Stanford Law Review

Volume 74 February 2022

ARTICLE

Getting Public Rights Wrong: The Lost History of the Private Land Claims

Gregory Ablavsky*

Abstract. Black-letter constitutional law distinguishes "private rights," which must be litigated before an Article III tribunal, from "public rights," which Congress may resolve through administrative adjudication. Yet both scholars and the Supreme Court have long struggled to define this distinction. Recently, many have turned to history for clarity—especially to *Murray's Lessee*, the 1856 case that inaugurated the public-rights doctrine. As part of a broader critique of the administrative state, Justices and scholars have sought to use this history to cabin the scope of constitutionally permissible administrative adjudication.

This Article intervenes in this debate by suggesting that administrative adjudication had a much broader scope in the nineteenth century than previously thought. It examines the sole example of public rights cited in *Murray's Lessee*: preexisting property rights held by European settlers in territories ceded to the United States. These "private land claims," though almost entirely neglected by scholars of public rights today, were the subject of an enormous amount of nineteenth-century law and jurisprudence. Both the antebellum Congress and Supreme Court concluded that Congress enjoyed considerable discretion over the resolution of these claims, including through binding and preclusive decisions by non–Article III tribunals. The Court reached this conclusion, I suggest, based on a dichotomy between *perfect* title—where complete legal title had passed to the claimant—and *imperfect* title—where some further government act was required before the claimant enjoyed complete ownership. But this framework did not mean that private land claims, whether perfect or imperfect, were considered *privileges*, a category that other scholars have used to explain the public-rights doctrine. Rather, the era's case law and jurisprudence described both perfect and imperfect titles as vested property rights that the

* Professor of Law and Helen L. Crocker Faculty Scholar, Stanford Law School; Professor (by courtesy) of History, Stanford University. Thanks to Sam Lazerwitz and Caroline Schechinger for outstanding research assistance. Thanks also to Lawrence Friedman, David Hausman, Amalia Kessler, Sophia Lee, Julia Lewandoski, Jerry Mashaw, Lisa Ouellette, and Nick Parrillo for suggestions and feedback. This paper benefitted from feedback from the Wisconsin Discussion Group on Constitutionalism at the University of Wisconsin Law School, the Stanford Law School Faculty Workshop, and the NYU Law Faculty Workshop.

government could not take away. Moreover, by the end of the nineteenth century, the distinction between perfect and imperfect titles had collapsed in favor of a broad and durable embrace of federal power.

This history does not offer a new bright-line test to distinguish public from private rights. But it does challenge influential prior accounts in case law and scholarship by suggesting that, from the very beginning of the United States, "public rights" encompassed vested rights to property that were routinely adjudicated before federal administrative tribunals.

Table of Contents

Introduction

Under black-letter law, Congress may subject "public rights" to adjudication before administrative tribunals, while "private rights" must be litigated in Article III courts.[1] But parsing this distinction has proven difficult. The Supreme Court itself has conceded that it has not "'definitively explained' the distinction between public and private rights" and that "its precedents applying the public-rights doctrine have 'not been entirely consistent.'"[2] Now, amidst broader debates over the modern administrative state, the Justices have turned to history to cabin this doctrine.[3] In prominent recent cases, litigants have challenged congressional efforts to provide administrative alternatives to expensive, sometimes vexatious litigation regarding patents,[4] trademarks,[5] and

1. The Supreme Court's lengthy line of cases outlining this distinction includes *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1372-73 (2018); *Stern v. Marshall*, 564 U.S. 462, 499, 502-03 (2011); *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833, 852-57 (1986); *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 593-94 (1985); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69-70 (1982) (plurality opinion); and *Ex parte Bakelite Corp.*, 279 U.S. 438, 449, 460-61 (1929).

2. *Oil States*, 138 S. Ct. at 1373 (first quoting *N. Pipeline*, 458 U.S. at 69 (plurality opinion); and then quoting *Stern*, 564 U.S. at 488).

3. For recent opinions questioning the historical foundations of current administrative law, see *Baldwin v. United States*, 140 S. Ct. 690, 692-94 (2020) (Thomas, J., dissenting from the denial of certiorari); and *Department of Transportation v. Association of American Railroads*, 575 U.S. 43, 70-76 (2015) (Thomas, J., concurring in the judgment). *See also* Gundy v. United States, 139 S. Ct. 2116, 2133-40 (2019) (Gorsuch, J., dissenting) (arguing that the "intelligible principle" test for legislative delegation of authority to administrative agencies has "no basis in the original meaning of the Constitution, [or] in history"). For the academic debate, compare PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 8 (2014) ("[A]dministrative law runs contrary to the very origin and nature of Anglo-American constitutional law."), with Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1613-19 (2018) ("Locating and identifying the origins of the administrative state in the petition process can begin to situate, on firmer historical and constitutional footing, the administrative state within our constitutional framework."), and Sophia Z. Lee, *Our Administered Constitution: Administrative Constitutionalism from the Founding to the Present*, 167 U. PA. L. REV. 1699, 1706 (2019) (arguing that "administrative agencies have been the primary interpreters and implementers of the federal Constitution throughout the history of the United States," especially in the nineteenth century). *See generally* Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 17-33, 42-46 (2017) (recounting the current judicial and academic "attack" on the administrative state and its reliance on originalist critiques). Moreover, scholars have recently argued that the category of public rights is relevant not only for determining when administrative adjudications are permissible but also for resolving the scope of federal administrative authority more generally. *See* Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo* 2 n.5 (Univ. of Va. Sch. of L. Pub. L. & Legal Theory Rsch. Paper, Paper No. 2022-09, 2022), https://perma.cc/R9BN-LD3B (collecting such arguments).

4. *See Oil States*, 138 S. Ct. at 1372.

bankruptcy.[6] Though these challenges failed, several Justices dissented, turning to the nineteenth-century origins of the public-rights doctrine to posit significant limits to agency authority and discretion.[7] Justice Thomas has been especially keen to argue that history cabins non–Article III adjudication,[8] but he has not been alone. Chief Justice Roberts and Justice Gorsuch's dissent in *Oil States Energy Services, LLC v. Greene's Energy Group, LLC* put an even more restrictive gloss on the past.[9]

These historical investigations have led the Justices and commentators alike back to *Murray's Lessee*, the 1856 decision that inaugurated the public-rights doctrine.[10] The case arose when a former customs collector challenged a federal seizure of his land, arguing that only a federal court exercising the "judicial power of the United States" under Article III could seize the parcel.[11] The Court upheld the seizure by crafting a dichotomy. Although most cases had to be adjudicated by the judicial power, the Court concluded, Congress had discretion over matters "involving public rights" and could determine their resolution "as it may deem proper."[12]

Unpacking the *Murray's Lessee* dichotomy has led the Justices and scholars down a number of byways of nineteenth-century jurisprudence. Some have burrowed into treatises, drawing parallels with Blackstonian language describing "private rights."[13] Others have delved into the era's practice and case

5. *See* B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 140 (2015).

6. *See* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 668-69 (2015).

7. *E.g.*, *id.* at 714-16 (Thomas, J., dissenting) (examining the public-rights doctrine by turning to "[n]ineteenth-century American jurisprudence").

8. *See* Laura Ferguson, Essay, *Revisiting the Public Rights Doctrine: Justice Thomas's Application of Originalism to Administrative Law*, 84 GEO. WASH. L. REV. 1315, 1324-28 (2016).

9. *Compare Oil States*, 138 S. Ct. at 1375 (concluding that patents were historically considered franchises), *with id.* at 1381-84 (Gorsuch, J., dissenting) (disputing the majority's interpretation of the "historical record" and arguing that patent validity could only be determined through jury proceedings).

10. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856); *see also Wellness Int'l*, 575 U.S. at 713 (Thomas, J., dissenting) (noting that the Supreme Court's precedents "attribute the [public-rights] doctrine to this Court's mid-19th century decision, *Murray's Lessee*"); Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 67 (1989) (describing *Murray's Lessee* as the case in which the Court "uttered the words giving birth to the public rights doctrine").

11. *Murray's Lessee*, 59 U.S. (18 How.) at 274-76.

12. *Id.* at 284.

13. *See, e.g.*, Ilan Wurman, *Constitutional Administration*, 69 STAN. L. REV. 359, 421-22 (2017); John Harrison, *Public Rights, Private Privileges, and Article III*, 54 GA. L. REV. 143, 170-72 (2019); Adam J. MacLeod, *Public Rights After* Oil States Energy, 95 NOTRE DAME L. REV. 1281, 1293-304, 1316-18 (2020). *But see* Gordon S. Wood, Lecture, *The Origins of Vested*

footnote continued on next page

law, especially the sprawling body of law dealing with the national public domain known as "public land adjudication."[14] Still others have looked to the intersection between the public-rights doctrine and the Due Process Clause.[15]

The result has been a welter of various terms and definitions to explain the divide between public and private rights.[16] Perhaps the clearest—and most influential—typology appears in the work of Caleb Nelson.[17] Investigating nineteenth-century jurisprudence, Nelson unearthed a "coherent" early-American framework that distinguished private rights, public rights, and quasi-private "privileges."[18] Private rights, Nelson argues, encompassed the "core" rights to security, liberty, and property identified by Blackstone.[19] These rights were "vested," meaning that legislatures could not take them away.[20] Public rights, by contrast, were entitlements that literally belonged to the public at large, like navigational rights.[21] And although "privileges" resembled

---

Rights in the Early Republic, 85 VA. L. REV. 1421, 1437-40 (1999) (noting how Americans' conceptions of property rights diverged from Blackstone's).

14. *See, e.g.*, William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1543-44 (2020); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 947-48 (2011); Gordon G. Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFF. L. REV. 765, 798 n.161 (1986).

15. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1781-82, 1801-04 (2012); Gary Lawson, *Appointments and Illegal Adjudication: The America Invents Act Through a Constitutional Lens*, 26 GEO. MASON L. REV. 26, 37-40 (2018); Kent Barnett, *Due Process for Article III—Rethinking* Murray's Lessee, 26 GEO. MASON L. REV. 677, 678-79, 693-96 (2019).

16. Recently, Jim Pfander and Andrew Borrasso have pointed toward another dichotomy—between "constitutive" and "adjudicative" acts—to explain the divide between public and private rights in the nineteenth century. *See* James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 539-49 (2021). For reasons that I explain more fully below, *see infra* text accompanying notes 273-78, I find Pfander and Borrasso's contrast much more grounded in the historical evidence than Caleb Nelson's distinction between public rights, private rights, and privileges, *see infra* note 17 and accompanying text, though I disagree with how tidily Pfander and Borrasso construe this division.

17. *See* Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559 (2007) [hereinafter Nelson, *Adjudication*]; Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429 (2021) [hereinafter Nelson, *Vested Rights*]. On Nelson's influence, see Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1124 n.377 (2010) (describing Nelson's 2007 article as "[t]he best defense of an originalist or quasi-originalist approach" to public rights); and Harrison, *supra* note 13, at 148 (recounting the impact of Nelson's work).

18. Nelson, *Adjudication*, *supra* note 17, at 564, 567-68.

19. *Id.* at 567.

20. *See id.* at 565 ("[O]nly 'judicial' power could authoritatively declare that a competent private individual no longer retained core private rights previously vested in him.").

21. *Id.* at 566 & n.25.

private rights, they were actually entitlements that the government conferred and could freely take away; they could thus be adjudicated *outside* of courts.[22] The Supreme Court, especially Justice Thomas, has embraced this vocabulary in seeking to limit the scope of the public-rights doctrine.[23]

Yet this literature and framework neglect a key piece of evidence long hidden in plain sight. The *Murray's Lessee* decision itself used "public rights" only once. The term appeared in what has become the decision's most-cited section—a section in which the Court delineated the contours of the public-rights doctrine "[t]o avoid misconstruction upon so grave a subject."[24] Immediately after it introduced the term "public rights," the Court provided a sole example, what it called a "striking instance" of this category: the "[e]quitable claims to land by the inhabitants of ceded territories."[25] This "class

22. *Id.* at 567-69 ("The political branches of the state and federal governments were understood to hold sway over both public rights and whatever quasi-private 'privileges' the legislature created for reasons of public policy.").

23. *See, e.g.*, Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting) (defining public rights as those "rights belonging to the people at large" (quoting Lansing v. Smith, 4 Wend. 9, 21 (N.Y. 1829))). The Justices have cited Nelson's work in six separate public-rights cases. *See* McKee v. Cosby, 139 S. Ct. 675, 679-80 (2019) (Thomas, J., concurring in the denial of certiorari); Ortiz v. United States, 138 S. Ct. 2165, 2175 (2018); Sessions v. Dimaya, 138 S. Ct. 1204, 1246 (2018) (Thomas, J., dissenting); *Wellness Int'l*, 575 U.S. at 712-13 (Thomas, J., dissenting); B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. 138, 171 (Thomas, J., dissenting); Teva Pharms. USA, Inc. v. Sandoz, Inc., 574 U.S. 318, 344 n.2 (2015) (Thomas, J., dissenting).

24. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

25. *Id.* Earlier in the opinion, the Court described various "summary extrajudicial remedies" for various harms, though it cited these not as examples of public rights but as instances of legal enforcement outside courts. *Id.* at 283. Many commentators have also spent considerable time on the controversy that prompted the case itself, which involved the application of a summary process to seize property belonging to a customs official to compensate for a shortfall in his accounts. *See, e.g.*, Barnett, *supra* note 15, at 681-87; James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 733-38 (2004); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 231 (1991). But it is surprisingly difficult to figure out what, exactly, the Court was describing as the public right at issue in the facts in *Murray's Lessee*; one scholar has noted four possible ways to interpret the Court's highly ambiguous language on this question. *See* Barnett, *supra* note 15, at 683-85.

I am not arguing that those earlier investigations were incorrect—only that the portrait of public rights is limited if we try to discern the contours of the entire category based solely on the cause of action in *Murray's Lessee*. The case, after all, turned on governmental exactions and officer suits, which, if viewed in isolation, provide a strikingly different portrait of the public-rights doctrine than if we focus on the rights to real property *also* specifically mentioned in the decision. *See Murray's Lessee*, 59 U.S. (18 How.) at 284. Yet in contrast to the expansive attention to the ambiguous facts of *Murray's Lessee* itself, the enormous body of private-land-claims cases has received little scholarly or judicial attention in defining public rights.

of cases," the Court continued, had "repeatedly decided" that the "acts of executive officers, done under the authority of congress, were conclusive, either upon particular facts involved in the inquiry or upon the whole title."[26]

This reference may seem obscure now, but it was not at the time. The Court was alluding to a specific, and hugely significant, body of nineteenth-century law that addressed what were called "private land claims."[27] According to George Ticknor Curtis, whose 1854 treatise on federal courts was the first such treatise in the nation, these claims spawned "a peculiar system of jurisprudence, of a mixed character."[28] Curtis devoted his longest chapter—over one hundred pages—to explaining the topic.[29]

This Article explores the sprawling jurisprudence created by the private land claims. Reconstructing this unfamiliar and often complex body of law, I argue, yields a very different definition of public rights than the one advanced by Nelson, Justice Thomas, and other critics of the administrative state. The private land claims that *Murray's Lessee* made the definitional example of public rights were neither rights belonging to the public nor privileges that the government could freely take away. The key jurisprudential distinction that applied to these claims was not between rights and privileges, but between *perfect*, completed titles and *imperfect*, inchoate ones. Yet both were considered vested rights to property that legislatures could not take away—*core* private rights under Nelson's framework. Nonetheless, antebellum courts routinely held that Congress could resolve these claims itself or, alternatively, refer these claims to Article I tribunals for final adjudication. By 1868, the Supreme Court proclaimed that Congress enjoyed "plenary power" over these claims' resolution.[30]

Recovering this history does not necessarily provide a tidy typology for public rights today. But it does suggest one highly relevant and straightforward implication for current debates. Throughout the nineteenth century, the administrative adjudication of at least one form of vested rights to private property was constitutionally permissible. And *Murray's Lessee* elevated these

26. *Murray's Lessee*, 59 U.S. (18 How.) at 284.

27. This term of art seems to date from 1816, when Congress first established its "Committee on Private Land Claims." 29 ANNALS OF CONG. 1451 (1816). Usage grew dramatically in the 1840s and 1850s, peaking around 1860. *See Ngram Viewer*, GOOGLE BOOKS, https://perma.cc/S754-QX9N (archived Oct. 29, 2021) (showing the results of a search for "private land claims" in the "American English" database).

28. 1 GEORGE TICKNOR CURTIS, COMMENTARIES ON THE JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES § 280, at 392 (Philadelphia, T. & J.W. Johnson 1854).

29. *See id.* at vii.

30. Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 379 (1868); *see also infra* text accompanying notes 215-16; *infra* Part III.B.

private land claims into *the* paradigmatic example of public rights that could be resolved by administrative adjudication. To the extent that the Court is looking to the past to guide its jurisprudence, then, the history of private land claims demonstrates that the administrative adjudication of rights, including to property, is on firmer historical footing than current critics argue.[31]

* * *

The private land claims were a consequence of U.S. empire. Over the course of the nineteenth century, the United States rapidly, and often violently, expanded from a small cluster of Atlantic states into a continental behemoth.[32] But the lands over which the nation ostensibly gained sovereignty were not empty. They were the homelands of hundreds of Native nations, which, as scholars have increasingly recognized, led the United States to develop a distinctive jurisprudence to justify Indigenous dispossession.[33] But they were also home to Euro-Americans who had received lands under the prior French, Spanish, British, and Mexican regimes. After cession, both treaties and international law obligated the United States to acknowledge and protect these preexisting property rights.[34] As a result, Anglo-American jurists had to wade into and master unfamiliar and poorly documented foreign land laws to translate these property rights into federal land patents.[35] The ability to resolve these "intricate questions," a congressional commission later observed, represented the pinnacle of "legal erudition."[36]

---

31. This Article does not seek to intervene in the large scholarly literature on whether appellate review by an Article III tribunal is required for such Article I determinations. *Compare* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 918 (1988) (advancing an appellate-review model), *with* Pfander, *supra* note 25, at 647-55 (arguing that the relevant inquiry is not the availability of appellate review but the distinction between "courts" and "tribunals"). The history here is likely relevant to that literature, but I find the evidence too scattershot to draw any firm conclusions.

32. The literature on the history of U.S. continental expansion is vast. For helpful recent surveys, see generally STEVEN HAHN, A NATION WITHOUT BORDERS: THE UNITED STATES AND ITS WORLD IN AN AGE OF CIVIL WARS, 1830-1910 (2016); AZIZ RANA, THE TWO FACES OF AMERICAN FREEDOM (2010); and ALAN TAYLOR, AMERICAN REPUBLICS: A CONTINENTAL HISTORY OF THE UNITED STATES, 1783-1850 (2021).

33. For an overview of this topic, see generally STUART BANNER, HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER (2005); ALLAN GREER, PROPERTY AND DISPOSSESSION: NATIVES, EMPIRES AND LAND IN EARLY MODERN NORTH AMERICA (2018); and BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: *JOHNSON V. MCINTOSH* AND THE HISTORY OF NATIVE LAND RIGHTS (2012).

34. *See infra* notes 53-56 and accompanying text.

35. *See, e.g.*, THOMAS DONALDSON, PUB. LAND COMM'N, THE PUBLIC DOMAIN. ITS HISTORY, WITH STATISTICS 365-66 (Washington, Gov't Printing Off. 1884) (recounting this process).

36. *Id.* at 366.

The private land claims are a rich, if understudied, topic in U.S. legal history. They exemplify the entangled legacies of legal pluralism, racial capitalism, and the ongoing dispossession of colonized peoples, especially Latinx communities in what became the U.S. Southwest.[37] In places like California and Missouri, fights over the land claims dominated local politics, spawning intense conflicts between speculators who bought up enormous tracts and numerous "squatters" who contested these speculators' rights.[38]

No article could cover all these issues. This Article focuses here on one part of the history of private land claims: the internalist story of institutional and doctrinal development that the claims prompted. It does so partly to combat legal scholars' frequent charge that historians are uninterested in the history of formal law, as well as the claim in recent scholarship that legal doctrine somehow existed apart from histories of race and empire.[39]

---

37. Scholars have only begun to explore private land claims. A key study of one private land claim appears in MARÍA E. MONTOYA, TRANSLATING PROPERTY: THE MAXWELL LAND GRANT AND THE CONFLICT OVER LAND IN THE AMERICAN WEST, 1840-1900, at 5-6 (2002). Public-land historians as well as economists and scholars of international law have devoted some attention to the topic. *See, e.g.*, Harry L. Coles, Jr., *Applicability of the Public Land System to Louisiana*, 43 MISS. VALLEY HIST. REV. 39, 39-44 (1956); Karen B. Clay, *Property Rights and Institutions: Congress and the California Land Act of 1851*, 59 J. ECON. HIST. 122, 122-24 (1999); Markus G. Puder, *Uncertain Land Titles in Louisiana's Formative Years: Colonial Grants, John Marshall's* Foster *Opinion, and Lauterpachtian Interplays Between Private Law and International Law*, 53 AM. J. LEGAL HIST. 329, 329-30 (2013). Historian Paul Gates published a particularly important set of articles on the topic. *See* Paul Wallace Gates, *Private Land Claims in the South*, 22 J.S. HIST. 183 (1956) [hereinafter Gates, *Private Land Claims*]; Paul W. Gates, *Adjudication of Spanish-Mexican Land Claims in California*, 21 HUNTINGTON LIBR. Q. 213 (1958) [hereinafter Gates, *Adjudication*]; Paul W. Gates, *The California Land Act of 1851*, 50 CAL. HIST. Q. 395 (1971) [hereinafter Gates, *California Land Act*]; Paul W. Gates, *The Frémont–Jones Scramble for California Land Claims*, 56 S. CAL. Q. 13 (1974) [hereinafter Gates, *Frémont–Jones Scramble*]. An important recent study of the role of private claims in Indigenous land rights appears in Julia M. Lewandoski, Small Victories: Indigenous Proprietors Across Empires in North America, 1763-1891 (Summer 2019) (Ph.D. dissertation, University of California, Berkeley) (on file with author). Another important and large vein of scholarship has focused on the fate of Latinx owners under the Treaty of Guadalupe Hidalgo. *See, e.g.*, RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO: A LEGACY OF CONFLICT 72-86 (1990); LAURA E. GÓMEZ, MANIFEST DESTINIES: THE MAKING OF THE MEXICAN AMERICAN RACE 123-38 (2d ed. 2018); Christopher David Ruiz Cameron, *One Hundred Fifty Years of Solitude: Reflections on the End of the History Academy's Dominance of Scholarship on the Treaty of Guadalupe Hidalgo*, 5 SW. J.L. & TRADE AMS. 83, 97-98 (1998).

38. *See, e.g.*, TAMARA VENIT SHELTON, A SQUATTER'S REPUBLIC: LAND AND THE POLITICS OF MONOPOLY IN CALIFORNIA, 1850-1900, at 11-35 (2013) (recounting various struggles, including a Sacramento riot, prompted by these conflicts).

