Property Rights and Institutions: Congress and the California Land Act of 1851

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Governments frequently establish institutions to govern the transition in property rights when they acquire territory or experience radical changes in political regimes. By examining a specific example—the United States' acquisition of California from Mexico in 1848, this paper investigates general questions about these institutions and institutional choice. The paper finds that the specific institution that Congress chose for California best balanced the interests of the federal government, American owners of land grants, and American squatters and settlers. Further, despite the lobbying, litigation, and delay associated with the institution, the institution was more efficient than prior institutions.

When governments acquire territory or experience radical changes in political regimes, they frequently establish institutions to govern the transition in property rights. This paper examines a specific example—the United States' acquisition of California from Mexico in 1848—to address general questions about governments' choices of institutions. The issue of institutional choice arose repeatedly for the United States in the nineteenth century as it acquired territory from Spain, France, and Mexico. More recently the issue has arisen again in Germany, Eastern Europe, and parts of the former Soviet Union as governments have recognized private property rights in assets seized by earlier regimes. Despite the potential importance for economic performance of institutions that govern transitions in property rights, the institutions themselves and questions of institutional choice have received almost no attention from economists. Historians have studied the American institutions, but even so the literature is thin and questions of institutional choice are unanswered.[1]

In 1851 the United States Congress passed the California Land Act to address the problem of pre-existing property rights in land in California. The Spanish and Mexican governments, which controlled California up to 1821 and from 1821 to 1846, had granted lands to their citizens as an incentive to settle a remote frontier. Measured in thousands of acres and

used as cattle ranches, the grants covered between twelve and thirteen million acres of prime coastal and valley land. In the Treaty of Guadaloupe-Hidalgo (1848), which governed this acquisition, the United States government pledged to protect property rights. With its attention monopolized by a national debate over slavery, Congress took no immediate action. In the meantime, the need to resolve property rights became more pressing, because the gold rush of 1848/49 brought between 150,000 and 200,000 people to a region that had been populated by 15,000. Following the Compromise of 1850, California's problems came to the fore. Six months later, through the California Land Act, Congress established the institution that would govern the transition in property rights.

When Congress was choosing an institution, it had at least six options (see Table 1). Congress could have confiscated the land, bought the land, or awarded property rights in the land to owners of claims, all with minimal investigation of the validity of the claims. If Congress decided to investigate the validity some or all claims, it could have used a bureaucratic or judicial organization to decide claims. Congress could also have allowed for hybrids that awarded property rights for small claims and investigated the remaining claims. Why did Congress choose the California Land Act, which established a judicial institution? What were the efficiency consequences of this choice? And how did the institution compare to prior institutions?

To address these questions, I evaluate the institutions using evidence from the historical record and a Coasian framework, where the three key issues are speed, security of property rights, and acceptance. Speed is a measure of the average time between the establishment of an institution and the resolution of property rights. Security is a measure of the state of property rights during the decision process. Any institution that dragged out the process or failed to completely resolve uncertainty about property rights would be economically costly for society. The institution would also have to be acceptable to both the U. S. Supreme Court and the relevant players in the process.

What I find is that two of the institutional choices were politically or judicially infeasible. Of the remaining four, Congress chose the California Land Act because it best balanced the interests of the government, American owners of land grants, and American squatters and settlers. Although politically desirable, the institution had drawbacks. The lobbying, litigation, and delay in the resolution of property rights that occurred under the institution all represented efficiency losses. Even with these losses, however, the institution represented a substantial improvement over prior institutions.

The Problem and Institutional Alternatives

Millions of acres of valuable coastal land were at stake in California. As a reward for service and an inducement to settle a remote frontier, the Mexican government offered grants to citizens of up to eleven leagues (about 48,000 acres) of land.[2] To acquire a grant, an individual submitted a petition to the governor, who forwarded it to a local official, the *alcalde*, for a report. If the report was positive, the governor usually made the grant, and the *alcalde* put the grantee in formal possession of his land. Because actual settlement was the government's object, the grantee had to build a house and improve the grant, usually within one year. By doing this and acquiring the approval of the territorial assembly, the grantee could convert the use right into a fee-simple property right. Two other parties—the Roman Catholic Church and Native Americans—also acquired property rights under Mexico. As part of its secularization of the Catholic missions in the mid-1830s, the Mexican government reduced the Catholic Church's vast land holdings to fee-simple rights in small parcels that encompassed the mission buildings. At this time, government officials awarded certain Native Americans use rights in lands near the missions.[3] By 1846 approximately 750 land grants had been made (see Figure 1).[4]

Two types of problems acted as barriers to the rapid resolution of Mexican property rights under the United States. By the time Congress began to consider legislation on the topic of California land claims, it was well aware of both.[5] The first problem was the difficulty in determining whether property rights had been established under Mexican law. Grants were provisional, and few had complied with all of the conditions of their grant.[6] Further, many

grants had been made in violation of one or more tenets of Mexican land law. For instance, when issuing grants, however, governors regularly ignored the restriction that grants be at least ten leagues from the coast.[7] The poor state of the archives also made establishing the nature of property rights more difficult. Incomplete records created an opportunity for individuals to submit fraudulent claims by forwarding antedated grants, resurrecting abandoned grants, or outright manufacturing claims.

The second problem was the difficulty in determining the boundaries of the grants. When individuals applied for grants, they appended a rough sketch, *diseño*, of the land. An 1849 report on land titles noted, "These sketches frequently contain double the amount of land included in the grants; and even now very few of these grants have been surveyed or their boundaries fixed."[8] Thus, even if property rights were fee-simple, the grant could not be automatically incorporated into the prevailing system.

Congress could have chosen to resolve property rights with one of six types of institutions.[9] The first three—confiscation, buyout, and confirmation—are characterized by minimal investigation of the validity of land claims. Under confiscation, the government takes the land and pays individuals nothing for their claims; under a buyout, the government takes the land but pays cash or scrip to individuals for their claims; and under confirmation, individuals retain whatever land they allegedly own. The remaining three—bureaucratic investigation, judicial investigation, and hybrids—are characterized by the investigation of the validity of some or all claims. Individuals whose claims are deemed valid retain the land. All remaining claims revert to the federal government and become part of the public domain. Bureaucratic and judicial institutions differ only in the nature of the organizations that have decision-making authority. Hybrids allow for the confirmation of claims below a certain size and investigation of the remaining claims.

