D. Kennedy
635 Duncan

CHICANA/CHICANO LAND TENURE IN THE AGRARIAN DOMAIN: ON THE EDGE OF A "NAKED KNIFE"†

*Guadalupe T. Luna**

Neither sovereignty nor property rights could forestall American geopolitical expansion in the first half of the nineteenth century. The conflicts that resulted from this clash of doctrine with desire are perhaps most evident in the history of the Chicanas/Chicanos of Texas, California, and the Southwest, who sought to maintain their land and property, as guaranteed by the Treaty of Guadalupe Hidalgo, in the aftermath of the U.S.-Mexico War. Integrating an exploration of case law with political and social histories of the period, the Author explores the sociolegal significance of Chicana/Chicano land dispossession; exposes the racial, economic, and political motivations of the legislators, judges, and attorney's involved; and demonstrates the internal incoherence of land grant doctrine. Focusing on the material relationship of the past to the present, the author seeks to establish linkages between the past roles of law and legal structures in dispossessing Chicanas/Chicanos of their land and their present roles in structuring Chicana/Chicano political and economic subordination in the agricultural sector. The author concludes that the study of Mexican land dispossession suggests both the need to expand the traditional approach to teaching property law as well as the importance of deploying the Treaty of Guadalupe Hidalgo and international law in the struggle for racial equity.

† United States v. Castillero, 67 U.S. (2 Black) 17, 102 (1862).

* Associate Professor of Law, Northern Illinois University. B.A., University of Minnesota; J.D., University of Minnesota. I thank Professors Kevin Johnson, George Martinez, Dennis Nodín Valdés, Yvette Barksdale, Mark Cordes, Jim Alfini, Jane Larson, Vincent Rougeau, and Ibis Gomez-Vega for much appreciated contributions. I also thank Armando Espinoza for his wit and valuable help and Andrea Guerrero Reyes for her gentle persuasion in ensuring the completion of this text.

INTRODUCTION

> *Law is not a water-tight compartment sealed or shut off from contact with the drama of life which unfolds before our eyes. It is in no sense a cloistered realm but a busy state in which events are held up to our vision and touch at our elbows.*[1]

As early as 1885, the federal courts evinced clear awareness of their dubious record in deciding disputes between Mexican landowners and American settlers in the Southwest. In *United States v. San Jacinto Tin Company*,[2] the court poignantly addressed the subject as follows:

> Those familiar with the notorious public history of land titles in this state need not be told that our people coming from the states east of the Rocky Mountains very generally denied the validity of Spanish grants . . . and, determining the rights of the holders for themselves, selected tracts of land wherever it suited their purpose, without regard to the claims and actual occupation of holders under Mexican grants . . . . Many of the older, best-authenticated, and most-desirable grants in the state were thus, more or less, covered by trespassing settlers. When the claims of Mexican grantees came to be presented for confirmation, these settlers aided the United States; the most formidable opposition usually

1. Wortham v. Walker, 128 S.W.2d 1138, 1150 (Tex. 1939).
2. 23 F. 279 (C.C.D. Cal. 1885).

> coming from them, first, to the confirmation of the grants, on every imaginable ground, of which the most frequent was fraud in some form at some stage of the proceedings. When confirmed, and the officers of the government came to the location, the contest became still more vigorous and acrimonious; the trespassing settlers, or adverse claimants . . . would seek to move the location . . . in opposition to confirmation . . . . Charges of fraud are easily made, and they were by no means sparingly made by incensed defeated parties, and these reckless charges by disappointed trespassing and opposing claimants, in many instances, as in this case, involved the officers of the government, as well as the claimants under the grant.[3]

This Article investigates the dispossession of Chicanas/Chicanos[4] from their property interests following the war between the United States and the Republic of Mexico ("U.S.-Mexico War").[5]

---

3. 23 F. at 295–96.

4. "Mexican" nationals include citizens of Mexico. The term "Chicanas/Chicanos" refers to individuals of Mexican descent in the United States after the Conquest of the former Mexican Territories. The terms are used interchangeably with emphasis on "self-designations." *See generally* GENARO M. PADILLA, MY HISTORY, NOT YOURS (1993) (describing the importance of allowing people to name their own identity). For an alternative designation, see ANA CASTILLO, MASSACRE OF THE DREAMERS 12 (1994), which employs the term "Xicanisma." Castillo encourages Xicanistas to "not only reclaim [their] indigenismo but also reinsert the forsaken feminine into [their] consciousness." *Id.* For information concerning the indigenous heritage of people of Mexican ancestry, see RICHARD GRISWOLD DEL CASTILLO & ARNOLDO DE LEÓN, NORTH TO AZTLÁN, A HISTORY OF MEXICAN AMERICANS IN THE UNITED STATES (1996). Griswold del Castillo and De León assert that the indigenous background of Mexicans derives from "the tribes and groups that populated America before Christopher Columbus's voyage. Along with most Mexicans, Chicanos are also Mestizos—a biological as well as cultural mixture of Indian and Spanish with some traces of African and Asian peoples." *Id.* at 7.

The Mexican period is distinguished from the Spanish governance of the provinces. *See generally* Ely's Adm'r v. United States, 171 U.S. 220, 228 (1898) (noting Mexico's declaration of independence from Spain on February 24, 1821).

5. The war between the two Republics began on May 13, 1846. Lisbeth Haas reports that "its immediate causes . . . stemmed from the United States' annexation of Texas." Lisbeth Haas, *War in California, 1846–1848*, *in* CONTESTED EDEN, CALIFORNIA BEFORE THE GOLD RUSH 331, 333 (Ramón A. Gutiérrez & Richard J. Orsi eds., 1998). Imperialism and the doctrine of Manifest Destiny encouraged westward expansion in the 19th century, *see* FREDERICK MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY (1963), and it is well established that the United States long had coveted Mexico's northern provinces. *See* A. BROOKE CARUSO, THE MEXICAN SPY COMPANY, UNITED STATES COVERT OPERATIONS IN MEXICO, 1845–1848, at 5 (1991) (reporting that President Adams "made no less than three [unsuccessful] attempts to induce Mexico to sell [Texas] to the United States") After Mexico's refusals, President Andrew Jackson attempted to purchase key regions of Mexican territory; he also became the first American president to direct American continental acquisition

The admission, by at least one federal court,[6] of the widespread abuses that occurred during the nineteenth century suggests that one might reasonably expect to find some mention of them within traditional legal education in the contemporary period. Not only were these actions the type of "abuses" that often attract at least academic discussion, they also constituted the means by which private citizens gained title to vast amounts of rural property. Nevertheless, legal scholarship and classroom discussions are virtually silent on the matter.