39. *See, e.g.*, AKHIL REED AMAR, THE WORDS THAT MADE US: AMERICA'S CONSTITUTIONAL CONVERSATION, 1760-1840, at x-xi (2021); John O. McGinnis, *Akhil Amar's 1789 Project*, LAW & LIBERTY (Apr. 29, 2021), https://perma.cc/6PNF-K4PN.

In fact, the private land claims dramatically demonstrate just how consequential U.S. empire was to the development of federal law and institutions. "No problem caused Congress, officials of the General Land Office, and Federal courts more difficulty or took up as much time as the private land claims," the public-lands historian Paul Gates observed.[40] Over the course of the nineteenth century, according to Gates, Congress grappled with 30 to 35 thousand claims to around 45 million acres of land, with entire House and Senate committees devoted solely to private land claims.[41] By 1851, Congress had enacted 138 measures establishing procedures for adjudicating claims and another 143 special acts to confirm particular claims, which were rife with fraud and abuse.[42]

Though Congress embraced various methods to resolve the claims, the first step remained constant: Claimants had to present their claims to a federally appointed board of commissioners for adjudication. Then, depending on the terms of the particular statute, the board's ruling might be final, might be dispatched to Congress for ultimate decision, or might be referred to the federal courts for review. Many of these disputes ended up in the Supreme Court, especially when Congress authorized direct review.[43] Over the nineteenth century, the Court adjudicated more than 100 cases involving private land claims.[44]

Resolving the private land claims, then, was both one of the earliest and one of the most substantial instances of administrative adjudication in U.S. history. Yet previous histories of administrative adjudication have largely overlooked or obscured these claims. I attribute this neglect to three methodological assumptions. First, scholars have arguably overrelied on intellectual history, interpreting nineteenth-century law by tracing the views of canonical treatise writers about rights and the separation of powers.[45] Such reconstruction is important, but it risks privileging the uncertain influence of political philosophy over the well-documented impact of ordinary law and governance. In *Murray's Lessee*, the Court discussed a half century of

40. PAUL W. GATES, PUB. LAND L. REV. COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 87 (1968).

41. *Id.* at 88, 107; *see also* Ctr. for Legis. Archives, *Guide to Senate Records: Chapter 6—Records of the Committee on Private Land Claims, 19th-67th Congresses (1826-1921)*, NAT'L ARCHIVES, https://perma.cc/D64R-TUAU (last updated June 7, 2021); Ctr. for Legis. Archives, *Guide to House Records: Chapter 6—Committee on Private Land Claims, 14th-62nd Congresses (1813-1911)*, NAT'L ARCHIVES, https://perma.cc/EXQ8-DRGA (last updated Apr. 2, 2021).

42. Gates, *California Land Act*, *supra* note 37, at 396-98, 404-05.

43. *See infra* Part I.A.1.

44. Gates counts 126 such cases before 1860, GATES, *supra* note 40, at 88, and separately notes 111 cases from California alone, Gates, *California Land Act*, *supra* note 37, at 404..

45. *See* sources cited *supra* note 13.

administrative precedent in detail but made no mention of Blackstone—who, unsurprisingly, had little to say about the land law of Mexican California.[46]

Second, to the limited extent that scholars have considered the private land claims, they have often lumped them into the broader category of "public lands."[47] There were, to be sure, some important similarities, and courts often drew parallels between the private land claims and the law governing the federal land office. Yet these were distinct bodies of law, and the differences between them—especially when it came to the *origin* and *certainty* of the property rights at issue—prove especially important for the public-rights doctrine.

Last is the question of framing. Nearly all prior explorations of the history of public rights situate the doctrine at the intersection of federal courts and administrative law—bodies of law that barely existed in the nineteenth century. Property law, by contrast, has appeared only briefly in this literature, with scholars flagging, then setting aside as distinct, the difficult question of how to define the property interests at issue.[48] But for nineteenth-century jurists, the questions of governmental authority and of ownership were not two separate inquiries: What constituted property, and what rights it conferred, also defined the scope of governmental authority within private-land-claims doctrine. This Article, then, seeks to understand private-land-claims jurisprudence by examining it within nineteenth-century debates over real property and the nature of ownership.

More broadly, the public-rights doctrine illustrates some of the hazards that emerge when judges and scholars look to history to supply coherent jurisprudential categories for the present. The problem is not that the past lacks answers to give: Just like jurists today, earlier judges crafted categories to explain their decisions (although, also like today, they often downplayed the resulting tensions and contradictions). The challenge, rather, is that we do not always fully understand their answers. When we rip those categories out of their often-unfamiliar jurisprudential contexts and plop them down into our own, we often do them violence, failing to grasp what gave them explanatory power in the first place. We fail, in short, at historical translation.

This Article offers what I hope is a fuller translation. It proceeds in five parts. Part I examines the development of the law of private land claims until 1851. It traces how Congress's ad hoc adjudicatory responses to these claims

46. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856).

47. *See* sources cited *supra* note 14.

48. *See, e.g.*, Chapman & McConnell, *supra* note 15, at 1736 (observing that the "rights of property were more difficult to define"); Nelson, *Adjudication*, *supra* note 17, at 573 (describing the challenge of "determining whether a particular property right exists at all").

hardened into precedent without much debate. It then recounts how the courts, particularly the Supreme Court, (1) validated congressional action, establishing a broad political-question doctrine that deferred to congressional resolutions; and (2) acknowledged and even expanded the preclusive effect that these land adjudications had, including against adverse claimants. Part II turns to the puzzle of *why* Congress was thought to enjoy such authority. After exploring and rejecting alternate explanations, it focuses instead on a key distinction between *perfect* titles, in which the claimant held a completed grant that was thought to be outside congressional control, and *imperfect* titles, in which a ministerial act remained outstanding before the claimant's ownership right was complete. But even imperfect titles were not privileges; they were unquestionably property, and most commentators described them as vested rights. The deference shown to Congress, I argue, reflected understandings of the *kind* of property that they were, and the role of different branches in perfecting ownership rights. Nonetheless, the dichotomy between perfect and imperfect titles was not as sharp as this framework suggested: Not only did the perfect–imperfect divide conflate jurisdiction with merits, but it also ignored how Congress had routinely modified perfect rights. Part III considers the key California Land Act of 1851,[49] which altered the existing framework. Unlike prior statutes, the Act prompted intense debate over its constitutionality; it also spawned a group of significant cases that collapsed the perfect–imperfect dichotomy and expanded the preclusive effects of claims adjudication. Part IV briefly examines a somewhat unsatisfying late nineteenth-century coda: the creation of an Article I Private Land Claims Court, which recapitulated earlier uncertainties instead of resolving them. This Article concludes by examining the implications of this history, reiterating the point that administrative tribunals routinely adjudicated vested rights to private property.

I. The Law of Private Land Claims: 1788-1851

The United States confronted private land claims the moment it came into existence. In the 1783 Treaty of Paris, which ended the Revolutionary War, Great Britain not only recognized U.S. independence but also ceded its claim to the vast expanse of North America east of the Mississippi River.[50] The region's existing French residents, residing in present-day Indiana and Illinois, quickly wrote to the new nation's governing body, the Continental Congress. They felt

49. Ch. 41, 9 Stat. 631.

50. Definitive Treaty of Peace, Gr. Brit.–U.S., art. II, Sept. 3, 1783, 8 Stat. 80.

"fear & anxiety" over their titles to "lands which they were wont to consider as their own" and asked Congress to protect their property.[51]

Such demands were a key, if little-known, consequence of the United States' successive territorial conquests and expansions. Once Native title had been "extinguished," in the parlance of the time, the land in these ceded territories was supposed to be part of the public domain—the vast reserve of federally owned land to be surveyed and sold to white settlers through the federal General Land Office.[52] But before this process could begin, the federal government had to identify those lands that had *already* passed into private European ownership under prior imperial regimes.

Multiple sources of law obligated the United States to honor these land rights. The era's law of nations mandated that new sovereigns of ceded territories recognize preexisting rights to private property.[53] The United States also repeatedly pledged to recognize such rights in successive treaties of cession: the 1803 Louisiana Purchase Treaty with France,[54] the 1819 Adams–Onís Treaty with Spain,[55] and the 1848 Treaty of Guadalupe Hidalgo with Mexico.[56]

Aggressive U.S. expansion over the nineteenth century ensured that determining these existing ownership rights would dominate much of antebellum federal governance. After the Revolutionary War, the federal government confronted French land rights around the Midwestern towns of

51. Petition to Congress from the Illinois Country (Sept. 15, 1787), *in* 2 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY NORTHWEST OF THE RIVER OHIO, 1787-1803, at 72, 72-73 (Clarence Edwin Carter ed., 1934) [hereinafter 2 TERRITORIAL PAPERS]; *see, e.g.*, Petition of the Inhabitants of Post Vincennes (July 26, 1787), *in* 2 TERRITORIAL PAPERS, *supra*, at 58, 58-60; Petition to Congress from Post Vincennes (Aug. 7, 1787), *in* 2 TERRITORIAL PAPERS, *supra*, at 66, 66-67.

52. *See* Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 51 n.(a) (adopting the Northwest Ordinance of 1787); Alexander Hamilton, Plan for Disposing of the Public Lands (July 22, 1790), *in* 1 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, IN RELATION TO THE PUBLIC LANDS 4, 4 (Walter Lowrie ed., Washington, Duff Green 1834) [hereinafter 1 AMERICAN STATE PAPERS: PUBLIC LANDS].

53. EMER DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY bk. III, § 200, at 598 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund 2008) (1758).

54. Treaty Between the United States of America and the French Republic, Fr.–U.S., art. III, Apr. 30, 1803, 8 Stat. 200.

55. Treaty of Amity, Settlement, and Limits, Spain–U.S., art. 8, Feb. 22, 1819, 8 Stat. 252.

56. Treaty of Peace, Friendship, Limits, and Settlement, Mex.–U.S., arts. VIII-IX, Feb. 2, 1848, 9 Stat. 922 [hereinafter Treaty of Guadalupe Hidalgo].

Vincennes, Detroit, and Kaskaskia.[57] Twenty years later, after the Louisiana Purchase, the United States grappled with French and Spanish grants throughout what became Louisiana, Arkansas, and Missouri.[58] And after Andrew Jackson's invasion of Spanish Florida, federal officials had to address Spanish grants across northern Florida and along the Gulf Coast.[59]

This Part examines the law created to adjudicate these many private land claims. It first considers the claims in Congress, tracing the statutory history of their resolution and noting the widespread assumption of congressional authority. It then turns to what became an increasingly large body of antebellum case law addressing the private land claims, in which the Supreme Court both validated congressional authority as an application of the political-question doctrine and gave these resolutions a broad preclusive effect, including against third parties.

A. Private Land Claims in the Antebellum Congress

Congress began the centuries-long process of adjudicating the private land claims in 1788, in response to petitions from French villagers. Because these petitioners lived within the newly established Northwest Territory, Congress instructed the territorial governor to "examine[]" and "confirm[] in their possessions and titles the [F]rench and Canadian inhabitants" of the lands "allotted to them according to the laws and Usages of the Governments under which they have respectively settled."[60]

Over the coming half century, Congress experimented with how it addressed the private land claims. But the 1788 law established two clear precedents for future claims explored in this Part. First, Congress consistently relied on federal administrators to assess private land claims in the first instance. Second, these statutes received little debate or discussion, with Congress seemingly assuming its power to decide these questions of title.

57. *See* GREGORY ABLAVSKY, FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES 91-99 (2021); LEONARD LUX, THE VINCENNES DONATION LANDS 443-82 (1949); Francis S. Philbrick, *Introduction* to THE LAWS OF INDIANA TERRITORY, 1801-1809, at ix, lxv-c (Francis S. Philbrick ed., 1930).

58. *See* STUART BANNER, LEGAL SYSTEMS IN CONFLICT: PROPERTY AND SOVEREIGNTY IN MISSOURI, 1750-1860, at 3 (2000); Coles, *supra* note 37, at 40-42; Puder, *supra* note 37, at 332-33.

59. M.C. Mirow, *The Supreme Court, Florida Land Claims, and Spanish Colonial Law*, 31/32 TUL. EUR. & CIV. L.F. 181, 183-90 (2017).

60. *Friday, August 29, 1788*, *in* 34 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 471, 472-74 (Roscoe R. Hill ed., 1937).

1. The statutory history of private land claims

The execution of the 1788 congressional resolution proved more difficult than anticipated. Over the course of the 1790s and into the early 1800s, the governor of the Northwest Territory and his successor, the governor of the Indiana Territory, sifted through thousands of claims, trying to parse an enormous mass of poorly documented property rights.[61] These ad hoc determinations simultaneously burdened the overstretched territorial governors and failed to satisfy many claimants.

In 1803, when legislating for the newly established Mississippi Territory, Congress opted for a different approach to private land claims.[62] Instead of relying on territorial governors, Congress established two three-person boards of federally appointed commissioners.[63] Those asserting property rights based on prior Spanish or British grants had to present their claims and supporting evidence at the land office in the following year; if they failed to do so, the claimant's right was effectively forfeited, becoming inadmissible against any federal grant.[64] The boards would then "hear and decide in a summary manner, all matters respecting such claims" and "determine thereon according to justice and equity; which determination . . . shall be final."[65] A ruling in favor of the claimant would constitute "a relinquishment for ever, on the part of the United States to any claim whatever to such tract of land."[66]

Congress did not discuss why it turned to adjudication by commission, but such boards were a routine part of early American governance.[67] States had relied on similar tribunals to resolve property disputes: In 1779, for instance, Kentucky created a board of commissioners to hear conflicts over preemption rights to land, while Pennsylvania employed an administrative Board of Property to adjudicate conflicting property rights to state public lands.[68]

61. *See* ABLAVSKY, *supra* note 57, at 91-99; Philbrick, *supra* note 57, at lxv-c.

62. *See* Act of Mar. 3, 1803, ch. 27, 2 Stat. 229.

63. *See id.* § 6.

64. *See id.* § 5.

65. *Id.* § 6.

66. *Id.*

67. For instance, the term "commissioners" appears over 150 times in the first volume of the *Statutes at Large*.

68. *See* SAMUEL M. WILSON, THE FIRST LAND COURT OF KENTUCKY, 1779-1780: AN ADDRESS DELIVERED BY SAMUEL M. WILSON BEFORE THE KENTUCKY STATE BAR ASSOCIATION AT COVINGTON, KENTUCKY, JULY 6, 1923, at 6-13 (1923) (describing the Kentucky Court of Land Commissioners established by the Virginia state legislature to adjudicate claims to unpatented lands); Elizabeth K. Henderson, *The Northwestern Lands of Pennsylvania, 1790-1812*, 60 PA. MAG. HIST. & BIOGRAPHY 131, 141-44 (1936) (briefly recounting the Pennsylvania Board of Property, a state administrative body). Preemption rights gave first improvers to a parcel the initial right to purchase it at a modest price. *See* GATES, *supra* note 40, at 219, 225.

Boards of commissioners had also been common practice in international treaties, especially to determine issues of compensation. The 1794 Jay Treaty between the United States and Great Britain, for example, created two five-person boards to decide compensation for British creditors who were owed American debts and for American citizens who were injured by British seizures, and the treaty stipulated that the boards' determinations would be "final and conclusive."[69] In federal governance, too, Congress had established boards of commissioners to resolve its ongoing territorial dispute with Georgia over the state's western boundary,[70] to assess a federal property tax under a 1798 statute,[71] and to assist in establishing the new federal capital.[72]

Whatever the reason behind it, the 1803 decision to create boards of commissioners to adjudicate private land claims became standard practice. Congress established a similar board to hear unresolved land claims in Indiana and Michigan in 1804.[73] The next year, it extended this approach to the vast expanse of the recent Louisiana Purchase, which came with thousands of preexisting French and Spanish land titles.[74] By 1809, the U.S. Attorney General observed that "[t]he usual course, where the rights of the United States are concerned, has been, I believe, to appoint a board of commissioners."[75]

These statutes made one significant change from the Mississippi precedent: Instead of making final decisions, the boards in Louisiana, Indiana, and Michigan all made recommendations to Congress, which would rule on the claims' ultimate validity.[76] In the coming decades, Congress vacillated between the two approaches. "The tribunals constituted for this purpose have been of various character," a congressional committee later summarized, "sometimes authorized merely to examine and report; at others invested with the power of

69. Treaty of Amity, Commerce and Navigation, Gr. Brit.–U.S., arts. VI-VII, Nov. 19, 1794, 8 Stat. 116.

70. *See* Act of Apr. 7, 1798, ch. 28, § 1, 1 Stat. 549, 549.

71. *See* Act of July 9, 1798, ch. 70, 1 Stat. 580. *See generally* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1322-45 (2021) (describing this statute's use of boards of commissioners to assess property taxes).

72. *See* Act of July 16, 1790, ch. 28, § 2, 1 Stat. 130, 130.

73. *See* Act of Mar. 26, 1804, ch. 35, § 4, 2 Stat. 277, 278-79.

74. *See* Act of Mar. 2, 1805, ch. 26, § 5, 2 Stat. 324, 327-28.

75. C.A. Rodney, Land in the City of New Orleans, Called the "Batture" (June 12, 1809), *in* 2 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, IN RELATION TO THE PUBLIC LANDS 1, 1 (Walter Lowrie ed., Washington, Duff Green 1834) [hereinafter 2 AMERICAN STATE PAPERS: PUBLIC LANDS].

76. *See* Act of Mar. 26, 1804 § 4, 2 Stat. at 278-79; Act of Mar. 2, 1805 § 5, 2 Stat. at 327.

final decision" (the committee noted that the latter type was usually limited to smaller land claims).[77]

These statutes aimed to resolve land claims quickly and envisioned that commissions would last only a couple of years.[78] Speed was important, because as long as a claim was unresolved, the boundaries of the public domain remained uncertain and the disputed land could not be sold.[79] Yet by appointing itself arbiter of many of these land claims, Congress also ensured that many land controversies endured for decades. Congress usually rubber-stamped nearly all of the claims approved by the commissioners, but—eager to secure the allegiance of borderlands residents and importuned by land speculators—it also routinely extended filing deadlines and revived claims that commissioners found dubious.[80] Congress passed an act for the "final adjustment of claims" in Louisiana in 1811[81] and then, over the next forty years, enacted another thirty-eight laws addressing land claims there.[82] Such delays tied up millions of acres of land, frustrating both would-be purchasers and claimants themselves, whose lands were overrun by trespassers.[83]

Some in Congress began to advocate for a third approach: resolution in the courts. Though an 1818 bill to transfer all of Louisiana's unconfirmed claims to federal court for investigation failed,[84] a similar 1824 bill for Missouri and Arkansas succeeded. This statute, the first of its kind, required all outstanding claimants there to file in federal district court, which would determine the

77. S. Comm. on Priv. Land Claims, Provision for the Trial and Decision of Claims to Land in the Several States and Territories, Derived Otherwise than from the United States (Jan. 9, 1828), *in* 5 AMERICAN STATE PAPERS: DOCUMENTS OF THE CONGRESS OF THE UNITED STATES, IN RELATION TO THE PUBLIC LANDS 350, 351 (Asbury Dickens & John W. Forney eds., Washington, Gales & Seaton 1860) [hereinafter 5 AMERICAN STATE PAPERS: PUBLIC LANDS]. For instance, in legislating for Louisiana in 1807, Congress stipulated that for most claims less than a league (nine miles) square, the "decision of the commissioners when in favour of the claimant shall be final, against the United States, any act of Congress to the contrary notwithstanding." Act of Mar. 3, 1807, ch. 36, § 4, 2 Stat. 440, 441.

78. *See* Act of Mar. 26, 1804, § 4, 2 Stat. at 278; Act of Mar. 2, 1805, § 5, 2 Stat. at 327.

79. *See, e.g.*, Act of Apr. 21, 1806, ch. 39, § 5, 2 Stat. 391, 392 ("[T]he lands which may be embraced by such report, shall not be otherwise disposed of, until a decision of Congress shall have been had thereupon.").

80. *See* Gates, *Private Land Claims*, *supra* note 37, at 190-91, 203-04.

81. Act of Feb. 15, 1811, ch. 14, 2 Stat. 617.

82. *See* Act of Mar. 2, 1805, 2 Stat. at 324 n.(a) (listing all the acts "relative to lands and land titles in Louisiana").

83. *See* Gates, *Private Land Claims*, *supra* note 37, at 186-92.

84. *See* Wm. H. Crawford, Plan for Adjusting Land Claims in Louisiana and Missouri (Dec. 8, 1818), *in* 3 AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE AND EXECUTIVE, OF THE CONGRESS OF THE UNITED STATES, IN RELATION TO THE PUBLIC LANDS 348, 348-49 (Walter Lowrie ed., Washington, Duff Green 1834).

validity of their title, while also authorizing an appeal to the Supreme Court.[85] Yet many regarded this "departure from the ordinary and long-established legislation of the government" as "an experiment of a doubtful policy,"[86] arguing that it had "not contributed to the settlement of these claims."[87]

Nonetheless, in 1828, the Senate Committee on Private Land Claims sought to expand this judicial approach. In drafting a bill for the "final settlement of Private Land Claims in the several States and Territories," the Committee sought to create a "special tribunal for the audit and decision of claims."[88] This tribunal of three commissioners would meet in Washington, hear evidence, empanel juries to try contested facts, and issue a "final and conclusive" judgment on the claims, subject to an appeal to the Supreme Court.[89] This approach remained controversial: Although many in Congress recognized that the legislature was poorly equipped and painfully slow to resolve claims, others insisted on retaining congressional oversight, arguing that some of the claims "were too large to be subjected to a judicial tribunal."[90]

Ultimately, Congress compromised. Instead of establishing a new tribunal, the committee's bill morphed into a law simply transferring outstanding claims in Florida alone into the territory's superior court, with the right of appeal to the Supreme Court.[91] Over the coming decades, Congress waffled between the older approach of congressional resolution and its newer approach that dispatched claims to the federal courts.[92]

By the 1840s, the fifty-year stream of congressional statutes, reports, and decisions on private land claims began to slow. Over the previous five decades, Congress had freely experimented with three approaches: preserving its role as final arbiter, referring claims to the boards of commissioners for final resolution, or dispatching claims to the federal courts. Yet several features remained constant. First, most owners in the territories had to present their

85. *See* Act of May 26, 1824, ch. 173, §§ 1-2, 14, 4 Stat. 52, 52-53, 56.

86. H. Comm. on Pub. Lands, Validity of Claims to Land in Arkansas (Jan. 31, 1825), *in* 4 AMERICAN STATE PAPERS: DOCUMENTS OF THE CONGRESS OF THE UNITED STATES, IN RELATION TO THE PUBLIC LANDS 147, 147 (Asbury Dickens & James C. Allen eds., Washington, Gales & Seaton 1859) [hereinafter 4 AMERICAN STATE PAPERS: PUBLIC LANDS].

87. S. Comm. on Priv. Land Claims, *supra* note 77, at 350-51.

88. S. 49, 20th Cong. (1828); S. Comm. on Priv. Land Claims, *supra* note 77, at 352.

89. S. 49, §§ 1, 7-11.

90. 4 REG. DEB. 481 (1828).

