of Constitution for a civil society of their own creation.<sup>101</sup> One preamble, indeed, directly echoes the language of the U.S. Constitution.<sup>102</sup> The miners knew, of course, that their society was a very

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98. *Id.* at 40.

99. Hovey, Journal, *supra* note 71 (entry for Apr. 5, 1850).

100. *See, e.g.*, Woods, *supra* note 77, at 126-29 (transcribing Jacksonville criminal code of Jan. 20, 1850).

101. *See, e.g.*, KING, *supra* note 50, at 300 (reprinting Rules and Regulations of Dry Creek, Brownsville Mining District, Yuba County, Apr. 7, 1860). *See also* Wood, *supra* note 94 (entry for Jan. 20, 1850).

102. *See* KING, *supra* note 50, at 279 (reprinting Regulations of Warren Hill, Plumas County, Oct. 22, 1853) (“We the miners and citizens of Warren Hill, in order to form a more perfect and correct understanding amongst ourselves and all others that may come among us, . . . to establish Justice and secure harmony, do enact and draft the Laws as follows.”).



temporary one, but they believed themselves to be playing an important role as a harbinger of American democracy. In total, some 500 placer camps in California enacted mining codes,<sup>103</sup> about 150 of which were collected for the Department of the Interior.<sup>104</sup> Very few of these date to 1849 or the first half of 1850,<sup>105</sup> but fortunately, many individual rules are mentioned in miners' journals and letters, from which it is possible to reconstruct the basic elements of the earliest codes and their variants.

A large number of camps elected an alcalde<sup>106</sup> to hear civil and criminal disputes and to act as a general law enforcement agent. The alcalde was originally a Mexican official. On paper, his job was to maintain good order, preside over council meetings, execute ordinances and decrees, arbitrate between disputants, and act as a judge of first instance. In practice, however, the alcalde of a small town was its only official and played the role of mayor, judge, and justice of the peace until the citizens voted to replace him. The Americans who were in California before the gold rush adopted the institution of alcalde without the Mexican laws that he had administered. In 1848, all but four or five of the alcaldes in California were Americans.<sup>107</sup> Colonel Mason recognized the expanded role that the alcaldes had assumed in practice; indeed, given the vacuum of government in California at the time, he had little choice.<sup>108</sup> The miners at most of the early diggings elected one of themselves as alcalde (after 1850, justice of the peace) to manage their day-to-day government, such as it was, and to hear disputes. Other codes provided for dispute resolution by arbitrators, half selected by each party, or by jury. In all cases, the miners assembled en masse were the ultimate authority; they could depose an alcalde at will and put another in his place. In practice, the assembled miners often managed and decided criminal cases even when these were nominally in the hands of an alcalde and a jury. They could also enact new regulations that might change the

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103. SHINN, *supra* note 15, at 9.

104. See KING, *supra* note 50, at 14. For the 500 mining districts, each with its own code, see BROWNE, *supra* note 6, at 226.

105. The earliest code I have found is that of Calaveras Diggings, Dec. 9, 1849, passed mainly to enact a rule under which the Americans could expel the Chileans from their rich claims. See Hovey, Journal, *supra* note 71 (entry for Jan. 1850).

106. The history of the office of alcalde in California is discussed by Theodore Grivas, *Alcalde Rule: The Nature of Local Government in Spanish and Mexican California*, 40 CAL. HIST. SOC'Y Q. 11 (1961). See also SHINN, *supra* note 15, at 182-98 (discussing the function of the alcalde in the mining camps).

107. See Grivas, *supra* note 106, at 24-25.

108. In a letter to the Adjutant General in Washington, dated April 19, 1848, Colonel Mason wrote that the alcaldes had been the only civil officers in California during the two preceding years. See CALIFORNIA AND NEW MEXICO, *supra* note 3, at 573. For further discussion of Mason, see *supra* note 4.

property rights of every claimholder in the district.<sup>109</sup> The ancient institution of *alcalde* was thus Americanized.

Mining codes<sup>110</sup> generally included three core provisions: they established maximum claim sizes, they determined whether or not to restrict the number of claims one miner could hold, and they set notice requirements. Their basic structure was probably introduced by immigrants familiar with the lead mines of the Mississippi valley.<sup>111</sup> The most striking thing about all three provisions is that they tend to *limit* or restrict a miner's right to a claim.

Because the earliest preserved codes contain some anomalies, I reproduce here a mining code of a slightly later date as an example of a simple set of rules and regulations for dry diggings similar to rules in force in 1849. These are the regulations for Rockwell Hill in Nevada County, probably passed in June 1852:

#### LAWS

We the undersigned Claim Holders on this Hill subscribe to the following laws by which our claims on this Hill are to be governed.

1st. This hill shall be named and known as Rockwell Hill.

2d. No person shall hold more than one claim by location.

3d. No claim shall exceed one hundred feet square.

4th. Every claim not registered in the books of the Recorder within ten days after being taken up shall be liable to be jump'd.

5th. All transfers shall be registered in the Books of the recorder.

6th. Each claim shall be worked at least one day during a period of at least sixty consecutive days, or otherwise be liable to be jumped[.] Except a Company or Individual holding two or more claims, in which case it will be sufficient for said Company or

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109. See, e.g., BROWNE, *supra* note 6, at 228.

110. This section will discuss only the rules for dry diggings and claims along the rivers (river claims), not river-damming claims or quartz claims. The rules for such damming companies were completely different from those for individual claims along a river; a damming company was entitled to all of the riverbed that it exposed by diverting the water along some other route. Quartz mining was introduced at the end of 1850, but it yielded very little gold until the end of the decade. Ninety-nine percent of the gold produced in California between 1851 and 1860 came from placer diggings. See PAUL, *supra* note 1, at 144.

111. See, e.g., Jesse Macy, *Institutional Beginnings in a Western State*, 3 ANNALS IOWA 321, 322 (1898) (stating that the lead miners of Dubuque passed rules and regulations on June 17, 1830, adopting the regulations used in Illinois, but setting claim sizes at 200 yards square, to be worked one day in six, and providing for arbitration of disputes).

individual to work one of their claims one day in each sixty consecutive days, but in case of sickness or being prevented from working said claim or claims by too much water, said claim or claims shall not be liable to be jump'd provided the same may be proved by at least one witness before the District Recorder[.]

Signed by John Parker, Hughes, E.E. Cheeny[,] Alexander Elder, A.H. Otis[,] G.M. Sheridan[,] John Hughes, G.C. Jewell, J.P. Stone[,] I. Slaght.

The foregoing laws of Rockwell Hill are a true copy of the Original taken this 17th day of June 1852.

JOHN DAY District Recorder<sup>112</sup>

All of these rules also appeared in the earliest codes, except that in 1849 claims were much smaller and the number of miners attending the meetings was often much bigger.

#### *A. Number of Claims*

The second article in the Rockwell Hill code, providing that “no person shall hold more than one claim by location,” is almost tautological, but not uncommon. If someone were able to make multiple claims by location or preemption, then the maximum claim size would be meaningless; two claims of 100 feet square, after all, amount to the same thing as one claim of 100 by 200 feet. From another point of view, one might say that all codes that set a maximum claim size limited miners to only one claim by location. Many districts, however, recognized several different types of claims—such as river claims, dry-digging claims, and hill claims. River claims took the form of a short stretch of river bank, plus all the land on either side running back as far as the miner wished; the holder would begin work in the spring and move forwards towards the center of the stream as it fell during the course of the summer. Dry diggings were believed to have been the beds of old rivers; claims were square and the dirt had to be carried to water for washing. Miners were generally allowed to hold one of each and to work them according to season, that is, river claims in the summer and dry diggings in the rainy season.

The Rockwell Hill law sets no limit on the number of claims one could hold by purchase, gift, or other means; and many other published codes provided explicitly that “all persons can hold one claim by occupancy and any number by purchase.”<sup>113</sup> The property rights in

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112. KING, *supra* note 50, at 337.

113. For later examples, see *id.* at 280 (Warren Hill, 1853); *id.* at 282 (Sucker Flat, 1855);

claims thus included the freedom to buy, sell, and, in general, to transfer rights, as one might expect in a system designed by Americans. The potential abuses of such a law are discussed above;<sup>114</sup> later codes often also included provisions intended to prevent spurious sales—for example, by requiring the seller to have worked the claim for ten days and the buyer to pay genuine remuneration.<sup>115</sup>

In many diggings, however, miners were not permitted to hold more than one claim at a time, or sometimes two claims that amounted to the same thing—such as one by preemption and one by purchase, or one claim in the dry diggings and one along the river.<sup>116</sup> Such restrictions on accumulation may well have been the norm in the early days of the gold rush, since James Carson wrote in 1853 that at that time, the majority of camps allowed miners to hold any number of claims by purchase, and he suggested that this was a change from the rules of 1848 to 1850.<sup>117</sup> Moreover, as we saw above, the one-claim rule was the first of *The Miner's Ten Commandments*, suggesting that even in 1853, when the *Commandments* were written, this was considered customary.

A one-claim rule was a very stringent restriction on a miner's interest in his claim. More than any other feature of the codes, it reduced the miner's right to a personal use right. Where the claim size was small, as it was in many of the diggings of 1849, and where claims could be jumped if they had not been worked in three days or a week, the effect was that a miner could hold only the area in which he himself was actively digging. Capital could not be used to increase profits, because it could not be invested in extra claims, at least not until the first claim was worked out. The one-claim rule, while it

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*id.* at 288 (Oro Fino, 1856); *id.* at 289 (Ohio Flat, 1856); *id.* at 291 (Little Humbug Creek, 1856); *id.* at 292 (Maine Little Humbug Creek, 1856); *id.* at 300 (Brownsville, 1860); *id.* at 301 (Bodie, 1860). In addition, at least twenty-four codes passed between 1850 and 1853 in Nevada County in and around Grass Valley permitted miners to hold multiple claims by purchase. Most, if not all, of these concerned quartz diggings and are not relevant to our discussion; the Gold Mountain Laws (1850) may be an exception. See *id.* at 331; GUDDE, *supra* note 30, at 135-36.

114. See text accompanying *supra* notes 77-80, *infra* note 236.

115. See KING, *supra* note 50, at 296 (reprinting Centreville and Helltown Mining Laws, Oct. 11, 1857).

116. For mostly later examples, see *id.* at 292 (Saint Louis Mining District, 1856); *id.* at 277 (Upper Yuba Mining District, Apr. 11, 1852); *id.* at 277 (Weaver Creek, 1852); *id.* at 286 (Lower Humbug Creek, 1852); *id.* at 286 (Oregon Gulch, 1855); *id.* at 296 (Centreville and Helltown, 1857); *id.* at 297 (Hungry Creek, Oct. 24, 1857). On January 27, 1858, the Hungry Creek regulations were amended to allow multiple claims. See *id.* See also Irish Hill Mining District Rules and Regulations, December 1857 (unpublished manuscript, Bancroft Library, catalogued at Banc MSS C-B 547 Pt. I: 112); Letter from J. Matthew to Euphemia (Feb. 17, 1851, Great Oak Flat, Tuolumne Co. (unpublished manuscript, Bancroft Library, catalogued at Banc MSS C-B 547 Pt. I: 92); Hovey, Historical Account, *supra* note 71, at 3 (recording Calaveras Resolutions, Dec. 9, 1848); Woods, *supra* note 77, at 127 (Jacksonville, Jan. 20, 1850).

117. Letter from James H. Carson, *supra* note 80, at 174-75.

lasted, thus entrenched the preeminence of labor over capital, which had been the most striking feature of the revolutions of 1848.

The rule also lowered the selling price of claims because claim-holders in the same diggings, the largest part of the potential market, could not buy a second claim. Thus, miners who enacted a “one-claim” rule reduced the market value of their own claims (the use value remained the same). That they realized this themselves is suggested by the mining laws of the Upper Yuba Mining District, which provided “that claims of deceased persons can be sold to the highest bidder, and the person thus purchasing shall be allowed to hold such claims for the purpose of Working, even if he is in possession of others.”<sup>118</sup> I interpret this to mean that the claim was sold for the benefit of the deceased’s family back in the United States, whose circumstances were often a source of concern to his friends, and that in this particular case it was more important to raise the largest possible amount than to adhere to the “one-claim” rule. In other cases, however, the priorities were reversed.

### *B. Size of Claim*

The third article of the Rockwell Hill law limits the size of a claim to 100 feet square. By the standards of 1849, this was enormous; in that year, claims were usually fifteen feet square or less in dry diggings, and fifteen or twenty feet along the river.<sup>119</sup>

We do not know how the miners who drafted a local code decided on the proper size for a claim, though the richness of the diggings and the ease or difficulty of extracting gold were naturally taken into consideration.<sup>120</sup> There were also at least two limiting conditions on the minimum size. The first was the custom that had already emerged before there was a miners’ meeting. Perhaps when the ground was already being worked in fifteen-foot-square parcels, it would be excessively disruptive to cut the maximum claim size down

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118. KING, *supra* note 50, at 277 (reprinting Article 4 of Yuba County Mining Laws, Apr. 11, 1852).