This gap in legal history does not result from a lack of present relevance.[7] A fundamental issue in both property and agricultural law[8] involves the reconciliation of conflicts between the ownership rights of fee holders and certain governmental actions.[9] Academic

---

efforts toward the Mexican ports of Monterrey and San Francisco. *See id.* Because he sought to expand the United States to all Mexican territories, Andrew Jackson, whether in or out of office, proved a continuous threat to Mexico's security for the next 20 years. *See id.*

For an account of westward expansion into territory formerly belonging to Mexican landholders, see generally *Southern Pacific Railroad v. Brown*, 68 F. 333 (C.C.S.D. Cal. 1895), in which the court discussed land granted by the Mexican government and later awarded by the U.S. government to railroad companies. For another detailed discussion, see generally WILLIAM H. GOETZMANN, WHEN THE EAGLE SCREAMED: THE ROMANTIC HORIZON IN AMERICAN DIPLOMACY, 1800–1860 (1966).

6. *See supra* note 2 and accompanying text.

7. For example, property law exposes students to chain of title issues. *Broome v. Lantz*, 294 P. 709 (Cal. 1930), presents a chain-of-title fact pattern of property once held under Mexican ownership. That case describes Isabel Yorba and her ranch, Guadalasca, dating back to 1836. During her tenure as property owner, Yorba conveyed various parts of the ranch. Whether she conveyed her property under duress is a further point of interest. Finally, the gap in legal history obscures the extent to which property titles throughout the Southwest derive from the land grant periods. As the Supreme Court noted at the time, "[w]hen the sovereignty of Spain was displaced by the revolutionary action of Mexico, the new government established regulations [for granting public lands to individuals]. These two sovereignties are the spring heads of all land titles in California . . . ." United States v. Moreno, 68 U.S. 400, 403 (1863).

8. Agricultural law encompasses the realm of federal and state regulatory structures that expedite food production in the United States and entry into foreign markets. *See* KEITH MEYER ET AL., AGRICULTURAL LAW, CASES AND MATERIALS (1985).

9. Students of property law conceptualize property rights as a "bundle of sticks." Board of County Comm'rs v. Conder, 927 P.2d 1339, 1352 (Colo. 1996) (Kourlis, J., dissenting); *see also* JOSEPH SINGER, PROPERTY LAW, RULES, POLICIES AND PRACTICES 3 (1994) ("Property rights concern relations among people regarding control of valued resources."). Anglo-American jurisprudence has a longstanding tradition, expressed in Constitutional and legislative provisions as well as court rulings, of protecting these bundles of sticks from overly intrusive governmental actions. For example, the Fifth Amendment to the U.S. Constitution provides in part: "Nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V., cl. 4. The Federal Takings Clause applies not only to the federal government but also to state governments by incorporation through the Due Process

inquiry also examines how those conflicts impact the country's natural resources. Notwithstanding the breadth of these fields of study, the literature generally excludes reference to Chicana/Chicano land dispossession.[10] This Article seeks to provide a partial remedy for that exclusion.[11]

Prior to the U.S.-Mexico War, the Mexican government awarded and recognized private and communally held[12] grants of

---

Clause of the Fourteenth Amendment. *See, e.g.*, Chicago, Burlington & Quincy R.R. v. City of Chicago, 166 U.S. 226, 236 (1897).

10. *See, e.g.*, JESSE DUKEMINIER & JAMES KRIER, PROPERTY (3d ed. 1993) (extensively discussing property acquisition by discovery, capture, creation, find, adverse possession, and gift, but omitting the enormous history of property ownership and governmental actions as they affected Chicana/Chicano land disposition). Land use texts also fail to examine the historical underpinnings of land distribution law, which arose from land grant adjudication law. *See, e.g.*, CHARLES M. HAAR & MICHAEL ALLAN WOLF, LAND-USE PLANNING, A CASEBOOK ON THE USE, MISUSE AND RE-USE OF URBAN LAND (4th ed. 1989). These omissions result in an imprecise legal history and deprive students of the opportunity to address complex analytic exercises that stem from the difficult task of reconciling land grant adjudication with prior American legal principles.

Regarding the invisibility of Latinas/Latinos in law generally, see Berta E. Hernandez-Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Kevin Johnson, *Los Olvidados: Images of the Immigrant, Political Power of Noncitizens, and Immigration Law and Enforcement*, 1993 BYU L. REV. 1139 (1993); Kevin R. Johnson, *Some Thoughts On The Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. 101 (1997); Juan F. Perea, *Los Olvidados: On the Making of Indivisible People*, 70 N.Y.U. L. REV. 965 (1995).

11. Although Chicana/Chicano dispossession touches on numerous compelling issues that require further scholarly investigations, space constraints permit the enumeration of only a few. For example, the jurisprudence from the annexation period encompasses federalism considerations. *See, e.g.*, United States v. Martinez, 184 U.S. 441, 444 (1902) (questioning whether, after the private land claims court confirms a land grant, a court can without explanation "entertain a supplemental petition for the value of certain parcels disposed of and patented by the United States to third parties before the filing of the original petition"); Gunn v. Bates, 6 Cal. 263, 266 (1855) ("California is an independent sovereignty, and the Federal Courts have no right or power to interfere with the decisions of this Court.").