91. *See* Act of May 23, 1828, ch. 70, §§ 6-7, 4 Stat. 284, 285.

92. *Compare* Act of July 9, 1832, ch. 180, 4 Stat. 565 (abandoning the judicial model in Missouri), *with* Act of June 17, 1844, ch. 95, 5 Stat. 676 (reviving the judicial approach and extending it to encompass claims for Louisiana, Arkansas, and parts of Mississippi and Alabama).

claims for confirmation upon penalty of possible forfeiture. Second, federally appointed boards of commissioners invariably heard these claims in the first instance, although their rulings were not final unless Congress made them so. Third and finally, Congress presumed that it had complete authority over the claims and their resolution, a theme that the next Subpart takes up more fully.

2. (Not) debating congressional authority

Congress was arguably the nation's premier venue for constitutional debate in the antebellum United States, particularly on the meaning and scope of federal power.[93] Much of this argument and contention surrounded the question of the public lands, if only because they occupied so much congressional time and attention.[94] The antebellum Congress fought fiercely over how and to whom federal lands should be distributed, as well as over competing state and federal claims to ownership.

A quick glance at the extensive, multivolume *American State Papers: Public Lands*, which preserves early federal records, underscores how fully the private land claims also occupied congressional attention.[95] Roughly half the work is occupied by the thousands of pages of petitions, reports, and dispatches from the boards of commissioners on the claims, as well as the dozens of reports produced by congressional committees, especially the House and Senate Committees on Private Land Claims.[96]

Yet unlike public land claims, the private land claims seemed to produce few arguments over the extent of federal power; the question of congressional

93. On the congressional role in constitutional interpretation in the early United States, see generally DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829 (2001); and JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018).

94. For scholarly accounts of the extensive debates over public lands in the antebellum Congress, see generally DANIEL FELLER, THE PUBLIC LANDS IN JACKSONIAN POLITICS (1984); JOHN R. VAN ATTA, SECURING THE WEST: POLITICS, PUBLIC LANDS, AND THE FATE OF THE OLD REPUBLIC, 1785-1850 (2014); David P. Currie, *The Constitution in Congress: The Public Lands, 1829-1861*, 70 U. CHI. L. REV. 783 (2003); and Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397, 420-42 (2015).

95. *See, e.g.*, 1 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 52. The *American State Papers* are a printed, thirty-eight-volume collection of federal administrative records from the late-eighteenth and early-nineteenth centuries. The eight volumes devoted to public lands—more volumes than devoted to any other area of governance—span 1789 through 1837. *See American State Papers, 1789-1838*, LIBR. OF CONG., https://perma.cc/4HT5-H546 (archived Nov. 2, 2021).

96. *See* GATES, *supra* note 40, at 108 ("The Senate and House Committees on Private Land Claims spent an inordinate amount of time investigating cases that had earlier been rejected or confirmed for less acreages than the owners claimed. They drafted hundreds of reports, some in great detail . . . .").

authority almost never appeared in this extensive archive. Occasionally, questions arose over the extent of Congress's power to revise its earlier determinations: Congressional committees disagreed, for instance, over whether Congress could establish new boards of commissioners to reassess the decisions it had earlier delegated to the territorial governors without any provisions concerning their finality.[97] But the issue raised in *Murray's Lessee* and within present-day public-rights doctrine almost never arose—almost no one asked whether the Constitution placed any limits on congressional power to resolve preexisting property rights. In examining four decades of congressional and administrative records, I uncovered only two instances when anyone articulated separation-of-powers concerns over congressional adjudication of private land claims. The first came in 1828, when Missouri petitioners objected to a proposal by another set of Missourians to abandon the 1824 federal court experiment and return the claims to boards of commissioners.[98] "Any tribunal that might be substituted to a court of law would be made competent only to recommend their claims for confirmation," the petitioners argued, "but could not be made constitutionally competent to make final decisions against any of those claims."[99] The second came in 1836, when a congressional committee expressed different doubts in a report on a Louisiana land claim. For Congress to resolve the claim, the committee suggested, might be a potential "usurp[ation of] the powers of the judicial department of the Government."[100] But the proposed solution was not to refer the claim to an Article III tribunal but, echoing the 1828 proposal, to create a special Article I tribunal to adjudicate the claim.[101]

These arguments ran in opposite directions: One advocated against congressional authority to subject claims to special tribunals, the other

97. For instance, Congress waffled on whether it could revise the rulings of the governors in Illinois and Indiana when the earlier statute had been silent on their finality. *Compare* H. Comm. on Pub. Lands, Land Claims in the District of Kaskaskia (Dec. 17, 1811), *in* 2 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 75, at 223, 224 ("[I]t cannot be admitted that the mere act of confirmation is of such efficacy as to preclude the Legislature from correcting the error or annulling the erroneous decision."), *with* S. Comm. on Priv. Land Claims, Claim of John Edgar to Land in Illinois (Jan. 5, 1830), *in* 6 AMERICAN STATE PAPERS: DOCUMENTS OF THE CONGRESS OF THE UNITED STATES, IN RELATION TO THE PUBLIC LANDS 23, 24 (Asbury Dickins & John W. Forney eds., Washington, Gales & Seaton 1860) (concluding it would be "inconsistent with the common practice of the government as it is with the established principles of equity" to vacate the earlier decisions).

98. Theodore Jones et al., Land Claims in Missouri Derived from the French and Spanish Governments (Mar. 31, 1828), *in* 5 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 77, at 509, 509-10.

99. *Id.* at 509.

100. *See* H.R. REP. NO. 24-554, at 3 (1836).

101. *Id.* at 4; *see supra* text accompanying notes 88-89.

endorsed it. But what united them was the suggestion that it might be unconstitutional for Congress to continue doing what it had been doing for decades without meaningful objection: subjecting claims to administrative tribunals as well as deciding claims itself. These arguments gained little currency; Congress continued to act just as it had always done.

Drawing historical interferences from silence is always hazardous. Nonetheless, the four-decade-long absence of nearly any objection to congressional authority over private land claims is striking, especially in contrast with the other robust constitutional debates of the era. In 1828, when the Senate Committee on Private Land Claims proposed the special tribunal to adjudicate outstanding claims, it devoted a lone sentence to the issue of congressional authority: "It is believed to be unnecessary to examine the question of the competency of Congress to accomplish this object."[102] As this remark indicates, many in Congress thought congressional authority too self-evident to warrant discussion. Most, it seems, did not even go as far as the Committee: They found the answer too obvious to mention.

B. Private Land Claims in the Antebellum Courts

Land litigation was endemic in the early United States. The elaborate revolutionary-era land systems in states spawned "endless law-suits," which quickly reached federal courts through diversity jurisdiction.[103] Throughout the early 1800s, cases from the complicated land systems of Kentucky, Ohio, and Tennessee proliferated on the Supreme Court's docket.[104] After the

102. S. Comm. on Priv. Land Claims, *supra* note 77, at 352.

103. 3 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA app. D, at 66, 70 (Philadelphia, William Young Birch & Abraham Small 1803); G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35, at 763-65 (1988); *see also* MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY 1789-1816, at 167-90 (1978) (recording the explosion of land claims suits in Kentucky's federal court tracing to Virginia's system of land grants).

104. Ted White recorded 172 real property cases between 1816 and 1835 out of a total of 791 nonconstitutional cases, making title disputes the "largest number of substantive nonconstitutional cases on the Court's docket," eclipsing contracts, credit disputes, and admiralty. White observed that many of these cases arose from "state public land grants" from "Virginia [including the Military District in Ohio], Tennessee, and especially Kentucky." WHITE, *supra* note 103, at 752, 763, app. at 978-79. A similar pattern held for the first fifteen years of the nineteenth century, when commercial litigation on the Court's docket was "dwarfed in economic magnitude by the great cases involving real property and public land grants." 2 GEORGE L. HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801-15, at 588 (1981).

creation of federal land offices to distribute the public domain in 1800, the Court slowly began to hear cases implicating *federal* land rights too.[105]

Resolving these cases created a body of law known as public-lands law, which was governed by a complicated set of procedural rules. In actions at law, the courts, including the Supreme Court, adopted what Ann Woolhandler has called a res judicata approach to land office decisions.[106] Such suits, usually ejectment suits, turned on the state or federal land patent—the official governmental document transferring title from the government to the grantee. Courts at law refused to look behind the patent to determine whether a competing claimant had the stronger claim to title.[107] A litigant at law could only challenge a patent if its issuance was ultra vires, that is, if "the patent was issued without authority, or against the prohibition of a statute, or [if] the State [lacked] title to the land granted," the Court summarized.[108] The rules were different in equity: There, the Court was more willing to examine the underlying title claims *behind* the patent, including claims of fraud and mistake. But even then, Woolhandler suggests, the Court would still not entertain procedural attacks against the land office.[109]

As Part II.C later explores, there were key differences between kinds of property entitlements in the broad category of public-lands law and the private land claims. Nonetheless, when the Supreme Court belatedly began to hear private-land-claims cases, it readily extended the deferential model from other land adjudications to congressional decisions to submit the claims to the boards of commissioners for determination. If anything, as Subpart B.1 discusses below, the Court proved *more* deferential, adopting a robust political-question doctrine that severely limited the scope of all judicial jurisdiction over the private land claims. Moreover, as Subpart B.2 considers, courts interpreted these determinations to have a broad preclusive scope, including against third parties and adverse claimants.

1. Validating the boards of commissioners

Though Congress first legislated for the private land claims in 1788, the Supreme Court did not hear its first case addressing these claims, *Henderson v.*

105. *See, e.g.*, M'Intire v. Wood, 11 U.S. (7 Cranch) 504 (1813); M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821); Chotard v. Pope, 25 U.S. (12 Wheat.) 586 (1827); Ross v. Doe, 26 U.S. (1 Pet.) 655 (1828); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498 (1839); Brown's Lessee v. Clements, 44 U.S. (3 How.) 650 (1845), *overruled by* Gazzam v. Lessee of Phillips, 61 U.S. (20 How.) 372 (1858).

106. Woolhandler, *supra* note 25, at 209-10 (describing the "res judicata model").

107. *Id.* at 217-19.

108. Patterson v. Winn, 24 U.S. (11 Wheat.) 380, 382 (1826) (emphasis omitted).

109. Woolhandler, *supra* note 25, at 219.

Poindexter's Lessee, until 1827.[110] The long delay seemed to reflect uncertainty over whether courts had jurisdiction over such cases at all. Many believed that Congress enjoyed exclusive authority over these claims: One congressional committee reported the "unwillingness of the local judicial tribunals thus collaterally to decide between these conflicting claims," deferring instead to Congress.[111]

In *Henderson*, the Court vindicated exclusive congressional authority. The case arose as an ejectment suit in Mississippi between a plaintiff claiming title under a U.S. patent from the federal land office and a defendant asserting title under an unconfirmed Spanish grant.[112] Chief Justice Marshall readily found for the U.S. patentee. Congress had mandated that all land titles be brought before the commissioners to adjudicate, he noted.[113] Because the appellant had failed to file in that tribunal, he had forfeited his claim.[114] Justifying this rule, Chief Justice Marshall made a positivist argument in favor of congressional discretion. "Claimants could not complain," he concluded, "if the law which gave validity to their claims, should also provide a board to examine their fairness, and should make the validity depend on their being laid before that board."[115]

Henderson prefigured a long line of cases in which the Court repeatedly, and with increasing firmness, blessed the use of boards of commissioners to determine title.[116] One particularly influential decision came in the 1838 case of *Strother v. Lucas*, which involved a Missouri claim.[117] "Congress . . . wisely and justly went to the extent, perhaps, of their powers, in providing for the security of private rights," the Court observed, "by directing all claimants to file their claims before a board, specially appointed to adjust and settle all conflicting claims to lands."[118] Such laws had "been uniformly approved by this Court," the Court noted, and "their validity cannot be questioned."[119]

---

110. 25 U.S. (12 Wheat.) 530 (1827).

111. *See* S. Comm. on Priv. Land Claims, *supra* note 77, at 352.

112. *See Henderson*, 25 U.S. (12 Wheat.) at 530-31.

113. *Id.* at 543 ("The whole legislation on this subject requires, that every title to lands in the country which had been occupied by Spain, should be laid before the board of commissioners.").

114. *Id.* ("The plaintiff in error has failed to bring his case before the tribunal which the legislature had provided for its examination, and has, therefore, not brought himself within the law.").

115. *Id.*

116. *See, e.g.*, De la Croix v. Chamberlain, 25 U.S. (12 Wheat.) 599, 601-02 (1827); Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 375 (1844).

117. *See* 37 U.S. (12 Pet.) 410, 427-28 (1838).

118. *Id.* at 448.

119. *Id.*

By the 1840s and 1850s, the Court's case law on private land claims had hardened into a robust version of the political-question doctrine. The Court "repeatedly ruled" that only the political branches could determine the validity of inchoate or equitable land rights based on foreign land grants.[120] Therefore, both federal and state courts lacked all jurisdiction over these cases unless expressly conferred by Congress.[121]

Under this interpretation, these entitlements were unenforceable in court until Congress had recognized them. "No standing, therefore, in an ordinary judicial tribunal has ever been allowed to these claims, until Congress has confirmed them and vested the legal title in the claimant," the Court observed in 1850.[122] "Such, undoubtedly, is the doctrine assumed by our legislation."[123] This principle even extended to disputes in equity, when courts *would* otherwise look behind a land patent to assess underlying claims.[124] When one litigant attempted to avoid the doctrine's strictures by asserting ownership as an equitable claim, the Court concluded that "her claim had no standing in a court of equity or of law, up to the date of its confirmation, and depended on the political power."[125] "[I]f the sovereign power wronged her" in refusing to confirm her claim, the Court opined, then "she is without remedy in a municipal court."[126]

Just like Congress itself, then, the Court assumed that Congress had authority to decide private land claims. In nearly all of the Court's

120. *See* United States v. D'Auterive, 51 U.S. (10 How.) 609, 620-21, 624 (1851) ("It has been heretofore repeatedly ruled by this court, that the control and recognition of claims like that now before us were subjects belonging peculiarly to the political power of the government; and that, in the adjudication of those claims, the courts of the United States expound and enforce the ordinances of the political power."). *Inchoate* and *equitable* rights were key terms of art, and I further explore their meanings in Part II.B below.

121. *See* Burgess v. Gray, 57 U.S. (16 How.) 48, 62 (1854) ("Now as regards any equitable and inchoate title which the petitioner may possess under the treaty with France, it is quite clear that the State court had no jurisdiction over it. For it has been repeatedly held by this court that, under that treaty, no inchoate and imperfect title derived from the French or Spanish authorities can be maintained in a court of justice, unless jurisdiction to try and decide it has first been conferred by act of Congress."); United States v. King, 44 U.S. (3 How.) 773, 787 (1845) ("These decisions stand upon the ground that such titles are not confirmed by the treaty itself so as to bring them within judicial cognisance and authority: and that it rests with the political department of the government to determine how and by what tribunals justice should be done to persons claiming such rights.").

122. Menard's Heirs v. Massey, 49 U.S. (8 How.) 293, 307 (1850).

123. *Id.*

124. *See supra* text accompanying notes 108-09.

125. Les Bois v. Bramell, 45 U.S. (4 How.) 449, 462 (1846).

126. *Id.*

investigations of the private-land-claims cases, the touchstone was congressional intent. Constitutional issues concerning federal power barely emerged: Not until 1854, after having resolved dozens of private-land-claims cases, would the Court decide, and reject, a constitutional objection to their resolution.[127]

Nonetheless, considered within the context of present-day public-rights doctrine, these extensive decisions had a significant limitation. Because of the Court's jurisdictional holdings, the bulk of the Court's private-land-claims cases arose either under statutes that explicitly conferred Article III jurisdiction or from instances where Congress itself made the final determination. What about instances where the boards of commissioners rendered final decisions? Because Congress only occasionally made the boards' decisions final, and did so usually for smaller claims, such cases rarely reached the Court. Nonetheless, the Court addressed the question of finality in two key antebellum decisions: *United States v. Percheman*[128] and *Lessee of Hickey v. Stewart*.[129]

Percheman turned on an 1830 federal statute that gave federal courts jurisdiction to review every claim in Florida "not finally acted upon" by earlier rulings.[130] The claim at issue in the case had been presented to the Board of Commissioners, which, in a three-sentence decision, observed that a key survey was missing.[131] "As it is," the commissioners concluded, "we reject the claim."[132] The government's attorney insisted that this rejection was a final ruling that divested the federal courts of jurisdiction under the statute.[133]

Chief Justice Marshall's skepticism was evident. To him, the Board of Commissioners looked like a "board of inquiry, not a court exercising judicial power and deciding finally on titles."[134] He found further evidence for this conclusion in the commissioners' practices, which similarly struck him as unjudicial.[135]

---

127. *See infra* text accompanying notes 329-32.

128. 32 U.S. (7 Pet.) 51 (1833).

129. 44 U.S. (3 How.) 750 (1845).

130. Act of May 26, 1830, ch. 106, § 4, 4 Stat. 405, 406 (incorporating the Act of May 23, 1828, ch. 70, § 6, 4 Stat. 284, 285).

131. *Percheman*, 32 U.S. (7 Pet.) at 86.

132. *Id.* (quoting the books of the register and receiver acting as commissioners).

133. *Id.*

134. *See id.* at 90.

135. *Id.* at 91-92 ("The commissioners do not appear to have proceeded with open doors, deriving aid from the argument of counsel, as is the usage of a judicial tribunal, deciding finally on the rights of parties but to have pursued their inquiries like a board of commissioners . . . whose inquiries would enable the government to ascertain the

footnote continued on next page

Yet *Percheman* turned not on the Constitution, which went unmentioned, but on statutory interpretation. The touchstone for Chief Justice Marshall was "the object and purpose of the act," which the Florida statute and its predecessors left vague.[136] Instead of providing that the commissioners' decisions would be final, as prior laws had,[137] the Florida land statutes stated only that, if the claims were "correct and valid," the Board "shall give confirmation to them."[138] Chief Justice Marshall's close reading led him to conclude that Congress did not intend the Board's *rejections* to be final. And then, in a brief aside that swept aside everything he had previously stated, he also noted that decision could not be binding for "another reason": The size of the petitioner's claim exceeded the Board's jurisdiction under the clear terms of the statutes.[139]

Percheman thus did not clarify the effect of decisions where Congress had unambiguously provided that the commissioners' decisions would be final. The Court squarely addressed this question only once, in the 1845 case *Lessee of Hickey v. Stewart*.[140] There, the plaintiffs claimed title under a Spanish land grant that the Board of Commissioners had confirmed. Yet the defendants had prevailed in Mississippi Chancery Court, despite the Board's ruling, because the court held that the Spanish title was fraudulent.[141] It was particularly significant that the chancery court had reached this decision while sitting in equity.[142] As discussed earlier, under well-established rules of public-land law, equity courts, unlike courts at law, *could* look behind a patent to determine the underlying equitable property rights.[143]

Nonetheless, the Court held that the chancery court's decision was ultra vires. Key to this decision was the 1803 statute governing private land claims in Mississippi, which expressly decreed that the Board's decisions "shall be final."[144] That language was enough for the Court. The Board of Commissioners, it reasoned, was a "tribunal . . . created for the express purpose of deciding all questions arising under the deed of cession."[145] Moreover,

---

great bulk of titles which were to be confirmed, not to decide ultimately on the titles which those who had become American citizens legally possessed.").

136. *See id.* at 89-95.

137. *See supra* text accompanying notes 65, 77.

138. Act of May 8, 1822, ch. 129, § 5, 3 Stat. 709, 717-18.

139. *Percheman*, 32 U.S. (7 Pet.) at 94-95.

140. 44 U.S. (3 How.) 750 (1845).

141. *Id.* at 757-59.

142. *Id.* at 751 (argument of Coxe for the plaintiff in error).

143. *See supra* text accompanying notes 106-09.

144. Act of Mar. 3, 1803, ch. 27, § 6, 2 Stat. 229, 231; *see also* text accompanying notes 62-66.

145. *Lessee of Hickey*, 44 U.S. (3 How.) at 761-62.

Congress had mandated that "its decision was to be final."[146] "[T]herefore," the Court reasoned, the Board's "jurisdiction was exclusive; unless, by express words, Congress had conferred concurrent jurisdiction on some other judicial tribunal."[147] Finding no such conferral, the Court invalidated the Chancery Court's decision as a "mere usurpation of judicial power."[148]

Taken together, *Percheman* and *Lessee of Hickey* underscore that the touchstone in determining the commissions' finality was once again congressional intent. The commissions may not have looked like "judicial tribunals" to Chief Justice Marshall, but that ultimately did not matter.[149] Rather, the Court ruled that Congress, by speaking clearly, could make the commissions' decisions final without any further review or approval, divesting state and federal courts of the power to review a board's determinations.

2. Preclusive effects

The Supreme Court, then, found that Congress had broad and even exclusive power to determine how the private land claims would be resolved. But once such claims were adjudicated, who would be bound by these determinations? Many private-land-claims statutes included stipulations that limited the decisions' preclusive effects, providing, in the words of one such statute, that confirmation "shall only operate as a release of any interest which the United States may have, and shall not be considered as affecting the rights of third persons."[150] Some present-day commentators have concluded that these limitations distinguished administrative tribunals, which determined public rights, from court proceedings, which determined private rights.[151]

146. *Id.* at 762.

147. *Id.*

148. *Id.*

149. Later Justices disagreed, concluding that commissions were the functional equivalent of courts. *See infra* notes 348-53 and accompanying text.

150. *See, e.g.*, Act of May 8, 1822, ch. 129, § 5, 3 Stat. 709, 718; *see also, e.g.*, Act of Feb. 8, 1827, ch. 9, § 2, 4 Stat. 202, 202 ("Provided, That this confirmation shall only operate as a relinquishment of the title of the United States: Provided further, That nothing in the aforegoing sections shall be construed to prevent or bar the judicial decision between persons claiming titles to the lands confirmed."); Act of May 26, 1830, ch. 106, § 6, 4 Stat. 405, 406 ("That all confirmations of land titles, under this act, shall only operate as a relinquishment of the right of the United States to the said lands respectively, and shall not be construed either as a guarantee of any such titles, or in any manner affecting the rights of other persons to the same lands.").

151. *See* Baude, *supra* note 14, at 1543-44 ("The commissioners lacked any authority to bind private parties . . . ."); Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1717 (2007) ("The statutes providing for land commission adjudication of private claims made those determinations final against the United States, but not against third party claimants. These latter claims would have to be fought out in the courts.").

This is a misreading. Rather than narrowing the boards' preclusive effects, these provisions actually sought to *replicate* the collateral consequences of common law suits over title. Yet in the end, these provisions did not work. The Supreme Court ultimately gave federal confirmations of private land claims even *broader* effect than comparable court proceedings, holding that they effectively barred competing ownership claims even when claimants did not participate in the administrative adjudication.