These institutions can be evaluated along three dimensions—speed, security of property rights, and acceptance. Speed is a measure of the average time between the establishment of an institution and the resolution of property rights. In the best case the average time represents

months or even weeks, and in the worst case it represents decades. Security is a measure of the state of property rights during the decision process. Rights range from relatively secure if the government can issue patents to very insecure if squatters have overrun the claim. Acceptance is a measure of judicial and political feasibility. Any institution that Congress established would have to satisfy both the U. S. Supreme Court and the relevant interest groups.

Table 1 summarizes how the six compare in terms of speed, security, and acceptance.[10] With respect to speed, because the government simply takes the land, confiscation is fastest. Given the uncertain boundaries, the speed of a buyout depends on how precisely the government chooses to determine the size of the claims.[11] For confirmation, the boundary problem is more severe, because the government cannot give multiple individuals patents for the same piece of land. Thus, the need to establish boundaries makes confirmation relatively slow. Investigations are similarly slow. Decision-making may be slow because of the number of claims that an individual judicial or bureaucratic organization handles or the time spent per claim. Delay may also occur if claimants have the right to appeal decisions to a number of organizations.

Because the government owns all the land, confiscation and buyouts carry the most secure property rights. The government can establish relatively secure private property rights quickly through survey and award of the land, even though resolution and payment of claims under a buyout may take years. Thus, speed and security are separable. If claimants will eventually own some or all the land, speed and security are not separable, and the security of property rights is likely to be low. Low security may stem from unclear definition of interim property rights, weak enforcement of these rights, or uncertain boundaries. As a result, land will effectively be common property.

Acceptance is the most complex of the three. The government has to satisfy the judiciary and two opposing interest groups—the thousands of Americans who had migrated to California during the gold rush and American owners. Migrants felt that the government should declare claims invalid and open the land to settlement. By 1850, however, wealthy and politically well connected Americans owned a positive and increasing fraction of the Mexican land grants. Both

American owners and the judiciary would be antagonized by confiscation. A buyout would be more acceptable to owners and the judiciary, but how much more would be dictated by the price. Migrants stood to benefit under a buyout as well, because the land would become part of the public domain. Allowing individuals to keep their land either through confirmation or investigation was likely to be acceptable to owners and the judiciary, but not migrants. The level of acceptance for all parties would turn on what the government did in the case of overlapping claims and, in the case of investigations, on how aggressively the government scrutinized claims.

California up to 1851

Prior to American annexation in July 1846, California was sparsely populated, and the market for land was thin. The population of individuals who were not Native Americans in 1790 was about 1,000. In 1840—fifty years later—the population was 5,780, and in 1845 it was 6,900.[12] Because citizens could obtain land from the government for free, prices were low. In 1842 when Abel Stearns bought Los Alamitos, he paid just $1,500 for the 26,000-acre ranch.[13] Most of this payment was not for the land, but for the adobe houses on the property. In 1845 Thomas Larkin purchased a somewhat more remote 49,000-acre tract, Rancho Jimeno, for $1,000.[14] Even the centrally located 7,000-acre Familia Sagrada ranch had sold in 1829 for just $2,000.[15]

Between annexation and the arrival of miners in the summer of 1848, the market became more active, and prices rose. Prices increased for two reasons. Population had risen to 15,000. Further, the military and carpetbaggers had arrived and begun to speculate in land. Walter Colton, a military chaplain, reported: "The property [a brewery] sold well, forty per cent. higher than it would under the Mexican flag. All real estate has risen since our occupation of the territory."[16] San Francisco lots increased in value hundreds of percent per annum.[17] Ranches also changed hands at substantially higher prices. For instance, in 1846 Larkin sold one-half of Ranch Jimeno to Lieutenant Missroon for $1,500.[18] In one year, the ranch had tripled in value.

With the onset of the gold rush, both population and land values began to climb steeply. By 1850, the population was greater than 100,000, and by 1852, it was 224,000.[19] In 1850 Abel

Stearns's Los Alamitos was valued on the county assessment rolls at $12,192, or $78,592 including livestock. Its value had increased more than 800 percent in eight years. And in 1851—just one year later—John Fremont offered Stearns $300,000 for the ranch and livestock.[20] In 1861 Commodore Stockton's well-located Portrero de Santa Clara was thought to be worth $100,000. Since his 1847 purchase of the property for $10,500, its value had increased roughly 1,000 percent.[21]

Rising population and uncertainty about property rights led to widespread squatting on Mexican grants. Both Congress and the California press expressed concern over the potential that this raised for violence. For instance, in January 1851, Senator Gwin of California observed, "There is a constant danger of collisions between the land claimants and settlers; and, if we wish to prevent the shedding of more blood in that country, we must act speedily."[22] And in February 1851, The Daily Alta California wrote, "The feeling in reference to Squatters and the question of land titles has become one of great interest, excitement and danger."[23]

Interestingly, Congress made almost no mention of other losses from common property such as socially wasteful land use, underinvestment, and the costs of establishing and protecting property rights apart from violence. In virtually the only allusion to these losses, Senator Benton argued that the uncertainty about property rights would "prevent the people from cultivating next year."[24]

Political Analysis

Congress responded to the problem of Spanish and Mexican land grants by passing the California Land Act (1851). The heart of the act was the requirement that "each and every person claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government, shall present the same ... together with such documentary evidence and testimony of witnesses as the said claimant relies upon in support of such claims."[25] Individuals had to present these claims within two years to a three-person land commission, which would investigate the claim and decide its validity.[26] The act provided for the appointment of an agent whose duty it was to "superintend the interests of the United States." Both sides—the claimant

and the U. S. government—had the right of appeal from the land commission to the United States district courts in California and from there to the United States Supreme Court.[27] If the highest court that a claim reached confirmed its validity, the next step was to have the claim surveyed and resolve any boundary disputes. Once this was complete, the owner of the claim could receive a patent, which definitely established his property rights under the United States.