119. See, e.g., FRANK MARRYAT, MOUNTAINS AND MOLEHILLS 214 (London, Longman 1855) (giving ten feet for Murderer’s Bar, April 1851); CONG. GLOBE, 31st Cong., 1st Sess. 1362 (1850) (quoting Senator Fremont’s statement that “[a]t this time, men on their rights only stake out twenty feet square, and are satisfied with that”); Letter from Solomon A. Gorgas to his wife (Sept. 9, 1850, Placerville) (unpublished manuscript, Huntington Library, catalogued at HM 2187) (stating that each miner was allowed fifteen feet square); Woods, *supra* note 77, at 57 (giving ten feet for Salmon Falls, July 9, 1849); *id.* at 89-90 (giving fifteen feet for Aqua Frio, Dec. 4, 1849).

120. See, e.g., John Sharp, Letter to the Editor, *Settlers and Miners Convention*, CALIFORNIA CHRISTIAN ADVOCATE (San Francisco), Feb. 4, 1852 (stating that the miners and settlers meeting in Spring Valley passed a resolution “[t]hat the extent of claims is properly governed by their richness and accessibility—hence the inability to establish laws which shall be applicable in all respects, to the different mining districts”).

to twelve feet square and to remeasure and redistribute all of the claims. This may explain in part why rules allowing twenty feet and even thirty feet claims were not challenged.

The second limitation is that claims had to be large enough to be workable. Fifteen feet square is said to be “the quantity of ground allowed to the man by custom” of the diggings in an account from 1851;<sup>121</sup> another source from 1849 reports that ten feet square was allowed by custom.<sup>122</sup> A claim of ten feet square was hardly big enough to contain both the hole and the pile of dirt that came out of the hole—and one was not allowed to throw dirt on one’s neighbor’s claim.<sup>123</sup> At the phenomenally rich Mokelumne Hill, which was divided into claims of ten feet square, one miner would have to put off digging until his neighbor had cleared his claim.<sup>124</sup> If claims had been smaller, neighbors would have had to pool their claims and work together—something they often did in practice, but which the codes never forced them to do. Even in the richest diggings, claim sizes did not fall below ten feet. Ten feet, then, was the minimum workable size in the California mines.

Larger claims were sometimes open to challenge by outsiders,<sup>125</sup> but rules allowing claims of twenty or thirty feet square were not necessarily overturned, even in the most desirable diggings. In July 1850, for instance, on the forks of the Yuba River, an exceptionally rich location was worked in claims of thirty feet square:

Every inch of ground is contested when there is any dispute as to the true line or boundary + a great deal of litigation is going on . . . . Each man can hold 30 feet square of ground. These are

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121. Letter from George McKinley Murrell to Father (Jan. 29, 1851, Long Bar), *in* Murrell Collection, *supra* note 47.

122. See Woods, *supra* note 77, at 57 (July 9, 1849, Salmon Falls, El Dorado County). Woods was apparently working dry diggings.

123. See PIERRE CHARLES FOURNIER DE SAINT-AMANT, VOYAGES EN CALIFORNIE ET DANS L’ORÉDON PAR M. DE SAINT-AMANT ENVOYÉ DU GOUVERNEMENT FRANCAIS, EN 1851-1852, at 586 (Paris, Maison 1854). Saint-Amant says that holes were about two meters, or over six and one half feet, in diameter. *See id.*

124. See Hovey, Journal, *supra* note 71, at 133 (describing Mokelumne Hill Incident, March 1851). Shinn reported that in 1848 the ten-foot claims at Jackass Gulch “in many cases” yielded ten-thousand dollars, but also that there were sufficient claims of that size for all the miners in those diggings. SHINN, *supra* note 15, at 11. Since there were enough ten-foot claims for all, there would be no pressure to reduce claim sizes even if that were a practical alternative.

125. See, e.g., Letter from George McKinley Murrell to Robert F. Strange, *supra* note 81. See also FARISS & SMITH, *supra* note 47, at 287 (stating that the first comers had staked out very large size, but a miners meeting voted the size of claims down to forty feet). This account was written in 1882, however.

richer diggings than I have before been at—the largest amount which I have heard being taken out of a single claim is 203 lbs.<sup>126</sup>

Even where the claimless outnumbered the claimholders by twelve to one, there was no demand for a redistribution of property.<sup>127</sup> Hiram Dwight Pierce, an elder of the Second Presbyterian Church, observed the crowds pouring into Mariposa and remarked, “I never wish to live amongst a more friendly peaceable law abiding People.”<sup>128</sup>

Local custom was a strong stabilizing factor in reaching a consensus about claim size and other conditions of holding a mining claim. When new diggings were discovered, many of the first miners on the scene came from camps nearby, bringing with them the usages and expectations of the spot where they had just been working. George McKinley Murrell, one of the few active miners who thought the mines should be sold to the miners rather than worked as claims, wrote: “15 ft—the quantity of ground allowed to the man, by custom & (that you know when acquiesced in for a long time becomes law) is too small.”<sup>129</sup> It was Murrell who had written the year before that he and his partners had staked thirty-foot claims but feared that if the diggings proved as rich as they hoped, “they will cut claims down to 15 ft.”<sup>130</sup> As it happened, the new spot was not rich and the larger claims were not cut down, but Murrell was ready to comply with such a demand if it were made. Similarly, in the rush near Kelsey’s diggings described above,<sup>131</sup> the first claims were staked at thirty feet square, and this claim size was evidently ratified at the meeting held two weeks later, even though there were not enough claims for all the miners present at that size. If thirty feet was the maximum claim size at Kelsey’s, this would explain the automatic adoption of the same size in the new diggings.

Contrary to Zerbe and Anderson’s theory, maximizing total wealth was not an important consideration when the first mining

126. Letter from Thomas J. Van Dorn to His Wife (July 28, 1850, Forks Yuba), in Thomas J. Van Dorn Papers, 1847-1869 (unpublished manuscripts, Beinecke Library, catalogued at WA MSS S-1319).

127. See Cowley, *supra* note 55, at 56 (Sept. 1, 1850, Mokelumne River) (“I . . . understand that the northern mines has 12 men to one claim the mines being overrun with people.”).

128. Letter from Hiram Dwight Pierce to His Wife and Family (Feb. 24, 1850, Mariposa) (unpublished typescript, Huntington Library Mormon File, catalogued at microfilm 44). Writing on March 24, 1850 to his wife, Pierce noted that “[t]he People are comeing [sic] into this place in crowds. [T]he claims are all taken up. Each man is allowed 20 feet across the aroyar [sic].” *Id.* Pierce was with a river-turning company at Mariposa, but intended to take up a regular claim.

129. Murrell, *supra* note 121.

130. Murrell, *supra* note 81. See also text accompanying note 81.

131. See *supra* notes 87-88 and accompanying text.

codes were passed. The only concession to this kind of efficiency in 1849 was that the claims were not made so small as to be unworkable; above that point, the productivity of a claim was unrelated to its size. There were no economies of scale until 1850, when miners began using the long tom, a dirt-washing device that required large amounts of water. In fact, the claims of 1849 and 1850 were all impractically small because they were worked out within a couple of weeks, and then the claimholders had to prospect for a new spot, an undertaking that could take days or even a week.<sup>132</sup> Any given individual would have preferred to have a claim large enough to provide him work for the whole season, and in this sense, fairness trumped productivity. Furthermore, the miners used quick, wasteful gold-washing methods, gathering the most easily obtained gold and then moving on.<sup>133</sup>

### *C. Bending the Rules*

I have suggested that ten or fifteen feet square, or fifteen feet along the river, approached the minimum that could be worked easily, and that local rules or customs setting claims at this size or a bit larger were not challenged by outsiders. Where diggings were exceptionally rich, however, miners bought and sold half-claims or even smaller shares of a claim. For instance, in 1851, at Big Bar on the North Fork of the American River, river claims were ten feet wide; but five feet of ground sold for \$300. In this case, the writer specified that “five feet” were sold rather than a half-share of a ten-foot claim to be worked in common.<sup>134</sup> In other cases, the nature of the interest in fractions of a claim is not clear. Certainly it was possible for two or more men to buy a claim together and work it as tenants in common. The Huntington Library has a “Bill of Sale” of one-half of a claim on the Tuolumne, which may pertain to either a divided or an undivided share.<sup>135</sup> This “deed” is especially interesting because miners did not hold title to their claims. Perhaps the buyer wanted extra security because the former owner was still working

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132. See BROWNE, *supra* note 6, at 223 (stating that claims were small “so that everybody should have a chance to get one,” but that they were soon exhausted, and then the miners had to move).

133. See *id.* (“If a claim could, by hastily [sic] washing, be made to pay \$10 per day to the hand for three months, or \$6 for three years by a careful washing, the hasty washing was preferred.”). Browne thought that creating fee-simple in mining claims would have prevented this waste, though it is not quite clear how a system of fee-simple would have worked.

134. Letter from George McKinley Murrell to His Father (May 21, 1851, Big Bar, El Dorado County), *in* Murrell Collection, *supra* note 47.

135. D. Darius Comstock, Bill of Sale of One Half of His Share on the Tuolumne to John F. Damon, Jacksonville, Sept. 11, 1850 (unpublished manuscript, Huntington Library, catalogued at HM 4326).



there and, to all appearances, had the same interest in his claim as before. In June 1850, Alexander Barrington paid \$450 for a quarter of a claim, possibly near Kiota Diggings, and \$900 for the whole of a claim on Little Deer. The high prices indicate that these were rich diggings, and indeed Barrington took out extraordinary sums over the course of the next few weeks. On July 1, he collected seventeen ounces (\$272.25) and on July 2, fifty-eight ounces (about \$928). Two months later, on September 27, Barrington refused an offer of \$2,500 for his interest in the Kiota claim, which might well be the quarter-share he bought earlier.<sup>136</sup> There is, at any rate, clear evidence that these were extraordinarily rich diggings, that even a portion of a claim was expensive, and that the miners reacted by buying and selling fractions of a claim rather than by reducing the legal claim size.<sup>137</sup>

Barrington may have been working in a camp that had not placed limits on the accumulation of claims, but one can imagine the same sort of activity in camps with stricter rules. Only a pedant would argue that the sale of quarter-shares violated the principle of one claim per person, but other transactions, equally reasonable, did begin to undercut the rule. This is especially clear when a seller helped a buyer finance his purchase. Newcomers often arrived at rich diggings without the money to buy a claim, and promised to pay the seller from their earnings in one of various ways.<sup>138</sup> This could be a lump sum, but buyers might also promise the seller a share of the future profits. Barrington sold his very rich claim at “Shirt-Tail Hill” for two-thirds of the main lead profits (probably profits from the lead he had opened) in October 1851. This was a good arrangement for buyer and seller, inasmuch as they shared not only the risk that the claim was almost worked out, but also the profits, which might be enormous. It also gave Barrington a stake in a claim that he did not own. Shirt-Tail Hill is otherwise undocumented, and miners there may have been permitted to hold any number of claims, but at other diggings this type of arrangement may have been used to circumvent the rule of one claim per miner. A similar expedient involved renting out a claim for a share of the profits,<sup>139</sup> whatever form such an

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136. See Alex[ander] R. Barrington, *Journal with Brief Entries Concerning Voyage from Panama to San Francisco, . . . the Northern Mines, and Return, March 23–Dec. 11, 1850*, in CALIFORNIA GOLD RUSH MISCELLANY, *supra* note 52, at 3, 5-7 (entry for Sept. 27, 1850).

137. See, e.g., *From the Diggings—Gold Run*, PLACER TIMES (Sacramento), May 17, 1850, at 2 (recording sale of one-third of a one-hundred-foot claim for \$5,000 at Gold Run, probably in Nevada County).

138. We saw this already in one of the earliest documented claims, that of Peter Burnett at Long’s Bar in 1848. See BURNETT, *supra* note 43.

139. See, e.g., Simon Doyle, Journals and Letters 136 (unpublished manuscripts, Beinecke Library, catalogued at WA MSS 144) (entry for Feb./Mar. 1851) (“I . . . let my claim at Oregon

arrangement took, it allowed a miner to profit from claims in several diggings at once. All of these methods diffused title and muddied the tidiness dictated by the code.

The almost universal practice of working in partnership also made it difficult to tell who owned what. Placer mining was done most efficiently by three or four men working together—one to dig, one to carry dirt, one to work the mining “cradle,” another to pour in water.<sup>140</sup> Partners shared all expenses, labor, and profits; they usually lived together, took turns doing the cooking, and cared for one another in sickness while the partnership lasted.<sup>141</sup> They held one claim each and the codes explicitly or tacitly allowed their work on one claim to hold them all<sup>142</sup>—an arrangement that incidentally made it difficult for neighbors to know whether an unworked claim was abandoned or belonged to someone working on one of his partnership’s other claims. Some groups took advantage of the confusion and held claims for partners who were absent or wholly fictitious.<sup>143</sup>

Another blatant bending of the rules occurred when first arrivals at rich diggings, knowing that rules would be passed to reduce the maximum claims size, salvaged what they could from their holdings by selling parts of them off to individual newcomers.<sup>144</sup> Since it would take some time to call a meeting and draft a code, some non-claimholders preferred to guarantee themselves a spot in the richest part of the diggings by buying one from the man in possession, rather

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bar to Frank Owen, to work on the shares[,] and determined to remain in the mountains which I did until the last of July.”)