Some context on nineteenth-century land litigation is helpful. By the early nineteenth century, ejectment suits had become the predominant way to try title in American law.[152] Many of the myriad land cases that reached the Court were ejectment suits.[153] But like all in personam land litigation, such suits did not establish title as against all the world; they only determined title as between the two litigants, reiterating the foundational property law principle of relativity of title.[154] In fact, because the action of ejectment began at common law as a way to determine the right of possession rather than title, an ejectment decision, strictly speaking, did not even authoritatively determine title as among the litigants.[155] Because ejectment determined the superior possessory claim at a particular moment, the same two parties could, under strict common law, relitigate ownership de novo in a future case.[156]

As commentators at the time recognized, hearings before the boards of commissioners were thus the functional equivalent of such ejectment suits, with the boards and Congress deciding which litigant enjoyed superior ownership rights.[157] By limiting a confirmation's preclusive effects to the parties involved, then, Congress was making the commissioners' decisions *more* akin to the judicial decisions, not less. Those decisions unambiguously bound not just the United States but at least one private party—the land claimant, impairing their property rights against the United States to the same

152. *See* ABLAVSKY, *supra* note 57, at 35.

153. *See, e.g.*, Huidekoper's Lessee v. Douglass, 7 U.S. (3 Cranch) 1 (1805); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603 (1813); Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543 (1823). Westlaw identifies 310 Supreme Court decisions before 1850 that contain the term "ejectment."

154. *See generally* Larissa Katz, *The Concept of Ownership and the Relativity of Title*, 2 JURIS. 191 (2011) (describing the concept of relativity of title and its significance in property law).

155. *See* J.C. WELLS, A TREATISE ON THE DOCTRINES OF RES ADJUDICATA AND STARE DECISIS § 341, at 280 (Des Moines, Mills & Co. 1878).

156. *See* Lessee of Hickey v. Stewart, 44 U.S. (3 How.) 750, 759 annot. 1 (1845) (Stewart Rapalje ed., Banks L. Pub'g 2d ed. 1903) (1884) ("The action of ejectment is only a possessory action—to determine who is entitled to the possession of the land at the moment suit was brought for it. . . . 'It is a recovery of the possession without prejudice to the right, as it may afterward appear, even between the same parties.'" (quoting Taylor v. Horde (1757) 97 Eng. Rep. 190, 220; 1 Burr. 60, 114)).

157. *See infra* Part III.A.

extent that would have been similarly impaired by an adverse ruling in any ejectment suit.

Why include such language at all, if it merely replicated the preexisting law of preclusion? Much of the explanation likely lies in the conflicting congressional roles in the law of property. In addressing the private land claims, Congress was often at pains to stress that it was not decreeing property rights, but rather simply acting as a landowner, trying to determine the scope and extent of its own landholdings.[158] But the same Congress was *also* in the business of *creating* property rights as against all the world through its extensive public-land legislation. The risk, then, was that courts would interpret the federal confirmations of private land claims not as an adjudication but as a sovereign act and therefore grant congressional statutes concerning private land claims *greater* weight than an ordinary title dispute between parties.[159]

Yet, despite the language protecting the rights of "third persons," the commissioners' decisions *did* bind parties other than the claimant and the United States. In part, this outcome reflected the well-settled law of preclusion that litigants' privies—that is, those whose ownership traced back to the litigants—were also bound by the outcome of a suit.[160] As the statutes themselves acknowledged, this principle, which also applied to the commissioners' determinations, bound anyone whose title traced back either to the claimant or the United States.[161] This rule proved hugely significant in the context of antebellum land law. Even considered as an ordinary landowner, the United States was *not* just another land litigant: It sought to vindicate ownership to millions of acres of land only so that it could then turn around to sell or distribute that land to thousands of would-be private owners. The result was that nearly every landowner in the ceded territories was a privy to the original land dispute: Their ownership rights invariably traced back either to the claimant or, more frequently, to the United States through the federal land office. Many, perhaps even most, private-land-claims disputes involved just such clashes between two private parties with competing chains of title, one tracing back to the United States. And in these cases, courts

158. *See, e.g.*, CONG. GLOBE, 31st Cong., 2d Sess. 361 (1851) (statement of Sen. Thomas Ewing) ("We do not act here as legislators; we act as a great landed proprietor . . . .").

159. This concern turned out be to quite valid. *See, e.g.*, *infra* Part III.C.

160. *See* WELLS, *supra* note 155, § 169, at 141-43.

161. *See, e.g.*, Act of May 8, 1822, ch. 128, § 1, 3 Stat. 707, 707 (confirming land claims as "valid and complete titles, against any claim on the part of the United States, or right derived from the United States").

uniformly ruled that Congress's resolutions *were* binding, even though they affected private parties.[162]

There were also sometimes disputes between two private parties that had nothing to do with federal ownership, in which *both* parties asserted title based on preexisting land rights that predated the United States. Those, it seemed, were the kind of disputes that the limiting language about "third parties" sought to preserve for judicial resolution. If the federal government confirmed *both* claimants' land rights, then those federal confirmations *did* have a limited preclusive effect: The claimants could turn to the courts to adjudicate their dispute (although even then, the date of a federal patent might prove dispositive, with the older claim gaining priority).[163]

But that was not the only possible outcome. Often, the federal government confirmed one claimant's title but not that of the other. In those instances, federal confirmation effectively divested third-party claimants of their competing title claim, due to the Court's political-question doctrine. Because courts lacked all jurisdiction over claims until Congress had confirmed them, Congress's decision to validate one claimant's title but not that of another claimant was, in practice, a dispositive ruling on their respective merits.[164]

This consequence seemed to violate the statutes' express language, since it bound claimants who were in no way parties to the board's original proceeding. But the Supreme Court disagreed: It not only acknowledged but blessed the conclusion that these rulings constituted a binding resolution between the private claimants. "[T]he federal government, being unable to confirm the same land to two adverse claimants, must then, to some extent, determine between the conflicting titles," the Court ruled in 1844.[165] Thus, the Court reasoned, "when the government exercises its powers and confirms the land to one [but not the other], it must necessarily be considered in a court of law the paramount and better title."[166] The Court applied the same principle in subsequent litigation, stressing that the federal confirmation established that a

162. For just a few early examples from an enormous set of cases, see *Lindsey v. Lessee of Miller*, 31 U.S. (6 Pet.) 666, 675-76 (1832); *Chotard v. Pope*, 25 U.S. (12 Wheat.) 586, 587 (1827); and *Matthews v. Zane*, 20 U.S. (7 Wheat.) 164, 203, 211 (1822).

163. *See, e.g.*, Widow & Heirs of Delahoussaye v. Saunders, 4 La. 443, 445-46 (1832); Calvit v. Innis, 10 Mart. (o.s.) 287, 288 (La. 1821).

164. The Missouri Supreme Court noted this implication. *See* Widow & Heirs of Mackay v. Dillon, 7 Mo. 7, 12-13 (1841), *rev'd on other grounds sub nom.* Mackay v. Dillon, 45 U.S. (4 How.) 421 (1846).

165. Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 375 (1844).

166. *Id.* at 376; *see also* Les Bois v. Bramell, 45 U.S. (4 How.) 449, 464 (1846) (holding, similarly, that when there are "two adverse claims to the same land" the federal government "was under the necessity of determining between them").

claimant "had the oldest and best claim to the land, as against every other claimant under the Spanish government."[167]

Commentators have thus misunderstood the statutory language that Congress applied to its adjudications of private land claims. These provisions sought not to limit but to duplicate the preclusive effects of common law adjudications of title. Yet the language arguably failed to achieve its aim. Federal resolutions of private land claims ultimately bound not only the huge number of landowners whose title traced to the federal government—a result that Congress anticipated and endorsed—but also competing claimants who were not in privity with the original litigation. Congress may not have intended this outcome, but the Court explicitly endorsed it without expressing any constitutional qualms.

C. The Law of Private Claims and the Public-Rights Doctrine

Restoring the context of private-land-claims jurisprudence to *Murray's Lessee* helps clarify some of the case's otherwise opaque language. The citation to the private-land-claims cases demonstrates, for instance, that when the Court spoke of public rights in *Murray's Lessee*, it did not mean to limit them only to those rights owned by the public. That more circumscribed definition of public rights occasionally appeared within antebellum jurisprudence, but such a definition did not encompass the *private* land claims, which the Supreme Court had consistently described, prior to *Murray's Lessee*, as "private rights."[168]

The private-land-claims context also sheds light on perhaps the most influential, but confusing, statement in *Murray's Lessee*. Congress could not "withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty," the Court stated.[169] But, the Court continued, "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States."[170]

The Court has recently sought to elevate this ambiguous language into a black-letter test for whether a given right is a "public right": If it is similar to

167. Landes v. Brant, 51 U.S. (10 How.) 348, 370 (1851).

168. *See, e.g.*, Strother v. Lucas, 37 U.S. (12 Pet.) 410, 448 (1838); United States v. Percheman, 32 U.S. (7 Pet.) 51, 87 (1833).

169. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

170. *Id.*

claims that could only be litigated in court, then it is not a public right.[171] In *Oil States*, Justice Gorsuch noted, the majority and dissenters alike agreed that the relevant "test" is whether "a suit is made of the stuff of the traditional actions at common law."[172]

Yet the private land claims suggest that this essentialist reading of the test could not have been what the Court meant in *Murray's Lessee*. At their core, the private land claims involved conflicting claims to ownership, one of the most frequent and traditional subjects of common law litigation. Indeed, as we shall see, the *nature* of the private land claims was indistinguishable from the nearly identical land entitlements that antebellum courts routinely adjudicated.[173] The private land claims would thus almost certainly fail the *Oil States* formulation of the test.

Why, then, were the private land claims consistent with the Court's definition of public rights? One potential explanation is that the *Murray's Lessee* Court defined the *nature* of the relevant suit narrowly and technically, rather than by analogy to similar lawsuits. Title disputes, for instance, were clearly the "stuff" of common law, but the private land claims were not—if only because of the broad political-question doctrine courts adopted. Another related explanation is that Congress never "withdrew" the private land claims "from judicial cognizance." Rather, Congress simply legislated on the claims; it was the courts, deferring to congressional authority and separation of powers, that then declined to exercise jurisdiction.

But the Court did not elaborate these justifications itself. All it said was that the private land claims were a defining example of public rights, leaving us to puzzle through the implications.

II. Explaining the Antebellum Law of Private Land Claims

One implication is particularly significant and puzzling: Why was there such seeming consensus in favor of congressional authority over the private land claims? Neither the antebellum Congress nor the courts ever fully explained this conclusion. Jerry Mashaw, the only prior legal commentator to seriously investigate the history of private land claims, surveyed some tentative explanations proffered by other scholars before ultimately

171. Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1376-78 (2018) (concluding that the grant of a patent is a public right because it is not "a matter that, 'from its nature,' must be decided by a court" (quoting Stern v. Marshall, 564 U.S. 462, 484 (2011))).

172. *Id.* at 1381 (Gorsuch, J., dissenting) (quoting *Stern*, 564 U.S. at 484).

173. *See infra* text accompanying notes 252-65.

concluding that Congress's broad discretion over the claims was "something of a mystery."[174]

This Part attempts to solve that mystery. After exploring some partial explanations offered at the time, it suggests that the best answer comes from the sparse language of *Murray's Lessee* itself, particularly its reference to "[e]quitable claims."[175] Not a mere throwaway, this language was an explicit reference to a key property law doctrine: the dichotomy between *perfect* or *legal* land titles and *imperfect*, *equitable*, or *inchoate* titles. This dichotomy was ubiquitous throughout legislative and judicial discussions of the private land claims. Put simply, Congress was thought to have complete authority over imperfect titles but limited authority over perfect land rights.[176]

Why did antebellum thinkers believe the perfect–imperfect dichotomy had so much legal force? It is tempting to assimilate the framework into current assumptions about the division between *right* and *privilege*, but this divide fits poorly with the historical evidence. A better explanation focuses on nineteenth-century assumptions about the nature of property rights and the role of the separation of powers. But even as most jurists in the antebellum United States embraced the perfect–imperfect distinction for the work that it did, others hinted at its contradictions and uncertainties, pointing toward challenges to come.

A. The Private-Land-Claims Puzzle

The apparent "easy acceptance of the constitutional propriety of administrative adjudication of private claims," in Jerry Mashaw's words, has puzzled subsequent commentators.[177] Surveying various scholars' interpretations, Mashaw notes the challenge of anachronistically trying to fit these historical understandings into a present-day jurisprudential frame and suggests that many at the time likely thought about the private land claims as similar to other claims against the United States that fell within congressional discretion.[178] From this perspective, he suggests, the key question was not whether to defer to the courts, but when and whether Congress should delegate its adjudicative power to these administrative tribunals—even as he qualifies that these views are "speculative."[179]

174. Mashaw, *supra* note 151, at 1727-34.

175. *Murray's Lessee*, 59 U.S. (18 How.) at 284.

176. *See infra* Part II.B.

177. Mashaw, *supra* note 151, at 1733.

178. *See id.* at 1729-33.

179. *Id.* at 1731-33.

Mashaw is clearly right about nineteenth-century thinking: The private land claims were considered a matter for Congress rather than the courts, as the prior Subparts have explored. But, as he acknowledges, his account struggles to explain why.

One likely reason for the challenge that confronted Mashaw is that, when Congress first created the commissions, there was no *single*, fully developed justification for congressional authority. Rather, as this Subpart explores, jurists floated various explanations. Yet most of these arguments quickly collapsed as flawed or unpersuasive under the era's law.

One line of justification focused on the broad scope of congressional power over federal lands. The "power over the public lands is vested by the constitution exclusively in Congress," one Attorney General observed in explaining Congress's actions in the context of one Louisiana grant.[180] This emphasis fit with much antebellum thought and jurisprudence, which stressed congressional power over the public domain "without limitation."[181] But this argument was circular. Definitionally, valid private land claims were *not* part of the public domain. Congressional power over public lands could only operate once it was established that the lands *were* public lands—the precise question that the land claims adjudications sought to resolve.

Another justification stemmed from foreign relations law—the treaties protecting preexisting land rights were not self-executing, and therefore it fell within congressional discretion to determine how to satisfy those provisions. The Supreme Court often stated that Congress alone had the political obligation to honor preexisting property rights under the treaties.[182] For example, it did so in one of the earliest Supreme Court private land claims decisions, *Foster v. Neilson*; in fact, it was in this decision that Chief Justice Marshall first enunciated the doctrine of non-self-executing treaties.[183] Yet Chief Justice Marshall and others also unambiguously asserted that the treaties of cession merely reinforced the requirements of the law of nations and that the claimants' property rights would have been valid even in the absence of treaty provisions.[184] Few at the time seemed to think congressional discretion

180. Title to Certain Lands in La., 4 Op. Att'y Gen. 643, 706 (1847).

181. *E.g.*, United States v. Gratiot, 39 U.S. (14 Pet.) 526, 537 (1840).

182. *See, e.g.*, Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 375 (1844) ("These cases maintain . . . that the treaty [of the Louisiana Purchase] imposed on this government only a political obligation to perfect [inchoate property rights]: that this obligation, sacred as it may be, in any instance, cannot be enforced by any action of the judicial tribunals . . . . We think this reasoning correct . . . .").

183. 27 U.S. (2 Pet.) 253, 314-15 (1829).

184. *See, e.g.*, Soulard v. United States, 29 U.S. (4 Pet.) 511, 511-12 (1830) ("The United States, as a just nation, regard this stipulation [to protect property] as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract."); Strother v. Lucas, 37 U.S. (12 Pet.) 410, 436 (1838) ("[Under] the law of

footnote continued on next page

over the treaties encompassed the right to *annul* preexisting property rights.[185] Regardless, *Foster*'s reign was very brief. Four years later, Chief Justice Marshall reversed his earlier position in another part of his ruling in *Percheman*.[186] Upon reading a new translation of the Spanish provisions of the 1819 Adams–Onís Treaty, Chief Justice Marshall concluded that the treaty's protections for property were, in fact, self-executing and could be judicially enforced.[187]

Another commonly discussed justification was procedural rather than substantive: sovereign immunity. Because claimants could not sue the federal government to assert their title, this argument ran, Congress could create the boards of tribunals as an alternative. This explanation had quite a bit of currency at the time,[188] with the Supreme Court itself occasionally citing sovereign immunity to explain administrative adjudication of private land claims.[189]

Yet the sovereign-immunity justification for private land claims made little sense in the context of nineteenth-century jurisprudence. In practice, sovereign immunity was almost never a meaningful bar to public-lands litigation at the time.[190] It was easy enough, after all, to bring a suit against a federal officer rather than the government directly, and courts rarely looked

---

nations . . . the rights of property are protected, even in the case of a conquered country, and held sacred and inviolable when it is ceded by treaty, with or without any stipulation to such effect . . . .").

185. *See, e.g.*, United States v. Percheman, 32 U.S. (7 Pet.) 51, 86-87 (1833) ("The modern usage of nations, which has become law, would be violated, that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated, and private rights annulled . . . .").

186. *Id.* at 89.

187. *Id.* at 88-89 (noting that the treaty "conform[ed] exactly to the universally received doctrine of the law of nations," under which "titles, so far at least as they were consummate, might be asserted in the courts of the United States").

188. *Cf.* Rodney, *supra* note 75, at 1 (stating that a board of commissioners was typically created "where the rights of the United States are concerned" and suggesting that the territorial courts lacked authority to settle these claims).

189. *See* Menard's Heirs v. Massey, 49 U.S. (8 How.) 293, 307 (1850) ("[A]s the sovereign power could not be sued as legal owner, Boards of Commissioners were created, with liberal powers, to investigate every description of claims . . . ."); *cf.* Auth. of Regs. & Receivers, 3 Op. Att'y Gen. 93, 97 (1836) (noting, in the context of a different public-land dispute, that "as the government cannot be sued, . . . it should institute some appropriate legal proceeding for the purpose of trying and determining the validity of the claim").

190. *See* Antonin Scalia, *Sovereign Immunity and Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 MICH. L. REV. 867, 885 (1970) ("[D]uring the nineteenth century, despite the considerable volume of public-lands litigation, no public-lands case against a federal officer—for mandamus, injunction, or ejectment—was dismissed by the Supreme Court on the ground of sovereign immunity.").

behind the pleadings to discover the real party in interest.[191] Moreover, many private-land-claims cases involved no governmental party at all: They were suits between two private parties with conflicting chains of title. Antebellum courts routinely reviewed such cases implicating property rights that derived from either state or federal land grants; in fact, some of the most famous cases in antebellum jurisprudence arose through such litigation.[192] Sovereign immunity, then, cannot explain why the Court singled out private land claims as subject to a broad political-question doctrine while routinely adjudicating many other kinds of title tracing to sovereign acts.

In short, although litigants and courts discussed and at times invoked these various justifications, none of them fully explained why courts deferred so strongly to political branches' determinations over the private land claims. The next Subpart explores how jurists found what they considered the most persuasive explanation in the era's property law—above all, in the distinction between the terms *perfect* and *imperfect* that littered the Court's rulings in this area.

B. The Perfect–Imperfect Dichotomy

In addressing the private land claims, the Supreme Court consistently distinguished between two sets of property rights. The first was *perfect* or *complete* titles; the second was *imperfect* or *inchoate* titles. For both Congress and the Supreme Court, this dichotomy had legal, and perhaps even constitutional, significance in the treatment of land rights.

The distinction between perfect and imperfect titles did not originate with the private land claims. Property rights had long been fractured and divided under the common law. For treatise writers like Blackstone, "good and perfect title" to land encompassed both the right of possession and legal ownership (the "right of property," in Blackstone's parlance), while "imperfect" ownership included only some of these entitlements.[193] In the early United States, jurists applied this distinction to the complicated systems that colonies, and later states, developed to distribute the public domain. Especially in states like Virginia, North Carolina, and Pennsylvania that claimed to own enormous tracts of (purportedly former) Indigenous land, the state land systems required many, often elaborate, steps: Claimants had to file entries, receive state warrants, and submit plats and surveys to the land office.[194] Only once these

191. *See id.* at 885-86.

192. Two particularly prominent examples in antebellum jurisprudence are *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), which implicated Georgia's land grants, and *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), which tested the validity of a federal land grant.

193. 2 WILLIAM BLACKSTONE, COMMENTARIES *195-99.

194. ABLAVSKY, *supra* note 57, at 31-34; Henderson, *supra* note 68, at 137-39.

requirements were complete would a patent or grant issue.[195] Courts applied the perfect–imperfect distinction to these land rights. Full, complete, or perfect title, they reasoned, passed only with the patent or grant, which formally transferred the state's title to the claimant.[196] Until that point, claimants holding entries, warrants, or other official documents acknowledging intermediate ownership still owned something—what courts described as "imperfect" or "inchoate" title.[197]

As courts interpreted it, this distinction had important procedural consequences. At common law, only a perfect title was a *legal* title—that is, one that could vindicate ownership in an action at law, especially an ejectment suit, as described above.[198] Holders of inchoate titles, however, also had rights that they could vindicate in court: They could bring suits in equity based on their *equitable* titles. In such suits, litigants asserting equitable title could, and did, prevail against those holding legal title if they proved that they had the superior prior right—because, for instance, the issuing authority had erred in its legal interpretation.[199] Some states went still further: Through statute, they permitted courts to entertain equitable titles either offensively or as a defense in actions at law.[200] A perfect title was still valuable—in particular, it trumped rights, either equitable or legal, that *postdated* its issuance[201]—but it did not always prevail against all competing claims.

Anglo-Americans extended this jurisprudential framework to assimilate the Spanish, French, British, and Mexican land systems that had existed prior to U.S. sovereignty. After all, these complicated, multistage processes for distributing property resembled state practices: Governors freely granted land but attached conditions to be satisfied before title passed. Early on, Justice

195. ABLAVSKY, *supra* note 57, at 31-34.

196. *See, e.g.*, Danforth's Lessee v. Thomas, 14 U.S. (1 Wheat.) 155, 157 (1816); Green v. Liter, 12 U.S. (8 Cranch) 229, 247-48 (1814); Fairfax's Devisee v. Hunter's Lessee, 11 U.S. (7 Cranch) 603, 625-26 (1813).

197. *See, e.g.*, Burton's Lessee v. Williams, 16 U.S. (3 Wheat.) 529, 536 (1818); *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 625-26.

198. *See supra* text accompanying notes 106-07.

199. *See, e.g.*, Taylor v. Brown, 9 U.S. (5 Cranch) 234, 241-45 (1809).

200. *See, e.g.*, Gibson v. Chouteau, 80 U.S. (13 Wall.) 92, 96 (1872) ("By the statutes of the State [of Missouri] the action of ejectment will lie on certain equitable titles."); Fenn v. Holme, 62 U.S. (21 How.) 481, 488 (1859) ("A practice has prevailed in some of the States (and amongst them the State of Missouri) of permitting the action of ejectment to be maintained upon warrants for land, and upon other titles not complete or legal in their character . . . .").

201. *See* Hoofnagle v. Anderson, 20 U.S. (7 Wheat.) 212, 214-15 (1822) ("Any defects in the preliminary steps, which are required by law, are cured by the patent. It is a title from its date, and has always been held conclusive against all those whose rights did not commence previous to its emanation.").