Congress passed the California Land Act six months after the Compromise of 1850. The compromise averted a national crisis by allowing the admission of California as a state, establishing territorial governments for New Mexico and Utah, resolving Texas boundary and debt issues, providing a new fugitive slave law, and restricting slavery in the District of Columbia.[28] In the aftermath of the compromise, Congress faced a backlog of legislation as well as eighteen bills on California. The issue of land titles in California nevertheless received significant attention. The Senate debated the California land problem briefly in September and continued the debate again in early January after session reopened.[29] Faced with competing bills, the Senate sent them to the Committee on the Judiciary. The bill that emerged was the subject of further debate in early February before being passed by the Senate on February 6th and by the House on March 3rd.

Although much less controversial than the Compromise of 1850, the California Land Act was nonetheless more controversial than prior land acts. Congress had addressed the problem of preexisting property rights before, most recently in the Louisiana Territory and Florida, so in other circumstances the act might have gotten through with minimal consideration. The high quality of the land, the possibility of gold, and the large number of Americans who wanted land guaranteed debate would be more extensive. The debate was prolonged by two other factors. First, Congress had previously decided the validity of claims. The current act, however, delegated that authority to the judiciary. Second, Senator Thomas Hart Benton judged the land acts for his home state of Missouri (part of the Louisiana Territory) to have been failures. Hence, he led a personal crusade to defeat the California Land Act, which he felt would be an even greater failure.

In the months before the passage of the California Land Act, Congress actively considered four of the six institutions outlined earlier. Confirmation was championed by Senator Benton. Despite Benton's insistent interjections, most of the debate focused on bureaucratic and judicial institutions.[30] The Committee on the Judiciary, which shaped the final bill, also discussed a hybrid of judicial investigation. The hybrid would have limited government appeals, essentially confirming claims smaller than 640 acres. Although commentators discussed the other two institutions—confiscation and buyout—subsequent to the adoption of the act, Congress was undoubtedly aware of these as well.[31]

Why did Congress choose the California Land Act and not one of the alternative institutions? Two of the alternatives—confiscation and buyout—were economically attractive, but judicially and politically infeasible. Confiscation would have done away with the troublesome validity and boundary problems. What is more important, the government would have acquired the 8.9 million acres eventually patented to individuals under the California Land Act. The U.S. Supreme Court would, however, almost surely have opposed the confiscation of property rights that the United States had promised to protect. Chief Justice Marshall had written for the court, "It is a principle of the common law, which has been recognized as well in this as in other courts that the division of an empire works not forfeiture of previously vested rights of property."[32] Confiscation would also have been extremely politically costly, because by 1851 military personnel and carpetbaggers had already invested heavily in California land claims.[33]

A buyout would similarly have done away with validity and boundary problems. A buyout was not as attractive as confiscation, however, because it involved paying—possibly millions of dollars—for the land. If the government forced claimants to sell at the a given price, the U. S. Supreme Court would almost certainly have intervened. Further, carpetbaggers' ownership of land claims guaranteed that mandatory buyout would have had serious political repercussions.[34] The alternative, a voluntary buyout, would have been judicially but not politically feasible. The preemption price of $1.25 an acre would probably have set the lower

bound for what individuals would accept. Making average payments of $20,000—roughly 150 times per capita income in 1860—would, however, have created enormous political problems for Congress.[35]

The remaining four choices were at least potentially politically and legally viable. One option for Congress was to do what it had done before and use a bureaucratic institution.[36] Doing what it had done before had two significant drawbacks. First, the resolution of property rights had been incredibly drawn out. For instance, claimants in Missouri had had numerous opportunities for their cases to be heard and reheard as a result of lobbying by their politicians in Washington.[37] Second, by reserving the power to confirm, Congress imposed significant costs on itself. Confirmation, per se, was not especially time consuming, because Congress tended to follow the recommendations of the commissions. The greater problem lay with the owners of doubtful claims that encompassed tens and hundreds of thousands of acres. Those claimants recruited the brightest legal and political talent to press their case against the government. An 1836 House Committee described the effect: "Congress has been perpetually harassed for upwards of twenty years ... the claimants are becoming more imposing from their wealth, numbers, and influence, yearly."[38]

Alternatively, Congress could have departed from past policy and used a legal institution. Congress had not previously made the district and Supreme courts the only forums for appeal.[39] In doing so, Congress freed itself from much of the burden of confirmation and sharply limited the number of appeals that claimants could conduct. A judicial institution was not entirely a free lunch, however. Congress and claimants had to pay hundreds of thousands of dollars for judges, defense, and other expenses. Congress would also not have the final word in shaping the institution. Under the act, the Supreme Court was responsible for setting the thresholds of proof for demonstrating the validity of a grant.

The third possibility, confirmation, had two significant drawbacks for Congress. First, confirmation was costly for the government, because it would effectively be giving away land. Although confirming claims that would have been valid under bureaucratic or judicial

institutions was costless, the cost of confirming invalid claims would have been significant. This point clearly concerned the Senate. Senator Gwin of California argued against confirmation, because "a principle like this would have a tendency to open the flood-gates of iniquity and inundate the whole country with spurious and fictitious claims."[40] He went on to cite government losses of more than ten million dollars in Louisiana due to the confirmation of fraudulent claims and the potential for even more severe problems in California.[41]

Second, confirmation avoided the validity issue, but in doing so created thorny boundary problems. Under confirmation, a larger number of claims would have been deemed valid than under investigative institutions. Because fraudulent claims tended to cluster along with bona fide claims on valuable land, resolving boundary problems of overlapping claims would have been extremely difficult. In addition, by confirming rather than investigating claims, the government may or may not have saved money on litigation. The federal government paid for boundary litigation indirectly through subsidies to the courts or the General Land office. The federal government also paid directly by taking up suits on behalf of settlers whose land and improvements were included in the surveys of Mexican grants.[42]

The final possibility was to adopt a hybrid that would have allowed for litigation of large claims, such as occurred under the California Land Act, and limited scrutiny of smaller claims. In choosing the breakpoint for confirmation versus litigation, the government would have been able to explicitly trade off the costs of fraud and the costs of litigation. Although the confirmation of small claims was never on the table, the Committee on the Judiciary considered the possibility of limiting government appeals for claims smaller than 640 acres. Ultimately, the costs of fraud loomed too large. Senator Berrien noted the committee had decided against doing so because even claims of 640 acres could be extremely valuable if they encompassed mineral deposits.[43]

Thus the choice came down to confirmation or the California Land Act, a judicial institution. The economic costs to the government of the act were probably lower than confirmation and in any case hidden, because they came in the form of budget allocations for the

judicial system rather than free land for claimants. The political costs also favored a judicial institution. Confirmation carried the risk of widespread violence. Confiscation would also have alienated squatters, who were fast becoming a powerful political lobby. Unlike confirmation, the California Land Act struck a balance between the competing interests of claimants and squatters. At the end, for all but a few Congressmen like Benton, the choice was clear-cut. Something had to be done, and institution established by the California Land Act was the least costly choice.