This review also omits discussion of water rights litigation. However, information on that litigation as it involved the former Mexican territories can generally be found in *Gutierres v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545 (1903); *Mann v. Tacoma Land Co.*, 153 U.S. 273 (1894); *Miller v. Letzerich*, 49 S.W.2d 404 (Tex. 1932). These conflicts extend into the present. *See* Richard D. Garcia & Todd Howland, *Determining the Legitimacy of Spanish Land Grants in Colorado: Conflicting Values, Legal Pluralism, and Demystification of the Sangre de Cristo/Rael Case*, 16 CHICANO-LATINO L. REV. 39 (1995).

12. *Empresario* grants entitled groups to live on large tracts of land. *See* Vernon B. Hill, *Spanish and Mexican Land Grants Between the Nueces and Rio Grande*, 5 S. TEX. L. REV. 47, 47 (1960). Communal living was valued because it permitted people living on semi-arid tracts to access scarce water resources. American courts, however, disallowed communal rights. *See, e.g.*, United States v. Sandoval, 167 U.S. 278, 298 (1897). In rejecting these rights, United States courts failed to consider colonial American laws that permitted colonists to hold communal property. For a discussion

property throughout its territories.[13] After the Conquest,[14] the United States annexed the former Mexican territories through the Treaty of Guadalupe Hidalgo ("Treaty").[15] In establishing new national geographic borders,[16] the Treaty also obligated the United States to provide grantees in the annexed areas citizenship status and to protect their fee interests.[17] Notwithstanding the promises contained in the Treaty, grantees of Mexican descent and their successors in title experienced the loss of the very property interests the Treaty pledged to protect.[18]

---

of such laws and practices, see EDWARD T. PRICE, DIVIDING THE LAND, EARLY AMERICAN BEGINNINGS OF OUR PRIVATE PROPERTY MOSAIC 29–48 (1995).

13. Rural Mexican estates of varying sizes included, for example, Rancho San Antonio, Canon de San Diego, and Rancho San Francisquito. *See, e.g.*, Chaves v. United States, 168 U.S. 177 (1897) (San Antonio and San Diego); United States v. Rodriguez, 25 F. Cas. 821 (D.C.N.D. Cal. 1864) (No. 14,950) (San Francisquito).

14. For an account of the provocation between the countries as a factor leading to alienation, see RICHARD GRISWOLD DEL CASTILLO, THE TREATY OF GUADALUPE HIDALGO, A LEGACY OF CONFLICT 83–86 (1990), which discussed hostilities in Texas and subsequent alienation. Other scholars assert that the alienation followed from the actions of the Mexican ruling elite who, by arguing for privatizing communal grants prior to annexation, set the stage for post-annexation partition actions under Anglo-American law. *See* Robert D. Shadow & Maria Rodríguez-Shadow, *From Repartición to Partition: A History of the Mora Land Grant, 1835–1916*, 70 N.M. HIST. REV. 257, 270 (1995).

15. Treaty of Peace, Friendship, Limits, and Settlement with the United States of America and the Republic of Mexico, Treaty of Guadalupe Hidalgo, Feb. 2, 1848, U.S.-Mex., art. IX, 9 Stat. 922, 930 [hereinafter Treaty of Guadalupe Hidalgo].

16. Treaty of Guadalupe Hidalgo, arts. V–VII, *supra* note 15, at 926–29. Cartographic errors in a map relied on in negotiating the Treaty engendered a "prolonged dispute that resulted in the Gadsden Treaty in 1854." GRISWOLD DEL CASTILLO, *supra* note 14, at 56; The Disturnell map was a "reprint of 1828 plagiarism of an 1826 reproduction of an 1822 publication titled Mapa de Los Estados Unidos de Méjico, published by H.S. Tanner, of Phildelphia." *Id. see also* HUNTER MILLER, *Treaty of Guadalupe Hidalgo, Documents 122–150: 1846–1852*, 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA, 207, 414–21 (1937). For an analysis of the geographical dispute in case law, see *Ainsa v. United States*, 161 U.S. 208 (1895) (adjudicating a land claim under the Gadsden Purchase). *See also* Camou v. United States, 171 U.S. 277, 287 (1898) (addressing a land dispute deriving from the Gadsden Treaty); State v. Gallardo, 135 S.W. 664, 670–71 (1911) (leaving boundary question for future determination between Texas and Mexico).

17. Treaty of Guadalupe Hidalgo, *supra* note 15, at 929–30.

18. For example, by the 1920s, the majority of grantees and their heirs in Texas had long ago been dispossessed of their property holdings. *See* Rodolfo O. de la Garza & Karl Schmitt, *Texas Land Grants & Chicano-Mexican Relations: A Case Study*, 21 LATIN AM. RES. REV. 123, 125 (1986). Grantees of Spanish descent also lost their property following the Conquest by the United States, but this Article focuses on governance of the Southwest in the Mexican period. Specifically, the Treaty of Guadalupe Hidalgo identifies those remaining after the Conquest as Mexicans. Treaty of Guadalupe Hidalgo, art. VIII, *supra* note 15, at 929 ("Mexicans are now established in territories previously belonging to Mexico . . . .").

Scholars outside of legal academia have long investigated the issue of Chicana/Chicano property dispossession.[19] Three theories regarding the origins of Chicana/Chicano alienation from their property interests emerge from these scholars' work. Two of these theories attribute alienation to differences between Anglo-American and Mexican property law, while the third relies on cultural differences.

The first theory places responsibility for property dispossession on the substantive differences between United States common law and Mexican civil law.[20] Adherents of this theory contend "[n]ot so much that Americans ran roughshod over the legal rights of Mexican landowners [but rather] that different traditions of property rights came into conflict."[21] Such an argument is difficult to reconcile with the Treaty, international law, constitutional provisions, and subsequent congressional legislation obligating the United States to protect the property rights of those remaining in the annexed territories.[22] Thus, by relying on conflict between the different property traditions, the first theory does not completely explain Chicana/Chicano land alienation.[23]

---

19. *See, e.g.*, HUBERT O. BRAYER, WILLIAM BLACKMORE, THE NEW MEXICO LAND GRANTS OF NEW MEXICO AND COLORADO (1949); MALCOLM EBRIGHT, LAND GRANTS AND LAWSUITS IN NORTHERN NEW MEXICO (1994); WILLIAM GREY, A PICTURE OF PIONEER TIMES IN CALIFORNIA (1881); William W. Morrow, *Spanish and Mexican Private Land Grants*, *in* SPANISH AND MEXICAN LAND GRANTS 1, 15 (Carlos E. Cortés et al. eds., 1974); Paul Gates, *The California Land Act of 1851*, 50 CAL. HIST. SOC'Y Q. 395 (1971).