Baldwin compared the private land claims to the familiar "judicial history of landed controversies, under the land laws of Virginia and North Carolina," where "the origin of titles is in very general, vague, inceptive equity."[202]

Yet the ceded European territories presented a tangled system of preexisting land rights even more perplexing than that of the states. A handful of land grants were supposedly consummated, but many remained in various intermediate stages, with some governmental action purportedly necessary to pass full title. The constant changes of sovereignty as competing empires had jockeyed for authority had only unsettled titles still further, creating intricate layers of overlapping legal regimes.[203] One surveyor in the Mississippi Territory identified twenty-two distinct categories of preexisting land rights tracing to prior British and Spanish regimes: some of those grants had been conditional, while others had been made outright; some had been maintained while others had been abandoned; and some had been warranted before the treaty of cession but not actually perfected until after.[204] Further compounding the challenge, most of the colonies, with sparse European populations, had had little market for land. As a result, claimants and governments alike had been strikingly cavalier about marking boundaries and keeping records—at least in the eyes of real-estate-obsessed Anglo-Americans.[205]

The need to resolve private land claims produced one of the most sustained, if little known, projects of legal pluralism in American legal history, as Anglo-Americans set out to become experts in prior Spanish, French, and Mexican land law. Congress commissioned the attorney Joseph M. White to compile and translate these laws, and in 1839 he published his authoritative multivolume work, known as White's *Recopilación*.[206] The nation's most eminent and prominent lawyers, as well as judges from the states up through the Supreme Court, soon found themselves wading through the particularities of these colonial practices.[207]

Throughout this elaborate process, Congress and the Supreme Court repeatedly drew a sharp distinction between perfect titles—that is, where the grants had been completed—and the imperfect titles where some further governmental act was required before the claimant enjoyed complete

202. United States v. de la Maza Arredondo, 31 U.S. (6 Pet.) 691, 727 (1832).

203. GATES, *supra* note 40, at 87-90, 93.

204. 5 THE TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF MISSISSIPPI, 1798-1817, at 158 n.53 (Clarence Edwin Carter ed., 1937).

205. *See* ABLAVSKY, *supra* note 57, at 91-99.

206. JOSEPH M. WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN, RELATING TO THE CONCESSIONS OF LAND IN THEIR RESPECTIVE COLONIES; TOGETHER WITH THE LAWS OF MEXICO AND TEXAS ON THE SAME SUBJECT (Philadelphia, T. & J.W. Johnson 1839).

207. *See, e.g.*, GATES, *supra* note 40, at 90-92, 102; DONALDSON, *supra* note 35, at 365-66.

ownership. In its early Louisiana statute, for instance, Congress stipulated that anyone claiming lands under "any legal French or Spanish grant" *may* file their claim to be recorded, but anyone with an "incomplete title" *shall* record the claim upon pain of forfeiture.[208]

In explaining this distinction, the Court noted that both perfect and imperfect titles were protected under the law of nations and treaties: The United States, it repeatedly held, was obligated to honor both. But the *manner* of obligation differed. One Florida dispute in 1840 elicited the "established doctrine of this Court": Perfect titles were "intrinsically valid . . . [and] need[ed] no sanction from the legislative or judicial departments of this country."[209] In other words, upon cession, the perfect titles became yet another complete land title within the United States.[210] Just like other titles at law, for instance, perfect titles could serve as the basis for an ejectment suit without any sort of government recognition.[211]

Imperfect titles were different. They, too, remained legally valid, but their holders possessed the same right *after* cession as before: an inchoate property right that required some further act of the government to be perfected—that is, to ripen into a complete, legal title. The only difference was that, with cession, the United States replaced the prior regime: As the Court stated, "The new government takes the place of that which has passed away."[212] As a result, the Court reasoned, the political branches, and especially Congress, had full discretion to determine when, and how, these rights could become complete titles to land, just as the prior colonial governments had.[213] But until these rights had been perfected, the formal legal title remained in the United States by virtue of the cession from the prior sovereigns.[214]

The dichotomy between perfect and imperfect title, then, explains the shorthand reference in *Murray's Lessee* to "equitable titles" and congressional

208. Act of Mar. 2, 1805, ch. 26, § 4, 2 Stat. 324, 326-27.

209. United States v. Wiggins, 39 U.S. (14 Pet.) 334, 350 (1840).

210. Title to Certain Lands in La., 4 Op. Att'y Gen. 643, 713 (1847) ("The claims that had been brought before the board on complete and perfect titles were not confirmed, for the reason, unquestionably, that they required no confirmation from the government of the United States."); 1 CURTIS, *supra* note 28, § 290, at 401 ("The doctrine, therefore, established by a series of decisions, in reference to claims under the Florida treaty, was, that perfect titles, or titles completed before the cession, needed no confirmation, legislative or judicial, after the cession . . . .").

211. *See* United States v. Roselius, 56 U.S. (15 How.) 36, 38 (1853) (noting that a claimant asserting perfect title was "at liberty to assert his rights in any court having competent jurisdiction to decide upon the validity or invalidity of the complete and perfect title set up in his petition").

212. Soulard v. United States, 29 U.S. (4 Pet.) 511, 512 (1830).

213. *See* De la Croix v. Chamberlain, 25 U.S. (12 Wheat.) 599, 601 (1827).

214. *Id.*

discretion. While perfect title could be challenged only in court, Congress enjoyed nearly unchecked authority to resolve *imperfect* claims. As the Supreme Court summarized in 1868 after resolving hundreds of such cases, Congress was the "the sole judge of the propriety of the mode" of their confirmation: "It may declare the action of the special board final; it may make it subject to appeal; it may require the appeal to go through one or more courts, and it may arrest the action of board or courts at any stage."[215] Congress, in short, enjoyed "plenary power" over the resolution of imperfect claims.[216]

C. Explaining the Perfect–Imperfect Dichotomy

For antebellum jurists and commentators, then, the perfect–imperfect dichotomy explained congressional discretion over private land claims. But it is less clear *why* they thought so. One tempting solution is to try to map this divide onto the right–privilege dichotomy. Yet this approach does not fit the historical understanding: Privileges were not property and so could be freely stripped,[217] while imperfect rights, though incomplete, *were* vested rights to property. A better explanation reflects the *nature* of the property rights at issue. In particular, courts were reluctant to *perfect* incomplete property rights—which, they argued, is what it meant to judicially enforce imperfect rights—because they regarded this as a political, not judicial, function.

Imperfect private land claims were one of a growing class of property entitlements in the nineteenth-century United States that conferred some kind of legal right to ownership and possession but which provided less than full dominion. In one sense, such subdivision of real property perpetuated long-standing common law understandings tracing back of feudalism.[218] But these new rights differed from long-standing separations of land into different use and possession rights. Rather, even as early American law streamlined land ownership by elevating fee simple ownership, it also abstracted and commodified title by fragmenting it through these new government-issued inchoate rights.[219]

---

215. Grisar v. McDowell, 73 U.S. (6 Wall.) 363, 379 (1868).

216. *Id.*

217. *See supra* text accompanying notes 17-22.

218. *See generally* A.W.B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986) (tracing the complicated division of land tenure and its historical evolution).

219. *See* Gregory Ablavsky, *The Rise of Federal Title*, 106 CALIF. L. REV. 631, 678-82 (2018) (recounting how the proliferation of "inchoate rights to ownership" dependent on a "governmental act of confirmation" furthered the commodification of land); *see also* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970, at 56 (1997) (describing the rise of the "'new property' of the eighteenth century" whose "character as property depended on its exchangeability").

The early United States was full of such imperfect titles. States and the federal government recruited soldiers with bounties that promised future land ownership; state land offices issued certificates and warrants that could be located anywhere on the public domain; land companies issued shares that would eventually translate into title; and governments routinely recognized the anticipatory rights to land based on improvement known as preemption rights.[220] Amidst the booming real estate market in the early United States—routinely described as a "mania" or a "fever"—such promises of ownership were routinely bought, sold, transferred, and devised.[221] This alienability was what made them so attractive: They became another speculative investment, another "species of mercantile paper," the eminent Virginia jurist St. George Tucker lamented, that had "deluged the United States for some years past."[222]

Maintaining a single legal category of property, especially one predicated on absolute dominion, amidst this deluge of fragmented ownership claims to both things and land posed one of the great jurisprudential challenges of the early nineteenth century.[223] On the one hand, the era's legal thinkers tended to categorize *any* sort of legally enforceable right as a form of property, encompassing not just land but various political offices and even what we might now think of as political and civil rights.[224] On the other hand, as Gregory Alexander has traced, the rise of such "'commodified' property" was deeply unsettling to common law and republican understandings of property: "[E]xpectation as the basis of property," he observed, "seemed both unnatural and politically dangerous."[225]

Inchoate private land claims—grounded in state-sanctioned expectation—encapsulated this dissonance. Some resolved this tension by concluding that such unperfected titles were *not* truly property. While perfect rights were "private property, which no legislation of Congress can affect," the Louisiana Supreme Court opined in 1853, inchoate rights were "mere equities, and the

220. On these various rights, see generally ABLAVSKY, *supra* note 57, at 19-105.

221. The authoritative recent work on this subject is Michael Albert Blaakman, Speculation Nation: Land and Mania in the Revolutionary American Republic, 1776-1803 (2016) (Ph.D. dissertation, Yale University) (on file with author).

222. 3 TUCKER, *supra* note 103, at 68.

223. *See* Robert W. Gordon, *Paradoxical Property*, *in* EARLY MODERN CONCEPTIONS OF PROPERTY 95, 99 (John Brewer & Susan Staves eds., 1996) (describing how the rise of "property in hopes and expectations . . . required heroic acts of reification to make it fit into the picture of the proprietor standing majestically alone upon his thing").

224. *See, e.g.*, James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson & Fredrika J. Teute eds., 1983) ("In its larger and juster meaning, [property] embraces every thing to which a man may attach a value and have a right . . . .").

225. ALEXANDER, *supra* note 219, at 54-55, 70.

Government had the right to say in what manner they should ripen into perfect titles."[226] The fullest development of this position came from Attorney General Hugh Legare in an 1841 opinion on Missouri private land claims. Imperfect title, he argued, was "not property strictly so called, or the *dominium* of the civil law, but the doing of what is necessary to complete title, and to convey property"—a mere "*ju*[*s*] *ad rem*," he stated,[227] using the Latin civil law term that described an inchoate personal right in contrast with the *jus in re*, a property right valid against all the world.[228] Consequently, "a claim to land protected by a treaty with a foreigner" (*jus ad rem*) and "a title actually vested in a citizen under the constitution of the United States" (*jus in re*) were "two very distinct things."[229] This distinction was irrelevant as to whether they were "sacred," Legare opined, but it did alter "*how* they are to be regarded by courts of justice, [and] *how* they have been affected by federal legislation."[230]

Yet many disagreed with Legare's assessment—including, most notably, the Supreme Court. "The term 'property,' as applied to lands, comprehends every species of title inchoate or complete," Chief Justice Marshall wrote in *Soulard v. United States*, one of the first Supreme Court cases adjudicating private land claims.[231] "It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed."[232] Chief Justice Marshall was even more emphatic five years later in *Delassus v. United States*: "The right of property then is protected and secured by the treaty, and no principle is better settled in this country, than that an inchoate title to lands is property."[233]

Chief Justice Marshall's view predominated in the antebellum United States, with subsequent commentators and cases frequently citing his unambiguous pronouncements in *Soulard* and *Delassus*.[234] This outcome

226. Riddle v. Ratliff, 8 La. Ann. 106, 107 (1853).

227. Mo. Land Claims, 3 Op. Att'y Gen. 720, 723 (1841) (emphasis omitted).

228. *Jus ad rem*, BLACK'S LAW DICTIONARY (11th ed. 2019); *Jus in re*, BLACK'S LAW DICTIONARY (11th ed. 2019).

229. Mo. Land Claims, 3 Op. Att'y Gen. at 728.

230. *Id.* at 723.

231. 29 U.S. (4 Pet.) 511, 512 (1830). As noted above, my research suggests that the first U.S. Supreme Court case to address private land claims was decided only three years earlier. *See* text accompanying note 110.

232. *Soulard*, 29 U.S. (4 Pet.) at 512.

233. 34 U.S. (9 Pet.) 117, 133 (1835); *see also id.* ("The language of the treaty ceding Louisiana excludes every idea of interfering with private property, of transferring lands which had been severed from the royal domain. The people change their sovereign. Their right to property remains unaffected by this change.").

234. *See, e.g.*, Lessee of Pollard's Heirs v. Kibbe, 39 U.S. (14 Pet.) 353, 390-91 (1840) (Baldwin, J., concurring); Smith v. United States, 35 U.S. (10 Pet.) 326, 330 (1836); Teschemacher v. Thompson, 18 Cal. 11, 24 (1861); 1 CURTIS, *supra* note 28, § 336, at 464 n.2.

reflected not only the precedential weight of the Court's opinion but also the implausibility of Legare's views at the time. Legare's conclusion was circular: Private land claims could not be property because they were not treated liked property. He offered little explanation as to why an inchoate right of ownership, though less than full title, was not still a form of ownership. Chief Justice Marshall's views, by contrast, fit much more comfortably within a jurisprudential tradition that envisioned a gradation of ownership rights. Perfect titles may have been the fullest possible form of land rights, but the common law had long recognized other entitlements to real estate—reversions, remainders, a variety of possessory rights—that it also deemed "property."[235]

Legare's language suggests another potential explanatory distinction: the equation of *perfect* rights with *vested* rights. Prior commentators on public-rights doctrine have emphasized the dominance of the concept of vested rights in the antebellum United States: It was a commonplace of the era that once a right had "vested," it lay outside the power of the legislature to strip it away.[236] Perfect property rights and vested property rights had similar connotations at the time, and courts, including the Supreme Court, sometimes seemed to equate them.[237] The evidence from private-land-claims decisions is sparser, but the Court did, in one instance, describe congressional confirmation as the act that "vested the legal title in the claimant."[238]

Yet the analogy between perfect and vested rights poses its own difficulties. One has to do with the law's *source*: The antebellum Supreme Court made it emphatically clear that, whatever its merits, the vested-rights doctrine was not part of federal constitutional law.[239] Another has to do with administrability. Even if nineteenth-century judges and lawyers spoke of vested rights as sacrosanct, they seldom agreed about what vested rights *were*.[240] Many hundreds of nineteenth-century cases *discussed* vested rights, but only a mere handful invoked the concept to invalidate governmental action.[241]

235. *See, e.g.*, SIMPSON, *supra* note 218, at 209-12, 232.

236. *See, e.g.*, Chapman & McConnell, *supra* note 15, at 1737-40; Nelson, *Vested Rights*, *supra* note 17, at 1433-34.

237. *See, e.g.*, Boone v. Chiles, 35 U.S. (10 Pet.) 177, 212 (1836) (observing, in the context of the innocent-purchaser doctrine under Kentucky law, that "[t]he title purchased must be apparently perfect, good at law, a vested estate in fee simple").

238. Menard's Heirs v. Massey, 49 U.S. (8 How.) 293, 307 (1850).

239. *See* Watson v. Mercer, 33 U.S. (8 Pet.) 88, 110 (1834) ("[T]his court has no right to pronounce an act of the state legislature void, as contrary to the constitution of the United States, from the mere fact that it devests antecedent vested rights of property.").

240. On this difficulty, see Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 962 & n.285 (2000).

241. *Cf.* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 235-36 (2d ed. 1985) (noting that the "19th century was full of talk about respect for property, for vested rights, and so on" even in the midst of "massive, major changes in the law of land").

Most concluded that a supposedly vested right was either not a right, not vested, or both.[242]

But there was another, more basic conceptual challenge. In the era's jurisprudence, perfect rights and vested rights addressed distinct, if overlapping, legal questions that in some ways paralleled the present-day distinction between substance and procedure. Whether a property right was perfect hinged on how complete the claimant's ownership entitlement over a given thing was—it was, in short, a substantive question of property law.[243] By contrast, whether a property right was vested turned on whether the process for conveying or granting ownership to a given claimant had progressed so far that it could no longer be undone—it was a procedural question.[244]

Under these standards, then, it was possible for a right to be *both* imperfect and vested. This was a point that claimants themselves repeatedly made, insisting that their "incomplete titles" nonetheless "created a property and a vested right."[245] Less predictably, the Supreme Court agreed. In *Delassus*, for instance, Chief Justice Marshall, after stressing that inchoate rights were property, observed in the next paragraph: "The sovereign who acquires an inhabited territory, acquires full dominion over it, but this dominion is never supposed to divest the *vested rights* of individuals to property."[246] This conclusion made sense given that, as Chief Justice Marshall and his successors repeatedly affirmed, the treaties unambiguously bound the United States to honor all preexisting rights, even inchoate ones.[247] In this sense, the treaties themselves had vested all inchoate rights.

---

242. *See, e.g.*, Elliott's Ex'r v. Lyell, 7 Va. (3 Call) 268, 287 (1802) (opinion of Pendleton, P.J.) (noting that the abolition of the fee tail "did not take from any person a right vested . . . but unfettered them of limitations" (emphasis omitted)); Turpin v. Locket, 10 Va. (6 Call) 113, 167-70 (1804) (opinion of Roane, J.) (concluding that Virginia could reclaim church glebe lands for the state on the ground that the new Episcopal Church was not the legal successor of the Church of England and thus had no vested rights in the glebe lands).

243. *See, e.g.*, Chouteau v. Molony, 57 U.S. (16 How.) 203, 216-17 (1854) (argument of Attorney General Cushing for the defendant in error) (equating a "perfect title" with a "complete title"); *see also supra* text accompanying notes 210-11.

244. *See, e.g.*, James L. Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation from Vested to Substantive Rights Against the State*, 31 BUFF. L. REV. 381, 399 (1982) ("[E]very violation of a vested right was conceived to result from the retrospective application of a rule which did not exist at the time the individual's right had vested.").

245. OBSERVATIONS ON THE NATURE AND ORIGIN OF RIGHTS TO LAND IN UPPER LOUISIANA, (NOW THE TERRITORIES OF ARKANSAS AND MISSOURI) DERIVED FROM FRENCH OR SPANISH GRANTS OR ORDERS OF SURVEY 14-15 (Washington, Gazette Off. 1820).

246. Delassus v. United States, 34 U.S. (9 Pet.) 117, 133 (1835) (emphasis added).

247. *See supra* text accompanying note 233; Strother v. Lucas, 37 U.S. (12 Pet.) 410, 436 (1838) ("This Court has defined property to be any right, legal or equitable, inceptive, inchoate, or perfect, which before the treaty with France in 1803, or with Spain in

footnote continued on next page

The Court's 1855 decision *Fremont v. United States*[248] illustrates this conceptual overlap. In that case, decided under the distinctive congressional scheme for California titles described in Part III below, the claimant possessed a grant for which certain conditions had to be satisfied before it became a completed land right—"an equity to have a perfect title from the Mexican government," in the words of one Justice.[249] But for Chief Justice Taney, who wrote the majority opinion, the imperfect state of the claimant's land right did not mean that the right was not vested. There might be superior rights to the land in competing claimants, Chief Justice Taney observed, but "as between [the claimant] and the government, he had a vested interest in the quantity of land mentioned in the grant."[250] This imperfect right was vested, he concluded, because the government had already conveyed its ownership right to the claimant.[251] In short, Chief Justice Taney concluded that even an inchoate land grant could be, and was, a *vested* right.

Private land claims were not the only form of land rights of the era that could be both *imperfect* and *vested*. Rather, they closely resembled other inchoate land titles in this respect.[252] Preemption rights, for example, granted occupants who had improved a given parcel of land the initial right to purchase it at a modest price.[253] These common entitlements were heavily litigated, but, as Caleb Nelson has noted, there was considerable uncertainty about whether they constituted vested rights.[254]

1819, had so attached to any piece or tract of land, great or small, as to affect the conscience of the former sovereign, 'with a trust' . . . ."); Chouteau v. Eckhart, 43 U.S. (2 How.) 344, 375 (1844) ("These cases maintain in substance, that such inchoate claims . . . were not changed in their character, by the treaty by which Louisiana was acquired; [and] that the treaty imposed on this government . . . a political obligation to perfect them . . . .").

248. 58 U.S. (17 How.) 542 (1855).

249. *Id.* at 568 (Catron, J., dissenting).

250. *Id.* at 558 (majority opinion).

251. *Id.* ("The right to so much land, to be afterwards laid off by official authority, in the territory described, passed from the government to him by the execution of the instrument granting it.").

252. *See, e.g.*, Chouteau v. Molony, 57 U.S. (16 How.) 203, 217 (1854) (argument of Attorney General Cushing for the defendant in error) ("As in our own system land titles are progressive from an incipient, inchoate right, to a perfect title by patent, . . . so also under the Spanish dominion of Louisiana, land titles were progressive from an incipient, inchoate right, from a petition admitted or conceded, an order of survey to fix the identity of the tract of land, the formal delivery of possession thereof, the return of the procès verbal and figurative plat, up to the approval thereof by the governor, or the intendent-general, and the issue of the title in form thereupon.").

253. GATES, *supra* note 40, at 219.

254. Nelson, *Adjudication*, *supra* note 17, at 579; *see also* GATES, *supra* note 40, at 230-44 (noting the intense struggles over preemption rights).

Though Nelson suggests a growing consensus that they did not,[255] confusion over their status persisted in antebellum jurisprudence. Some described preemption rights as mere tentative rights, but the Supreme Court disagreed. "The claim of a preemption is not that shadowy right which by some it is considered to be," the Court observed in the long-running property dispute *Lytle v. Arkansas*.[256] "[W]hen covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."[257] The Court thus determined that the preemption rights at issue in *Lytle* constituted "vested rights."[258]

But preemption rights also differed from the private land claims in one important way: Because of the lengthy process for obtaining federal land from the public domain, it was hard to determine whether, and when, preemption rights vested.[259] By contrast, the moment when the private land claims vested was clear: It happened when the United States promised to honor preexisting property rights in the ceded territories.[260] In other words, even if a property claim was originally defeasible under the Spanish, Mexican, or French government, it became a vested claim as against the United States, even if it would never become a possessory, perfect title.

There was another similarity between preemption rights and the private land claims: broad executive adjudicatory discretion recognized by the courts. Congress had empowered land office officials to determine the validity of preemption claims, sometimes with an appeal to the Secretary of the Treasury.[261] Both federal and state courts, as well as multiple attorneys general, acknowledged that, in making these decisions, federal officers acted in a "judicial capacity,"[262] and their determinations were "final and conclusive" and "*res adjudicata* between the parties."[263]

---

255. Nelson, *Adjudication*, *supra* note 17, at 579-80 (contrasting Treasury Secretary Oliver Wolcott's view in 1800 that preemption rights were vested with the "[l]ater opinions of the Attorney General," which concluded that preemption rights were privileges).

256. 50 U.S. (9 How.) 314, 328, 333 (1850).

257. *Id.*

258. *Id.* at 333, 335.

259. Nelson, for instance, observes that this line was "somewhat arbitrary." Nelson, *Adjudication*, *supra* note 17, at 578-79.