140. See, e.g., WIERZBICKI, *supra* note 24, at 44.

141. The solidarity of mining partners became proverbial. Charles Henry Randall explained the arrangement in a letter to his parents dated San Francisco, September 13, 1849: “We three have formed ourselves into a company for the purpose of digging gold[,] taking care of each other if sick[,] with mutual interest in whatever any of us may obtain.” Unpublished manuscript, Bancroft Library, catalogued at Banc MSS 68 40 c.

142. See, e.g., KING, *supra* note 50, at 271-72 (reprinting Drytown Mining District, Amador County, Local Mining Laws, June 7, 1851, stating that “[i]n all cases where claims are held by a company working jointly they shall not be required to work in more than one place but when held by individuals each several claim must be worked”).

143. See, e.g., ERNEST FRIGNET, *LA CALIFORNIE* 107 (Paris, Schlesinger Frères 2d ed. 1867) (stating that the public officer had no means of checking the names of miners listed as members of a company, and that many companies included fictitious names). The miners of Shaw’s Flat passed a rule against such chicanery on August 5, 1854: “Art 5. But this law shall not be considered as to allow a part of a company to hold the claims of the whole company during the absence of a part of its members.” HECKENDORN & WILSON, *supra* note 44, at 60-61. This rule, though of a late date, is probably a response to abuses that emerged earlier.

144. See, e.g., E.A. Upton, *Diaries*, Sept. 8, 1849 to Sept. 26, 1850 (entry for Oct. 17, 1849) (unpublished manuscript, Bancroft Library, catalogued at Banc MSS 78 48 c). Upton describes a company of eighteen men who gave up on their attempt to turn the river, and who sold their shares in the company since they were too few to hold their stretch of the bar as individual river claims. In this case, the company also wanted extra members to “repel invasion”; competition over river-turning companies was more likely to turn violent than that over individual claims. See also the remarks by Carson quoted in *supra* note 80.

than waiting to see if they could get one after the new claim size was introduced. Similarly, one miner who was alone on a bar known only to him arranged to sell neighboring claims; he made a deal to show prospective buyers the spot only if they promised not to jump the claims without paying him, as they had a right to do.<sup>145</sup>

#### *D. Extra Claim for Discovery and the Free-Rider Problem*

Many codes included a provision that the discoverer of new diggings was entitled to two claims by location—a double share. It was a meager reward for the successful prospector, who had invested his time and talents in finding a new location that might quickly attract hundreds of new miners. Where two men working together had discovered a gold mine, they were entitled to only one extra claim between them.<sup>146</sup> Free-riding thus continued to be a problem:

There are plenty of “prospectors” in the mines, but the profession scarcely pays, for the “prospector” is the jackal who must search for many days, and, when he has found, the lion, in the shape of the old miner, steps in and reaps the benefit. So that there is something to be learnt in the diggings, for undoubtedly one of the first principles in life is to look on while others work, and then step in and cry “halves.”<sup>147</sup>

In 1850 and later, we hear of hundreds of men sitting idle on their claims or playing cards in the nearest town, just waiting for someone else to hit pay-dirt. William Tell Parker wrote that in his neighborhood, Dixon Creek on the Feather River, most people were not working but waiting: “There are many stories of secret rich diggings now afloat & hundred[s] of men are lying about watching others & being watched themselves.”<sup>148</sup> Similarly, William Reed wrote of Kelsey’s Diggings in September 1851, “Nobody around here making anything good[;] many don’t pretend to work but spend their time at the bowling alley playing cards &c.”<sup>149</sup> They were waiting for someone to make a strike in the vicinity.

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145. See Warren Sadler, Journal (entry for Apr. 27, 1850, near Deer Creek) (unpublished manuscript, Bancroft Library, catalogued at Banc MSS C-F 73).

146. Reed, *supra* note 87 (entry for Oct. 1, 1851, Kelsey’s Diggings) (stating that the discoverer of new diggings was entitled to 90 feet, i.e., 30 feet each for him and his partner, “and an extra claim for discovery”).

147. MARRYAT, *supra* note 119, at 210-11.

148. William Tell Parker, Notes by the Way (Mar. 24, 1851, Dixon Creek on the Feather River) (unpublished manuscript, Huntington Library, catalogued at HM 30873).

149. Reed, *supra* note 87 (entry for Sept. 26, 1851, Kelsey’s Diggings). The applicable code presumably included a work requirement; but these men were evidently confident that no one would jump their claims. For details of the ensuing rush, see *supra* notes 87-88 and accompanying text.

The worst kind of free-riding occurred when individuals held claims in many different diggings, waited for gold to be discovered at one of them, and then worked or sold the claim in question. This kind of abuse was also prevented by work requirements that served mainly to allow a miner to be away from his claim for a limited time without losing it, and to allow others to jump a claim that was not in active use. The Rockwell Hill code, reproduced above, provided that claims must be registered with the Recorder within ten days of location and must be worked at least one day in sixty, or were liable to be jumped.

These bendings and evasions of the letter of the codes demonstrate two points. First, they show that even where the rules prescribed a simple, egalitarian property regime, the practical aspects of mining— involving such matters as the advantages of partnerships, the high value of some claims, and purchasers' inability to pay for their claims— generated more complex forms of property-holding. Second, it appears that the main enforcement mechanism of the codes— namely, the right to jump a claim held in violation of the rules— could not cope with these more complex relations to property. Thus, even before the introduction of capital-intensive mining techniques, the one-claim rule was under strain.

### *E. Notice Requirements*

Every mining code specified the form of notice that was necessary and sufficient to hold a claim. The customary law famously allowed miners to secure their claims by leaving a pick or other tool in the hole.<sup>150</sup> The notice requirements of the codes varied considerably; miners might have to post a notice bearing the name of each claimant; to post notices bearing the signature of the claimant and the date of the claim; to post notices at each end of the claim; to mark the angles; to drive a two-foot long, three-and-a-half-inch wide stake into the center of the claim; to drive a stake into each corner and one in the middle bearing the number of the claim; and so on.<sup>151</sup> Almost every code also required miners to record their claims with a Recorder appointed for that purpose. In fact, however, few miners

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150. See Letter from George Mifflin Harker to the St. Louis *Weekly Reveille* (Sept. 19, 1849, Weaverville, El Dorado County), reprinted in *Morgan Street to Old Dry Diggings 1849*, 6 GLIMPSES OF THE PAST 35, 66 (1939). See also BALLESTEDT, *supra* note 46, at 51; 1 TAYLOR, *supra* note 46, at 101 (ch. 10, "Gallop to Stockton"). See also William Franklin Denniston, Journal (entry for Nov. 25, 1849) (unpublished manuscript, Huntington Library, catalogued at HM 50660) (writing in his journal the day after he arrived in the diggings that leaving tools on one's claim "according to the mining laws conferred title").

151. For a list of different kinds of notice requirements (without references), see SHINN, *supra* note 15, at 12; for the notice requirements of the individual codes, see KING, *supra* note 50, *passim*.

took this last step, perhaps because claims were worked and abandoned so quickly, and because the Recorder charged a dollar.

The miners clearly attempted to devise some clear, conspicuous form of notice that would indicate the boundaries of the claim and the name of its holder. It was in every miner's interest to provide notice of his claim, to discourage others from working it, and to support his case if it was jumped and there was a dispute. But it was in the newcomer's interest that notice be *required*, so that a claim that was not clearly marked would be liable to be jumped. The newcomer might otherwise find himself putting a day's work or more into a spot that then turned out to belong to someone else. For example, at Mormon Island in April 1850, a party of novices who had been in the mines for only ten days found an old hole without tools in it and began to dig. They dug all day, but at night the "owner" came back and claimed it. The inadvertent jumpers surrendered the claim, but kept the ten dollars they made that day (whether by agreement or after arbitration remains unclear).<sup>152</sup> When they had a similar experience several days later, they were determined not to be bluffed off the claim; evidently they had learned that absence of notice gave them the upper hand.

Just as outsiders were the greatest beneficiaries of these rules, so they benefited most from publication, without which the miners in possession could make whatever assertions they liked.<sup>153</sup> Indeed, "secret" rules are no rules at all; the group that monopolized these diggings probably called its private arrangements "rules" simply in order to give them a spurious legitimacy.

#### *F. Work Requirements*

Almost all early mining codes required miners to work their claims at least once in every five, seven, or ten days in order to retain them,

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152. See Barker, *supra* note 91 (entry for Apr. 4, 1850, Mormon Island). For another example of this sort of experience, see *id.* (entry for Dec. 6, 1850).

153. See, e.g., Woods, *supra* note 77, at 115 (stating that Woods and his party were expelled from several claims by local miners who had unpublished rules favoring themselves). The Rough and Ready Company similarly attempted in 1849 to protect "their" ravine by warning off any newcomers who tried to mine it; for an account preserved in later sources, see UMBECK, *supra* note 9, at 91 (citing HARRY L. WELLS, HISTORY OF NEVADA COUNTY, CALIFORNIA 89 (Oakland, Thompson & West 1880); EDWIN BEAN, BEAN'S HISTORY AND DIRECTORY OF NEVADA COUNTY, CALIFORNIA 359 (Nevada, Cal., Daily Gazette Book & Job Office 1867)). The Rough and Ready Company maintained its monopoly until challenged by the Randolph Company. According to Wells in his 1880 *History*, "this proceeding threatened to result in a difficulty between the two companies, but a compromise was effected" and they divided the ravine between them. WELLS, *supra*, at 89. Bean does not mention the "difficulty"; he does report, however, that the companies kept their exclusive hold on the ravine through the 1849 season, though they had lost it by the next season. BEAN, *supra*, at 359.

unless the claimholder was sick or disabled.<sup>154</sup> I have found no reference, however, to a work requirement dictated by custom. Some accounts suggest that a tool left on a claim would hold it forever, implausible though this may be. McCall, a miner who had only just arrived in the diggings, recorded a discussion with his partners in October 1849 that suggested there was no work requirement, and that simply clearing the topsoil from a claim served as notice:

A portion of the bar, above us for a considerable distance, had been cleared of boulders and the top dirt by some diggers before our arrival, and I suggested that as the operators had not made an appearance since our advent, we work into the claim, having the benefit of so much labor already expended, but my soldier comrades said, "No. We have no right to the claim. . . . How do we know that they have abandoned it? They may be sick or compelled to go some distance for provisions or tools, intending to return. We have no right to the fruits of their labor." They utterly refused to touch a shovelfull of dirt from the claim.<sup>155</sup>

This author paints a consistently rosy picture of life in the mines, however, and he may well have misunderstood the force of good manners in the diggings, which he calls rules of neighborliness, as opposed to "law."

A work requirement meant, in effect, that a miner had a right to use the property he occupied at the moment—a right that Blackstone hypothesized existed from the beginning of human society, when mankind held all of the earth in common. Communal property rights could extend only to the substance of things, he wrote, whereas the use of a thing had to belong to the person using it at any given time:

Thus the ground was held in common, and no part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership from which it would have been unjust, and contrary to the law of nature, to have driven him by force: but the instant that he

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154. See, e.g., KING, *supra* note 50, at 277 (Apr. 11, 1852, Upper Yuba Mining Laws) (requiring that a claim be worked every five days); *id.* (June 19, 1852, Weaver Creek Rules and Regulations) (requiring that a claim be worked every ten days); *id.* at 280 (Oct. 22, 1853, Warren Hill Act) (requiring claimholders to have persons at work on their claims "at all times . . . [and] in good faith, not merely as a pretext to hold said claims"); *id.* (Nov. 12, 1854, French Creek Mining Laws) (requiring that a claim be worked every seven days); *id.* at 283 (Smith's Flat Hill Laws) (requiring that a claim be worked every seven days).

155. ANSEL JAMES MCCALL, PICK AND PAN: TRIP TO THE DIGGING'S IN 1849, at 19 (Bath, NY, Steuben Courier Printing 1883) (Oct. 9, 1849, Yuba River).

quitted the use or occupation of it, another might seize it, without injustice.<sup>156</sup>

As Blackstone goes on to observe, disagreements might well arise about who was the first to occupy a spot, and he could have added that the concepts of “use” and “occupation” are indeterminate. How much of a spot could one person occupy for shade? If there was not enough shade for all, why should he not be made to share his spot? Blackstone used “occupation” literally to mean actual presence, which ceased “the instant that [one] quitted possession.” It goes against nature to grant only such ephemeral rights, he notes, when even wild animals have nests and caverns that they regard as their own and that they would defend unto death. Blackstone believed that these uncertainties, together with the need to protect an individual’s investment in his home, prompted the introduction of property rights.<sup>157</sup>

The main purpose of the mining codes, however, was to define the limits of use and occupation precisely enough to manage without rights in the substance of the mineral lands. A miner was said to be using his claim if he worked it regularly; he did not forfeit his rights if he left the claim unattended for two or three days, while he went to collect his mail or to obtain provisions, but at a given point he was no longer actively exploiting the claim, and his interest lapsed. Similarly, the question of how much ground one man could be said to “occupy” was set originally at roughly the minimum amount that he could work practically. To a certain extent, therefore, the miners formalized and stabilized the communion of goods as Blackstone imagined it.