20. "Civil law uses law codes as the main source of its rules, while Anglo-American common law . . . looks primarily to the decisions of judges for precedents to govern its jurisprudence." EBRIGHT, LAND GRANTS, *supra* note 19, at 69. Contrary to the English common law origins of U.S. law, Mexican law originated from the civil law of Spain. *See* Manry v. Robison, 56 S.W.2d 438, 442 (Tex. 1932) (contrasting American common law riparian rights with Roman civil law governing Spain and Mexico); Miller v. Letzerich, 49 S.W.2d 404, 407 (Tex. 1932) ("After the revolution by which Mexico gained her independence, the Spanish civil law prevailed in connection with the decrees and statutes of the supreme government of Mexico.").

21. DAVID GUTIERREZ, WALLS AND MIRRORS: MEXICAN AMERICANS, MEXICAN IMMIGRANTS, AND THE POLITICS OF ETHNICITY 23 (1995); *see also* Gordon Morris Bakken, *Mexican and American Land Policy: A Conflict of Cultures*, 75 S. CAL. Q. 237 (1993) (describing the civil litigation process in Mexican California and its conciliation system). In some instances, the differences are difficult to discern. *See, e.g.*, Suñol v. Hepburn, 1 Cal. 254 (1850) (similarly interpreting possession under common and civil law).

22. *See* discussion *infra* Part II. For a discussion of the role of a former sovereign's law in proving validity of a grant and American courts' disregard of testimony regarding official jurisdiction as a source of construction of that law by the antecedent government despite the lack of a practically available alternative, see Hans W. Baade, *The Historical Background of Texas Water Law, A Tribute to Jack Pope*, 18 ST. MARY'S L.J. 1, 21–23 (1986).

23. Indeed, in the southwestern United States, several Mexican and Spanish legal principles extend to the present. For example, the law of community property

A second theory argues that the procedural differences between the systems led to the loss of property. Characterizing Anglo-Saxon law approvingly as "exact, clear, and precise,"[24] while criticizing Mexican legal institutions as employing "loose and careless methods,"[25] proponents of this theory assert that "the defects in the Spanish and Mexican records and titles," rather than the unfair treatment of Mexican grantees, resulted in alienation.[26] American courts, however, did not always share this view. In *Davis v. California Powder Works*,[27] for example, the court declared that "[t]he Mexicans of the Spanish race, like their progenitors, were a formal people, and their officials were usually formal and careful in the administration of their public affairs."[28] Thus, the second theory does not adequately link Chicana/Chicano land dispossession to differences in procedural administration of the laws.

The last theory asserts that the cultural differences between the United States and Mexico produced dispossession of Mexican grantees' property interests.[29] This theory posits that "the original holders being Mexicans were improvident and really squandered [their land] for riotous living."[30] As one author has noted, while early

---

remains in use. *See* SINGER, *supra* note 9, at 1078. For an account of the Spanish influence on Texan marital property law, see generally Hans W. Baade, *The Form of Marriage in Spanish and North America*, 61 CORNELL L. REV. 1 (1975).

24. Gates, *The California Land Act of 1851*, *supra* note 19, at 405 (1971); *see* Paul Gates, *Pre-Henry George Land Warfare in California*, *in* LAND AND LAW IN CALIFORNIA: ESSAYS ON LAND POLICY 186 (Richard S. Kirkendall ed., 1991) (discussing the "rigidity" of Anglo-Saxon law).

25. Morrow, *supra* note 19, at 15; *see also* Sena v. United States, 189 U.S. 233, 239 (1903) (favoring the U.S. government's interpretation of property boundaries due to the "loose manner" in which Spanish land grants were made).

26. Morrow, *supra* note 19, at 15; *cf.* WILLIAM W. ROBINSON, LAND IN CALIFORNIA 109 (1948) (discussing the typical lawyer's attitude that "condemnation of the whole procedure comes only from those not familiar with the situation").

Other scholars, providing only limited references to legal causes, assert that Mexican lands were lost because they were the spoils of war. *See* Harold Weiss, *The Texas Rangers Revisited: Old Themes and New Viewpoints*, 97 S.W. HIST. Q. 621 (1994). These discussions, however, fail to consider the extent to which the United States breached its contractual and fiduciary-like obligations to grantees of Mexican descent.

27. 24 P. 387, 388 (Cal. 1890).

28. *Id.* (internal quotation marks omitted) (quoting White v. United States, 68 U.S. 660, 680–81 (1863)).

29. *See* DOUGLAS MONROY, THROWN AMONG STRANGERS: THE MAKING OF A MEXICAN CULTURE IN FRONTIER CALIFORNIA 199 (1990) (discussing the "conflict of legal cultures").

30. U.S. INDUST. COMM'N, REPORT ON AGRICULTURE AND AGRICULTURAL LABOR, H.R. Doc. No. 57-1, at 952 (1901) (testimony of A.H. Naftzger, President and General Manager of Southern California Fruit Exchange). Those who adhered to this theory essentially viewed the land as wasted until American settlers arrived. *Cf., e.g.*, Luco v. United States, 64 U.S. 515, 524 (1859) ("The influx of American settlers had, from the year 1849, given great value to these lands . . . .").

Anglo-Americans pejoratively characterized the Mexican population as "indolent, ignorant, and backward, Americans of the late nineteenth century re-imagined the Californios as unhurried [and] untroubled."[31] This theory is grounded in part on the same demeaning ethnic stereotypes that shaped court decisions in the nineteenth and early twentieth centuries.[32] Moreover, evidence from historical texts demonstrates the industry of Mexican grantees' land use practices.[33] Cultural biases alone cannot justify any theory. The lack of evidentiary support further demonstrates that this theory fails as a sufficient explanation for Chicana/Chicano alienation.