260. *See supra* note 247.

261. *See, e.g.*, Act of Sept. 4, 1841, ch. 16, § 11, 5 Stat. 453, 456 (repealed 1891).

262. *See, e.g.*, Auth. of Regs. & Receivers, 3 Op. Att'y Gen. 93, 94 (1836).

263. McGhee v. Wright, 16 Ill. 555, 557 (1855); *see also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856) (citing Foley v. Harrison, 56 U.S. (15 How.) 433 (1854)); *Lytle*, 50 U.S. (9 How.) at 333 ("The register and receiver were constituted, by the act, a tribunal to determine the rights of those who claimed preemptions under it. From their decision no appeal was given. If . . . the decision cannot be impeached on the ground of fraud or unfairness, it must be considered

footnote continued on next page

Yet courts showed less deference to administrative adjudications of preemption rights than to similar executive proceedings over private land claims. For one, the Court permitted litigants in preemption cases to challenge land-office decisions if they could produce evidence of "fraud or unfairness."[264] For another, unlike with private land claims, courts routinely exercised jurisdiction to hear collateral attacks on the land office's determinations, especially litigation in equity between private parties.[265]

The Court's private-land-claims decisions, then, strongly suggest two conclusions. First, imperfect private land claims were not privileges; they could be, and were, considered vested rights to property under well-established law, and legislatures could not simply legislate them out of existence. Second, imperfect private claims differed from other imperfect land claims in that they could be resolved only through Congress—"it depends upon the will of congress whether a remedy in the courts shall be allowed at all," the Court stated in *Murray's Lessee*.[266] Yet, but for the Court's circular insistence that the private land claims fell solely within congressional power, imperfect land claims could easily have been the "subject of a suit at the common law, or in equity,"[267] just as preemption and other equitable rights routinely were.

Unlike both contemporaneous and present-day commentators, the Court did not seem to find any difficulty in blessing congressional discretion to adjudicate imperfect but vested rights. The Court never justified this conclusion other than in its brief cryptic remarks in *Murray's Lessee*. Yet the contextual evidence suggests that the explanation for the Court's acceptance of administrative power over private land claims may lie in the *nature* of the property at issue. The value of an imperfect land right lay in the promise that it could become a *perfect* land right: As future-Justice Field, then serving on the California Supreme Court, observed of Congress's treaty obligation to protect

final."); *Foley*, 56 U.S. (15 How.) at 448 ("As this decision was made by a special tribunal, with full powers to examine and decide; and, as there is no provision for an appeal to any other jurisdiction, the decision is final within the law.").

264. *Lytle*, 50 U.S. (9 How.) at 333.

265. *See, e.g.*, Minnesota v. Bachelder, 68 U.S. (1 Wall.) 109, 115 (1864) ("A court of equity will look into the proceedings before the register and receiver . . . where the right of property of the party is involved, and correct errors of law or of fact to his prejudice."); *see also* Barnard's Heirs v. Ashley's Heirs, 59 U.S. (18 How.) 43, 46 (1856) (examining the facts behind a preemption dispute "to ascertain which party had the better right"); Brown's Lessee v. Clements, 44 U.S. (3 How.) 650, 666-68 (1845) (adjudicating a dispute between rival claimants advancing patents based on preemption rights), *overruled by* Gazzam v. Lessee of Phillips, 61 U.S. (20 How.) 372 (1858).

266. *Murray's Lessee*, 59 U.S. (18 How.) at 284.

267. *See id.*

preexisting property, "to protect an equitable title is to perfect it, or to afford the means of its perfection."[268]

Yet perfecting an imperfect title was not a judicial function. That, the courts repeatedly stated, was a responsibility for the political branches. This principle was not limited to private land claims. Indeed, it was a staple of early American land jurisprudence, in which courts were willing to enforce equitable rights against other competing claimants but routinely declined to compel government officials to acknowledge land rights. "It is the province of the judicial department to determine between man and man," the Tennessee Supreme Court stated in an 1812 dispute involving that state's land office, "and not between the State and its citizens, where there is no vested *perfect* right to a grant . . . ."[269] The U.S. Supreme Court adopted similar language in its own public land cases, insisting that it lacked the authority to "coerce[]" the government "to perfect equitable claims and rights."[270]

The Court readily extended this approach to the private land claims. The transfer of sovereignty, the Court stated, had required the United States "to satisfy individual and unperfected claims."[271] But like the public-lands cases, this could only happen through the government separating out, and patenting, lands that would otherwise be within the public domain. "This was to be done in a due exercise of the political power," the Court continued, "to whose justice alone the claimant could appeal, and to whose decision she was compelled to submit . . . ."[272]

This language sounds, perhaps, akin to concerns about sovereign immunity, even though it appeared in litigation between two private litigants. But it actually reflects a different issue: separation of powers. Courts sought to avoid exercising a responsibility they regarded as legislative and executive rather than judicial. This anxiety had little to do with whether the claims at issue were vested rights to property, which contemporary evidence suggests they were. Rather, this limitation stemmed from the *kind* of property at issue. Imperfect land titles could be, and were, judicially enforceable against competing claimants with lesser title, but courts alone could not ripen them into perfect title. Only the political branches, it seemed, could do that.

---

268. Teschemacher v. Thompson, 18 Cal. 11, 24 (1861).

269. Williams v. Reg. of W. Tenn., 3 Tenn. (Cooke) 213, 219 (1812) (emphasis added).

270. Kissell v. Bd. of the President & Dirs., 59 U.S. (18 How.) 19, 24-25 (1856).

271. Les Bois v. Bramell, 45 U.S. (4 How.) 449, 464 (1846).

272. *Id.*; *see also* Chouteau v. Molony, 57 U.S. (16 How.) 203, 217 (1854) (argument of Attorney General Cushing for the defendant in error) (arguing that claimants must look to the government to engage in "the farther acts to complete the severance, and perfect the inchoate private right into a complete title").

Here, Jim Pfander and Andrew Borrasso's recent work on public rights in the nineteenth century offers a helpful framing. Pfander and Borrasso's research unearthed a key distinction between *constitutive* acts—where an agency conferred new rights and over which the executive enjoyed discretion—and *adjudicative* acts, in which an agency resolved "disputed claims," which fell within the judicial power.[273] This dichotomy clarifies the views of nineteenth-century jurists, who clearly regarded perfecting imperfect land rights as a *constitutive* act.[274]

Yet the private land claims also trouble Pfander and Borrasso's dichotomy. "[T]he line between the constitutive act of creating new public rights and the adjudicative act of assessing the legal implications of past assignments of private rights," they acknowledge, "will not always be crystal clear."[275] The private land claims constantly forced federal officials to confront that ambiguity as they adjudicated the validity of past vested rights in order to establish new ones.[276] Recognizing the property rights of some, they discovered, implied invalidating the rights of others. As a result, constitutive acts quickly blurred into adjudication, as commissioners found themselves assessing competing retroactive claims and making rulings that had the broad preclusive effects that Pfander and Borrasso identify as hallmarks of adjudication.[277] But as described above, the Supreme Court seemed untroubled when confronted with these contradictions.[278] Rather than attempt to maintain a tidy division, it instead blessed the overlap and accepted that the commissions' constitutive power also conveyed adjudicative authority.

---

273. Pfander & Borrasso, *supra* note 16, at 498-503, 539-40; *see also id.* at 564 ("When the assignment involved a matter of adjudication, a retrospective determination of the rights of parties under the law as stated, the judicial power of the federal courts was implicated. But when Congress empowered the agency to create or distribute new rights or entitlements—in effect to exercise constitutive power—the judicial role was limited to make way for the exercise of agency discretion.").

274. *See supra* text accompanying notes 271-72.

275. Pfander & Borrasso, *supra* note 16, at 546; *see also id.* at 499 (noting the categories "shade into one another at the margins").

276. In a brief discussion, Pfander and Borrasso place the private land claims cleanly in the constitutive category because "Congress followed the language of controlling treaties in confirming that federal title to land within ceded territory . . . would continue to respect ownership rights under the prior regime." *Id.* at 541-42. Later on, they observe that in the public-land cases, "no prior rights existed aside from those that Congress chose to recognize." *Id.* at 551. But of course, the conundrum of the private land claims was precisely the persistence of property rights that Congress was legally obligated to honor; no "federal title" to those lands existed because they were already owned. *See supra* text accompanying notes 52-59.

277. *See* Pfander & Borrasso, *supra* note 16, at 561 (arguing that "constitutive decisions bind those they govern and determine outcomes in subsequent cases, but they do not represent adjudications to which claim and issue preclusive effect should attach").

278. *See supra* text accompanying notes 165-67.

D. Complicating the Perfect–Imperfect Dichotomy

The dichotomy between perfect and imperfect titles, then, was the central distinction in antebellum jurisprudence on private land claims and helps explain why courts embraced such broad deference to Congress. But even at the time, this seemingly tidy divide struggled to support the conceptual weight placed on it.

One substantial problem with the distinction was practical: The supposedly straightforward bright line between perfect and imperfect titles was, in practice, notoriously hazy. "The opinions of men are so variant as to what constitutes a complete Spanish grant," read one representative's complaint from Congress.[279] The predictable result was intense litigation over whether a given claim constituted perfect title. Resolving this question usually turned on intricate points of Spanish, French, or Mexican land law applied to complicated factual questions—whether a grantee had satisfied all the conditions stipulated in a grant, for instance, or whether the boundaries in a survey were sufficiently precise.[280]

Yet antebellum jurisprudence treated this fact-intensive, difficult, and unpredictable inquiry as not only a jurisdictional but also a constitutional matter, defining the outer limits of congressional power. As a consequence, antebellum courts routinely dove into the merits of particular claims on which the commissioners had already ruled.[281] If the courts concluded that the claim was *imperfect*, that conclusion divested the courts of all jurisdiction to hear the case; the political branches' decision was final and unreviewable. But if the courts determined that the claim was, in fact, *perfect*, then the entire administrative adjudication was ultra vires, and courts could make their own decision about the claim's merits—which, of course, they had effectively already done. In short, by linking merits and jurisdiction, the perfect–imperfect framework proved remarkably circular and expanded the endless litigation around private land claims.

The perfect and imperfect dichotomy faced another substantial challenge: Congress's own inconsistency. In dealing with the private land claims, Congress had sometimes distinguished perfect and imperfect titles, but sometimes it had not. This inconsistency was especially true for registration. Congressional statutes addressing private land claims routinely mandated that

279. H. Comm. on Private Land Claims, Land Claim in Louisiana (Jan. 10, 1826), *in* 4 AMERICAN STATE PAPERS: PUBLIC LANDS, *supra* note 87, at 455, 456.

280. *See, e.g.*, United States v. King, 44 U.S. (3 How.) 773, 786-87 (1845); United States v. Boisdoré, 52 U.S. (11 How.) 63, 94-96 (1851); United States v. Castant, 53 U.S. (12 How.) 437, 440-42 (1852); *see also supra* Part II.B.

281. *See, e.g.*, Les Bois v. Bramell, 45 U.S. (4 How.) 449, 463-64 (1846); Doe v. Eslava, 50 U.S. (9 How.) 421, 444-50 (1850); *see also supra* Part II.B.

claimants submit their claims to the land office for recordation. Unsubmitted claims risked forfeiture, defined in various ways in the different statutes.[282] Some of these recording statutes made registration optional for perfect titles,[283] but others did not. For instance, the 1803 statute addressing the Mississippi claims—the first to create the land claims commissions—mandated that "*every person* claiming lands by virtue of any British grant" was obliged to record the claim.[284]

In its earliest decisions on the private land claims, the Supreme Court acknowledged that Congress had legislated for both perfect and imperfect land rights. Justice Baldwin, for instance, contrasted "perfect or complete grants" with "inchoate incomplete ones" but observed that "[*b*]*oth* classes have been submitted to the special tribunals."[285] At points, this lumping troubled Chief Justice Marshall.[286] In *Percheman*, he even implausibly interpreted a statutory provision mandating that unrecorded claims "should be void" to apply solely to proceedings before the commission.[287] "It is impossible to suppose," Chief Justice Marshall reasoned, that Congress "intended to forfeit real titles not exhibited to their commissioners within so short a period."[288] Yet the clear text of such provisions strongly suggested that this "impossible" outcome was precisely what Congress had intended.[289] Chief Justice Marshall's dicta suggested qualms about the extent of Congress's power to invalidate perfect titles.

But Chief Justice Marshall's reservations went largely untested, likely because federal courts interpreted Congress's statutes to limit their jurisdiction

282. The statutes outlined slightly different consequences for failure to register land claims. Some laws only invalidated the effect of unregistered claims against federal grants. *E.g.*, Act of June 13, 1812, ch. 99, § 7, 2 Stat. 748, 751. Others included similar language but also mandated that such unregistered claims "shall become void" more generally. *E.g.*, Act of Mar. 26, 1804, ch. 35, § 3, 2 Stat. 277, 278. Still others went further to make such claims inadmissible as evidence "in any court whatsoever." *E.g.*, Act of Mar. 3, 1813, ch. 44, § 1, 2 Stat. 812, 814.

283. *E.g.*, Act of Mar. 2, 1805, ch. 26, § 4, 2 Stat. 324, 326 ("[E]very person claiming lands . . . by virtue of any legal French or Spanish grant . . . *may*, and every person claiming lands . . . by virtue of the two first sections of this act, or by virtue of any grant or incomplete title, . . . *shall* . . . deliver to the register of the land-office, or recorder of land titles, . . . a notice in writing, stating the nature and extent of his claims, together with a plat . . . ." (emphasis added)).

284. Act of Mar. 3, 1803, ch. 27, § 5, 2 Stat. 229, 230 (emphasis added).

285. United States v. de la Maza Arredondo, 31 U.S. (6 Pet.) 691, 718 (1832) (emphasis added).

286. *Cf.* Henderson v. Poindexter's Lessee, 25 U.S. (12 Wheat.) 530, 539 (1827) (describing the provision of the 1803 federal statute invalidating unregistered perfect rights in the Mississippi territory as "a very rigorous law").

287. *See* United States v. Percheman, 32 U.S. (7 Pet.) 51, 90 (1833).

288. *Id.*

289. *See* Act of May 8, 1822, ch. 129, § 4, 3 Stat. 709, 717.

solely to *imperfect* rights.[290] Nonetheless, there were hints that other Justices disagreed with Chief Justice Marshall. Justice Baldwin, for instance, analogized the registration of perfect land rights to long-established state recordation laws.[291] A litigant might have questioned this comparison—it was at least arguable whether Congress, as opposed to a state, could create a land registry, and these land rights had *already* been recorded under the prior regimes—yet because the question never reached the Court, these issues were never resolved.

In short, the supposedly bright-line rule that made sense of the private-land-claims jurisprudence—that Congress had complete authority over imperfect land rights and none over perfect titles—was, in practice, quite blurry. Not only did it turn out to be very difficult to distinguish perfect from imperfect titles, but courts also acknowledged that Congress held *some* ill-defined authority over the perfect land rights too. Just how much authority, and how far it extended, went largely unresolved until the California Land Act of 1851 forced the Supreme Court to resolve this long-latent tension.

III. The California Land Act of 1851

In 1848, the United States and Mexico signed the Treaty of Guadalupe Hidalgo, ending the Mexican–American War.[292] In the treaty, the victorious United States coerced Mexico into ceding its northern half in return for a payment of $15 million.[293] This ceded land comprises most of the present-day Western and Southwestern United States.

Just as with the earlier ceded territories, the lands that the United States acquired under the Treaty teemed with preexisting property rights under Mexican law. And just as with earlier cessions, the United States promised to recognize these claims.[294] In 1851, Congress enacted the first statute to execute this responsibility: "An Act to ascertain and settle the private Land Claims in the State of California."[295] A year earlier, as migrants flooded the state during

290. *See* United States v. McCullagh, 54 U.S. (13 How.) 216, 217 (1852) ("[T]his court [has] always held that . . . the District Court has jurisdiction in those cases only where the title set up by the petitioner is equitable and inchoate . . . . [T]he titles which the court is authorized to confirm, are inchoate and imperfect ones . . . ."); *see also* Kennedy's Ex'rs v. Hunt's Lessee, 48 U.S. (7 How.) 586, 593-94 (1848) (concluding, for want of a federal question, that the Supreme Court lacked appellate jurisdiction over a perfect-title dispute on appeal from the Alabama Supreme Court).

291. *See* Strother v. Lucas, 37 U.S. (12 Pet.) 410, 448 (1838) (describing Congress's approach to the private land claims as "analogous to acts of limitations, for recording deeds").

292. Treaty of Guadalupe Hidalgo, *supra* note 56.

293. *See id.* arts. V, XII; *see also Map of the United States Including Western Territories: 12/1848*, NAT'L ARCHIVES: DOCSTEACH (Nov. 7, 2021), https://perma.cc/F4TV-HUEE.

294. Treaty of Guadalupe Hidalgo, *supra* note 56, arts. VIII-IX.

295. California Land Act of 1851, ch. 41, 9 Stat. 631.

the gold rush, California had hurriedly ascended to statehood as part of the Compromise of 1850.[296] Anglo-Americans' rapid invasion of California made the ongoing uncertainty around existing land title especially costly and controversial.

The California Land Act of 1851, as historians have labeled it, built on decades of private-land-claims precedent. "[W]e are walking in the steps which have been prescribed to us by our own legislation for the last forty years," a member of the drafting committee stated.[297] In broad strokes, the Act followed these precedents. It required that would-be owners file their claims and supporting documentation with the land office within two years, or else their land would be "deemed . . . part of the public domain."[298] And as in the past, a federally appointed Board of Commissioners would then rule on the claims' validity, while the statute limited these decisions' preclusive effects on what it termed "third persons."[299]

Yet the 1851 Act also contained several novel features. First, though past laws had required all titles to be registered, this statute went further and unambiguously mandated that *all* titles, both perfect and imperfect, undergo adjudication by the Board of Commissioners.[300] Second, instead of reserving to Congress the ultimate power to confirm or reject rights, the law made the commissioners' decisions subject to a de novo appeal to the federal district court and then to the U.S. Supreme Court.[301] These tribunals' rulings would "finally decide[]" the title.[302]

The 1851 Act, and the explosion of land claims litigation it prompted, simultaneously reinforced and challenged the private-land-claims jurisprudence of the prior half century. In contrast to its earlier silence, Congress hotly debated the Act and its constitutionality, as Subpart A explores below. This debate demonstrated the perceived limits of congressional power over the private land claims. But these boundaries were uncertain, and the subsequent litigation under the Act unsettled or disregarded many of them. In particular, the Supreme Court adopted a robust vision of congressional authority that cast aside the imperfect–perfect dichotomy, as described in

296. *See* Act of Sept. 9, 1850, ch. 50, 9 Stat. 452.

297. CONG. GLOBE, 31st Cong., 2d Sess. 351 (1851) (statement of Sen. John M. Berrien).

298. California Land Act §§ 8, 13, 9 Stat. at 632-33.

299. *Id.* §§ 8, 15, 9 Stat. at 632, 634.

300. *Id.* § 8, 9 Stat. at 632 ("[E]ach and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same to the said commissioners when sitting as a board . . . .").

301. *Id.* §§ 9-10, 9 Stat. at 632-33.

302. *Id.* § 13, 9 Stat. at 633.

Subpart B, and dramatically expanded these rulings' preclusive effects on third parties, as described in Subpart C.

This late nineteenth-century jurisprudence, and its embrace of broad congressional power in place of the earlier legal categories, may seem a dramatic break from earlier law. But a more accurate interpretation is that the Supreme Court merely identified ambiguities and tensions that long existed and decisively resolved them in favor of congressional authority.

A. Debating the Act

The prolonged congressional debate over the 1851 Act was a contest between two opposing views on California's private land claims. On one side were advocates for the speculators who had bought up many Mexican land grants; they sought to ease the claims' confirmation. Chief among them was the aging Senator Thomas Hart Benton of Missouri, one of the lions of the antebellum Senate.[303] Benton's politically prominent son-in-law, John C. Frémont, owned the Mariposa grant, one of the largest and most controversial claims in California.[304] (Frémont was also a Senator, one of the first from California, but was absent during the debate.)[305] On the other side were proponents of the many Californian smallholders, often dubbed squatters, who resented what they regarded as the speculators' legally dubious monopolies.[306] Foremost among them were California's other senator, William Gwin, who had helped craft the bill,[307] and Georgia Senator John M. Berrien, a former U.S. Attorney General who had served on the drafting committee.[308]

Although the stakes of the debate reflected diverging political economies, the Senators invoked the vocabulary of constitutionalism in their discussion. Benton was especially outspoken, denouncing the bill as a "general confiscation of the lands of the old settlers of California."[309] His constitutional objections were revealing. Sometimes, his attacks seemed to echo the concerns of present-

303. Regarding Benton's career, see generally KEN S. MUELLER, SENATOR BENTON AND THE PEOPLE: MASTER RACE DEMOCRACY ON THE EARLY AMERICAN FRONTIERS (2014).

304. *See* Gates, *Frémont–Jones Scramble*, *supra* note 37, at 14-20; Lewis Grossman, *John C. Frémont, Mariposa, and the Collision of Mexican and American Law*, 6 W. LEGAL HIST. 17, 25-26 (1993).

305. Gates, *Frémont–Jones Scramble*, *supra* note 37, at 19-20.

306. *See* SHELTON, *supra* note 38, at 11-35.

307. *See id.* at 40 (describing Gwin as "the squatters' primary champion" and noting that he "authored" the 1851 Act).

308. On Berrien, see generally Royce Coggins McCrary, Jr., John Macpherson Berrien of Georgia (1781-1856): A Political Biography (1971) (Ph.D. dissertation, University of Georgia) (on file with author).

309. CONG. GLOBE, 31st Cong., 2d Sess. 349 (1851) (statement of Sen. Thomas Hart Benton).

day critics of administrative adjudication. "You institute a commission to inquire, and confound it with a court to try titles, and without a jury," he thundered.[310] Yet at the same time, Benton specifically *embraced* using land commissions to adjudicate title, praising past practice.[311]

In the context of present-day arguments over public rights, these positions seem contradictory. But that was because Benton did not share the concerns of current critics of Article I adjudication. His principal critique of the California land bill was, in fact, the exact opposite of present-day arguments: Benton thought the California commission was *too similar* to courts, too bound up with formal procedural intricacies. The old commissions had arbitrated based on "equity and justice," but this new Board, Benton complained, was "all law and lawyers."[312] He analogized the bill to a lawsuit "against the whole community" to prove their title and complained that the process would cost claimants millions of dollars.[313]

Senator Berrien, in response, also sometimes sounded like a present-day litigant fighting over public rights. "It is said that we are violating a principle of the Constitution of the United States by deciding upon private rights without the intervention of a jury," he responded to Benton.[314] "But there is no foundation for this suggestion. The commissioners are authorized and required to decide as between the United States and the claimant. . . . No question of private right arises there."[315] But at other points, Senator Berrien's vocabulary differed from today's discourse. "By the stipulations of the treaty we have bound ourselves to protect private property," he stated.[316] "We are about to institute a tribunal to ascertain what that private property is . . . ."[317] Such statements suggest that Berrien distinguished "private right" from "private property."