Efficiency Consequences

The institutions that govern transfers of property rights inevitably generate inefficiencies, and the institution that Congress established for California was no exception. Two of the inefficiencies—lobbying and litigation—were a direct result of the act. The remaining efficiency consequences resulted from delay in the resolution of property rights.

Although an improvement over prior acts in terms of lobbying, the act did not deter all lobbying. Claimants, squatters, and settlers pressed Congress to change the rules of the game and the outcome of the cases, consuming resources in the process. For instance, owners lobbied to be allowed into the claims process after missing the March 3, 1853, deadline. When claimants lost their cases, claimants lobbied for the right to purchase their land. Claimants' greatest victory came with the establishment of the Suscol Principle (1866). Under it, the owners of rejected claims could buy their lands at the preemption price of $1.25 per acre *without limitations on acreage*.[44]

Squatters and settlers also lobbied to change the rules. In 1852, Senator Gwin introduced a bill (which did not pass) that would have given squatters a valid title to eighty acres of land on Mexican grants and allowed the owner to select eighty acres elsewhere on public land.[45] Squatters' primary success lay, however, in influencing the California legislature to pass pro-squatter legislation in 1856 and 1858. The victories were, however, short-lived: the California Supreme Court struck down the first in 1857, and federal legislation later invalidated the second.[46]

Using litigation to allocate land also represented an efficiency loss. The volume of litigation under the act was tremendous. The land commission heard 794 claims cases; the district courts heard 608 cases; and the Supreme Court heard 92 cases.[47] Had the government limited its appeals, some of the efficiency loss may have been mitigated. These cases only decided issues of the validity of grants. The courts and the General Land Office also heard an unspecified number of boundary cases.

Litigation was costly for both the government and the claimants. Between 1856 and 1866, Congress appropriated a defense fund of $289,000 that paid for special counsel, legal assistance, and other expenses.[48] The fund did, however, not include either the salaries of the Attorney General, his regular staff, and the judges involved or other court costs.[49] For claimants, the lawyers' fees for bringing a claim before the land commission typically fell between $500 and $1500. Appeals to the federal district courts cost $100 to $500, and appeals to the United States Supreme Court cost $600 to $1000.[50] These numbers did not include other litigation expenses, the survey, or boundary litigation.

Despite having formally acquired California in February 1848, Congress waited until March 1851 to pass a land act. Once the California Land Act was in place, seventeen years on average passed between submission of a claim to the land commission and receipt of a patent. During much of this period, because of the numbers of squatters and the difficulty and cost of enforcing property rights, the land was effectively common property. The results—conflict, overharvesting of timber, and overuse of the soil—all represented efficiency losses.

Delay in the resolution of property rights led to conflict between owners and squatters.[51] The day-to-day actions taken by owners to deter squatters from establishing themselves or by squatters to deter owners from noticing, bothering, or evicting them have largely been lost. What have survived reports of violence. The ranch diary Henry Dalton kept between 1867 and 1875 "tells an eloquent story of confrontations, injunctions, broken dams, stopped up ditches, arrests, and threats."[52] In San Francisco, "squatters began to overrun the city, seizing upon every

desirable unimproved lot ... and bidding armed defiance to the original owners."[53] When squatters lost ejection suits, they often resisted removal, leading to tens of deaths.[54]

The common property nature of many large land grants led, predictably, to overharvesting of timber and overuse of the soil. In 1853 a ranch manager warned one owner, "[squatters] are using and distroying a great deal of your firewood and timber."[55] In 1855, a well-known lawyer pointed out in a letter to the U. S. Attorney General that "[groves of trees], which would have been sedulously preserved and cared for had the occupants been also the owners, [were] felled and sold for temporary gain."[56] John S. Hittell, a prominent observer, wrote in 1863: "The farmers generally are anxious to make as much money as possible, and as soon as possible, without regard to the future value of the land."[57] Wasteful practices caused by the uncertainty in property rights were evidently a source of contemporary concern, because in 1866 the two most important speakers before the State Agricultural Society made reform of these practices the theme of their speeches.[58]

Evidence on the effect of the uncertainty on investment is sketchy, but suggests that uncertainty limited investment.[59] Recent work by Timothy Besley and by Lee Alston, Gary Libecap, and Robert Schneider on the endogeneity of titling and investment raises a number of interesting questions in this context. For instance, what effect did violence have on investment? Did uncertainty lead to certain types of investment—for instance, in fences to keep out squatters? And did titling improve access to capital markets, thereby facilitating investment? Further research may eventually allow these questions to be answered.

Delay may also have had long-run effects. The U. S. Surveyor General for California alluded to these in his 1871 report: "Unfortunately for the prosperity of California, many delays have occurred in the definitive settlement of the boundaries of Spanish Grants in California."[60]

Some of these inefficiencies were avoidable; many were not. The parties at interest, for instance, would always engage in some lobbying of the government. Some delay was likewise unavoidable. The government, however, could almost certainly have been more selective in its appeals. And the issuance of patents would have been substantially faster had Congress

provided higher initial levels of funding for surveys and not later required that claimants pay for them.