Proponents of the above theories apparently ignore compelling legal evidence demonstrating that, in dealing with Mexican grantees' land, the United States failed to honor the Treaty of Guadalupe Hidalgo and violated American constitutional norms protecting against governmental instrusions on private property rights. By subjecting them to shifting legal norms, American courts subordinated Mexican grantees and their heirs as outsiders to the American legal system, thereby diminishing their status as citizens,[34]

---

31. DAVID J. WEBER, THE SPANISH FRONTIER IN NORTH AMERICA 341 (1992) ("Anglo Americans controlled Texas and the writing of its history. They adopted the story line of their propagandists and added an additional twist—they portrayed themselves as heroic, a superior race of men . . . ."). Several scholars discuss this revisionism. *See, e.g.*, GREY, *supra* note 19, at 20–21 (noting that much of the history of the war is rewritten by Anglo-Americans, constituting an account "full of exaggeration, and so extravagant and absurd that it is not even amusing"); Rufus B. Sage, *Degenerate Inhabitants of New Mexico*, *in* FOREIGNERS IN THEIR NATIVE LAND, HISTORICAL ROOTS OF THE MEXICAN AMERICANS 71, 71–75 (David Weber ed., 1973). For examples of these characterizations at the time, compare *United States v. Galbraith*, 63 U.S. (22 How.) 89, 92 (1859), in which the court said "The Californians are a simple, ignorant people," with THOMAS JEFFERSON FARNHAM, TRAVELS IN THE CALIFORNIAS AND SCENES IN THE PACIFIC OCEAN 139 (1844), *quoted in* ROSAURA SÁNCHEZ, TELLING IDENTITIES, THE CALIFORNIO *TESTIMONIOS* 30 (1995), who states "[i]n a word, the Californians are an imbecile, pusillanimous, race of men, and unfit to control the destinies of that beautiful country."

32. *See, e.g.*, Peralta v. United States, 70 U.S. (3 Wall.) 434, 439 (1865); Luco v. United States, 64 U.S. (23 How.) 515 (1859).

33. *See* Paul Horgan, *Life in New Mexico*, *in* CHICANO: THE EVOLUTION OF A PEOPLE 67, 67–68 (Renato Rosaldo et al. eds., 1973); Carey McWilliams, *The Heritage of the Southwest*, *in* CHICANO, *supra*, at 11–14; *see also infra* notes 108–113 and accompanying text.

34. *See* Guadalupe T. Luna, *The Treaty of Guadalupe Hidalgo and Dred Scott v. Sandford and the Complexities of Race*, U. MIAMI L. REV./TEX. HISPANIC L. REV. (forthcoming 1999); *see also* Guadalupe T. Luna, *Agricultural Underdogs and International Agreements: The Legal Context of Agricultural Workers Within the Rural Economy*, 26 N.M. L. REV. 9, 9 (1996) ("As soon as cheap labor from Europe was stopped, . . . American industry . . . turned to the Mexican supply. . . . The Mexican 'peon' (Indian or mixed-breed) is a poverty-stricken, ignorant, primitive creature, with strong muscles and with just enough brains to obey orders and produce profits under competent direction . . . .") (quoting LOTHROP STODDARD, RE-FORGING AMERICA: THE

sacrificing basic principles of law, and ultimately privileging the dominant population.[35]

A principal goal of this Article is to provide a counter-hegemonic story to the exclusion of the history of the post-U.S.-Mexican War period from legal analysis and education. This omission facilitates a legal culture that subordinates Chicana/Chicano communities through restrictive laws.[36] Its exclusion also denies a more sophisticated understanding of race.[37] Not unlike the work of LatCrit theorists, this Article elaborates several linkages among our history, our communities, and legal norms, long denied by mainstream legal culture and scholarship.[38] By providing a counter-story, this Article presents an opportunity to examine the continuing subordination of Chicana/Chicano communities and its harmful effects, both of which derive from the period of land grant adjudication.

This Article also aims to introduce the case law of Chicana/Chicano land dispossession into legal education. Chicanas/Chicanos' status as outsiders and the extent of their land alienation encompass a wide range of issues, including ejectment, trespass law, adverse possession, quieting of title, and the takings doctrine.[39] Consideration

---

STORY OF OUR NATIONHOOD 214 (1927)); George A. Martinez, *The Legal Construction of Race: Mexican and Whiteness*, 2 HARV. LATINO L. REV. 321 (1997).

35. The terms "dominant population," "Euro-American," and "European-American" refer to individuals of European descent. For a discussion of the legal identification of the dominant population, see *In re Camille*, 6 F. 256, 257 (C.C.D. Or. 1880), which defined the dominant population as "Europeans or white race."

36. *See, e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-220, 110 Stat. 3009-546 (1996); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997) (vacating en banc judgment that struck down as overbroad and unconstitutional an article of Arizona's constitution that required state employees to speak only English); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1992) (holding that the University of Texas Law School's affirmative action policy violated the Fourteenth Amendment by discriminating against those of European descent).

37. *See, e.g.*, Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1 (1996).

38. Environmental racism in contemporary communities of color constitutes an example of these denied linkages. *See* Gerald Torres, *Race, Class, Environmental Regulation, Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 841 (1992).

39. In addition, other authors specifically describe the use of violence in removing Chicanas/Chicanos from their land and property. *See, e.g.*, RODOLFO ACUÑA, OCCUPIED AMERICA: A HISTORY OF CHICANOS 115 (3d ed. 1988) (arguing that through "nonfeasance law officers condoned the legal and physical abuse" of Mexican grantees and noting that grantees were killed after they acquired title to their property) (citing LEONARD PITT, THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846–1890 119 (1971)); *see also* ALFREDO MIRANDÉ,

of the diverse legal methods that expedited dispossession provides an invaluable opportunity for analytical study of the tension between private ownership rights and governmental actions.