### *G. The Nature of the Property Interest in Mining Claims*

In formal terms, the federal government continued to have fee-simple in the mineral lands and their gold; it had tacitly accepted the miners’ pretensions, but could at any time have expelled the present occupants and sold the mineral territory to others. The mining codes established the conditions under which a miner would have the exclusive use of a parcel of land for mining purposes. This property right could be sold, given away, or left as a legacy, and the claimholder could prosecute trespassers with a reasonable certainty that the community would enforce his rights. The property right was in minerals only and not in the surface soil. From the opposite point of view, farmers, homeowners, and even towns in the mining district did

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156. 2 WILLIAM BLACKSTONE, COMMENTARIES \*3.

157. *Id.* at \*4-\*9.

not have a claim to the minerals under their land unless they fulfilled the requirements of the local mining code.<sup>158</sup>

Did this amount to perfect title regarding all parties except for the federal government?<sup>159</sup> No. Most obviously, as noted above, the mining codes severely restricted the miner's property right in his claim. Later miners' meetings could change the code, and thus could change the claimholder's property rights, for instance by reducing the maximum claim size or imposing further work requirements or notice requirements.<sup>160</sup> On the other hand, as the miners appreciated later, a mining claim could not be attached by creditors or taxed by the state. In fact, it could be argued that a mining claim was not property at all. As late as 1865, a litigant before the U.S. Supreme Court argued that a Nevada mining claim could not be assigned a value and therefore could not have the value of \$1,000 required to give the Supreme Court jurisdiction in the case. The claimholder's interest, counsel argued, was at best a tenancy at will of the government. "Whatever the occupant may hope for or even expect . . . he has neither right, title, interest, claim, nor demand in or to the property in suit."<sup>161</sup> The Court was not persuaded by this argument. A Nevada statute had recognized the miners' codes and customs as valid and binding, and the federal government had sanctioned them by implication. Moreover, it was plain that Nevada mines were generating millions of dollars.<sup>162</sup>

In sum, the maximum claim size (which in 1849 was near the minimum practicable size), along with the notice and work requirements, limited the claimholder's right in his property in favor of others who might want to jump his claim. As we have seen, however, the most notable feature of the codes is that many did not permit

158. Several codes required miners to pay the owner of the land for damage to his crops and improvements and to repair city streets when they had finished mining them. *See, e.g.*, HECKENDORN & WILSON, *supra* note 44, at 54-55 (reprinting the code of Jamestown, 1853); *id.* at 72 (reprinting the code of Gold Springs, Aug. 19, 1854); SHINN, *supra* note 15, at 15-16, 24-25 (discussing codes with such provisions).

159. Compare the following description of a river-turning company's right in the riverbed it exposed: "It remains to add a remark as to the title. This is as perfect as it can be under the present state of things, or until the government shall confirm it. It is possessory only, but cannot be disturbed or disputed, except by the government. In a word it is perfect, as regards all other parties." PHILO D. MICKLES & JA[ME]S DELAVAN, ROCKY-BAR MINING COMPANY, CIRCULAR, ARTICLES OF ASSOCIATION, RESOLUTIONS, ETC. (New York, The Company 1850) (copies of this printed circular are in the Bancroft, Beinecke, and Huntington Libraries). Seeking to encourage investors, this circular would naturally stress the security of the company's right in the riverbed.

160. *See* BROWNE, *supra* note 6, at 228 ("A miners' meeting adopts a code; it apparently is the law. Some time after, on a few day's notice, a corporal's guard assembles, and, on a simple motion, radically changes the whole system by which claims may be held in a district.").

161. *Sparrow v. Strong*, 70 U.S. (3 Wall.) 97, 101 (1865) (argument of counsel).

162. *See id.* at 104.



miners to hold more than one claim at a time. In the early years, which are poorly documented, this rule appears often but is by no means universal. Deciding whether to allow individuals to accumulate claims by purchase if they were willing and able, or to prevent such aggrandizement, was one of the most significant choices that the first miners' meeting had to make. Consider the arguments against such a rule. The market for claims would almost certainly be affected, because some of the wealthiest potential buyers—those whose own claims turned out to be rich—were forbidden to buy, and this is quite likely to have reduced the selling price. On the other hand, a miner who struck it rich could not invest his new money in more claims; his opportunities were limited. To prevent a willing buyer and a willing seller from making a deal in this way seems almost un-American. And finally, the opportunities for wage-earners would be affected. If every claim was fifteen feet square, the owner would be less likely to employ workers, even if he had the means; by contrast, holders of large claims could offer steady employment to several workers. Therefore, the purpose of the codes was in part to protect the property rights of those who held claims, but the actual terms of the codes limited those rights and guaranteed outsiders or non-claimholders a reasonable chance of entry.

## V. WHY DID THE CODES RESTRICT PROPERTY RIGHTS?

The remainder of this Article will address the question of why the mining codes restricted property rights so severely, even when they were enacted by miners, most of whom held or expected to hold a claim. In this section, I will first discuss the ideological debate about property rights in the gold mines, and will demonstrate that the egalitarian, anti-capitalist norm of the miners was by no means self-evident or undisputed among Americans of the day. I will then turn to questions of self-interest. As indicated above, I will argue that the miners associated fee-simple in land with monopoly and the separation of capital and labor. They feared monopolization of the diggings not just in the long run, but immediately. Because miners generally abandoned their claims in two to three weeks, even those who held a claim when the mining code was enacted might soon be both claimless and penniless. Knowing this, they voted for rules that restricted all property rights, including their own, so as to increase their chances of getting another claim in the future.

### *A. Ideology*

I suggest that new norms of fairness arose in the diggings. The expectations about property rights were not those brought from

home, but those generated by local experience. New arrivals in California looked around, saw what the local rules were, and adopted them without criticism. The miners in the diggings where claims were first introduced were probably motivated by a rough idea that everyone should have a share, but the customs they developed became associated with an ideology that fee-simple in mineral land was wrong. That ideology was articulated and further developed to defend the mining custom against challenges from those who believed that miners should hold title to their claims.

That there was a debate about the appropriate nature of property rights is evident from the fact that some diggings limited the number of claims one could hold and others did not. One possible explanation for the one-claim rule is that it was a concession to non-claimholders, and was the price of having any property rights at all; this view assumes that the outsiders might have refused to recognize the law if they were locked out of the diggings by a rule that allowed first-comers to own large numbers of claims. There is no evidence for such reasoning in any of our sources, however, nor do we have reason to believe that diggings where miners outnumbered claims were more likely to pass a one-claim rule. The sources, in fact, include hardly any arguments made by newcomers challenging existing arrangements, and there are no records of the debates at the meetings where the rules and regulations were enacted. Without such accounts, we cannot know for certain what was in the minds of those who supported or opposed various restrictions on property rights. At most, the miners recorded in their journals that someone had too much or that others thought they themselves had too much, but not why they believed there should or should not be certain limits on property-holding.<sup>163</sup> It may be that after the first few mining codes had been enacted, there was a shared local norm of acceptable claim sizes, and a generally accepted argument for limiting property rights, that nobody needed to invoke explicitly.<sup>164</sup>

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163. There were at least two groups of miners who prepared to resist outsiders who claimed they had too much, but both of these were river-turning companies. Because such companies were everywhere entitled to as much of the riverbed as they exposed, they were only standing up for their rights. One of the writers was also a Texan, and Texans were particularly prone to fighting; the other was from Louisiana. *See* C.C. Mobley, Book [Diary of a Miner at Oregon Bar, California . . . 1850-1851] at 72 (July 10, 1850) (unpublished manuscript, Huntington Library, catalogued at HM 26612) (“We learn that some stragglers are threat[e]ning to take from us a part of our Claim under the plea that we have too much. Let them come.”). *See also* Letter from Ja[me]s McMurphy (Mar. 15, 1850) (unpublished manuscript, Huntington Library, catalogued at HM 53735) (“[A]t Sacramento there is a grate huin cry about our claiming so much of both rivers, for one I should like to know what they are goin to do about it . . .”).

164. *See supra* notes 129-131 and accompanying text.

In the press, however, and in the California legislature and the Congress, the best disposition of claims in the gold mines was hotly debated.<sup>165</sup> We have seen that the miners rejoiced in their hopes of a new social order based on gold mining, while others believed that California would make no real progress until the placers were exhausted. Similarly, some legislators strongly opposed proposals that would create a fee-simple in mining claims, while others favored sales or leases. In the course of the debates in 1849 and 1850, the miners' representatives made arguments for limited property rights. These sentiments are echoed in some of the miners' own writings of the early 1850s, the principle tenets of which were equal access and opportunity (which did not mean equality of wealth), and blocking the emergence of monopolies. These arguments, and those made in the press, are the best evidence available for the convictions of the assemblies that passed the early mining codes. At the same time, the repeated proposals to give or sell to the miners a fee-simple interest in their claims, beginning in 1849 and continuing through the early 1850s, demonstrate that a regime of limited property rights in mining claims was not considered the only possible option. Those in favor of selling or leasing the mines argued in terms of greater prosperity overall, and social and commercial progress (permanent communities, division of labor, investment in infrastructure, etc.).

The federal government had two concerns: it not only wanted to promote the interests of the Californians, but also hoped to generate some revenue from the gold mines which, its spokesmen said, had been acquired at such a cost to the nation. (In fact, of course, the price had been paid before the mines were discovered.) For this reason, and because of the tradition of selling public lands to individuals, Presidents Polk (1845-49) and Taylor (1849-50) recommended that the mineral lands be divided into small parcels and leased or sold.<sup>166</sup> A bill was introduced in the U.S. Senate on January 3, 1849, proposing the sale of mineral lands in California in lots not less than two acres each and at a minimum of \$1.25 per acre.<sup>167</sup> Thomas Hart Benton spoke out strongly against the bill, however,

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165. The various suggestions at the federal and state level about how to administer the mineral lands (which belonged to the federal government and not to California, even after the latter came into being), have been summarized conveniently by Joseph Ellison. JOSEPH ELLISON, CALIFORNIA AND THE NATION, 1850-1869, at 54-63 (1927); Joseph Ellison, *The Mineral Land Question in California, 1848-1866*, in THE PUBLIC LANDS 71 (Vernon Rosco Carstensen ed., 1963).

166. See ELLISON, *supra* note 165, at 55-56. See also CALIFORNIA AND NEW MEXICO, *supra* note 4, at 532-33 (printing letter from Governor Mason suggesting that gold bearing lands should be leased in lots of approximately 100 square yards, at \$100 to \$1000 annually, or sold at public auction in larger plots).

167. CONG. GLOBE, 30th Cong., 2d Sess. 257 (1849).

arguing that fee-simple in mining claims would lead to concentration of claims in the hands of a few, and could not be implemented in any case. Since the gold was distributed irregularly, he argued, mining was more like hunting than like agriculture or any other steady industry. "For this purpose, it is not fee-simples in two acres that are wanted, but permits to hunt, and protection in the discovery when a deposit is found."<sup>168</sup>

In September 1850, Senator John C. Fremont of California proposed an arrangement similar to Benton's, whereby miners could take out permits to dig for one dollar per month. The other terms of the proposed bill were strikingly similar to the codes drafted by the miners themselves, including the one-claim-per-person rule.<sup>169</sup> The bill passed the Senate, but the term ended before it could be read in the House. By the time of the next Congress, it had become known that the miners had adopted their own rules and required no help from Washington.<sup>170</sup>

The California legislature was as divided as Congress over the issue, and thus could not agree about what recommendation to send to Washington regarding the mines. At the constitutional convention of October 1849, a resolution against the sale of mineral lands lost by a vote of sixteen to twenty-one; the minority included most of the delegates from the mining districts.<sup>171</sup>

The Select Committee of the California legislature "to whom was referred the Joint Resolutions on the subject of the Public Domain, Mineral Lands, Custom Houses, and Branch of the United States Mint, and Money that rightfully belongs to the State of California," submitted two separate reports on February 9, 1850. The majority report recommended a policy of granting leases or permits for working small tracts to American citizens and prospective American citizens only. The majority preferred leases to sales or grants of title, because a market in property would open the door to monopoly. They argued that monopoly would be bad for labor and for the com-

168. *Id.*

169. See CONG. GLOBE, 31st Cong., 1st Sess. 1370 (giving Sen. Fremont's summary of the provisions of the bill, during the debate on the California mines on September 25, 1850). Thomas Butler King similarly opposed sale. See KING, *supra* note 2, 28-29 (arguing that capitalists would monopolize the gold mines and that the miners now in the diggings would resist such sales).