Comparison

Between the end of the American Revolution and the end of the nineteenth century, Congress repeatedly encountered the problem of pre-existing land claims in its territorial acquisitions. Congress' first experience with the resolution of these claims came in the Northwest Territory at Kaskaskia, Vincennes, and Detroit, where French settlers held lands. Later Congress enacted legislation to address similar problems in other parts of the Northwest Territory and in the Southwest Territory, Louisiana, Florida, the Mexican Southwest, and Oregon (see Table 2). As Congress quickly discovered, these claims were not easily resolved, because they were poorly documented, largely unsurveyed, and in some cases allowed the recipient of the grant to locate the grant at a later date. Further, prior governments, particularly the French and the Spanish rarely made grants that conveyed title in fee-simple; instead they conditioned title on settlement and occupation.[61]

The institutional structure that Congress initially constructed to handle the earliest claims was a failure. The governor of the Northwest Territory—Arthur St. Clair and later William Henry Harrison—was given complete authority to investigate and confirm claims. Forcing them to handle more than 4,000 claims without the benefit of well-defined guidelines led to substantial irregularities. The magnitude of the problem is suggested by Congress' creation of a board to investigate claims confirmed by St. Clair and Harrison. Under the board, the number and sizes of confirmed claims were substantially reduced.[62]

Congress subsequently used land commissions in most of the old Northwest Territory, old Southwest Territory, Louisiana, and Florida to investigate and make recommendations concerning confirmation. Given the loose guidelines and absence of accurate records, the presidentially appointed commissioners (which numbered two or later three) exercised considerable discretion over the confirmation of claims in their district. Not surprisingly, this

could and often did lead to a certain amount of self-dealing by the commissioners and close ties to the local elite.[63]

When individuals brought claims after the land commission had ceased to function, Congress reconvened a commission, delegated the task of investigating their validity to a bureaucrat, or authorized the District Court to hear the case. The primary problem was that Congress, in writing the legislation, often provided few incentives for claimants to bring their claims forward. Even in instances where Congress provided a deadline for submission of all claims to the land commission, these were rarely immutable. The slow resolution of land titles led to delay in settlement, improper land use, and occasionally violence.[64]

By 1846, Congress had confirmed many of the 18,643 claims that it would ultimately confirm for 10,253,671 acres in the lands east of the Missouri River (see Table 3).[65] Its experience with thousands of claims and dozens of institutional innovations left Congress well positioned to resolve some of the earlier problems that had plagued the process. In the California Land Act, it imposed strict deadlines for the submission of claims, standards for the maintenance of Land Commission records, and exemptions for claims deriving from towns. Stricter deadlines would alleviate the need to take action regarding late claims. Improved records would speed the review of claims by the courts. And by exempting town claims Congress would reduce by more than half the aggregate number of claims. Congress also delegated the power to confirm claims to the judiciary from the onset.

Viewed over the period 1783-1851, Congress appears to have gone through quite a striking period of institutional learning, which allowed it to rise to the challenge of California. Under the California Land Act, 844 claims were submitted that encompassed a total of between 12 and 13 million acres. The first stage of the claims process—confirmation—took an average of five years. Because of delays in surveying and lengthy boundary litigation, the second stage—patenting—took an average of twelve years. The end result was the issuance of 551 patents for 8.9 million acres.[66] Although the claims process was still slow and the California

Land Act carried efficiency consequences, it nonetheless represented a substantial improvement over what had come before.

What Congress did next indicates that it may not have learned at all. In the rest of the Southwest, Congress abandoned a commission and the courts. Instead, it adopted an institution that required the surveyor general of the New Mexico Territory to investigate claims and make recommendations on confirmation to Congress. The surveyor general was not, however, given either the personnel or the budget to carry out this mandate.[67] In his first annual report, the Surveyor General observed that "the present law has utterly failed to secure the object for which it was intended."[68] This institution proved so ineffectual in resolving property rights that Congress found it necessary in 1891—nearly 40 years after acquisition—to establish a Court of Private Land Claims.[69]

Why would Congress abandon the California Land Act as a model in favor of such a disastrous institution? The historical record does not offer any easy answers, so one can only speculate. Two factors appear to have been important. First, reports indicated that there was little or no land in the public domain in New Mexico.[70] California, in contrast, had tens of millions of acres in the public domain. Once the government separated the private from the public domain, it could begin land sales. The revenue these sales would generate created an incentive for the government to invest in straightening out land titles. Second, there was much more political pressure for resolution in California. California had received national attention because of the gold rush. Many of those who left the mines wanted land with clear title to begin farming. American buyers of land grants were also anxious for settlement of title. In contrast, few Americans were in New Mexico when it was acquired and few migrated there soon after the acquisition. Thus, Congress had fewer political as well as economic incentives to act quickly or definitely to resolve uncertainty about property rights.

Conclusion

Up to 1846, as an inducement to settle what was then a thinly populated frontier, the Spanish and the Mexican governments offered land grants to individuals in California. After the

United States formally acquired California from Mexico in 1848, Congress had to address the problem of pre-existing property rights. In 1851, through its passage of the California Land Act, Congress established an institution to govern the transition in property rights. At the time, Congress was choosing among six institutions. In this paper, I investigate why Congress chose the institution that it did, what the efficiency consequences of this decision were, and how the institution compared to prior institutions.

What I find is that Congress chose an institution on political rather than economic grounds. The institution it chose balanced the interests of the government, American owners of land grants, and American squatters and settlers. Given that the Congress' choice was political, it is not surprising that the institution would have adverse efficiency effects. Despite these effects, the institution established by the California Land Act was the most successful institution to date. Specifically, it resolved property rights more quickly than prior institutions, thereby facilitating economic growth and development.

What general lessons about governments' choices of institutions to address transitions in property rights does this research offer? The California case suggests that institutional choice is primarily political. Sometimes political choices lead to relatively economically efficient institutions, as in California Land Act. Other times they lead to very inefficient institutions, as in New Mexico. The outcome appears to depend on two factors. Congress' pattern of institutional learning from 1783 (the Old Northwest Territory) to 1851 (California) suggests that experience can lead to more efficient institutions. The problems in New Mexico indicate, however, that the outcome will depend heavily on whether the government has incentive—created by revenue from land sales, political pressure or other factors—to adopt a relatively more efficient institution.

REFERENCES

American State Papers, Public Lands. Washington, 1832-1861.

Alston, L., G. Libecap, and R. Schneider. "The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier." *Journal of Law, Economics, and Organizations*, 12 (1996): 25-61.

Bancroft, H. H. *History of California*. San Francisco: History Company, 1874-1890.

Bean, W. and J. J. Rawls. *California: An Interpretive History*. New York: McGraw-Hill, 1988.