As a means of establishing the legal framework necessary to develop a more precise understanding of the events of land dispossession, Part I provides a discussion of the historical procedures Mexico used to regulate land grants throughout its provinces.[40] Part II analyzes case law[41] to examine whether the United States met its obligations under the Treaty, which terminated the U.S.-Mexico War. This examination demonstrates that legal and governmental actors extended favorable legal "interpretations" to the dominant population, denied analogous interpretations to Mexican fee holders, and ultimately that favoritism expedited dispossession.[42]

Finally, Part III joins the past with the present and examines the link between lack of land tenure and poverty in the contemporary period. It demonstrates that rural Chicanas/Chicanos cannot acquire land[43] and that without property, they are unable to access the

---

GRINGO JUSTICE 3 (1987) (enumerating examples of violence against Mexicans after the Conquest).

40. For other legal perspectives on the dispossession of Chicanas/Chicanos, see Frederico M. Cheever, Comment, *A New Approach to Spanish and Mexican Land Grants and the Public Trust Doctrine: Defining the Property Interest Protected by the Treaty of Guadalupe Hidalgo*, 33 UCLA L. REV. 1364 (1986); Placido Gomez, *The History and Adjudication of the Common Lands of Spanish and Mexican Land Grants*, 25 NAT. RESOURCES J. 1039 (1985); Peter L. Reich, *The "Hispanic" Roots of Prior Appropriation in Arizona*, 27 ARIZ. ST. L.J. 649 (1995).

41. Further evidence of the treatment of Chicana/Chicano property interests can be found by examining land grant and deed records, census and church records, deposition papers, Board of Land Commissioners hearings, and federal legislation promulgated during the period. In addition, voluminous examples of these documents, legal briefs, motions, court opinions, surveys, and maps of land formerly held by grantees of Mexican descent are located in the Bancroft Library at the University of California at Berkeley.

42. The application of vague standards by American courts ultimately accomplished what political forces could not—an expedited dispossession of land from Chicanas/Chicanos. *See* George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930–1980*, 27 U.C. DAVIS L. REV. 555, 566–68 (1994) (referring to Mexican land grants); *cf.* H.L.A. HART, THE CONCEPT OF LAW 132 (1961) ("[I]n every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents.").

43. *See generally* Arnoldo De León & Kenneth L. Stewart, *Lost Dreams and Found Fortunes: Mexican and Anglo Immigrants in South Texas, 1850–1900*, 14 W. HIST. Q. 291 (1983); Richard Griswold del Castillo, *Myth and Reality: Chicano Economic Mobility in Los Angeles, 1850–1880*, 6 AZTLÁN 151 (1975) (examining the validity of economic upward mobility myths for Chicanas/Chicanos from 1850 to 1880). For data on the present condition of rural areas, see generally U.S. BUREAU OF THE CENSUS, THE HISPANIC POPULATION OF THE U.S. SOUTHWEST BORDERLAND, C3.196: P-23/17 (1992) [hereinafter HISPANIC POPULATION OF U.S. SOUTHWEST]; U.S. GEN. ACCOUNTING

privileges extended to property owners through government programs. Thus, they are guaranteed impoverished conditions.[44] To counter their marginalized existence, Part III suggests opening the public domain for distribution to Chicanas/Chicanos. Rather than calling for the wholesale distribution of the country's natural resources, Part III indicates that land transfers should be conditioned on sustainable, alternative forms of land use and agriculture. In addition to righting prior wrongs, this proposal therefore also provides a means of ameliorating the current *ad hoc* spoliation of the public domain.

III. CONTEMPORARY LAND USE AND CHICANA/CHICANO POVERTY IN THE AGRARIAN DOMAIN

Justice Holmes once declared: "This abstraction called the law . . . is a magic mirror [wherein] we see reflected, not only our own

473. *Id.* at 511–12 ("[T]he relations of the inhabitants of Louisiana to their government is not changed. The new government takes the place of that which has passed away.")

474. *See id.* at 86.

475. *See* MILLER, *supra* note 16, at 241 ("For Article 9, the Senate amendment was a new text, adapted from Article 3 of the Treaty for the Cession of Louisiana . . . which, indeed, was the basis of the first paragraph of the article as originally written. . . .").

Section 13 of the California Land Act reads as follows:

> [S]aid surveyor-general shall have the same power and authority as are conferred on the register of the land office and receiver of the public moneys of Louisiana, by the sixth section of the act "to create the office of surveyor of the public lands for the State of Louisiana approved third March, one thousand eight hundred and thirty-one."

§ 13, 9 Stat. 631 (1851) (mirroring a provision in the Treaty for the Cession of Louisiana). For an account of the confirmation of land titles in Louisiana, see Harry L. Coles, Jr., *The Confirmation of Foreign Land Titles in Louisiana*, LA. HIST. Q., Oct. 1955, at 1.

476. United States v. McLaughlin, 127 U.S. 428, 454 (1888) (holding that, where a float had been granted, the United States could dispose of any specific tracts within the exterior limits of the grant, leaving a sufficient quantity to satisfy the float).

lives, but the lives of all men that have been!"[477] "Holmes believed that this 'magic mirror' offered historians an opportunity to explore the social choices and moral imperatives of previous generations."[478] While this Article argues that including Chicanas'/Chicanos' rural experience in legal education enriches our understanding of property law, this legal experience also provides a basis for understanding their current economic standing in the rural and agricultural sector.[479] The magic mirror now shows both that their dispossession was improper and that agricultural law is replicating the historical alienation of Chicanas/Chicanos from rural land and policies.

Insofar as legal practices and land use policies privileged the dominant population, the mirror shows that they also discriminatorily determined the distribution of power and benefits.[480] Not long ago, Reis Tijerina and the Alianza in New Mexico revived the land grant issue and exposed the consequences resulting from land grant dispossession.[481] Currently, discriminatory distribution of agricultural resources excludes Chicanas/Chicanos and invokes Reis Tijerina's claims for a return of long lost land grants.[482]

Under the federal regulatory framework, farmers in their regions vote on the determination of subsidy awards for their given

---

477. Kermit L. Hall, The Magic Mirror Law in American History 3 (1989) (quoting Oliver Wendell Holmes, Jr., The Speeches of Oliver Wendell Holmes 17 (1891)).