170. See CONG. GLOBE, 39th Cong., 1st Sess. 3226 (1866) (giving Sen. Stewart's remarks on the history of Fremont's bill, introduced in September 1850).

171. See J. ROSS BROWNE, REPORT ON THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 472 (Washington, D.C., J.T. Towers 1850). At this same convention, delegates resisted the introduction of limited liability corporations and banks into California as "legalizing the association of capital to war upon labor." BROWNE, *supra* note 6, at 117 (quoting William Gwin, a delegate from San Francisco).

munity, because monopolists would seek out cheap labor, without considering the character of their workforce.<sup>172</sup> If Congress decided to sell the mineral lands, however, the majority recommended that the tracts should be small and that the purchasers should be allowed to pay for them in installments over eight to ten years, so that even poor laborers would be able to buy.

The minority report of the committee objected to leasing or selling mineral lands. Either system, the minority argued, would result in a monopoly of all the valuable placers in the hands of a few claim-holders “whose interests would thereby become immediately adverse to those of the masses, that from necessity are compelled to labor.”<sup>173</sup> The minority said that the “monopoly” could take the form of a combination of the holders in fee, who would naturally strive to reduce wages to the lowest possible figure. Like the majority, the minority report uses the language of republicanism: “[T]he true policy of the Government is that which tends to secure to every citizen a competency; and the best wealth that a nation can boast of, is that every citizen has a comfortable home that he can claim his own.”<sup>174</sup> In the end, the California legislature did not pass any laws intended to supersede the laws and customs of the miners. Those camps that preferred not to recognize titles to individual claims continued as they were.<sup>175</sup>

The strongest arguments in favor of fee-simple in mineral lands were made in two letters to the *Sonora Herald* published on October 23 and 30, 1852.<sup>176</sup> The writer signed himself “Tuolumne” and claimed to speak for the “intelligent, practical miners,” whose vociferous complaints about the existing property regime had been ignored.<sup>177</sup> It is difficult to know what to make of these pseudonymous letters, because we can only guess who these “practical” miners were and how many they were. “Tuolumne’s” ideas have much in common with civic republicanism, so it is unlikely that he represented the entrepreneurs who hoped to engage in large-scale, more

172. California Legislative Assembly, Journal of the Assembly, 1st Sess. 805-06 (1849-50).

173. *Id.* at 806, 811.

174. *Id.* at 812.

175. The State of California took a hands-off approach. See, e.g., *People v. Naglee*, 1 Cal. 232, 244-45 (1850) (“[T]he State is not the steward or security, nor bailiff of the General Government, having in charge the protection of the public property.”).

176. See “Tuolumne,” *A Title to the Land: The Present Tenure*, SONORA HERALD, Oct. 23, 1852, at 1 [hereinafter, “Tuolumne,” *The Present Tenure*]; and “Tuolumne,” *A Title to the Land: The Present System—Its Unthriftiness*, SONORA HERALD, Oct. 30, 1852, at 1 [hereinafter “Tuolumne,” *The Present System*]. Rodman Paul notes that the editors of the *Sonora Herald* were among the chief proponents of selling titles to mining claims. See PAUL, *supra* note 1, at 228 n.44.

177. “Tuolumne,” *The Present Tenure*, *supra* note 176, at 1.

productive mining. The letters also appeared in the *Sonora Herald* a full two years after the period that this article covers; at that point, conditions in the mines had changed significantly. In any case, “Tuolumne’s” concerns focus on the inefficiency, instability, and uncertainty arising from insecurity of title, all of which would have troubled early nineteenth-century authorities on property law and economic progress. First, he argues that the conditions set on holding a claim, such as the notice requirement and the work requirement, practically invited litigation because they were fuzzy.<sup>178</sup> Stakes and notice boards could be knocked down or moved, and work requirements, which often applied only when water was available, generated disputes over what constituted “work” and when water was “available.” These difficulties were compounded by the lack of written law beyond the barebones of the code, which obliged juries to reinvent the wheel for every case.<sup>179</sup> Fee-simple, “Tuolumne” implies, would supply a bright-line rule that would avert many of the interminable lawsuits then plaguing the mines.

Second, “Tuolumne” claims that because their titles were insecure, miners were more concerned with rapid profits than with long-term productivity. Each miner worked his claim blindly and hastily, sometimes overlooking rich deposits, and dumping his dirt and stones on what he supposed to be unproductive ground. The next wave of miners then washed the same dirt or shifted the first party’s tailings to get at the remunerative ground beneath.<sup>180</sup>

Finally, and at greatest length, “Tuolumne” argued that the miners were constrained to remain on their claims, keeping up a pretense of regular work even when there was not enough water to mine effectively. Because they were thus tied down, they could not engage in other, more gainful employment. He said that at Shaw’s Flat and Columbia, for instance, the profitability of the claims was certain, although title was not. Hundreds of miners sat on their claims for months, warding off interlopers instead of engaging in gainful employment elsewhere, or joining a company to bring the water to the district that would bring the long toms into action.<sup>181</sup> On the other hand, because the miners had no permanent stake in their diggings, “Tuolumne” wrote, they were reckless and restless, and failed to invest in their communities. He proposed that all mining claims should be surveyed and recorded, and that claimholders should be

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178. *Id.*

179. *Id.*

180. “Tuolumne,” *The Present System*, *supra* note 176, at 1. See also BROWNE, *supra* note 171.

181. “Tuolumne,” *The Present System*, *supra* note 176, at 1. For explanation of the long tom, see *supra* text accompanying note 132.

issued a certificate granting them perfect title so long as they complied with certain uniform and well established requirements.<sup>182</sup>

The problems that “Tuolumne” identified were real—especially, as we have seen, the problem that hundreds of miners sat idle near their claims waiting for them to become workable.<sup>183</sup> Whether it was feasible to survey the diggings at the beginning of each new rush or to administer a title-based system, let alone enforce it, is less clear. At the least, however, “Tuolumne” articulated the very real difficulties of a property regime without fee-simple.

As we have seen, those who were in California in 1848 thought they were witnessing the birth of a new order in which the individual laborer held all the power and capital was powerless, and most of them thought this was a good thing. Henry George would oppose private ownership of land three decades later.<sup>184</sup> The few miners of the early 1850s who wrote about the advantages of limited property rights hoped to secure for labor the advances it had made in 1848. Like their representatives in Congress and in the California legislature, whose speeches they may have read, these miners believed that outright ownership of gold-mining claims would enable speculators to monopolize the good diggings and to subordinate the laborer to capital.<sup>185</sup> In the fall of 1852, a meeting of miners and settlers in Spring Valley passed a resolution urging the mining community “not to sanction the making of any new claims by men who already have enough,” lest a mining aristocracy arise among them.<sup>186</sup> James Carson wrote in 1852 that “one claim after another would be purchased until whole districts would be under the control of the money gods.”<sup>187</sup> He observed that in diggings where it was possible to sell mining claims, newcomers had no chance for a share, and had to hire out for what they could get. If the tenure laws were passed, Carson said, the current miners would be reduced to hired hands within six months, and their salaries would be reduced to a pittance. Private property rights would lead inevitably to monopoly, as rich investors would buy out individual miners until there were no more miners who worked their own claims. The miners worried not only that they

182. “Tuolumne,” *The Present Tenure*, *supra* note 176, at 1.

183. *See supra* notes 74-75 and accompanying text.

184. *See supra* notes 10-11 and accompanying text.

185. *See, e.g.*, Carter, *supra* note 24 (entry describing speeches on July 4, 1849, Coloma). The speakers differed on the questions of slavery in California and foreigners in the mines, but “both were opposed to monopolies of all kinds, particularly of land.” Carter, however, thought there was little chance of monopoly.

186. Sharp, *supra* note 120. I owe this reference to GOODMAN, *supra* note 23, at 55-56, who notes that the miners at the convention envisaged a republican society of equals in the mines, without the speculation and profiteering of the world outside.

187. CASTRO, *supra* note 22, at 175.

would no longer be able to play in the lottery, but also that when capital got the upper hand, they would not even get the full value of their labor—the value of labor being particularly easy to calculate in the mines.<sup>188</sup>

Limited property interests protected the spirit of freedom and equality in 1848, when “labour ha[d] obtained the upper hand of capital.”<sup>189</sup> For example, Pierre de Saint-Amant, a Frenchman writing about the mines in 1854, explained how agglomerations of capital were shackled by the rule that only an individual’s labor created a property right in his claim. A company could only acquire mineral land for its machinery by holding the land in the name of the employees, who, if the site proved rich, would not be satisfied with their simple salaries. It was the absence of secure title alone, Saint-Amant wrote, that postponed the time when big money would consume the little man.<sup>190</sup> Those who had capital to invest, of course, saw the restrictions on accumulation as impediments to progress.

The labor theory of value—or the miners’ belief that capital could not “earn” money—is illustrated by their attitude towards those who helped finance their trips to California. For many, the trip to the gold mines was a joint venture with a person or persons back home. Those who stayed home supplied the capital for the expedition, while the forty-niner contributed his labor, and in a year’s time they would divide the profits.<sup>191</sup> When the miners reached the mines, however, and understood how grueling the work was, how miserable the life, and how great the risk of disease and death, they one and all concluded that the “bargain” was unconscionable. In their view, the laborer—i.e., the gold-miner—had created all of the profits while the

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188. See *id.* at 176. Compare the words from final resolutions of the convention of the National Trades’ Union movement of the Workers’ Party in 1834:

[T]he social, civil, and intellectual condition of the laboring classes of these United States . . . exhibit the most unequal and unjustifiable distribution of the produce of labor, thus operating to produce a humiliating, servile dependency, incompatible with the inherent natural equality of man.

6 DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY 205 (John R. Commons & Helen L. Sumner eds., 1910). In another resolution, the delegates condemned the sale of the public lands, because this would effectively debar the laboring classes from such land for lack of capital. *Id.* at 207-08.

189. See *supra* note 23 and accompanying text.

190. See SAINT-AMANT, *supra* note 123, at 562-64.

191. See, e.g., HENRY SARGENT CRANDALL, LOVE AND NUGGETS 19 (Roland D. Crandall ed., 1969) (entry for Jan. 15, 1849); WILLIAM THURSTON, GUIDE TO THE GOLD REGIONS OF UPPER CALIFORNIA 63 (London, Darling 1849) (quoting “a New York correspondent of one of the chief daily journals”); James W. Haines, Life and Experiences in California 12 (unpublished typescript, Bancroft Library, catalogued at Banc MSS C-D 323) (notes written in 1887 for the use of H.H. Bancroft) (stating that farmers in Kingsville, Vermont, furnished funds for prospective miners in return for half their earnings in the two years after their arrival in California).



investor did nothing. Prentice Mulford surmised that none of them actually divided their *earnings* when they got back,<sup>192</sup> although at least some miners did return the money that the other advanced.<sup>193</sup> According to the Sacramento *Placer Times* of May 3, 1850, the Pennsylvania Supreme Court ruled that an alleged silent partner in a gold-digging arrangement had no right to the \$20,000 worth of gold dust dug up by his partner, the miner. The Court refused to enjoin the miner from collecting the whole amount from the U.S. Mint, where it had been deposited, and said that “even if there was a partnership, the plaintiff not having labored towards that end, and the whole fund having been acquired by the defendant, it was not a partnership properly.”<sup>194</sup>

The miners wanted to prevent a few individuals from monopolizing the mineral lands and reducing the rest of the population to wage laborers. In this sense, one might call the miners anti-capitalist. At the same time, however, they had all invested huge sums to get to California for the sole purpose of collecting as much gold as they possibly could, whether by mining or by “speculation”—that is, trade, money-lending, or buying and selling claims where this was permitted.<sup>195</sup> These two priorities were not seen as conflicting.<sup>196</sup> James Collier, the newly arrived Collector of Customs, wrote on November 13, 1849 that California’s position was “peculiar” because here, labor controlled capital. “The mechanic and artisan fixes his own price, and the capitalist is compelled from *necessity* to submit to

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192. See PRENTICE MULFORD, PRENTICE MULFORD’S STORY: OR, LIFE BY LAND AND SEA, A PERSONAL NARRATIVE 8 (New York, F.J. Needham 1889).

193. See, e.g., Letter from Charles Rossiter Hoppin (June 6, 1850, Goodyear’s Bar, Sierra County), in CHARLES ROSSITER HOPPIN, SOME OF HIS LETTERS HOME 1849-1863 AS WRITTEN TO HIS FAMILY IN NILES, MICHIGAN, FOLLOWING HIS IMMIGRATION TO CALIFORNIA IN 1849, at 6-7 (1948) (stating that he considered the contract with his backers null and void: “I now think of paying him for my fit out across the plains and that is all I shall do”). See also Letter from Albion C. Sweetser (Aug. 25, 1850, North Fork American River) (unpublished manuscript, Huntington Library, catalogued at HM 4172) (stating that the outfitter had provided \$500 for one year’s expenses and felt he had been cheated when his mining partner sent back only \$600).