Besley, T. "Property Rights and Investment Incentives: Theory and Evidence from Ghana." *Journal of Political Economy*, 103 (1995):903-937.

Bowman, J. N. "The Indians and the California Private Land Grants." Bancroft Library, 1966.

Bradfute, R. W. *The Court of Private Land Claims: The Adjudication of Spanish and Mexican Land Grant Titles, 1891-1904*. Albuquerque: University of New Mexico Press, 1975.

Briceland, A. V. "Land, Law, and Politics on the Tombigbee Frontier, 1804." *The Alabama Review* 33 (1980): 92-124.

California State Agricultural Society. *Transactions of the California State Agricultural Society*. Sacramento, 1866.

Clay, K. B. "The Cost of Uncertainty: Squatters, Contracts, and Conflict in Frontier California." Unpublished manuscript, 1997.

Cleland, R. G. *The Cattle on a Thousand Hills: Southern California, 1850-80*. San Marino: The Huntington Library, 1941.

Colton, W. *Three Years in California [1846-1849]*. New York: A. S. Barnes, 1850.

Congressional Globe, various dates.

Cowan, R. G. *Ranchos of California: A List of Spanish Concessions 1775-1822 and Mexican Grants 1822-1846*. Los Angeles: Historical Society of Southern California, 1977.

Cummings, H. and C. McFarland. *Federal Justice: Chapters in the History of Justice and the Federal Executive*. New York: The Macmillan Company, 1937.

Ebright, M. *Land Grants and Lawsuits in Northern New Mexico*. Albuquerque: University of New Mexico Press, 1994.

Fritzche, B. "San Francisco 1846-1848: The Coming of the Land Speculator." *California Historical Society Quarterly* 51 (1972): 17-34.

Gates, P. W. "Private Land Claims in the South." *Journal of Southern History* 22 (1956): 183-204.

_____. *History of Public Land Law Development*. Washington: Zenger Publishing, 1978.

_____. *Land and Law in California*. Ames: Iowa State University Press, 1991.

George, H. *Our Land and Land Policy*. New York, Doubleday and McClure Company, 1871.

Greaser, G. D. and J. F. de la Teja. "Quieting Title to Spanish and Mexican Land Grants in the Trans-Nueces: The Bourland and Miller Commission, 1850-1852." *Southwestern Historical Quarterly* 95 (1992): 444-464.

Gwin, W. "Speech of Mr. Gwin, of California, in reply to Mr. Benton. Senate, Thursday, January 2, 1851." Huntington Library, 1851.

Hague, H. and D. J. Langum. *Thomas O. Larkin: A Life of Patriotism and Profit in Old California*. Norman: University of Oklahoma Press, 1990.

Halleck, H. W. "Report." House Ex. Doc., 31 Cong., 2 sess., 5, no. 17, serial 573 (1850).

Hamilton, H. *Prologue to Conflict, The Crisis and Compromise of 1850*. Lexington: University of Kentucky, 1964.

Hittell, T. J. *History of California*. San Francisco: N. J. Stone & Company, 1898.

Jackson, S. G. *A British Ranchero in Old California: The Life and Times of Henry Dalton and the Rancho Azusa*. Glendale and Azusa, The Arthur H. Clark Company and Azusa Pacific College, 1977.

Jones, W. C. "Report of the Secretary of the Interior." Senate Ex. Doc., 31 Cong., 2 sess., 3, no. 18, serial 589 (1850).

_____. *Condition of Real Property in California*. San Francisco: Gideon, 1855.

Larkin, T. O. *The Larkin Papers: Personal, Business, and Official Correspondence of Thomas Oliver Larkin*. Berkeley: University of California, 1951-1968.

Paul, R. W. "The Beginnings of Agriculture in California: Innovation vs. Continuity." *California Historical Society Quarterly* 52 (1973): 16-27.

Richardson, L. K. "Private Land Claims in Missouri." *Missouri Historical Review* 50 (1956): 132-144, 271-286, 387-399.

Robinson, W. W. *Land in California*. Berkeley: University of California Press, 1948.

Surveyor General. "Report of the Surveyor General of California." *Report of the Commissioner of the General Land Office for the Year 1871*. Washington: GPO, 1871.

Swisher, C. B. *The Taney Period, 1836-1864*. New York: McMillan, 1974

Treat, P. J. *The National Land System, 1785-1820*. New York: Russell & Russell, 1910.

Whatley, G. C. and S. Cook. "The East Florida Land Commission: A Study in Frustration." *Florida Historical Quarterly* 50 (1971): 39-52.

Wright, D. M. *A Yankee in Mexican California: Abel Stearns, 1798-1848*. Santa Barbara: Wallace Hebberd, 1977

The Journal of Economic History, Vol. X, No. X (Mo. 199X).ISSN 0022-0507).

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I would like to thank Avner Greif, Knick Harley, Allan Hynes, Gary Libecap, Alan Olmstead, Mike Peters, Aloysius Siow, Nathan Sussman, Gavin Wright, two anonymous referees, seminar participants at the University of Toronto and University of Western Ontario, and participants at the 1995 Canadian Economic History meetings for helpful comments and Jeff Brown and Bridget O'Shaughnessy for excellent research assistance. I gratefully acknowledge the financial support provided by the Huntington Library, the University of Toronto, and the Social Science and Humanities Research Council of Canada.

[1]For general treatment of these institutions, see Gates*, History*. Additional citations for specific regions are given in the notes to Table 2.

[2]Because Mexico granted nearly all of the land either originally or through the regranting of land originally granted by Spain, the focus in the rest of the paper will be on Mexican grants. Naturalized citizens and Native Americans, as citizens, could also apply for land grants. (Larkin*, The Larkin Papers* III, p. 201. Thomas Larkin to Moses Yale Beach, Monterey, May 25, 1845.) Unfortunately, it is difficult to determine the composition of grantees, because officials did not uniformly record citizenship and ethnicity. Estimates suggest, however, that about 16 percent of the grants had been made to naturalized citizens and roughly 6 percent had been made to Native Americans. Gates, *Land*, pp. 39-40. Bowman, "The Indians", p. 4.