478. *Id.*

479. In rural areas Chicanas/Chicanos remain primarily as laborers without land tenure. *See generally* HISPANIC POPULATION OF U.S. SOUTHWEST, *supra* note 43. *See generally id.* Population figures, however, remain inexact because of the mobility of agricultural workers during census surveys. *See* Leslie A. Whitener, *A Statistical Portrait of Hired Farmworkers*, 2 MONTHLY LAB. REV. 49 (1994) (explaining that the nature of seasonal work ensures undercounting of field workers when workers are not employed on farms during the census-taking period).

480. See *supra* notes 217–99 for a discussion of this misappropriation.

481. *See generally* RICHARD GARDNER, REIS TIJERINA AND THE NEW MEXICO LAND GRANT WAR OF 1967 (1970).

482. *See generally* HISPANIC POPULATION OF U.S. SOUTHWEST, *supra* note 43, (enumerating Chicana/Chicano population in the Southwest); DEVELOPMENT PROFILE OF RURAL AREAS, *supra* note 43 (analyzing impoverished rural areas). Chicanas/Chicanos have long struggled to be heard in various areas. *See* ROOTS AND RESISTANCE: THE EMERGENT WRITINGS OF TWENTY YEARS OF CHICANA FEMINIST STRUGGLE, HANDBOOK OF HISPANIC CULTURES IN THE UNITED STATES: SOCIOLOGY 175 (Nicolas Kanellos & Claudio Esteva-Fabregat eds., 1994). This required further litigation to ensure access to public accommodation, *see* Terrell Wells Swimming Pool v. Rodriguez, 182 S.W.2d 824 (Tex. Civ. App. 1944), and the franchise through elimination of poll taxes and literacy tests, *see* White v. Regester, 412 U.S. 755 (1983); GOMEZ-QUIÑONES, *supra* note 84; JOHN STAPLES SHOCKLEY, CHICANO REVOLT IN A TEXAS TOWN (1974). Other cases discuss Chicana/Chicano rights to education. *See* Westminster Sch. Dist. v. Mendez, 161 F.2d 774 (9th Cir. 1947); Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391 (Tex. 1989); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

areas.[483] At present, Chicanas/Chicanos comprise only 1.7% of rural landholders[484] and those without land can neither participate nor vote on agricultural committees. Land alienation impoverished them, requiring transformation from land owners to field workers.[485] Their labor as fieldworkers consequently renders them ineligible to participate in the distribution of the federal benefits that accrue to the agricultural sector.[486] Long trajectories deriving from the inability to own land diminish their political standing[487] and perpetuate discrimination in the administration of farm programs and agricultural policy.[488] Without capital or land Chicana/Chicano farmers cannot improve their circumstances in a sector where they are largely relegated to subservience for established landowners' personal gain, and where they do not even benefit from the protections required in other industries.[489]

---

483. *See* 7 C.F.R. §§ 7.1–7.38 (1995).

484. Because the Census identifies rural landowners as Latinas/Latinos, it is difficult to discern the exact number of Chicana/Chicano landowners holding land. *See generally* U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF AGRICULTURE, U.S. DATA CHARACTERISTICS OF OPERATOR AND TYPE OPERATED BY BLACK AND OTHER RACES, 1992, 1987, AND 1982 (1995). The national total of 12.4 million rural landowners is dominated by majority-status individuals. *Id.* During the 1982–87 period, the number of new farm entrants—those who began operations on their current farm within a given year of the studied period—averaged about 25,000 fewer people on an annual basis. *See id.* at 2–3. Note, however, that these estimates remain imprecise because of limitations in census data, which do not account for farmers entering and exiting between the census periods. *See* sources cited *supra* note 479. Recently, government officials have responded to the complaints of those long excluded from accessing public agricultural programs. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-97-41, FARM PROGRAMS: EFFORTS TO ACHIEVE EQUITABLE TREATMENT OF MINORITY FARMERS (1997) (focusing on minority farmers and reviewing the Farm Service Agency's efforts to conduct farm programs in an equitable manner).

485. *See* J.J. Bowden, *Spanish and Mexican Land Grants in the Southwest*, 8 LAND & WATER L. REV. 467, 507–12 (1973).

486. Under the federal regulatory framework, farmers in their regions vote on the determination of subsidy awards for their given areas. *See* 7 C.F.R. §§ 7.1–7.38 (1995).

487. From early in the formation of the United States, the legal rights of fee holders have permitted access to a wide array of governmental benefits. In the contemporary period, for example, special tax valuations are available to holders of rural enterprises. *See, e.g.*, Williamson v. Commissioner, 974 F.2d 1525 (9th Cir. 1992) (holding that special use valuation protects agricultural enterprises and therefore permits the abeyance of estate taxes). The basis for the special use exemption is to keep land within the family claiming the exemption. *See id.* at 1527 (referring to the legislative history of legislation as promulgated "in the hope of protecting the family farm"). An ancient property doctrine recognizes these rights as a form of wealth. *See* SINGER, *supra* note 9, at 5 ("Property rights are the legal form of wealth.").

488. *See* U.S. GEN. ACCT. OFF., GAO/RCED-97-41, FARM PROGRAMS: EFFORTS TO ACHIEVE EQUITABLE TREATMENT OF MINORITY FARMERS 3–6 (1997) (describing the FHA's failure to promote farm programs in an equitable manner and noting the special treatment that non-minority farmers receive).