194. *California Gold Diggers—Important Decision*, PLACER TIMES (Sacramento), May 3, 1850, at 4. This case is not included in the Pennsylvania reporters of the time.

195. See, e.g., Letter from William A. Brown to his father (July 25, 1850, Stockton) (unpublished manuscript, Huntington Library, catalogued at HM 26407-26462) (using the term “speculating” to describe joining a trading establishment); Henry Sturdivant, Journal from Dec. 8th. [18]49, at 30 (unpublished manuscript, Huntington Library, catalogued at HM 261) (entry for June 11, 1850, Kanaka Diggings, El Dorado County) (stating that Sturdivant is afraid he will miss “all good chances for speculation”); Reed, *supra* note 87 (entry for Nov. 23, 1851) (using the phrase “a speculative turn” to describe buying claims on credit).

196. In New England, too, faith in equal opportunity persisted in a world of capital and labor. See J.R. POLE, THE PURSUIT OF EQUALITY IN AMERICAN HISTORY 152 (2d ed. 1993) (elaborating this point and quoting a “prominent Massachusetts speaker” as saying that “the laborer of today is the capitalist of tomorrow”).

that price, whatever it may be,” he wrote. At the same time, he said, California “now is, and for all time to come must be, essentially *commercial*. There *is* gold in *California*. She *is* rich in mineral wealth: that is a ‘fixed fact.’”<sup>197</sup>

The miners were both entrepreneurs and egalitarians, to whom equality meant, above all, equal opportunity.<sup>198</sup> They did not regard pre-existing wealth as a legitimate source of property in mineral land. Some believed enthusiastically that the conditions in the gold mines neutralized the artificial inequalities that arise in a complex society. One described California as “the most democratic country” in the world.<sup>199</sup> “Working side by side in all these gulches are the sons of toil and those reared in the lap of ease. . . . Here the wielder of the pick is as proud as a lord, and bends the knee to no man.”<sup>200</sup> If anyone had an advantage, it was those who had previously been at the bottom of the social ladder, namely the manual laborers.<sup>201</sup>

Many of the miners had come to California specifically to liberate themselves from the control of those with money, by collecting enough gold to set up in business for themselves or by paying off the mortgage on the family farm. The anti-speculator, anti-capital sentiment in the mines was therefore strong. On being asked why he had come to California, one gold-seeker answered, “I find that in this world the standard by which men are estimated is wealth, and only wealth.”<sup>202</sup> Before arriving at the mines, he said, “I used to pass men who would bend upon me such looks of *patronizing tolerance* . . . simply because their fathers were rich or had bestowed upon them the fruits of their ill-gotten gains, only because I was clad in a laborer’s garb or engaged in honest labor.”<sup>203</sup> Similarly, a miner in 1851 reported that thousands of Americans had come to the mines to “extricate themselves from the iron grasp of *land sharks*, that are scattered throughout the length and breadth of our country.”<sup>204</sup>

197. Letter from James Collier to W.M. Meredith, Secretary of the Treasury (Nov. 29, 1849), *in* CALIFORNIA AND NEW MEXICO, *supra* note 3, at 30-31.

198. On early nineteenth-century movements aimed at equality of economic opportunity, including Skidmore’s view that the state should bring about equality of property by collecting all existing property and redistributing it, see POLE, *supra* note 196, at 165-68.

199. 2 TAYLOR, *supra* note 46, at 68 (ch. 30, “Society in California”).

200. MCCALL, *supra* note 155, at 17 (Oct. 6, 1849, Yuba River). *See also* Letter from Allen Varner to Elias Varner (Nov. 12, 1849, Rector’s Bar, Placer County), *in* Varner, *supra* note 95 (stating that those who wanted to make money in the mines had to work hard and live rough, “[f]or there is no Aristocracy to contend with here”).

201. *See* SAINT-AMANT, *supra* note 123, at 582-83.

202. MCCALL, *supra* note 155, at 25-26 (Oct. 26, 1849).

203. *Id.* at 26.

204. JOHN HALE, CALIFORNIA AS IT IS: BEING A DESCRIPTION OF A TOUR BY THE OVERLAND ROUTE AND SOUTH PASS OF THE ROCKY MOUNTAINS 24 (Grabhorn Press 1954) (1851).

The miners had solid grounds for mistrusting private property rights. While they were passing their codes in the foothills, other immigrants were trying to settle on California's arable land. Much of that land was claimed by native Californians or their successors in interest. The Treaty of Guadalupe Hidalgo (signed February 2, 1848) provided that all Mexican-owned property in territories ceded to the United States would be respected.<sup>205</sup> Years of litigation followed over the validity of individual titles to the enormous Mexican ranches. During that time many settlers, or squatters, were uncertain whether the land they occupied was available for preemption or was already taken. The miners saw what happened to squatters in Sacramento and San Francisco, and knew what would happen to them if title came to the mining camps: with title would come lawyers, and with lawyers would come the protection of one class of claims against another.

The values of egalitarianism and opposition to capital played an important part in shaping the law and then sustaining it. They are the only justifications that the miners themselves gave for their peculiar system of property law, and this is reason enough to take them seriously. Moreover, as Zerbe and Anderson point out, the willingness of outsiders to respect local mining rules as they found them, and of claimholders to come to one another's assistance in case of an alleged breach of the rules, must have been based at least in part on the conviction that the rules were good.<sup>206</sup>

I suggested above that the miners passed their codes from behind a veil of ignorance about their future success or failure, and it is interesting to consider those codes from a Rawlsian perspective. Rawls says explicitly that his work compares different regimes in their ideal forms, and that it is irrelevant for his purpose whether a well-ordered democratic society exists now or has ever existed; at most, he seeks to show that such a society is possible in the future.<sup>207</sup> Conversely, the miners were aiming at much less than a well-ordered democratic society; their rules governed only certain property rights in temporary, highly specialized communities. Thus, their society cannot be tested comprehensively against Rawls's theories. I will only remark on some ways in which mining camps that followed the one-claim rule could be said to satisfy the two principles of justice underlying Rawls's idealized conception of a property-owning democracy—namely, equal basic liberties for all and fair equality of opportunity, coupled with the difference principle (i.e., that social and economic

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205. See *supra* note 4.

206. See Zerbe & Anderson, *supra* note 9, at 114.

207. See RAWLS, JUSTICE AS FAIRNESS, *supra* note 12, at 16-17, 137.

inequalities must “be to the greatest benefit of the least-advantaged members of society”<sup>208</sup>). I will suggest that they owe this resemblance to the circumstances in which they were passed.

Rawls suggests that a well-ordered democratic society would take the form of a property-owning democracy or a liberal-socialist regime, and that either system in its ideal form could satisfy the two principles of justice. For our purposes, we can leave aside the liberal-socialist alternative. A property-owning democracy is a political system in which private individuals own the means of production, but property ownership is widespread. A free market is an essential part of such a system because it sustains certain basic political and personal liberties, such as the choice of an occupation.<sup>209</sup> Unchecked, however, a free market generates concentrations of wealth. A property-owning democracy “avoids this, not by the redistribution of income to those with less at the end of each period, so to speak, but rather by ensuring the widespread ownership of productive assets and human capital (that is, education and trained skills) at the beginning of each period.”<sup>210</sup> This suggests that there would be limits on intergenerational wealth transmission.<sup>211</sup> In such a system, great inequalities would not emerge in the first place. Richard Krouse and Michael McPherson write that “clearly Rawls’s view presupposes that widespread ownership of productive property would result, and if it did, the distinction between laboring and capitalist class would disappear.”<sup>212</sup>

In many ways, the mining camps that permitted miners to hold only one claim at a time fit this picture. By preventing those who did strike it rich from investing in multiple claims, the codes allowed each miner to keep the rewards of his own labor, but not to use his earnings to monopolize the means of production. In a way, the life of a mining claim was the period at the end of which productive assets would be reassigned in equal measure to all participants. Although there were great inequalities in wealth, there was no concentration of the ownership of the means of production. The miners developed this arrangement to ensure that there would be no distinction between labor and capital. In this respect, the miners, from behind

208. *Id.* at 42-43.

209. Rawls suggests that in the just state, economic power must be dispersed among firms and that it is desirable for citizens to share in exercising that power. *See id.* at 114, 138-39. *See also* Richard Krouse & Michael McPherson, *Capitalism, ‘Property-Owning Democracy,’ and the Welfare State*, in *DEMOCRACY AND THE WELFARE STATE*, 79, 81 (Amy Gutman ed., 1988). Rawls expresses his debt to this article in *JUSTICE AS FAIRNESS*, *supra* note 12, at 135.

210. RAWLS, *JUSTICE AS FAIRNESS*, *supra* note 12, at 139.

211. *See* Krouse & McPherson, *supra* note 209, at 83, 100-04.

212. *Id.* at 83.

their veil of ignorance, designed a regime that realized Rawls's principles of justice.

In other respects, of course, the mines were a travesty of property-owning democracy. The miners who enacted the codes were all anglophone, American young men, and one way they sought to maintain the political equality in the diggings was by ejecting those whose rights were most vulnerable, namely, those of other ethnicities.<sup>213</sup> Moreover, the miners made no provision for those who became too sick to work, and many miners died for lack of nursing. In a just society, life-saving medical care would be available to all as a fundamental element of fair equality of opportunity.<sup>214</sup>

Most strikingly, perhaps, mining itself stretched equality of opportunity to the point of absurdity. Since fair equality of opportunity is one of Rawls's two principles of justice, he is deeply concerned about the extent to which differences in natural endowments should be allowed to result in inequalities of wealth.<sup>215</sup> In the mines, natural endowments such as skill, strength, and perseverance conferred hardly any advantage; almost every miner who kept a journal wrote that mining was a lottery and success almost entirely a matter of luck.<sup>216</sup> This was deeply demoralizing to the tens of thousands of young Americans brought up to believe that hard work would be rewarded. Rawls developed his famous difference principle—the view that social and economic inequalities are to be to the greatest benefit of the least advantaged members of society—as a means of respecting the individual's "ownership" of his endowments (that is, of himself) without allowing him to exploit them at the expense of the less fortunate.<sup>217</sup> A world in which natural endowments counted for nothing would be too equal for Rawls. Rawls's property-owning democracy would—and the property regime in the gold mines *did*—promote equality of opportunity by minimizing the impact of randomly distributed advantages such as social class and talent. In the gold mines, however, success and failure themselves were randomly distributed; equal opportunity meant a ticket in a lottery that would generate highly unequal results. As Barbara Goodwin notes, the random or arbitrary distribution of goods represents a kind of equality, but it cannot be called egalitarian.<sup>218</sup> It is true that the miners played the

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213. See, e.g., *supra* notes 71, 105; see also *infra* note 240.

214. See RAWLS, JUSTICE AS FAIRNESS, *supra* note 12, at 174.

215. See *id.* at 74-77; Krouse & McPherson, *supra* note 209, at 94-99.

216. See *infra* note 222.

217. See RAWLS, JUSTICE AS FAIRNESS, *supra* note 12, at 43, 74-77.

218. BARBARA GOODWIN, JUSTICE BY LOTTERY 116 (1992) (stating that a random distribution of social goods in a once-and-for-all draw would not do a better job of promoting equality than would any other means of distribution, but that repeated draws in a social lottery

lottery repeatedly by working out one claim after another, and someone who knew nothing of the realities of gold mining might suppose that this would mitigate the arbitrariness of the system. The chances of succeeding in the diggings were so minute, however, that only one in twenty immigrants made a profit on their venture, a result that is equivalent to a single draw in a lottery.

### *B. Self-Interest*

The norm of egalitarianism within the mining community, as I have described it above, was driven by a kind of long-term self-interest—a concern that if the privileged were to accumulate claims, the majority of the community would eventually be reduced to dependence and poverty. But the miners’ decision to limit property rights served their own immediate self-interest as well. The miners themselves never articulated this point, but it can be deduced from their aspirations and from the technical details of mining, the most important of which, for present purposes, was the high turnover of mining claims. What the miners did *not* do was to make an initial distribution of claims, and then to work those claims until the end of the season. Instead, a miner and his companions would work their claims until they were persuaded either that there was no gold there or that they had taken out most of what there was. This process could take as little as a few days, and seldom took more than three weeks. The miners would then move on to another claim nearby, or even to other diggings.<sup>219</sup> The claims they had abandoned were very often still desirable to others, however, who believed they might have better luck than the original claimholders.<sup>220</sup> These others might be newcomers to the diggings looking for a foothold, or neighbors who thought the abandoned claims looked better than the ones they were currently working. With everyone moving all of the time, all had an interest in seeing that mining claims became free as quickly as possible, and in bright-line rules defining when a claim became “jumpable.” The community did not want a few rich miners to buy up claims and lock the others out.

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would promote egalitarian social justice). I owe this reference to Simon Stern.