[3]Native Americans also possessed vast holdings in the interior, which were unrecognized by the Mexican government. This lack of recognition continued under the United States government until the establishment of the Indian Claims Commission in the mid-twentieth century.

[4]Gates, *Land*, p. 4.

[5]It had before it the findings of two studies; see Halleck, "Report" and Jones, "Report".

[6]Colton, *Three Years* p. 359. Bancroft*, History* VI, p. 532.

[7]The territorial legislature attempted to remedy this problem in 1836 and again in 1840 by requesting that the central government confirm grants already made. No such legislation was ever forthcoming. Halleck, "Report". p. 121.

[8]Ibid., p. 122.

[9]This list is not exhaustive. It represents the six general types of institutions that were considered by Congress or raised as significant alternatives by other commentators.

[10]These issues are explored in more detail in later sections.

[11] If the government is willing to tolerate some imprecision, the process can go relatively quickly. If not, the process will take as long as it takes under confirmation.

[12]These estimates are on the low side because of the undercounting of foreigners. Bancroft, *History* II, pp. 158, 653, III, p. 699, and IV, p. 617. During this same period, 1790 to 1845, the Native American population fell from roughly 300,000 to 150,000. (Bean and Rawls, *California*, p. 132.)

[13]Wright, *A Yankee*, pp. 100-101, and Cleland, *The Cattle*, pp. 192-193.

[14]Hague and Langum, *Thomas O. Larkin*, p. 183.

[15]Cowan, *Ranchos*, pp. 35-6.

[16]Colton, *Three Years*, p. 52.

[17]See Fritzche, "San Francisco".

[18]Hague and Langum, *Thomas O. Larkin*, p. 183.

[19]Bean and Rawls, *California*, p. 145. The population for 1850 is uncertain, because the federal census returns for several counties were lost. The 1852 population is the result of a state census.

[20]Wright, *A Yankee*, pp. 100-101, and Cleland, *The Cattle*, pp. 192-194.

[21]Gates, *Land*, pp. 132-133. See also Cowan, *Ranchos*, p. 90.

[22]Gwin, "Speech", p. 8. Gwin and others were reacting in part to the Sacramento Riots of August 1850. The clash between law enforcement officials (on behalf of the owners) and squatters left several dead, including the sheriff.

[23]*Daily Alta California*, Feb. 3, 1851.

[24]Benton, "California Land Titles." *Congressional Globe*. January 3, 1851, p. 63.

[25]U. S. Statutes at Large, vol. 9, pp. 631 ff. Specifically excluded, however, were "any town lot, farm lot, or pasture lot." Each town was to submit a single claim for the land within its boundaries.

[26]If an owner failed to submit a claim, the land would revert to the public domain.

[27]In deciding cases, the commission and the courts "shall be governed by the treaty of Guadaloupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are applicable."

[28]Hamilton, *Prologue*, pp. 168, 201-208.

[29]An act to resolve land problems in California and New Mexico had been proposed in July 1848, and briefly debated in January 1849, before being recommitted.

[30]See the *Congressional Globe*, September 27, 1850; January 2-3, 8-9, 27-31, 1851; and February 4-5, 1851.

[31]Proposals to confiscate claimants' lands usually represented straw men. The nineteenth century historian Hubert Howe Bancroft, for instance, went so far in his condemnation of the California Land Act as to say, "But for the national disgrace involved it would have been better to disregard treaty obligations and reject all the claims; for then the grantees might have preempted a small tract adjoining their buildings, or have migrated to Mexico, or revolted and been promptly killed." Bancroft, *History* VI, p. 579. The idea that the government should have purchased California land grants for the public domain was articulated by Henry George in 1871 in *Our Land and Land Policy* and championed by a series of later writers. George, *Our Land*, p. 38.

[32]Marshall quoted in Benton "Land Titles in New Mexico and California." *Congressional Globe*. January 15, 1849. p. 256.

[33]Gates, *Land*, pp. 131-132, 74.

[34]John Frémont's ownership of Las Mariposas, called the "ten million dollar rancho" because it included gold mines, was particularly difficult. No price that the government could reasonably offer would compensate Frémont.

[35]Claims were roughly 15,000 acres on average.

[36]The approach in Florida and Louisiana and before that in the Old Northwest and Old Southwest Territories had been to create a land commission to investigate claims and have Congress confirm them.

[37]Benton, "Land Titles in New Mexico and California." *Congressional Globe*. January 15, 1849, p. 257.

[38]Quoted in Gates, "Private Land Claims", p. 191.

[39]Gates, *Land*, pp. 27-28.

[40]Gwin, "Private Land Claims in California." *Congressional Globe*. February 5, 1851, pp. 84-85.

[41]Ibid., pp. 93-97.

[42]Swisher, *The Taney Period*, pp. 801-802.

[43]Berrien, "Land Titles in California." *Congressional Globe*. February 4, 1851, p. 426.

[44]Beginning in 1863 there had been special acts that allowed certain owners to buy their land. In 1866, this privilege was extended to all owners of rejected claims. Under the Preemption Act, owners would only have been allowed to buy 160 acres. Gates, *Land*, pp. 212-222.

[45]See Gwin, "Remarks of Mr. Gwin of California in the Senate of the United States." *Congressional Globe*. April 19 and 20, 1852, and Gates, *Land*, p. 161.

[46]Gates, *Land*, pp. 169-172, 309-311.

[47]Although 813 claims cases were submitted to the land commission, nineteen were abandoned prior to a decision.

[48]Cummings and McFarland, *Federal Justice*, p. 138.

[49]For the judges salaries, see *Congressional Globe*, 1860, pp. 2520-2521.

[50]Gates, *Land*, pp. 17-18 and Larkin, *The Larkin Papers* X, pp. 22-23, Adolphus Carter Whitcomb and Thomas Oliver Larkin, Agreement, September 29, 1852. Lawyers sometimes agreed to work on a contingency basis, with the usual fee being one quarter of the land to carry the claim to the land commission and the district court. Gates, *Land*, p. 18.

[51]Conflict was almost always owner-squatter and only rarely squatter-squatter.

[52]Jackson, *A British Ranchero*, p. 205. As one nineteenth-century historian observed, "all that could be done, until the number and influence of the land owners predominated over those of the squatters, was to employ force to resist force." Hittell, *History* III, p. 669.