What, then, did "private right" mean in these debates? Berrien did not elaborate, but some evidence can be found in the bill's two most controversial

310. *See id.* at 350.

311. *See id.* at 406-07 (praising the earlier acts that settled claims in Louisiana for providing "proceedings without expense, and without law forms, to the old inhabitants").

312. *See id.* at 407 (emphasis omitted). This concern seemed to mirror a broader debate, also unfolding simultaneously in California, over the merits of adversarial justice as opposed to more informal methods of adjudication. *See generally* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 223-36 (2017).

313. CONG. GLOBE, 31st Cong., 2d Sess. 439 (1851) (statement of Sen. Thomas Hart Benton).

314. *Id.* at 351 (statement of Sen. John M. Berrien).

315. *Id.*

316. *Id.* at 429.

317. *Id.*

elements: (1) the forfeiture of unsubmitted claims; and (2) the confirmation's preclusive effects on "third persons."

Several senators, not just Benton, expressed concern about the bill's provision that the failure to present a claim would return the disputed land to the public domain. Using the vocabulary of vested rights, they argued that the bill, so far as it attempted to divest "titles which became vested prior to the execution of the treaty of Guadalupe Hidalgo," was "unconstitutional" and "inoperative."[318] In response, the bill's defenders argued that the provision did not actually accomplish a forfeiture, which they conceded would be unconstitutional.[319] Rather, they argued that the process would have no effect on title. A claimant could "stand still" and the decision "will not divest him of his title," these defenders insisted, since the claimant could still maintain his title in a lawsuit against a competing claimant asserting title under the United States.[320] The critics remained unconvinced. If true, they suggested, this interpretation made the forfeiture provision meaningless.[321]

Similar controversy surrounded the preclusive effects of federal confirmation. Like prior laws, the bill contained a provision stipulating any final decisions "shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."[322] Yet some feared that a U.S. patent might be interpreted as more than a simple "quitclaim," a bare renunciation of title by the United States.[323] After all, they noted, a patent from the federal government would "in effect" provide the confirmee with "absolute title," even though another claimant might, "as between the two individuals," have a "better claim."[324]

---

318. *Id.* at 363 (statement of Sen. John P. Hale); *see also id.* at 429 (statement of Sen. Joseph R. Underwood) ("As was remarked the other day, under the Constitution of the United States and under the treaty, this bill cannot take away those rights, whether inchoate or merely equitable, which may exist in any one.").

319. *See id.* at 363-64 (statement of Sen. Thomas Ewing) ("There is nothing in it at all unconstitutional. If it attempted to forfeit the title of an individual who did not present his claim, and declare that upon his failure to present it his title should be forfeited, it would be unconstitutional . . . .").

320. *Id.* at 361 (statement of Sen. John Davis).

321. *See id.* at 363 (statement of Sen. John P. Hale) ("But if there is any meaning in this provision, it does undertake to divest all titles which are not presented within two years."). Benton also rejected the claim that the law merely echoed a recording requirement, arguing that this was "a bill to try [a claimant's] title instead of only registering it." *Id.* at 364 (statement of Sen. Thomas Hart Benton).

322. S. 346, 31st Cong. § 15 (as reported in Senate, Jan. 20, 1851).

323. CONG. GLOBE, 31st Cong., 2d Sess. 371 (1851) (statement of Sen. Isaac P. Walker).

324. *Id.* at 429 (statement of Sen. Roger S. Baldwin); *see also id.* at 428 (statement of Sen. Isaac P. Walker) ("We do not wish for a moment, as I understand it, to give him any advantage which he does not possess in right and justice, against any private individual who may set up a claim to the same land.").

Finally, the Senate agreed to add to the statute "or any patent to be issued" before "under this act," limiting the confirmation's preclusive effect.[325] Yet some remained skeptical. "I doubt very much whether the United States courts will adopt the idea which is here presented," Senator Walker of Wisconsin observed, "that this is designed to be nothing more than a relinquishment of title."[326]

The extensive debate over the California Land Act was also noteworthy for what was not said. In particular, few fixated on the issues that concern present-day jurists: the distinctions between Article III and Article I tribunals, for instance, or the proposed novel appellate role for Article III courts. In fact, the bill's proponents and detractors agreed that it might be preferable to make the commissions' determinations final, without right of appeal, in small cases; the committee had refrained from doing so, Berrien said, only because of the value of mineral rights in California.[327] But future laws could tweak this resolution, he observed: "[I]t will be in the power of Congress to provide that the decisions of the commissioners, or of the district court, shall be final in these minor claims."[328]

In short, at least some in Congress intended that adjudication of private land claims, whether before the commissions or an Article III tribunal, would not impair any private right. Yet debate over the bill was strikingly ambiguous about what constituted such a right. Clearly, a private right was not simply any property right that could be adjudicated in a court proceeding, since Congress explicitly discussed these administrative tribunals as a substitute for federal ejectment actions. Perhaps a private right was equivalent to a perfect title—and yet Congress declined to incorporate the perfect–imperfect distinction. Similarly, many in Congress expressed concern that the law did not effect a "forfeiture," oddly overlooking similar provisions in prior laws.

In the end, Congress passed the statute largely as written, despite all the concerns over the bill's constitutional validity, and declined to adopt amendments that would have narrowed the bill's scope. This outcome likely reflected politics: The speculators' congressional opponents, eager to craft a more rigorous review process, prevailed. But the result, as the next Subparts explore, fulfilled Senator Walker's predictions: Federal courts *did* interpret the statute to encompass perfect land rights, and they *did* give confirmations under

325. *Id.* at 428 (statement of Sen. Isaac P. Walker); S. 346, 31st Cong. § 15 (as ordered to be printed by Senate, Feb. 4, 1851) (inserting the "or any patent to be issued" language). For the language that was ultimately adopted, see Act of Mar. 3, 1851, ch. 41, § 15, 9 Stat. 631, 634.

326. CONG. GLOBE, 31st Cong., 2d Sess. 428 (1851) (statement of Sen. Isaac P. Walker).

327. *Id.* at 426 (statement of Sen. John M. Berrien).

328. *Id.*

the Act broad preclusive effect. But instead of ruling these outcomes unconstitutional, the Supreme Court concluded that these applications went to the core of the statute's purpose in providing certainty and security of title.

B. Collapsing the Perfect–Imperfect Dichotomy

Cases arising under the 1851 Land Act quickly reached the Supreme Court. One of the first, *United States v. Ritchie*, presented the question that Congress had ignored: the relationship between the boards of commissioners and Article III tribunals.[329] The litigant in the case argued that the California Land Act was "unconstitutional; as this board, as organized, is not a court under the constitution, and cannot, therefore, be invested with any of the judicial powers conferred upon the general government."[330]

Ritchie was the first time that commissions adjudicating private land claims faced a constitutional challenge in the Supreme Court for violating the separation of powers. Yet the question presented was distinct from the issue of whether non–Article III tribunals could adjudicate private land claims (which, after all, the commissions had already been doing for a half century). Rather, the issue was whether Congress could grant Article III tribunals *appellate* jurisdiction over the Article I tribunals, a novel feature of the 1851 statute and a question that persisted throughout the nineteenth century.[331] The Court in *Ritchie* ducked this question by noting that, although framed as an appeal, the district court case was actually a de novo proceeding.[332]

From the perspective of the era, a weightier constitutional issue appeared the same year in *Fremont v. United States*, which tested the validity of John C. Frémont's Mariposa grant. The Board of Commissioners approved Frémont's claim, but the district court reversed.[333] The Supreme Court reversed again, approving the grant.[334] Chief Justice Taney's opinion distinguished the Court's prior precedents in cases from Louisiana and Florida by noting that the California statute "embraces not only inchoate or equitable titles, but legal

329. 58 U.S. (17 How.) 525, 531 (1855).

330. *Id.* at 533-34.

331. *See id.*; *see also infra* note 403 and accompanying text; United States v. Duell, 172 U.S. 576, 581-82, 585-86, (1899) (rejecting an argument that the court of appeals could not review a decision by the patent commissioner).

332. *Ritchie*, 58 U.S. (17 How.) at 533-34. In practice, the district court largely ratified the board of commissioners. *See* CHRISTIAN G. FRITZ, FEDERAL JUSTICE IN CALIFORNIA: THE COURT OF OGDEN HOFFMAN, 1851-1891, at 139-40 (1991) ("In most cases the district court adopted the exact decree of the board . . . . Even more significant were the many cases, particularly in the southern district, in which the United States dismissed appeals and allowed claimants to proceed with the board's decision as a final decree.").

333. Fremont v. United States, 58 U.S. (17 How.) 542, 543 (1855) (statement of the case).

334. *Id.* at 565.

titles also; and requires them all to undergo examination, and to be passed upon by the court."[335]

Because Frémont's claim was acknowledged to be imperfect,[336] Chief Justice Taney's observation was dicta, but it raised what proved the most controversial aspect of the California law: its mandate that *perfect* as well as imperfect titles undergo adjudication. Challenges to this aspect of the Act's constitutionality arose repeatedly—not in the U.S. Supreme Court, whose docket was dominated by appellate cases arising from the Board of Commissioners, but in the California Supreme Court. That court repeatedly confronted the kinds of cases that Congress had anticipated: land disputes between one party invoking land rights derived from the federal land office and an opposing party asserting unregistered but allegedly perfect Mexican land rights.[337] Claimants asserting a patent under the United States predictably argued that their opponents, by failing to register their land rights, had forfeited them under the 1851 Act.[338] The private land claimants responded that, to the extent the statute required them to present perfect titles to the commissions to preserve their validity, it was unconstitutional: "Congress could not pass a law forfeiting the property of a citizen without compensation," one attorney argued.[339]

Although litigants repeatedly disputed the Act's application to perfect titles, the California Supreme Court managed to avoid the issue for more than a decade by ruling on alternative grounds.[340] Finally, in 1864, the court squarely resolved the question in *Minturn v. Brower*.[341] The case pitted an

335. *Id.* at 553.

336. *Id.* at 558; *see also supra* text accompanying note 249.

337. *See, e.g.*, Moore v. Wilkinson, 13 Cal. 478, 487 (1859); Waterman v. Smith, 13 Cal. 373, 405-06 (1859) (argument of Thompson, Irving & Pate for respondent); Estrada v. Murphy, 19 Cal. 248, 259 (1861) (argument of Gregory Yale for appellants); Teschemacher v. Thompson, 18 Cal. 11, 20-21 (1861) (argument of Sidney L. Johnson for appellants).

338. *See, e.g.*, *Estrada*, 19 Cal. at 263-64 (argument of Patterson & Stow for respondent); *cf. Waterman*, 13 Cal. at 393 (argument of Thornton, Williams & Thornton for appellants) (arguing that the appellants had superior title because the Treaty of Guadalupe Hidalgo did not protect respondent's imperfect claim absent confirmation by the commissioners).

339. *Moore*, 13 Cal. at 480 (argument of Robinson & Beatty for appellants).

340. *See, e.g.*, *Estrada*, 19 Cal. at 269 ("Whatever doubts may exist as to the validity of the legislation of Congress, so far as it requires the presentation to the Board of claims where the lands are held by perfect titles acquired under the former Government, there can be none as to the validity of the requirement with respect to claims where the lands are held by imperfect or merely equitable titles."); *Teschemacher*, 18 Cal. at 25 (assuming the litigated ownership right was "a merely equitable title, which was never perfected under the former Government").

341. 24 Cal. 644 (1864), *overruled by* Botiller v. Dominguez, 130 U.S. 238 (1889).

unregistered but allegedly perfect Mexican title against a U.S. patent from the federal land office.[342] The party claiming under the federal patent argued that the 1851 statute mandated the forfeiture of an unregistered claim.[343] This forfeiture nonetheless did not constitute a seizure of the property, this party argued, analogizing the 1851 act to a statute of limitations.[344] The court was unpersuaded. "[I]f a perfect title be required to undergo the ordeal of a Board of Commissioners," the court stated, "it might be declared invalid, notwithstanding it, before then, stood confirmed by the treaty."[345] The court declined to conclude that this was what Congress had intended: Otherwise, it stated, "persons holding perfect titles to lands" might be "deprived of their property otherwise than by due course of law."[346]

In crafting an extratextual exception for perfect land claims, *Minturn* built on decades of prior precedents addressing private land claims. Indeed, the *Minturn* court relied on, and discussed at length, the numerous Supreme Court precedents distinguishing perfect and imperfect titles.[347] In this sense, the *Minturn* decision was the culmination of the antebellum jurisprudence on private land claims: It simply made explicit the foundational jurisprudential assumption that the perfect–imperfect dichotomy had constitutional weight.

It took over two decades before the U.S. Supreme Court took up this question—and overruled *Minturn*. The case, *Botiller v. Dominguez*, presented yet another conflict between claimants asserting federally derived land rights and owners of a purportedly perfect Mexican land grant that had never been submitted to the commissioners.[348] Closely examining *Minturn*, the Court unambiguously, and unanimously, rejected the California Supreme Court's holding. The Court first noted that, if the claim were indeed perfect, the commissioners and the appellate courts would recognize its validity.[349] But it then went further to endorse the requirement that perfect titles be submitted to the commissioners. "We are unable to see any injustice, any want of constitutional power, or any violation of the treaty," the Court observed, "in the means by which the United States undertook to separate the lands in which it held the proprietary interest from those which belonged, either equitably or by a strict legal title, to private persons."[350] Every titleholder, the Court

342. *Id.* at 656-57.

343. *Id.* at 651-54 (argument of E.W.F. Sloan for respondent).

344. *Id.* at 651.

345. *Id.* at 668 (opinion of the court).

346. *Id.*

347. *See id.* at 659-64.

348. 130 U.S. 238, 238-39 (1889).

349. *Id.* at 249.

350. *Id.* at 250.

observed, was liable to confront a lawsuit challenging her property right, whether from an individual or from the government.[351] Such suits were unquestionably "legal, constitutional, and according to right," the Court opined before adopting a functionalist reading:

> What difference can it make, then, that the party who is supposed to possess all the evidences which exist to support his claim is called upon to come before a similar tribunal and establish it by a judicial proceeding? It is beyond question that the latter mode is the more appropriate one to carry out the object intended, and better calculated to save time and expense, both to the government and to the party, and to arrive at safe and satisfactory conclusions.[352]

Elsewhere in the opinion, the Court reiterated that the Board of Commissioners was a "tribunal possessing all the elements of judicial functions, with a guarantee of judicial proceedings."[353]

Botiller was both a culmination and a major departure from the prior jurisprudence on private land claims. Like most of its predecessors, the Court in *Botiller* was strikingly unconcerned with the distinction between Article I and Article III tribunals that preoccupies current commentators, specifically embracing the adequacy of the commissions compared to courts. But in *Botiller*, the Court also cast aside nearly a century's worth of jurisprudence on private land claims. Courts as well as Congress had long presumed the legal significance of the dichotomy between perfect and imperfect titles, even as this distinction had always been somewhat unsettled.

Botiller resolved these long-standing tensions by simply collapsing the two categories altogether—a major, even radical, remaking of private-land-claims jurisprudence that has nonetheless received little judicial or scholarly attention. As the next Subpart explores, this neglect occurred in part because the Court had already been drifting toward a more positivist jurisprudence in resolving the private land claims. But this inattention is also due to the decision's late date. By 1889, many of the private land claims in the United States, even in California, had been resolved. Yet the principle in *Minturn* would have permitted anyone asserting a purportedly perfect Spanish or Mexican title to challenge any subsequently arising title—which, in practice, encompassed nearly every landowner in California.[354] In this context, *Botiller* seemed less like a dramatic remaking of a fundamental area of law and more a defense of the principle of settled land titles—a theme the next Subpart picks up even more explicitly.

---

351. *Id.*

352. *Id.*

353. *Id.*

354. For examples of such suits, and courts' clear anxieties over unsettling existing titles, see Part III.D below.

C. Preclusion and "Third Persons"

Besides the requirement to register perfect titles, the other provision of the 1851 Act that caused legal difficulty was the mandate that confirmation of land claims not impair the rights of "third persons." This provision soon proved as tricky for courts to interpret as it had for Congress.

The question first emerged the year after enactment, when the land commissioners were ruling on the Las Pulgas land grant advanced by Maria de Soledad de Arguello.[355] While the grant was pending, competing claimants moved to intervene in the proceeding.[356] The 1851 Act made no provision for such intervention, and the Board of Commissioners split 2-1 over whether it was proper.[357] The dissenting commissioner argued that intervention was not proper because confirmation would not affect competing claimants and would bind only the United States.[358] But the majority disagreed. Citing the Supreme Court's precedents on preclusion, especially *Chouteau v. Eckhart*, it noted that the commissioners' decisions *would* have a preclusive effect.[359] If the Board confirmed the claim to Arguello, they reasoned, any future confirmation to a competing claimant would be a "mere nullity."[360] Because of this preclusive effect, the majority concluded, adverse claimants should be allowed to intervene in what was, strictly speaking, an adjudication between a single claimant and the United States.[361]

This question of preclusion quickly reached the California Supreme Court. Throughout the 1850s, several adverse claimants challenged titles confirmed by the commissioners, insisting that the 1851 Act's "third persons" provision left their claims unimpaired.[362] This interpretation, as we have seen, aligned with how many in Congress had intended the law to function.[363] But in a series of opinions written by Justice (and later, Chief Justice) Field, the California

355. *See* ORGANIZATION, ACTS AND REGULATIONS OF THE U.S. LAND COMMISSIONERS FOR CALIFORNIA 7 (San Francisco, Monson, Whitton & Co. 1852). As it happens, my own home lies within this disputed tract.

356. *Id.* at 7.

357. *Id.* at 12, 16.

358. *Id.* at 21-22 (opinion of Commissioner Thornton, dissenting) ("The force and effect of such confirmations, or patents, are only to estop the United States, and not to affect the rights of other persons.").

359. *Id.* at 10-12 (opinion of Commissioner Hall) (citing 43 U.S. (2 How.) 344 (1844)). On *Chouteau*, see the text accompanying notes 165-66 above.

360. *Id.* at 11.

361. *Id.* at 15-16.

362. *See, e.g.*, Moore v. Wilkinson, 13 Cal. 478, 480-81 (1859) (argument of Robinson & Beatty for appellants); Waterman v. Smith, 13 Cal. 373, 400 (1859) (argument of John Currey for appellants).

363. *See supra* Part III.A.

Supreme Court repeatedly swatted these claims down. Just as some in Congress had feared, he interpreted a federal patent to have "two aspects."[364] It was a quitclaim of federal interest, but also a "record of the Government."[365] This second aspect gave the federal patent broad preclusive effect: It constituted "conclusive evidence" of a land right, not just against the United States but against anyone who lacked a better title.[366] As for the "third persons" described in the statute, then-Justice Field interpreted the phrase to mean only "those whose title is at the time such as to enable them to resist successfully, any action of the government in respect to it."[367] The 1851 Act, he stated, was merely declarative of existing principles of law and relativity of title, and a patent issued under the Act had the same broad preclusive effect as any other land right.[368] He feared that the alternate holding would subject land titles to endless controversy and uncertainty.[369]

Justice Field had the chance to write his views into federal law soon after being elevated to the U.S. Supreme Court in 1863.[370] In 1865, the Court decided *Beard v. Federy*, in which a claimant confirmed by the commissioners sought to

364. Leese v. Clark, 20 Cal. 387, 412 (1862).

365. *Id.*

366. *Waterman*, 13 Cal. at 419 (describing the patent as "conclusive evidence of the right of the patentee to the land described therein—not only as between himself and the United States, but as between himself and a third person, who has not a superior title from a source of paramount proprietorship").

367. *Id.* at 420; *see also* Teschemacher v. Thompson, 18 Cal. 11, 27 (1861) ("The 'third persons' against whose interest the action of the Government and patent are not conclusive—under the fifteenth section of the Act of March 3d, 1851—are those whose title accrued before the duty of the Government and its rights under the treaty attached.").

368. *Waterman*, 13 Cal. at 420 ("The interests of the third persons, intended by the Act, would have been as effectually protected without its provisions, as they are now by them. The section in question is only a legislative recognition of a principle of law and justice, applicable to all grants.").

369. Justice Field was especially expansive on this point. If the court failed to give preclusive effect to the confirmation, "the patent, instead of being an instrument of quiet and security to the possessor, would become a source of perpetual and ruinous litigation, and the settlement of land titles in the country be delayed a quarter of a century." Moore v. Wilkinson, 13 Cal. 478, 488 (1859). He continued: "The patentee would find it established in different suits, to the utter destruction of his rights, that his land should have been located in as many different places within the exterior boundaries of the general tract, designated in his grant, as the varying prejudices, interests, or notions of justice, of witnesses and jurymen might suggest." *Id.*

370. Regarding Chief Justice Field's judicial career, see generally PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE (1997). For an overview of his land law jurisprudence (although it omits discussion of the Mexican land rights), see generally Charles W. McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 LAW & SOC'Y REV. 235 (1976).

oust a litigant asserting an unconfirmed Mexican title.[371] Once again, the litigant with the unconfirmed title insisted that section 15 of the 1851 Act meant that the patent could not be "evidence against the defendants for any purpose."[372] Justice Field was unpersuaded. He rebuffed the defendants' attempts to attack the Board's decision, holding that, just as for "other inferior tribunals," the Court would not entertain a collateral attack on the Board's decision.[373]

But Justice Field went further, concluding that the defendants' argument reflected a "misapprehension of the character and effect of a patent issued upon a confirmation of a claim to land under the laws of Spain or Mexico."[374] Quoting his earlier decisions nearly verbatim, Justice Field stressed once again the patent's significance as "a record of the government," which he saw as the principal source of "its security and protection."[375] Otherwise, he argued, the "patentee would find his title recognized in one suit and rejected in another," and "[e]very fact upon which the decree and patent rest would be open to contestation."[376] Justice Field thus declined to interpret section 15 of the law to undermine the security of the patent.[377] Instead, he once again articulated that "third persons" in the statute meant only those with stronger titles—only now writing this principle into federal law.[378]

Beard v. Federy was a watershed moment in the Court's jurisprudence on the preclusive effect of the commissioners' rulings, with the Supreme Court subsequently citing the case twenty-one times over the next fifty years. The decision represented precisely what many in Congress had feared and sought

371. 70 U.S. (3 Wall.) 478, 482-83 (1866) (statement of the case).

372. *Id.* at 485 (argument of Wills for defendants); *see also id.* at 486 ("A party who had no title, under any right or title derived from Spain or Mexico, acquired none as against third parties by a patent from the United States. A patent in such a case only protected the claimant against the United States. His original title or possession must be shown, as against all others." (emphasis omitted)).

373. *See id.* at 489 ("The board having acquired jurisdiction, the validity of the claim presented, and whether it was entitled to confirmation, were matters for it to determine, and its decision, however erroneous, cannot be collaterally assailed on the ground that it was rendered upon insufficient evidence. The rule which applies to the judgments of other inferior tribunals applies here,—that when it has once acquired jurisdiction its subsequent proceedings cannot be collaterally questioned for mere error or irregularity.").