489. The plight of agricultural workers and their working conditions is beyond the scope of this Article. For a well-documented discussion, see DENNIS NODÍN

The historical link between land and power is no secret. Paul Taylor writes that "[a] land policy means social control over one of the greatest instruments of production."[490] Agriculture "occupies nearly two-thirds of the private land in the United States, 878 million acres."[491] Yet, since the country's earliest periods, property has remained "concentrated in very few hands."[492] Examinations of the sector by Taylor and others demonstrate that public laws, including homestead laws,[493] grazing rights legislation,[494] and a vast array of labor legislation,[495] have long promoted access to the public domain and provided protection for private economic gain.[496] These and simi-

---

VALDÉS, AL NORTE: AGRICULTURAL WORKERS IN THE GREAT LAKES REGION 1917–1970 (1991). Agricultural workers' status contrasts with public law benefiting the economic status of some farm actors. *See, e.g.*, Agricultural Fair Practices Act of 1967, 7 U.S.C. §§ 2301–2305 (1967) (authorizing individual farm owners to join together to market their products); Clayton Act, 15 U.S.C. § 17 (1985) (recognizing the labor of farm owners). For an overview of the problems of employing field workers in light of conflicting laws, see generally PHILIP L. MARTIN, HARVEST OF CONFUSION, MEXICAN WORKERS IN U.S. AGRICULTURE (1988) (examining issues related to migrant farmworkers); David M. Saxowsky et al., *Employing Migrant Agricultural Workers: Overcoming the Challenge of Complying with Employment Laws*, 69 N. DAK. L. REV. 307 (1993).

490. Paul S. Taylor, *Public Policy and the Shaping of a Rural Society*, 20 S.D. L. REV. 475, 481 (1975).

491. Gene Wunderlich, *Agricultural Landownership and the Real Property Tax*, *in* LAND OWNERSHIP AND TAXATION IN AMERICAN AGRICULTURE 3, 3 (Wunderlich ed. 1993) ("ownership of agricultural land is unevenly distributed among 3 million owners" employing an ad hoc policy as to "who will use the land and how and when it will be used"). The author provides a detailed study on ownership, tenure, and taxation to analyze how "land is used, valued, transferred, and held in agriculture and the rural economy." *Id.*

492. Thomas Jefferson wrote that "property of this country is absolutely concentrated in very few hands." Letter to James Madison, October 28, 1785, *in* BASIC WRITINGS OF THOMAS JEFFERSON 161 (Philip S. Foner ed., 1944). Charles Geisler is one of many scholars linking the absence of land tenure with poverty. *See* Geisler, *infra* note 472; *see also* Wunderlich, *supra* note 491, at 4–5 (describing major American landholders and their holdings). Reis Tijerina and others have called for a return of misappropriated land to Chicanas/Chicanos. *See* GARDNER, *supra* note 481, at 30–47.

493. *See supra* notes 413–16.

494. *See* Frank J. Falen & Karen Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 IDAHO L. REV. 505 (1993–1994).

495. *See, e.g.*, National Labor Relations Act, 29 U.S.C. § 152(b) (1973) (denying farmworkers the right to organize and bargain collectively on the federal level); Mark Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987); *see also* ERNESTO GALARZA, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY 106 (1964) (referencing Carey McWilliams's "Great Exception" model meaning that agribusiness is excepted from "common principles of social legislation" and "the basic tenets of free enterprise").

496. The true economic value of land use is seen through its exploitation by private parties who access America's natural resources without paying true market value for this privilege. *See generally* U.S. GEN. ACCOUNTING. OFFICE, GAO/RCED-

lar policies ensure the growth of large-scale rural enterprises, which threaten smaller owner-operators.[497] The growth of production contracts[498] and large-scale enterprises are vertically integrating agricultural enterprises while imposing costs to the diversity of the rural sector.[499] Within the agricultural industry, historical and present structural conditions result from the cultural biases of those responsible for determining property rights and agricultural policy, and preclude Chicanas/Chicanos from farm ownership.[500]

97-16, U.S. FOREST SERVICE: FEES FOR RECREATION SPECIAL-USE PERMITS DO NOT REFLECT FAIR MARKET VALUE, (DEC. 20, 1996).

497. *See* Dennis Pollock, *Heritage of Family Farm Lost in Courts*, FRESNO BEE, July 28, 1996, at C1; James Walsh, *Agricultural Model or Menace? Corporate Farms Taking Hold in the Hog Industry*, STAR TRIB., Nov. 6, 1995, at A1. The agricultural census designates a farm as any place that sold or normally would have sold $1000 or more of agricultural products during the census year. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1992 CENSUS OF AGRICULTURE 22 (1995). The agricultural census counted a total of 1.93 million farms in the U.S. in 1992, down from 2.09 million in 1987. *Id.*

498. Keith Haroldson explains contract farming:

> Under the traditional livestock production process, the livestock owner fed and cared for the livestock throughout the growing period. Contract feeding arrangements split this process. Under contract feeding, a livestock owner enters into a care and feeding agreement with a production facility or feedlot owner. Typically, the feedlot owner will furnish facilities and labor in exchange for payment by the livestock owner for the livestock's care and feeding. Such payment is usually made after care and feeding is rendered. The parties often include specific terms indicting who will bear production costs such as feed, medication, and utilities.

Keith D. Haroldson, *Two Issues in Corporate Agriculture: Anticorporate Farming Statutes and Production Contracts*, 41 DRAKE L. REV. 393, 412 (1992); *see also* Chris Anderson, *Expert Sees Farms Without Farmers*, THE PANTAGRAPH, Jan. 11, 1995, at D1 (growth of agriculture as an industry promoting enterprises without farmers).

499. Vertical integration occurs "[w]hen a company involved in one phase of a business absorbs or joins a company involved in another phase in order to guarantee a supplier or a customer." Haroldson, *supra* note 498, at 410 (citing DAVID J. RACHMAN & MICHAEL H. MESCON, BUSINESS TODAY 37 (2d ed. 1979)). Professor Fred Morrison's description of vertical integration is one "in which individual farms would disappear or become mere operating units of large, integrated agribusinesses, which owned the means of production and controlled agriculture from the planting of the seed to the marketing of the processed product." Fred L. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 961, 992–97 (1976).

500. Every five years, since the New Deal, Congress promulgates a new farm bill that defines the agricultural agenda for the next five-year period. *See infra* note 523.