[53]Bancroft, *History* VI, p. 758. "In the long run the city of San Francisco was forced to recognize the claims of squatters in certain large areas and, under the Van Nuys and later ordinances, to issue city deeds on the strength of possession." Robinson, *Land*, p. 114.

[54]For more on conflict and its outcomes, see Clay, "The Cost".

[55]Larkin, *The Larkin Papers* IX, p. 317. M. T. McClellan to Thomas Larkin, Dec. 22, 1853. See also Larkin, *The Larkin Papers* IX, p. 83. Charles Sterling to Thomas Larkin, Feb. 10, 1852.

[56]Jones, *Condition*.

[57]Paul, "The Beginnings", p. 21.

[58]See Charles F. Reed, President (Opening Address) and Joseph W. Winans (Annual Address) in California State Agricultural Society, *Transactions*.

[59]See Larkin, *The Larkin Papers* X, p. 326. B. O. Smith to Thomas Larkin, Nov. 5, 1856, *California Culturist* quoted in Gates, *Land*, p. 194, and Paul, "The Beginnings", pp. 20-21.

[60]Surveyor General, "Report", p. 211.

[61]See, for instance, Thomas Jefferson's discussion of land claims in Louisiana cited in Gates, *History*, p. 93. In Louisiana and Florida, commissioners also suffered from a lack of evidence. Many of the Louisiana records had burned in fires in 1788 and 1794. In Florida, Spanish officials (in violation of the Treaties) took them with them when they departed; what remained had often been extensively altered. Whatley and Cook, "The East Florida", p. 48 and Richardson, "Private Land Claims", p. 143.

[62]See Gates, *History* and Treat, *The National*.

[63]See Briceland, "Land", Richardson, "Private Land Claims", Whatley and Cook, "The East Florida".

[64]See Memorial to Congress by the Territorial Legislature, December 14, 1804 (cited in Briceland, "Land", p. 114) and *American State Papers*, Vol. VI, p. 300.

[65]Gates, *History*, p. 113.

[66]The patents ranged in size from 0.45 to 133,440.78 acres and averaged about 15,000 acres.

[67]Ebright, *Land Grants*, p. 39.

[68]Quoted in Ebright, *Land Grants*, p. 40.

[69]See Bradfute, *The Court*.

[70] Benton "Land Titles in New Mexico and California." *Congressional Globe*. January 15, 1849, p. 255.

Table 1

Institution	*Speed*	*Security*	*Acceptance*
Confiscation	fast	good	low
Buyout	slow to medium	good	depends on price
Confirmation	slow	low	fair to good
Bureaucratic Invest.	slow	low	fair to good
Judicial Investigation	slow	low	fair to good
Hybrid	combination of the attributes of confirmation and investigation		

Table 2

Region	Grants	Year	Control	Institution	Commission	Confirmation
Old Northwest	F,GB	1783, 1818	Federal	Governor		Governor
				Land Commissions	Vincennes	Congress
					Kaskaskia	Congress
					Detroit	Congress
					Review Governors	Congress
Old Southwest	F,GB,S,G	1783	Federal	Land Commissions	Washington County	Congress
					Adams County	Congress
Louisiana Purchase	F,GB,S	1803	Federal	Land Commissions	Eastern District	Congress
					Western District	Congress
					Louisiana (St. Louis)	Congress
				Commissioner	East of Pearl	Congress
					West of Pearl	Congress
Florida	GB,S	1819	Federal	Land Commissions	East Florida	Congress
					West Florida	Congress
Texas	S,M	1845	STATE	Land Commission	Bourland and Miller, Rio Grande	State Legislature
				State District Court		SDC, SSC
Oregon	GB	1846	Federal	Donation		
Treaty of Guadalupe Hidalgo	S,M	1848	Federal	Land Commission	California	USDC, USSC
Gadsden Purchase	S,M	1853	Federal	Surveyor General	Rest of Southwest	Congress
				Court of PLC		

Notes: F, G, GB, M, and S are France, Georgia, Great Britain, Mexico, and Spain. The dates for the Old Northwest and Southwest Territories are the date that the United States acquired the region by treaty from Great Britain. The states ceded their claims lands in this region to the United States at later dates. Under Institution, the institutions are listed chronologically, with the exception of the Mexican Southwest, which was governed by a Land Commission in California and a Surveyor General and later the Court of Private Land Claims in Arizona, New Mexico, and Colorado. SDC, SSC, USDC, and USSC are the State District Court (Texas), the State Supreme Court (Texas), United States District Courts (California), and the United States Supreme Court.
Sources: Treat*, The National* (Northwest Territory), Briceland, "Land" (Southwest Territory), Gates, "Private Land Claims" (Southwest Territory, Louisiana, Florida), Greaser and de la Teja, "Quieting Title" (Texas), Gates*, History of Public Land Law* (Oregon), Gates, *Land* (California), and Ebright*, Land Grants* (Arizona, New Mexico, Colorado).

Table 3

Territorial Acquisition	Acreage Acquired	State	Confirmed Claims	Confirmed Acreage	Average Size
Old Northwest	525,452,800	Illinois	936	185,774	198
		Indiana	962	188,303	196
and		Michigan	942	280,769	298
		Ohio	111	51,161	461
		Wisconsin	175	32,778	187
Old Southwest		Alabama	448	251,602	562
		Mississippi	1,154	773,087	670
Louisiana Purchase	523,446,400	Iowa	1	5,760	5,760
		Louisiana	9,302	4,347,891	467
		Missouri	3,748	1,130,051	302
		Arkansas	248	110,090	444
Florida	43,342,720	Florida	869	2,711,290	3,120
Texas	247,060,480	Texas			
Oregon Compromise	180,644,480	Oregon	7,432	2,614,082	352
		Washington	1,011	306,795	303
Treaty of Guadalupe Hidalgo	334,479,360	California	588	8,850,144	15,051
Gadsden Purchase	18,961,920	Arizona	95	295,212	3,107
		Colorado	6	1,397,885	232,981
		New Mexico	504	9,899,021	19,641

Sources: Report of the Public Lands Commission, 1904. Cited in Gates, *History of Public Land Law*, pp. 86, 92, 113, 118, 119.

Figure 1: Map of Private Land Grants