374. *Id.* at 491.

375. *Id.* at 492.

376. *Id.* at 493.

377. *Id.*

378. *Id.* ("The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property.").

to prevent. Yet they had failed to codify this outcome unambiguously in the text, with the result that Justice Field and other jurists gave the resulting federal patents broad preclusive effect in furtherance, they believed, of the security and stability of title.

D. Twentieth-Century Culmination

Taken together, *Botiller* and *Beard* effectively barred all challenges to the commissioners' decisions. Under *Botiller*, all claims that arose *before* U.S. sovereignty, perfect or imperfect, had to be presented to the Board of Commissioners for adjudication or risk forfeiture. And under *Beard*, any claims that arose *after* U.S. sovereignty were precluded by the ultimate decision of the land claim proceeding. In combination, then, the result was that these decisions became binding against all the world.

This outcome was evident in the 1901 case of *Barker v. Harvey*, in which plaintiffs claiming land under an 1880 U.S. patent sued to evict "Mission Indians" who asserted a preexisting ownership right.[379] The Court considered a host of plausible arguments why the Native defendants' title, though never submitted to the commissions, persisted after the 1851 Act: Native peoples held a right of occupancy rather than a title derived from Spain or Mexico; Native defendants' ownership claim was perfect at the time of cession; and Native defendants were "third persons" with superior title whose ownership right was unaffected by the confirmation.[380] But the Court, quoting both *Botiller* and *Beard* at length, breezily rebutted these arguments and concluded that the defendants' failure to submit their claim invalidated their right against the plaintiff.[381] "Surely a claimant would have little reason for presenting to the land commission his claim to land, and securing a confirmation of that claim," the Court reasoned, "if the only result was to transfer the naked fee to him, burdened by an Indian right of permanent occupancy."[382]

Barker presaged a century of similar rulings. In 1924, the Court reiterated the *Barker* principle in a later lawsuit brought by the United States to vindicate Native title.[383] And in 1984, the Court invalidated the State of California's right to submerged lands despite the public-trust doctrine, which preserves sovereign ownership of tidal waters.[384] Reversing the California Supreme Court, Justice Rehnquist reasoned that, because the 1851 Act intended to

379. 181 U.S. 481, 482 (1901) (statement of the case).

380. *See id.* at 489-91 (opinion of the Court).

381. *Id.* at 487-89, 491.

382. *Id.* at 492.

383. United States v. Title Ins. & Tr. Co., 265 U.S. 472, 481, 486 (1924).

384. Summa Corp. v. California *ex rel.* State Lands Comm'n, 466 U.S. 198, 209 (1984).

provide stability and certainty of property, even a public-trust easement had to be presented to the commissioners; the state's failure to do so forfeited its property.[385] Two years later, the Ninth Circuit applied this "line of Supreme Court decisions" to affirm the title of Mexican confirmees under the 1851 Act against competing Native title.[386] When the confirmees had submitted their claims to the commissioners, the court reasoned, "they were entitled to believe that adverse claims to their lands had been eliminated."[387]

Set against the earlier history of private land claims, these twentieth-century decisions are shocking in their breadth. Courts did not read the boards as an effort to merely ascertain title against the United States that left third-party claims unimpaired, as many in Congress had anticipated. Instead, the Supreme Court concluded that extinguishing such third-party ownership rights—even when they predated U.S. sovereignty—was the boards' entire *purpose*. Many in Congress had sought to avoid this outcome in crafting the 1851 Act; many even thought such an interpretation unconstitutional. Yet the twentieth-century courts were not willfully misreading the Act. Rather, their harsh and punitive turn flowed logically, almost inevitably, from *Botiller* and *Beard*, where the Court had decisively resolved the ambiguities of title under the private land claims in favor of sweeping congressional power.

IV. Coda: The Court of Private Land Claims

California was not the only territory the United States seized in the Mexican–American War: Spanish and Mexican land rights extended over much of the Southwest, especially the New Mexico and Arizona Territories. Yet Congress delayed addressing them until 1854, when it enacted a statute that returned to the older model.[388] The law provided that the Surveyor-General would investigate preexisting land claims, which Congress would then approve or reject.[389] Just as before, this process proved interminable: Nearly four decades later, Congress had reportedly addressed a mere seventy-one claims.[390]

Many in Congress thus argued, yet again, for the creation of a specialized court to resolve the outstanding claims. The ensuing debate rehashed a century's worth of legal arguments. Speaking just before the Court decided *Botiller*, some reiterated the perfect–imperfect divide, quoting antebellum

385. *Id.* at 201, 206, 209.

386. United States *ex rel.* Chunie v. Ringrose, 788 F.2d 638, 646 (9th Cir. 1986).

387. *Id.*

388. Act of July 22, 1854, ch. 103, § 8, 10 Stat. 308, 309.

389. *Id.*

390. 22 CONG. REC. 428-29 (1890) (statement of Rep. Charles P. Wickham).

Court decisions to establish that courts alone had the authority to determine perfect titles.[391] (Skeptics, once again noting the ambiguity about what constituted a "perfect" grant, described this issue as so much "empty verbiage.")[392] The committee drafting the bill noted, without elaboration, that "grave questions, involving the authority of commissions to exercise judicial power, have arisen."[393] Yet few in Congress expressed similar qualms about establishing an Article I land claims court, which they described as "vested with judicial power" and providing "judicial investigation and settlement of these private land claims."[394] One representative expressed doubts about "creat[ing] a brood of inferior and special courts to assume the jurisdiction which is acknowledged to belong to the United States court," though his concerns sounded more about policy—a fear of creating "courts for specific localities"—than the Constitution.[395]

Finally, in 1891, Congress created the Court of Private Land Claims to address unresolved cases arising from Mexican and Spanish land grants under the Treaty of Guadalupe Hidalgo.[396] The new court consisted of five "justices," appointed for a five-year term (later extended[397]), to hear cases arising from states and territories throughout the Southwest.[398] Claimants had a right to appeal to the U.S. Supreme Court, which would review the case de novo for questions of both law and fact.[399]

The statute creating the court codified much of the framework that had evolved over the prior century. *Botiller* notwithstanding, the law distinguished between "complete and perfect" titles, the submission of which to the court was optional, and inchoate rights, which had to be submitted to avoid risk of forfeiture.[400] Moreover, the law stipulated the court's decisions, though final, would not "affect the private rights of persons as between each other."[401] The

391. *See* 15 CONG. REC. 888 (1884) (statement of Sen. Wilkinson Call) ("[T]he judicial department of the Government was the only department which could finally decide upon the private rights, upon the grants, the possession of which was already complete.").

392. 22 CONG. REC. 434 (1890) (statement of Rep. Antonio Joseph) (quoting Hon. Frank Springer).

393. H.R. REP. NO. 50-675, at 2 (1888).

394. *See, e.g.*, 22 CONG. REC. 430-31 (1890) (statement of Rep. James B. McCreary).

395. *See id.* at 441 (statement of Rep. Thomas R. Stockdale).

396. Act of Mar. 3, 1891, ch. 539, § 1, 26 Stat. 854, 854-55.

397. *Court of Private Land Claims, 1891-1904*, FED. JUD. CTR., https://perma.cc/VY3U-WJZF (archived Nov. 10, 2021).

398. Act of Mar. 3, 1891 §§ 1, 6, 26 Stat. at 854, 855-56.

399. *Id.* § 9, 26 Stat. at 858.

400. *Id.* §§ 6, 8, 12, 26 Stat. at 856-57, 859.

401. *Id.* §§ 8, 13, 26 Stat. at 857-58, 860.

act did contain one significant innovation: It permitted the Attorney General to file suit in the court to test the title of *any* landowner in the Southwest who had not voluntarily filed a claim.[402]

After the court's creation, the question of whether an Article I court to determine private land claims was properly "vested with judicial power" reached the U.S. Supreme Court for the first time.[403] In the 1894 case *United States v. Coe*, the Court validated the creation of the Court of Private Land Claims: "It must be regarded as settled that section 1 of article 3 [of the Constitution] does not exhaust the power of Congress to establish courts," the opinion observed.[404] But then the Court punted. Because Arizona was still a territory, the Court concluded, Congress clearly enjoyed power to establish courts there.[405] The Court of Private Land Claims also operated within three states, too, but the Court explicitly left that constitutional question for a future case.[406] Yet the Court of Private Land Claims disbanded in 1904 without such a case ever reaching the Supreme Court.[407]

The court's end represented a denouement of sorts for the outsized role that private land claims enjoyed in nineteenth-century federal governance. Those claims have not vanished or been satisfactorily resolved, of course. Especially in the Southwest, many Latinx and Native claimants continue to assert title predating the United States.[408] The federal government declines to recognize most of these rights, and efforts to enforce them today confront bars like laches and res judicata.[409] But the enormous doctrinal significance that the

402. *Id.* § 8, 26 Stat. at 858.

403. United States v. Coe, 155 U.S. 76, 84 (1894).

404. *Id.* at 85.

405. *Id.*

406. *Id.* at 84-86.

407. In fact, despite Congress's broad jurisdictional provisions, seemingly the entirety of the court's docket came *solely* from the Arizona and New Mexico Territories. *See* RICHARD WELLS BRADFUTE, THE COURT OF PRIVATE LAND CLAIMS: THE ADJUDICATION OF SPANISH AND MEXICAN LAND GRANT TITLES, 1891-1904, at 95 n.1 (1975) (recording 282 cases filed in New Mexico and 20 in Arizona, and apparently none elsewhere).

408. *See* U.S. GEN. ACCT. OFF., GAO-04-59, TREATY OF GUADALUPE HIDALGO: FINDINGS AND POSSIBLE OPTIONS REGARDING LONGSTANDING COMMUNITY LAND GRANT CLAIMS IN NEW MEXICO 97-99 (2004) (noting that many heirs of community-grant holders believe that the United States failed to comply with the promises of the Treaty of Guadalupe Hidalgo and unjustly stripped them of property rights); GÓMEZ, *supra* note 37, at 125-38 (describing how the U.S. Supreme Court invalidated many community grants in New Mexico, which prompted a "variety of political mobilizations" among Latinx communities).

409. U.S. GEN. ACCT. OFF., *supra* note 408, at 8-13 (citing the Supreme Court's precedents on land claims to conclude that "confirmation processes were conducted in accordance with U.S. law"); Christine A. Klein, *Treaties of Conquest: Property Rights, Indian Treaties,*
footnote continued on next page

private land claims once enjoyed within federal jurisprudence has passed. After its brief existence, the Court of Private Land Claims became, almost literally, a footnote in ongoing litigation over public rights and Article III tribunals.[410]

In many ways, the creation of the Court of Private Land Claims offered an unsatisfying conclusion to a century's worth of contention over the preexisting land claims, perpetuating, rather than resolving, long-standing ambiguities. The debate around the court's creation indicated vague lingering constitutional objections over administrative adjudications, notwithstanding a century's worth of practice. But instead of dispelling these issues, the Court ducked them in *Coe*—even though *Murray's Lessee* had effectively already settled the question. Moreover, Congress reinscribed the perfect–imperfect divide at the exact moment that the Supreme Court discarded this distinction, yet apparently saw no contradiction in authorizing the Attorney General to haul *any* property owner before the Article I tribunal to prove her title. In short, the Court of Private Land Claims remained wedded to the antebellum jurisprudence of private land claims, with all its uncertainties, at the very moment when the Supreme Court was resolving these ambiguities decisively in favor of congressional discretion.

Conclusion: Implications

The brief cryptic lines in *Murray's Lessee* about "public rights" and "[e]quitable claims" turn out to be the gateway for a trip down the proverbial rabbit hole.[411] On the other side lies a vast and largely forgotten nineteenth-century property jurisprudence, rooted in U.S. imperialism, that consumed Congress, the Supreme Court, federal administrators, and local politics for the better part of a century. Viewed from the present, the complicated, specialized law that developed around these private land claims—with its deep dive into the intricacies of Spanish, Mexican, and French land law, its arcane vocabulary and categories, and its ad hoc, often ineffectual attempts to create an administrative resolution scheme—seems almost as strange and fantastic as what Alice discovered through the looking glass.

---

and the Treaty of Guadalupe Hidalgo, 26 N.M. L. REV. 201, 249-51 (1996) (noting the application of statutes of limitations and laches to limit claims under the Treaty).

410. *See, e.g.*, *Ex parte* Bakelite Corp., 279 U.S. 438, 456-57 (1929) (discussing the court's significance as a "legislative court" while rebuffing a constitutional challenge to the Court of Customs Appeals); N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 108, 114 (1982) (White, J., dissenting) (arguing that limitations on Article III tribunals should focus on congressional intent rather than subject matter).

411. Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1856).

What do we learn from the journey? In one sense, the exploration merely reiterates what Robert Gordon has called the "subversive tendencies of historicism."[412] In reconstructing the origins of the public-rights doctrine, judges and scholars have offered an account of the past structured around a purported traditional framework that privileged vested rights to property. This narrative accurately reflects some of the language used by nineteenth-century jurists and legal thinkers. But it bears only a passing resemblance to, and cannot readily explain, the jurisprudence of the area of law that the Supreme Court proclaimed most salient when it first enunciated the public-rights doctrine.

Yet the complex history of the private land claims also has important positive implications for the present-day doctrine on public rights, if only because of the weight that judges and scholars today have given prior practice. Over the nineteenth century, Congress subjected vested rights to private property to non–Article III tribunals, usually with appellate Article III or congressional review but sometimes with sole and final decisionmaking power. These decisions could have been submitted to ordinary courts, like other disputes involving both perfect and imperfect property rights—the boards of commissioners were, commentators conceded, effectively substitutes for ejectment suits by the United States. But Congress chose not to do so, and courts, including the Supreme Court, deferred to its decision. Whether by courts or by commissions, the ultimate rulings on the private land claims enjoyed the same preclusive effect as equivalent judicial rulings—sometimes more so, because courts often found that the resulting federal patent bound third parties notwithstanding limiting language in the statutes. And on the rare instances when people challenged Congress's broad discretion over private land claims, the Supreme Court blessed these practices as constitutional.

We could, of course, quibble with these conclusions. We could argue that, when Chief Justice Marshall and other commentators said that imperfect land rights were vested rights to property, they were employing different definitions of the terms. We could insist that, because imperfect land claims were claims on the national domain, they depended effectively on governmental largesse, even though they were consistently spoken of as legally binding, preexisting rights to private property. We could claim that the advent of de novo court review cured any constitutional defects, even though this did not occur until the United States had already been addressing these claims for over sixty years.

412. ROBERT W. GORDON, TAMING THE PAST: ESSAYS ON LAW IN HISTORY AND HISTORY IN LAW 7 (2017).

Or, perhaps, we could attempt to hive off the entire body of private land claims as sui generis, uniquely tied to foreign relations law and the treaty power. Defending this conclusion, though, would require some difficult contortions. We would have to explain why so few at the time made this distinction and instead consistently analogized the private land claims to other kinds of land rights. We would also have to clarify why, if the treaty power simply authorized federal authority, nineteenth-century jurists spent so much time and attention parsing the distinction between perfect and imperfect rights. We would further have to come up with a convincing reason why, when the *Murray's Lessee* court crafted the category of public rights, the sole example it cited was an exception.[413]

All these objections attempt to cram the past into present-day jurisprudential assumptions. There is nothing wrong with revisiting past legal conclusions based on newer, differing understandings of law. But if we do so, we cannot claim merely to be neutrally applying the positive law of the past. We would have to offer explanations other than prior law and practice to explain why the administrative adjudication of property rights violates the constitutional separation of powers.

The history of private land claims unsettles prior attempts at line drawing between public and private rights more than it offers a new bright-line test. It certainly vindicates Justice Breyer's contention in his dissent in *Stern v. Marshall* that the majority had misunderstood and misapplied the test from *Murray's Lessee*.[414] But this history arguably also supports an anti-formalist line of reasoning about public rights currently in disfavor—one that focuses more on congressional intent[415] and entanglement with a "public regulatory scheme"[416] than on strict categorization.[417] Moreover, some of the nineteenth-

413. Nor is it clear that this interpretation would provide much of a limitation. The treaties examined here encompass most of the land within the United States. *See* GATES, *supra* note 40, at 75-76. If you add in the 374 treaties between Native nations and the United States, *see* NAT'L ARCHIVES & RECS. SERV., GEN. SERVS. ADMIN., RATIFIED INDIAN TREATIES 1722-1869, at 4 (1973), https://perma.cc/5BS6-98GM, then nearly all land within the United States would fall within this so-called exception for treaties, Claudio Saunt, *Invasion of America: How the United States Took Over an Eighth of the World*, EHISTORY.ORG, https://perma.cc/Z7HW-B6UT (archived Nov. 10, 2021) (to locate, select "View the live page").

414. Stern v. Marshall, 564 U.S. 462, 507 (2011) (Breyer, J., dissenting). For a historical argument against the *Stern* majority opinion's interpretation of *Murray's Lessee*, see the text accompanying notes 171-73 above.

415. *See N. Pipeline Constr. Co.*, 458 U.S. at 108-14 (White, J., dissenting).

416. Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 593-94 (1985).

417. Pfander and Borrasso persuasively urge looking more toward "legal context" than "formalist" classifications when distinguishing public and private rights and suggest more attention to the availability of judicial review. *See* Pfander & Borrasso, *supra* note 16, at 559-62. But they then distinguish "adjudicative" and "constitutive" functions, arguing that

footnote continued on next page

century discussions in Congress and the Supreme Court, especially in the late nineteenth century, suggest a functionalist approach that focuses on the adequacy of procedural safeguards rather than on formalist classifications.[418]

More broadly, this Article challenges some of the assumptions underlying current critiques of the public-rights doctrine. In part, nineteenth-century jurisprudence appeals to many as a time when the law supposedly accorded property rights greater respect than it currently does. At least as far back as Edward Corwin, libertarians have valorized a lost era of "vested rights" and inveighed against the fallen twentieth century for purportedly betraying the nation's constitutional foundations.[419] This historical account survives even though more rigorous scholarship has underscored how little regard antebellum governments actually showed to supposedly sacred property.[420] This view also ignores a deep irony: Even as the United States sang paeans to inviolate ownership, it was crafting one of the largest schemes of state-sponsored coercive dispossession in world history, violently seizing a continent already occupied by Native nations, Latinx peoples, and many others, compensating them only what federal officials were willing to pay. The doctrine of private land claims arose in large part to paper over the powerful dissonance between the nation's ostensible fealty to property rights and the nineteenth-century realities of conquest.

But nineteenth-century jurisprudence also appeals to many as a time when the law applied sharp bright-line rules. As we have seen, jurists crafting the jurisprudence of private land claims worked hard to construct just such

---

the proceedings of the Patent Trial and Appeal Board (PTAB) at issue in *Oil States* were adjudicative and therefore exceeded agency authority. *Id.* Yet the history of private land claims questions this conclusion. Given that Congress routinely created new commissions and tribunals to reexamine earlier constitutive decisions, *supra* note 97, that those decisions enjoyed preclusive effect, *supra* Part I.B.2, and that these tribunals exercised de facto authority to adjudicate adverse claims, *id.*, it is not clear that administrative agencies historically lacked the blended adjudicative–constitutive authority that Pfander and Borrasso find troubling about the PTAB.

418. *See supra* text accompanying notes 352-53, 394-95.

419. *See, e.g.*, Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 275-76 (1914); *see also* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 53-86 (rev. ed. 2014); JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 125-41 (3d ed. 2008).

420. Recent literature, for instance, has emphasized the widespread and routine regulation of property in the antebellum era. *See, e.g.*, WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); Harry N. Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 CALIF. L. REV. 217 (1984). Other works have noted that antebellum law, though it purported to protected vested rights, routinely disregarded preexisting property rights in its embrace of economic dynamism. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 31-62 (1977); ALEXANDER, *supra* note 219, at 185-210.

categories—distinguishing perfect from imperfect rights, or claimants from "third persons." But in the end, these distinctions collapsed under the weight of their own ambiguities and contradictions.

The private-land-claims cases proved so difficult because the supposedly clear category at the center of much nineteenth-century jurisprudence—property—was in fact contested, uncertain, and vague. Jurists and commentators had to figure out: What counted as property? When did such rights come into existence? Could the federal government limit or even invalidate them in some instances without paying compensation? These questions are still with us, often in the notoriously thorny realms of regulatory takings. This doctrine, largely unknown in the nineteenth century, is routinely described as a mess, in large part because the categories it relies on are hard to define.[421] Deciding when routine government regulation goes "too far," and becomes a taking, turns out to be hard, with even bright-line rules quickly yielding to exceptions.[422] Determining what constitutes *property* has proved equally difficult. The Supreme Court recently declined to establish a sharp definition in favor of focusing on an owner's "reasonable expectations . . . derive[d] from background customs and the whole of our legal tradition."[423]

Such present-day challenges seem to reflect what Thomas Grey lamented as the twentieth-century disintegration of property in the face of legal realism's corrosive power.[424] Yet the category of property was arguably no clearer or more coherent in the antebellum United States, as jurists and commentators of the era faced their own form of disintegration. In particular, as part of the era's broader rise of abstract forms of ownership, late-eighteenth and early nineteenth-century governments routinely sliced up the promise of real property into what one Justice called "very general, vague, inceptive equity," leaving courts to make sense of this explosion of "inchoate" titles and ownership.[425] A peculiarly nineteenth-century paradox made the stakes of this

421. *See, e.g.*, Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 ALA. C.R. & C.L. L. REV., no. 2, 2013, at 25, 28 & nn.14-20 (collecting the many scholarly attacks on takings jurisprudence as "famously incoherent and a mess, a muddle (or muddled), confused, incomprehensible, standardless, and unprincipled" (footnotes omitted) (internal quotation marks omitted)).

422. Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *see also* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1067 (1992) (Stevens, J., dissenting) ("Like many bright-line rules, the categorical rule established in this case is only 'categorical' for a page or two in the U.S. Reports.").

423. Murr v. Wisconsin, 137 S. Ct. 1933, 1945 (2017).

424. Thomas C. Grey, *The Disintegration of Property*, *in* PROPERTY: NOMOS XXII 69, 81 (J. Roland Pennock & John W. Chapman eds., 1980).

425. *See* United States v. de la Maza Arredondo, 31 U.S. (6 Pet.) 691, 727 (1832); *cf.* Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328-30, 333-66 (1980) (describing the challenge

footnote continued on next page

categorization particularly high: Though vested rights were thought to be immune from government regulation, government land offices were constantly creating new property rights in land. The private land claims epitomized the nineteenth-century struggle to resolve this seeming contradiction.

In the end, judges, members of Congress, and administrators of the era came up with their own solutions to these dilemmas that seemed to satisfy them well enough, at least for a while, although their answers yielded a remarkably baroque jurisprudence. What they did *not* do was come up with a set of answers that were necessarily clearer, better, or more authoritative than our current resolutions. In this area, as in many others, we cannot solve hard legal problems simply by outsourcing them to the past. It turns out that people then were just as confused as we are.

of the category of property over the nineteenth century, although focused mostly on ownership over intangible items rather than interests in land).