219. See Letter from Riley Senter to His Cousin (July 7, 1850, Angel’s Camp, Calaveras County), in RILEY SENTER, *CROSSING THE CONTINENT TO CALIFORNIA GOLD FIELDS: LETTERS OF RILEY SENTER WRITTEN DURING HIS TRIP ACROSS THE PLAINS FROM NEW YORK IN 1849 AND DURING HIS FIRST YEARS IN THE GOLD CAMPS OF CALIFORNIA* (1938) (unpag.) (stating that miners might give up on a claim after three days and abandon it).

220. See, e.g., 1 TAYLOR, *supra* note 46, at 91 (ch. 9, “Diggings on Mokelumne River”) (describing Mokelumne Diggings in 1849, and stating that “[i]n the dry diggings especially, where the metal frequently lies deep, many instances are told of men who have dug two or three days and given up in despair, while others, coming after them and working in the same hole, have taken out thousands of dollars in a short time”).

The uncertainty of mining—what made it a gamble—was the impossibility of knowing, even approximately, the value of any given claim in advance. One of the flaws of both Umbeck's analysis and that of Zerbe and Anderson involves their assumption that miners would have had some knowledge about the value of a claim, at least at its margins. The gold was distributed almost randomly, and there were no indications on the surface of whether there was gold underneath.<sup>221</sup> This was especially true in the most crowded camps, where the entire surface of the earth had been torn up and moved from one pile to another, until there were no natural features left. All of the soil contained some gold, but not all of it repaid washing. The miners were looking for rich soil, leads within the soil, and gold collected in the cracks and crannies of the bedrock. Such concentrations of gold were very localized; there might be hundreds of dollars worth of gold in one fissure in the bedrock, and no gold to speak of within a radius of a hundred feet. Thus, a hundred parties could be at work on a bar, all digging from dawn to dusk, and one might hit upon a fortune in gold while the others barely made their keep. Hence the cliché, repeated in almost every journal and correspondence, that mining was a lottery.<sup>222</sup> "No rules can be given, no evidences furnished for finding the concealed veins or opening the rich deposits," one miner wrote.<sup>223</sup> Even one claim might yield very different amounts from one day to the next, so that future earnings could not be predicted from the history of the claim. In May 1850, a gold-seeker in Jacksonville reported that "[c]ases are very frequent of persons making \$100 in a day, and sometimes in a single hour, and

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221. Taylor, for example, makes this point:

In holes dug side by side, I noticed that the clay would be reached eighteen inches below the surface in one, and perhaps eight feet in the other. This makes the digging something of a lottery, those who find a deposit always finding a rich one, and those who find none making nothing at all.

*Id.* at 246 (ch. 23, "Journey to the Volcano"). Many claims were bought and sold nevertheless, but the risk factor was high. Prices were generally low, and where claims were believed to be especially valuable, the price was sometimes specified to be taken from future earnings or to be a share of future earnings.

222. It would be easier to list here the handful of accounts that do not call mining a lottery than to present a representative sample of the great majority that do. For a few examples of this comparison, see Woods, *supra* note 77, at 56 ("[T]he chances of our making a fortune in the gold mines are about the same as those in favor of our drawing a prize in a lottery."); Letter from Charles Henri Doriot to his brother (Nov. 20, 1850, Coloma) (unpublished manuscript, Bancroft Library, catalogued at Banc MSS 85/70 C) (stating that mining is like drawing tickets in a lottery, and that "it is a new lesson to old miners that has bin mineing in other places"); Letter from Kimball Hale Dimmick to "Sarah" (May 1, 1849, San Jose) (unpublished manuscript, Bancroft Library, catalogued at Banc MSS C-B 847) (asking the recipient to tell friends who think of coming to California "that they are entering into a lottery speculation where the majority are doomed to lose").

223. Woods, *supra* note 77, at 20.

the whole week following making nothing."<sup>224</sup> The guideline was that the claims nearest to a big strike were also likely to be rich. The claims next to a new discovery were therefore the most desirable, although they often disappointed.<sup>225</sup>

It is true that claims were bought and sold—that is, that a value was assigned to them. In fact, it was impossible to get a claim in some diggings except by buying. But the purchase of a claim was as much of a gamble as any other aspect of mining. One man was said to have offered to sell a claim on Poor Man's Creek for \$50. The next day he took \$250 out of the claim, and the day after that, \$2,000.<sup>226</sup>

Even if a miner was lucky enough to have a rich claim, it would provide employment for only two to three weeks, and then he would have to move on.<sup>227</sup> Moreover, the miners were restless, even when their claims were paying well. At the slightest rumor of rich new diggings, they were inclined to pack their things, turn their backs on their claims, and rush off to the latest El Dorado. "There are thousands of places where men can make from 5 to 8\$ per day, but these are little sought," a miner wrote. "Those who came by the last year's emigration rush to the best points in the hope to make their fortunes in the time allowed for their stay, say by this fall but this course is not always practicable."<sup>228</sup>

The claim that one miner abandoned, for whatever reason, might be snapped up by someone else. The first wave of miners had gathered the gold that lay near the surface, either highly concentrated in the top layer of dirt, or on bedrock covered by only a few feet of soil. In 1849, and increasingly thereafter, the gold-seekers had to dig deep holes to find pay-dirt. Prospecting now involved digging down six feet, ten feet, or even twelve feet, usually only to find that there was not enough gold there to make digging remunerative. Mining re-

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224. *Id.* at 131 (May 1, 1850, Jacksonville). *See also* Letter from Solomon A. Gorgas (Sept. 9, 1850, Placerville) (unpublished manuscript, Huntington Library, catalogued at HM 2187) (describing two men who took \$2,000 from a claim while those around him were barely making board); "E.E.P.," *From the Mines*, PLACER TIMES (Sacramento), May 20, 1850, at 2 (stating that a few people are making \$500 to \$1,000 per day, but that rich spots are scarce and soon worked out, and they are randomly distributed through the diggings).

225. *See, e.g.*, Letter from Thomas J. Van Dorn to His Wife (July 28, 1850, Forks Yuba), *in* Van Dorn Papers, *supra* note 126 ("But like all other rich points the diggings are very unequal + many claims fail").

226. *See* Parker, *supra* note 148 (entry for May 5, 1851, Poor Man's Creek, Plumas County).

227. *See, e.g.*, Hovey, Journal, *supra* note 71, at 55 (entries for Aug. 27–Sept. 8, 1849, Mokelumne Hill, Calaveras County) (claim on virgin ground worked out in thirteen days); *id.* at 100-01 (entries for Apr. 5-24, 1850, Jackson's Creek, Amador County) (claim worked out in nineteen days); *id.* at 102 (entry May 4, 1850, Indian Gulch, Amador County) (claim worked out in nine days).

228. Letter from Van Dorn, *supra* note 126.



quired a greater investment of time and labor: one could say that the price of the lottery ticket increased. At some point, a prospector would conclude that it was not worth digging any deeper, that the dirt he had taken out so far was not promising, and he would abandon his hole to try somewhere else. This was a judgment call, and the miner sometimes gave up too soon; there might be gold only inches below the level at which he stopped. It happened often enough that two or three miners would dig for days and give up, and a newcomer would jump into the same hole and hit a lead with the first shovelful. An abandoned claim was therefore well worth trying again and again.<sup>229</sup>

In any case, as gold became scarcer and technology improved, the same land was dug over repeatedly by successive claimants.<sup>230</sup> If the diggings were rich enough, the miners who left were able to sell their claims and no ground was abandoned. In this case, the claim began to look more like traditional property, in which the holder's rights are derived from the first owner and not from his own occupation.<sup>231</sup>

In short, the miners were continuously on the move, continuously seeking new claims. Newcomers to the diggings, obviously, were better off under a system that made claims available as soon as possible, and at the lowest possible price—and the newcomers were among the voters. But the concerns of the present claimholders were similar to those of newcomers, because they knew that in two weeks' time, they would probably be unemployed and would need a new location, and they could not know whether they would then have money or not. Unless they had heard of other, richer diggings elsewhere, miners preferred to stay in the vicinity of their old claims, because of the costs involved in prospecting and moving camp. Claimholders as well as outsiders therefore had a real interest in

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229. See SHINN, *supra* note 15, at 24.

230. One miner, for example, wrote,

The first digging of the river banks + beds of the creeks, or rather the picking, gave from four to six ounces per day + board worth \$5.00, whiskey for \$2 the glass or \$5. per bottle; the second digging and washing, which was more thorough and which I arrived in time to get a parting glance at, gave from one to 2 1/2 ounces per day, board \$3, whiskey 50c the glass + two dollars per bottle; while the present working, with large machines called long toms, gives from four to five dollars per day to the man, board \$1, whiskey 12 1/2 cts the glass + everything else in proportion. We now wash the dirt that has been washed through cradles + break up and wash the ledge to the depth of two or three feet. I think it will all be worked over again at one or two dollars per day.

Letter from A.W. Genung to "Friend Thomas," Apr. 22, 1851, Curtis Creek, Tuolumne County (unpublished manuscript, Beinecke Library, catalogued at WA MSS S-1277).

231. See, e.g., Letter from Van Dorn, *supra* note 126 ("Things have changed much since we first came in. Then we had little difficulty in securing ground but now every point which has any note is crowded + held of the first occupants.").

keeping property mobile, and in making it impossible for a few speculators to control the diggings.

I suggest that the miners voted for a system that would allow them to keep playing the game; they opted for restricted property rights now in exchange for the possibility of securing a new claim when their own had been exhausted. The few miners who were not operating in the dark were those who already had money to invest in claims. These miners opposed the one-claim rule and circumvented it however they could.

The rigid restrictions on property also promoted administrative efficiency, although the miners may not have had this in mind when they set up their property regimes. They passed rules, elected officials, and, in some camps, heard civil disputes and tried criminal cases at mass meetings of up to several hundred men. Henry Hansmann, who has studied worker-owned firms, has found that the biggest difficulty such firms face is the cost inherent in collective decision-making.<sup>232</sup> Direct democracy is most viable, he found, where workers are fairly homogeneous, that is, where they do similar work, where there is minimal hierarchy of status or authority, and where profits are equally divided—in other words, “where there is minimal opportunity for conflicts of interest.”<sup>233</sup> Hansmann notes that, in fact, many worker-owned firms reinforce the homogeneity of interests of their members by paying them all the same salary regardless of task, productivity, or seniority. Plywood cooperatives say explicitly that the policy of equal pay promotes harmony among the worker-owners.<sup>234</sup> The practice in law firms of dividing earnings equally among all partners of the same age is particularly striking, Hansmann observes, because lawyers keep track of their billable hours and it is relatively easy to calculate their productivity. The firms could pay a partner according to his or her contribution, but they choose not to. Many law firms have also refused to create part-time partnerships, with a proportionate share of earnings, for women partners who would like to combine practice with child-rearing. Hansmann suggests that different categories of partners would hamper the collective governance of the firm: “A simple rule under which everyone does essentially the same amount and kind of work, and receives the same pay, is by far the easiest to agree upon and to enforce.”<sup>235</sup> As service industries become ever larger and more complex, Hansmann adds, they take on salaried employees or convert to

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232. See Hansmann, *supra* note 14, at 1783-90.

233. *Id.* at 1784.

234. *Id.* at 1785.

235. *Id.* at 1787.

investor ownership rather than continue as worker-owned, democratic companies. This was also the experience of the miners. In later years, when labor became much cheaper, the Americans became owners and specialist workers, while the manual labor was delegated to foreigners, particularly Chinese immigrants.<sup>236</sup>

The miners never mention administrative efficiency as a reason for restricting property rights. They may or may not have been aware that their limits on property holding made it much easier for the property regime to run itself, without a separate institution for law enforcement. In fact, however, it was much easier for miners to monitor one another's behavior if all claims were of equal size. Where the first-comers were allowed to keep their large, original claims, for instance, instead of accepting a new, standard-sized share, what would happen when these were abandoned or sold? Would the purchaser get the larger claim? How would first-comers document their status or the extent of their original claims? In those camps where accumulation of claims was permitted, there was always the danger that "sales" were not what they seemed—that a group would take claims by location, "sell" them to one another, and then locate further claims for themselves.<sup>237</sup> In short, enforcement of the rules depended on everyone's interests being open and obvious, which in essence meant that these interests were equal. If a miner occupied a claim of more than the standard size, others knew that the excess was there for the taking; if a miner was absent for more than three days, everyone knew that his claim could be jumped. In camps where the rules permitted miners to accumulate claims or permitted groups of miners to hold all of their several mining claims by working any one of them, it became almost impossible for neighbors to monitor one another.<sup>238</sup> In short, the California diggings serve as yet another illustration of Henry Hansmann's point that direct democracy is most practicable when the members of the group have equal interests.

## VI. CONCLUSION

Some of the most influential theories of property law begin with a story about how private property first came into being, or a cautionary tale about what would happen without private property.

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236. See PAUL, *supra* note 1, at 323.

237. See Morriss, *supra* note 21, at 601 nn.85-86. Note the similar method of cheating on load claims at a later date. See BROWNE, *supra* note 6, at 230 (stating that the customary limit on quartz- mining claim size was "more apparent than real" and describing such fictitious sales).

238. The difficulty of monitoring different kinds of interests is illustrated by claims held by partnerships. See *supra* notes 140-143 and accompanying text.

Carol Rose has argued persuasively that these stories are entirely ahistorical and serve as modern fables rather than as attempts to describe actual events.<sup>239</sup> Rose's theory accounts for some of the odd features of these creation myths; not only do they lack a setting in place or time, but the actors are recognizably modern (post-medieval), in a position to organize their affairs and negotiate with others, and familiar with the option of private property. They are, in fact, the philosopher's contemporaries transported to a wilderness and free to design society anew. Locke suggests as much when he says, "In the beginning, all the world was America." We know, however, as Locke presumably did, that the English colonists in America did not reinvent private property, and this was indeed one of the institutions that the founding fathers explicitly sought to preserve a century later.

Rose suggests that Locke and Blackstone never pretended to be writing history books. Their stories were noble lies, intended to persuade the reader that limited cooperation was better *for him* than all-out competition—that by surrendering the power to grab, the individual ultimately gets more, and is able to keep more. If Rose is right, as I believe she is, then Locke and the other theorists did not care about how property law evolved, or about comparative property law, or even whether every single person (as opposed to everyone collectively) is better off under a regime recognizing private property. Since the accuracy of their stories was irrelevant, the developments in the wilderness of the Sierra Nevada would not have mattered to them one way or the other.

It would not have mattered except in this: assuming Rose is right, these accounts of the origins of private property are hurried and vague because Locke and Blackstone were not sure that rational self-interest would necessarily generate a private property regime. They were so little impressed by human nature that they did not even consider more idealistic or egalitarian systems; it was enough for them to persuade—or beguile—the stronger and more aggressive members of society to recognize private property. But the real-world experiences of the California gold miners was that the most self-interested modern men, whose single goal was to get rich quick, made a social compact almost automatically; and this compact was in some ways, and especially in some camps, more egalitarian than that imagined by the classical theorists. This is not to say that the miners were saints. Their respect for majority rule may count as a virtue, their support for labor over capitalism was at best enlightened self-

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239. See Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 48-52 (1990).

interest; at worst, it showed a selfish disregard for the long-term well-being of the state. Moreover, a large number of camps did allow accumulation of claims, and thus rejected the strict egalitarianism of the one-claim rule.

The mining codes show that many Americans designing new property regimes in the diggings were anti-capitalist and opposed fee-simple in mineral lands. Their egalitarian, use-based system worked well, however, only when the relationship between a claimholder and his claim was simple, open, and obvious, a state of affairs that could not be maintained for long even with the best will in the world. This ideal regime was undermined early on by adjustments to the practical requirements of mining and by the inventiveness of greedy individuals—and eventually also by the exhaustion of the mines and the introduction of capital-intensive mining technology. Thus the miners' experience demonstrates that some Americans in certain conditions rejected fee-simple, but that experience does not provide evidence that a use-based property regime could be sustained.

The differences between the various codes illustrate the indeterminacy of basic ideological commitments—that is, values such as fairness, equal opportunity, and equality generate varied property regimes even in the same environment and with similar, sometimes identical players. Although equality dictated a maximum size for claims held by preemption in any given camp, it could not determine what that size should be; claim sizes in the richest camps varied from ten feet square to thirty feet square. More strikingly, “fairness,” in American mines, had both Rawlsian and Lockean elements to it, which could not both be satisfied at once. In some camps, fairness and equality meant equal opportunity; one claim of the standard size for each or one lottery ticket. Some might strike it rich while others had nothing to show for their labor, and this was almost entirely a matter of chance, but individuals who were lucky in the first round could not use their winnings to improve their chances by buying multiple claims. Here the Rawlsian idea of fairness predominated. In other camps, fairness and equality meant that a willing seller and willing buyer could enter into any transaction they wished. Here, claims were bought and sold just like real property back in the states, resulting in a more Lockean regime.

Nowhere were a strong arm, hard work, and self-denial sure to be rewarded, nor were gambling and drinking sure to lead to ruin, since even for those accustomed to hard labor, success depended largely on luck rather than effort. One might see this as a logical extension of the principle that the endowments of society and nature should give no one an advantage, but it makes an absurdity of Locke's idea

that the basis of private property is the individual's natural rights in the product of his own labor.<sup>240</sup> The miners were disturbed by this paradox. They knew that mining was a lottery and that success was a matter of luck, yet they continued to believe that industry and frugality would be rewarded. Failure in the mines was thus inevitably regarded as a personal failure, and the miners never doubted that it was fair for each to keep the gold he had found.<sup>241</sup> In short, the mines promoted neither a Rawlsian nor a Lockean notion of fairness, both of which demand that one own the products of one's labor.

#### APPENDIX: THE SOURCES

There were some 500 mining districts in California before 1860 and all of these enacted mining codes, some 175 of which are preserved.<sup>242</sup> These provide the bulk of the data on which Charles Umbeck based his work on property rights in the California gold mines. For the purposes of this article—namely, to investigate the development of property regimes in 1849 and 1850—the published law codes are not very useful. For one thing, they are too laconic. They provide the barebones of a property regime, including the name and boundaries of the district, the maximum size of claim, the requirements for making and/or registering a claim, work requirements, the number of claims one could hold, and some provisions for dispute resolution; but they almost never include information about why or how they were enacted, apart from an occasional platitude in the preamble about the importance of law and order. In the few cases where we know the real reason that a code was passed, it has nothing to do with the pious generalizations offered in the text. We know almost nothing about the context of any particular published code: the richness of the diggings, the number of miners, the conflicting interests, who and how many attended the miners' meeting at which

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240. Americans sometimes argued that Chileans should be excluded from the mines because they were better miners and thus had an (unfair) advantage. *See, e.g., The Placer, PLACER TIMES* (Sacramento), May 26, 1849, at 2 (reporting hostility to Chileans, who are "expert washers" and are "well fitted . . . for labor on the slopes of Sierra Nevada" because of "a life of servitude, together with exposure to a hot climate"). *See also* "J.M.E.," *supra* note 74, at 1 (lamenting that the Chileans brought with them cheap hired labor and that "they are better qualified and equipped for mining operations than we are generally"). The Americans used any and every argument that came to hand against foreigners, however, whether or not they were consistent or logical.

241. Although many miners compared mining to a lottery, *see supra* note 222, none went so far as to call it gambling, perhaps because miners did heavy manual labor and injured no one but themselves. On gambling as evil, analogous to speculation, *see* KAREN HALTTUNEN, *CONFIDENCE MEN AND PAINTED WOMEN: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA 1830-1870*, at 16-17 (1982).

242. The majority of these are printed in KING, *supra* note 50. For further publications, *see* UMBECK, *supra* note 9, at 104-05, tbl.8.1.

it was passed, what rules had been in force before, and so on. Most importantly, there are no codes preserved from 1849 and only two or three from 1850; almost all of the codes were drafted long after a customary law of mining had developed. To study the development of property law, therefore, one must turn to more discursive accounts of life in the mines in the first years of the gold rush.

Thousands of California letters and journals were saved by their owners and are now in library collections or in printed editions.<sup>243</sup> This Article is based almost entirely on these primary accounts, which described events and impressions as they occurred, in raw and unpolished language. Accounts of legal matters are few and far between; no forty-niner bothered to give a systematic description of property law in the diggings. It is maddening that miners who, for months at a time, experienced nothing of interest other than fluctuations in the price of flour, could mention a miners' meeting without going into any detail, but this happens time and again.

These are the problems of original sources of every period; however, the miners' letters and journals also have their own difficulties. First, only those miners who *had* a home wrote letters home. All of the writers had strong family ties and almost all intended to return to their parents or wives. Internal evidence suggests that many of the journals, too, were intended to be read, probably by the folks back home. The recorded impressions of the gold mines are therefore those of family-oriented, relatively responsible individuals, who congregated with others of their own sort. The writers were literate—self-evidently—and they expected their letters to reach their friends and relatives. It is quite possible that the soldiers, sailors, trappers and other loners in the mines would have told very different stories. This may account for my impression that frontiersmen (from Missouri, Arkansas, and Oregon) are under-represented in the literature, although they were conspicuous among the miners for their long-guns, their sharp-shooting, and their lack of education.

Second, since diaries and letters were written to be read, we must assume they were self-censored. It was common for letter writers to report greater success than they actually enjoyed, or at any rate to write home only when they were successful; similarly, they describe the drinking and gambling in the camps but never refer to their own lapses of this sort (although one journalist records in code that he

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243. Works published by persons who participated in or witnessed the gold rush are collected in GARY F. KURUTZ, *THE CALIFORNIA GOLD RUSH: A DESCRIPTIVE BIBLIOGRAPHY OF BOOKS AND PAMPHLETS COVERING THE YEARS 1848-1853* (1997). This bibliography is comprehensive and includes essential information about authors and their publications. Many of the most important first-hand accounts are also available online at the Library of Congress website, <http://lcweb2.loc.gov/ammem/cbhtml/cbhome.html>.

had broken his resolution not to drink).<sup>244</sup> It is quite possible, therefore, that our sources represent not only the views of just one section of the mining community, but also that those views were carefully edited.

Finally, the quantity of primary sources from 1848 to 1850 is overwhelming, and references to legal matters are sporadic and unpredictable. I have read hundreds of published and unpublished letters, journals, and newspapers, which represent a random and, I hope, representative sample of the larger corpus.

Contemporary newspapers are surprisingly unhelpful. The *Californian*, later the *Alta California*, was published in San Francisco throughout the gold rush, and the Sacramento *Placer Times* began publication early in 1849, but both reported developments in the mines haphazardly, as miners sent in reports from the various diggings. These papers do not provide any details about legal developments in the mines, except to mention that a meeting had been held or that the miners of a certain camp had expelled foreigners. From 1850 on, the newspapers provide many brief reports of murders in the mines, and sometimes also of lynch trials. Again, however, these are sketchy and probably also haphazard.

As noted above, this discussion is based on only “present sense impressions,” and not on memoirs or recollections recorded long after the event. The gold rush was already becoming the stuff of legends in 1849, and the miners worked and reworked their stories to fit their chaotic and unglamorous experiences into the dominant paradigm of the gold rush as the triumph of American ingenuity and self-government. For instance, the entry in Joseph Warren Wood’s journal for January 20, 1850, includes included a wry description of an early meeting:

The People had curious Ideas & curious understandings or rather misunderstandings. I left the assembly while they were adopting a criminal code & an Englishman was telling how many of the States of the World he had been in. He ought to have been knocked down, & a clause passed justifying it.<sup>245</sup>

Wood idealizes the meeting as a model of simple democracy, but pokes fun at the ineptitude of the miners and is especially amused by an Englishman who thought himself qualified to speak about criminal law because he had traveled a great deal. By June 25, 1852, however, Wood’s description of miners’ meetings is tidied up and

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244. See Mobley, *supra* note 163, at 84 (entry for Aug. 16, 1850) (writing, in code, “Took one glass or two of wine this evening”).

245. Wood, *supra* note 79 (entry for Jan. 20, 1850, Jacksonville).



almost reverential. The meetings were organized and effective, he says, and the miners enacted laws that were both wise and practical.<sup>246</sup> By that time, the first years of the gold rush had already become a golden age, and Wood recalls his own experiences in this flattering light. In general, the miners of 1848 were heroes to those of 1849; and 1849 was legendary to the miners of 1850. Former miners who published their recollections of the gold rush some thirty to forty years after the event were often demonstrably confused about what had happened, and when. Those who were present at the discovery of gold on January 24, 1848, told quite different stories in later years about what happened on that memorable day.<sup>247</sup> Secondary works, such as histories of the various mining districts written in the 1880s, seldom describe their own sources of information and are at least as unreliable as memoirs.<sup>248</sup> I hesitate to rely on even Charles Howard Shinn's ground-breaking works on law in the mines, both of which were written at Johns Hopkins and were obviously carefully researched, because they contain no footnotes and are based largely on interviews with former miners, which were no more reliable than the memoirs written at the time.<sup>249</sup>

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246. See *id.* (entry for June 25, 1852, Jacksonville).

247. See THE CALIFORNIA GOLD DISCOVERY: SOURCES, DOCUMENTS, ACCOUNTS, AND MEMOIRS RELATING TO THE DISCOVERY OF GOLD AT SUTTER'S MILL (Rodman W. Paul ed., 1966).

248. Compare, for instance, Edwin Bean's account of the early history of the Rough & Ready diggings with that of Harry L. Wells. Wells, writing thirteen years after the publication of Bean's work, presents a much more circumstantial report. It is hard to tell whether Wells had better sources than Bean, or whether he embroidered on his predecessor's story. See *supra* note 153.

249. See SHINN, *supra* notes 6 and 15. On Shinn's sources and methods, see Rodman Wilson Paul, *Introduction* to SHINN, *supra* note 6, at ix-xxiii.